BURMA LAW TIMES.

Index of Cases Reported in Vol. IX—1916.

CIVIL.

A

	PAGE.
A. G. Madari *vs.* R. Misser and one	119
Ahamut *vs.* Kalu	55
A. K. A. S. Jamal *vs.* Moolla Dawood Sons & Co., (P. C.) ..	8
A. K. R. M. S. Raman Chetty *vs.* A. V. P. Firm	61
Ali Ashgar *vs.* Mi Kra Hla U	251
H. Isphahany *vs.* N. A. P. K. Chetty	169
V. Chetty firm *vs.* Subaya and others	197
...kappa Chetty *vs.* K. A. R. Kadappa	130
Aung Hla *vs.* Ton Gyi and others	242

B

Badier Rahman Choudhry *vs.* M. A. R. R. M. R. M. Chetty firm ..	245
Bank of Bengal *vs* Ramanathan Chetty and others (P. C.) ..	1

C

Chan Tat Thai *vs.* Ma Lat and one	89
Chan Tha and one *vs.* Mi Ma Pyu	95
Collector of Rangoon *vs.* Mg. Aung Ba	111

E

E. A. Mehter *vs.* S. Balthazar	224

F

Foesan *vs.* Adi Clandro Borua	248

G

G. Hurry Krishna Pillay *vs.* M. A. Ammall in re (F. B.)	28
Gum Sone and others *vs.* Cassim Dalla	222

K

K. E. Mahomed *vs.* Ma O..	121
K. Hill *vs.* M. M. Greenberg	226
Ko Bat and others *vs.* Mg. Kya Baw and others	83
Ko Shwe Gya in the matter of	252
K. P. Mahomed Ebrahim *vs.* K. E. Mahomed	110
K. Y. K. M. Chetty *vs.* S. N. V. R. Chetty	199

L

La Aung *vs.* Mg So	57

M

Ma Array *vs.* Maung E Po (F. B.)	207
Ma Bon Lon and others *vs.* Mg. Po Lu	64
Ma Gun and others *vs.* Moniandy Survey	195
Ma Gyi and others *vs.* Pat Lon	247
Ma Hla Dun *vs.* Mg. Shwe Ya	250
Ma Hnya *vs* Ma On Bwin (F. B.)	15

M—*concluded.*

PAGE.

Mahomed Ismail Ariff and others *vs.* H. H. Moolla Dawood and one (P. C.) 141
Ma Htwe *vs.* Maung Lun In re. (F. B.) 141
Ma Kyun and others *vs.* Myaing Shain 234
Malayandi Chetty and others *vs.* Narayanen Chetty and others .. 239
Ma Min Kyin *vs.* Maung Wa and others 53
Ma Myo and one *vs.* Maung Kyan 205
Manekji Palonji *vs.* Nederlandsche Handel 160
Ma Nyein Me *vs.* Ma May and others 84
Ma Nyun *vs.* Mg. Ba Tha 157
Ma Paik *vs.* Ma Nwe Pauk and others 174
Ma Pu *vs.* Ma Su 201
Ma Pwa *vs.* Yu Lwai and one 187
M. A. R. R. M. R. M. *vs.* Badier Rahman Choudry 166
Ma Shwe On *vs.* Mg. Kywet and one 45
Ma Shwe U and others *vs.* Mg. Po Lu and one.. 177
Ma Shwe Yat' Aung *vs.* Mg. Da Li 152
Ma Shwe Yu and one *vs.* Mg. Sok Nyun 90
Ma Thin *vs.* H. M. Yassim 67
Ma U and others *vs.* Mg. Lu Gale and others 88
Ma Yon and others *vs.* Mg. Kya Gaing and one 98
M. E. Moola *vs.* K. C. Bose 63
Mg. Gyi Maung *vs.* Moosaji Ahmed & Co. 209
Mg. Kaw Le *vs.* Mg. Ke 183
Mg. Ne Dun *vs.* Ma Le and others 86
Mg. On Gaing and another *vs.* Ma On Sin 93
Mg. Po Saing and others *vs.* Mg. San Min and others 56
Mg. Po Tun *vs.* Ma E. Kha 117
Mg. Po U *vs.* Mg. Po Thin 164
Mg. Pya Gyi *vs.* Mg. Po Kha 74
Mg. San Ya and one *vs.* I. T. A. Club and others 228
Mg. Seik *vs.* Ma Thit Pu 154
Mg. Sein Kyi *vs.* Ma E 179
Mg. Shwe Bon and one *vs.* Mg. Pu 97
Mg. Shwe Kho *vs.* Ma Mya 87
Mg. Tha Hla *vs.* Mokhlas.. 48
Mg. Thein and one *vs.* Ma Thet Hnin and one.. 77
Mi Amin Nissa and others *vs.* Mi Sura Bi 52
M. Meyer *vs.* Mrs. C. Lea.. 51
Mi Nyin Tha Me and one *vs.* Mi Nyo Wun Me and others .. 59
Moolla Cassim *vs.* Moolla Abdul Rahim and one 148
Moolla Mahomed Bin Moolla Mahomed *vs.* P. K. Ebrahim .. 101
M. V. Pillai *vs.* C. K. Sheik Ebrahim 163

N

Nauk To *vs.* Ma Hnin 150
Nga Kyet Sein *vs.* Mi Kyin Ma and one 38
Nga Tha Zan and others *vs.* Nga Kyaw Kaing 253
Nga Tin Gyi *vs.* Nga Twe Aung 35

P

P. L. M. Firm *vs.* Daisy M. Stacey 122
Pranjivandas Jagjivandas Mehta *vs.* Chan Mah Phee (P. C.) .. 125
Puzandaung Bazar Co., Ltd. *vs.* T. Gwan Chan. 80

R

Ram Dhon Dhor *vs.* Sharfuddin and others 236

S

San Hla Baw *vs.* Hla Paw and others 172
S. Greenberg *vs.* A. S. Pinto 176

S—*concluded.* PAGE

Shanghai Life Insurance Co., Ltd., *vs.* Helen Constance Brown and one 43
Shwe Bon *vs.* Mi U Tha Nyo 92
Silam Kalia and others *vs.* Silam Sitama .. 158
Sit Taw *vs.* Mg. Gee 128
S. King *vs.* D. J. Buchanan and one 106
S. K. R. Cama & Co. *vs.* K. K. Shah 99
Swan Tee and one *vs.* Ma Ngwe 69

T

T. P. C. P. Rowther *vs.* Kamakantakath 243

Y

Yoo Joo Sein and one *vs.* Mg. Ba Tin and one.. 60

CRIMINAL.

B

Baba Khan *vs.* Maung Ba Naing 108

D

Deiya *vs.* King-Emperor 133

E

Emperor *vs.* Nga Saing 39

G

G. C. Chakrabuty and one *vs.* King-Emperor 124

I

Itala *vs.* King-Emperor 203

J

J. & F. Graham & Co. *vs.* C. H. Elsey 47

K

King-Emperor *vs.* Po Yin.. 213

M

Ma Sein *vs.* King-Emperor 193
Ma Shein *vs.* Kim Sin 81
Maung Po Hla *vs.* King-Emperor 76
Maung Tha U *vs.* Ma Mya Khin 162

N

Nga Aung Gyi and others *vs.* King-Emperor 202
Nga Po Chein and others *vs.* King-Emperor 217
Nga Poona and others *vs.* King-Emperor 136
Nga Po Yin and one *vs.* King-Emperor 203

R

Ram Sarup *vs.* King-Emperor 135

S

Sit Hon *vs.* King-Emperor .. .. 20[illegible]

INDEX

TO

BURMA LAW TIMES, Vol. IX—1916.

A

PAGE.

ABATEMENT OF APPEAL.

An appeal by a plaintiff in a suit for slander does not abate by reason of the death of the plaintiff—appellant who has succeeded in one court.

Nga Kyet Sein *vs.* Mi Kyin Ma and others 38

ACQUITTAL.

REVISION OF ORDER.

See Criminal Procedure Code S. 417.

J. & F. Graham *vs.* Elsey 47

ADMINISTRATOR GENERAL'S ACT.

Section 10.—An order for letters of administration to the administrator-general can only be made on the application of that official, or of one of the parties concerned.

Ma Pwa *vs.* Yu Lwai 187

ADMISSION.

Question of Law.—It is for the court to decide all the questions of law arising in a suit and the court should not accept a view admitted by counsel on a question of law.

Ma Min Kyin *vs.* Maung Wa 53

AGENT.

(1).—POWER TO BIND PRINCIPAL.

Where an agent of a firm carrying on a money lending business who had express authority to borrow money.....with or without a pledge of securities guaranteed a loan to a constituent of the firm.

Held that the firm was bound by the act of the agent whether or not it received any benefit from the transaction.

Bank of Bengal *vs.* Ramanathan Chetty P. C. 1

(2).—SUIT TO RECOVER MONEY WON IN A LOTTERY.

If the money won in a lottery is paid to a third person as agent for the winner the winner can bring a suit for recovery of the money as from an agent.

Maung San Ya and one *vs.* I. T. A. Club and others 228

ALIEN ENEMY.

(1).—British subjects and neutrals residing in a hostile country are alien enemies.

S. Greenberg *vs.* A. S. Pinto 176

(2).—RIGHT TO SUE.

An alien enemy who has been licensed to trade in British India, has access to the court, and may bring suits.

M. Meyer *vs.* C. Lea 51

(3).—See Trading with enemy 99

A—*concluded.* PAGE.

APPEAL.

NEW POINT RAISED IN APPEAL.

A court should not allow a new plea to be raised in appeal if it is inconsistent with the case in the original court.

Ma Min Kyin *vs.* Maung Wa 53

ARBITRATION.

See Reference to arbitration 253

ARMS ACT.

SECTIONS 19, 20 AND 29.

Section 29 applies only to offences under clause *(f)* of section 19. It does not extend to offences under section 20.

Want of sanction to the institution of proceedings is a fatal defect.

Nga Po Chein *vs.* King-Emperor 217

AWARD.

A valid award will bar a suit based on any of the claims embraced in the submission and covered by the award.

Ma Yon and others *vs.* Maung Kya Gaing 98

B.

BAILMENT.

See Contract Act, Section 160 224

BANK.

DEPOSIT OF MONEY IN—PROOF OF PAYMENT.

Fraud—when a bank denies an alleged deposit of money by any of its clients, it is for the latter to prove payment. It is unnecessary to allege or prove fraud.

Manekji Palonji *vs.* Nederlandsche Handel 160

BENAMI TRANSACTIONS.

When a purchase is made by a Hindu or Mohomedan in the name of his son, the presumption is in favour of its being a benami purchase.

Nga Tin Gyi *vs.* Nga Twe Aung 35

BOND.

See Stamp Act 111

BREACH OF PROMISE TO MARRY.

ASSESSMENT OF DAMAGES.

The rule for assessment of damages for breach of a promise to marry is the same as that applicable to all other contracts and is laid down in section 74 of the Contract Act.

Maung Sein Kyi *vs.* Ma E 179

BURMA TOWN AND VILLAGE LANDS ACT.

SECTION 24, 25, 26.

Under sections 24, 25, 26 of the Town and Village Lands Act ground rent due to Government is in a different position from rent due to an ordinary landlord, and is virtually a tax or assessment.

Swan Tee *vs.* Ma Ngwe 69

BURMESE BUDDHIST LAW.

(1).—ADOPTION.

Proof of publicity or notoriety.

Maung Seik *vs.* Ma Thit Pu 154

B—*continued.* PAGE

(2).—ANCESTRAL PROPERTY.

Presumption of separation—There is no presumption in Burmese Buddhist law that the property left by a long deceased person is an undivided estate.

Maung Po U *vs.* Maung Po Thin 164

(3).—APPLICABILITY.—See under Rajbansis 248

4.—INHERITANCE.

Grand children by a predeceased orasa son.

If an orasa son or daughter predecease his or her parents, his or her eldest son or children together receive on the death of the grand parents the same share as their youngest uncle or aunt.

Children of the same parents take the portion received by them in equal shares.

Chan Tha and one *vs.* Mi Ma Pyu 95

5.—INHERITANCE.

Right to share in joint estate lapses by delay.

Maung Seik *vs.* Ma Thit Pu 154

6.—INHERITANCE.—PARTITION ON REMARRIAGE OF MOTHER.

When children partition with their mother upon her remarriage they have no further right in the share taken by her. Her second husband becomes the heir to their exclusion.

Of the property left unpartitioned the children of the first marriage take three fourths and the second husband takes one-fourth.

Maung Shwe Bon and one *vs.* Maung Pu 97

7.—INHERITANCE—RIGHTS OF AN ILLEGITIMATE CHILD.

Per Fox C. J. Ormond and Twomey J. J.....Where a Burman Buddhist dies leaving a widow and an illegitimate child, the latter is not entitled to any share in the estate left by him, and even if entitled to a share in its deceased father's estate, such a child cannot claim and obtain such share in the life time of the father's widow.

Per Parlett J.....A step child though illegitimate has a right of partition against the surviving stepmother when there are no legitimate children, and the illegitimate daughter is entitled to three-fourths of the property taken by the father to the marriage with the surviving widow, and to one-sixth of the joint property acquired during the marriage.

Ma Hnya *vs.* Ma On Bwin 15

8.—JOINT UNDIVIDED ANCESTRAL PROPERTY.

See, Limitation Act art 144.

Ma Nyein Me *vs.* Ma May and others 84

9.—KANWIN AND PAYIN PROPERTY.

Kanwin property is property given by the bridegroom to the bride at the time of marriage. Such gift is void if not registered and on divorce by consent the property goes to the husband.

Maung Shwe Kho *vs.* Ma Mya 87

10.—MARRIAGE.

The rule of Burmese Buddhist Law that a female whether a minor or not, cannot be married without her consent, or against her will applies a fortiori to a male.

Maung Thin and one *vs.* Ma Thet Hnin and one 77

B—*concluded.* PAGE.

11.—MARRIAGE OF A CHINESE BUDDHIST WITH A BURMAN BUDDHIST WOMAN.

Per Parlett J.—There can be no marriage between a Chinese Buddhist male and a Burman Buddhist female without a due observance of the formalities required by Chinese law.

Per Fox J.—The validity of such marriages is determined by the lex loci contractus quoad solemnitates and the lex domicilii quoad the capacity of the parties to marry

Maung Sein Kyi *vs.* Ma E 179

12.—PARTITION.

Under Burmese Buddhist Law a step-child can claim partition during the lifetime of the step father.

Ma Min Kyin *vs.* Maung Wa and others. 53

13.—SEPARATION OF PROPERTY ON DIVORCE.

If a husband abandons his wife on the ground of her adultery there is a divorce from the moment she leaves her husband and the holder of a decree against her cannot attach property in her husband's possession, as she is no longer entitled to a share in it.

Maung Pya Gyi *vs.* Maung Po Ka 74

14.—WIDOW'S POWER OF DISPOSAL.

Under Burmese Buddhist Law a widow has absolute power of disposing of the whole of her property, subject to the rights of others.

Maung Po Saing *vs.* Maung San Min 56

C

CHINESE BUDDHIST LAW.

1.—ADOPTION.

The customary law of Chinese Buddhists as far as it can be ascertained is the law applicable to questions of adoption and inheritance among Chinese Buddhists in Burma.

A Chinese widow can adopt a son to her deceased husband with the consent of her husband's male relatives.

Ma Pwa *vs.* Yu Lwai and one 187

2.—FAMILY HOUSE.

A family house is one which has belonged to paternal ancestors or which a man has built for his family and their male decendants.

Ma Pwa *vs.* Yu Lwai and one 187

3.—MARRIAGE.

No particular ceremony is necessary for a marriage under Chinese Buddhist Law. If the parties have lived for several years as man and wife, the presumption that there was a valid marriage must prevail.

Ma Shein *vs.* Kim Sein 81

4.—WIDOW'S RIGHT TO MAINTENANCE.

The rule of Chinese customary law depriving a widow of her maintenance unless she lives in the family house ought not to be enforced when the widow is compelled to leave the family house because the members of the family make themselves objectionable to her.

Ma Pwa *vs.* Yu Lwai and one 187

CIVIL PROCEDURE CODE.

1.—SECTION 2 (2).—PRELIMINARY DECREE.

If a decision on a preliminary issue merely entitles the plaintiff to go on with the suit it is not a preliminary decree.

A. G. Madrai *vs.* R. Misser and one 119

C—*continued.* PAGE.

2.—SECTION 2 (2).—DECREE.

An order deciding that a suit is not maintainable is not a decree

Ma Gun *vs.* R. Moniandy Survey 195

3.—SECTION 11—RES JUDICATA.

In order that a previous decision against a transferer may operate as res-judicata against the transferee as claiming under the transferor the transferee's title must have arison subsequently to the commencement of the first suit.

Ma U and others *vs.* Maung Lu Gale 88

4.—SECTION 13.—A foreign judgement is conclusive as to any matter thereby adjudicated upon, except in cases provided in section 13.

A claim that would be time-barred according to the law of British India is not a claim founded on a breach of any law in force in British India.

S. King *vs.* D. J. Buchanan 106

5.—SECTIION 16.—SUIT FOR THE DETERMINATION OF A RIGHT TO OR INTEREST IN IMMOVEABLE PROPERTY.

A vendor's suit for specific performance is not a suit for land, or for the determination of any right to or interest in immoveable property.

A. G. Madari *vs.* R. Misser 119

6.—SECTION 21.—OBJECTION TO JURISDICTION.

No objection as to place of suing can be allowed in appeal or revision unless such objection was taken in the court of first instance at the earliest opportunity.

A. G. Madari *vs.* R. Misser 119

7.—SECTIONS 92 AND 93.—PUBLIC CHARITIES.

Powers of court in settling scheme, and in appointing trustees.—Points to be considered.

Mahomed Ismail Ariff and others *vs.* Hajee Hamed Moolla Dawood 141

8.—SECTION 113.—REFERENCE.

A question referred need not be answered if it is to arise in the case at a later stage.

P. L. M. firm *vs.* Daisy M. Stacey.. 122

9.—SECTION 151.—INHERENT POWERS OF COURT.

Extension of time for deposit of money.

A court has power to extend time for deposit of money under a decree even on an application made after the day fixed.

Ko Bat and others *vs.* Maung Kya Baw and others 83

10.—O. I, R. 8.

See under Corporation 247

11.—O. II, R. 2.

A suit for possession of immoveable property without a claim for mesne-profits will not bar a subsquent suit for mesne-profits accruing after the institution of the first suit.

Shwe Bon *vs.* Mi U Tha Nyo 92

C—*continued.* PAGE.

12.—O. II, R. 2.—Omission in a previous suit for cancellation of a deed to ask for leave to bring a separate suit for possession will not bar a subsequent suit for possession.

The competence of a court to give leave to a plaintiff to omit to sue for a relief does not depend on the pecuniary value of the claim in respect of which the leave is sought.

Maung On Gaing and one *vs.* Ma On Sin 93

13.—O II, R. 5.

Money in the hands of an executor, administrator or as such cannot be attached in execution of a decree against such executor, administrator, or heir personally, but the executor can be restrained from receiving in his personal capacity any portion of the money in his hands as executor.

K. Hill *vs.* M. M. Greenberg 226

14.—O. VI, R. 17.—AMENDMENT OF PLEADINGS.

A plaint in a suit for redemption of mortgage cannot be amended so as to convert the suit into a suit to enforce a right as owner.

Nauk To *vs.* Ma Hnin 150

15.—O. VI, R. 17.

When in a suit for redemption of a mortgage it is found that the document sued on is not a mortgage-deed but a deed of sale, the plaintiff should be allowed to amend his plaint.

Ma Shwe U and others *vs.* Maung Po Lu and one 177

16.—O. XX, R. 1.

When a court does not pronounce judgment at once after the case has been heard, it ought to give notice to the parties of the day on which judgment is to be delivered.

Ma Hla Dun *vs.* Maung Shwe Ya 250

17.—O. XXI, R. 46(a).—PERSON REFUSING TO PAY AN ADMITTED DEBT TO A JUDGEMENT-DEBTOR.

The procedure to be followed when a debtor who admits he owes money to a judgment-debtor does not pay it into court is laid down in Order XXI, Rule 46(a) added to the code by the Chief Court of Lower Burma. All that can be done under the rule is to warn him that if he does not pay the money into court, he may be liable to be sued.

P. L. M. Firm *vs.* Daisy M. Stacey 122

18.—O. XXI, Rs. 58 AND 63.

A suit under Order XXI, R. 63 is not controlled by section 42 of the Specific Relief Act, and a person against whom an order has been passed in an investigation under XXI R. 58 can sue for a declaratory decree without any further relief though he is out of possession.

K. Y. K. M. Chetty *vs.* S. N. V. R. Chetty 199

19.—O. XXI, R. 63.

Although an attaching creditor who withdraws his attachment cannot file a suit under Order XXI, Rule 63 he can file a suit for a declaration that the property sought to be attached belonged to his judgment-debtor.

Chan Tat Thai *vs.* Ma Lat 89

20.—O. XXI, R. 66.—MISTAKE IN PROCLAMATION OF SALE.

Remedy of purchaser misled by such mistake. When owing to a mistake in the proclamation of sale a larger area was advertized for

C—*continued.* PAGE.

sale than was actually sold, the auction purchaser can sue either for a refund of proportionate portion of the purchase-money or for cancellation of sale.

A. M. H. Ispahany *vs.* N. A. P. K. Chetty 169

21.—O. XXII, R. 1.

See Abatement of Appeal 38

22.—O. XXIX, R. 1.

See under Corporation 247

23.—O. XXXII, R. 3.

Want of formal appointment of guardian ad item.

Silam Kalia and one *vs.* Silam Sitama 158

24.—O. XXXII, R. 7.

Reference to arbitration by guardian of a minor without leave of court.

Silam Kalia and one *vs.* Silam Sitama 158

25.—O. XXXIII, R. 5.

An application for leave to sue as pauper ought to be dismissed without enquiry into poverty of applicant if it does not disclose a cause of action. There is no appeal from such dismissal.

Maung San Ya and one *vs.* I. T. A. Club and others 228

26.—O. XLI, R. 31.—JUDGMENT IN APPEAL.

An Appellate court's judgment should show the points raised, and the reasons for its decision.

Mi Nyin Tha Me *vs.* Mi Myo Wun Me 59

27.—SCHEDULE II, CLAUSE 22.

The last thirty seven words of section 21 of the Specefic Relief Act do not apply to any agreement to refer to arbitration, or to any award to which the schedule applies.

Ma Yon and others *vs.* Maung Kya Gaing and one 98

CONTRACT ACT.

1.—SECTION 23.—SUBSEQUENT ILLEGALITY.

If after a contract is made it becomes illegal to carry it out, it cannot be enforced.

S. K. R. Cama *vs.* K. K. Shah 99

2.—SECTION 23 AND 27.—RESTRAINT OF TRADE.

An agreement not to set up and carry on a business in consideration of a periodic payment for life is void as being in restraint of trade, and the party who has carried out the promise to refrain from trading cannot claim the payment as based on an executed consideration.

In re G. Hurry Krishna Pillay *vs.* M. A. Ammal, F. B. 28

3.—SECTION 30.—BY WAY OF WAGER.

There is no difference between gaming and wagering as used in the English Gaming Act and "by way of wager" in the Indian Contract Act.

Maung San Ya *vs.* I. T. A. Club and others 228

4.—SECTIONS 73 AND 107.

The loss to plaintiff arising from defendant's breach of contract to sell is the loss at the date of the breach. If on that date the plaintiff could do something or did something which mitigated the damage the

C—*continued.* PAGE.

defendants would be entitled to the benefit of it, but the fact that by reason of the loss of the contract which the defendants failed to perform the plaintiff obtained the benefit of another contract which was of value to him does not entitle the defendants to the benefit of the latter contract.

Section 107 of the Contract Act applies only to cases in which a seller has a lien on goods or has stopped them in transit.

A. K. A. S. Jamal *vs.* Moolla Dawood, P. C. 8

5.—SECTION 107.—BREACH BY PURCHASER—RESALE.

If in the case of a sale in which the property has passed to the purchaser, the seller exercises his right of resale, he rescinds the contract of sale, revests the property in himself and sells as owner. If at the resale the seller buys the goods, he buys his own property, and the defaulting purchaser can treat the resale as invalid.

A seller who has effected an invalid resale can recover damages for breach of contract from the defaulting purchaser.

The resale must be conducted fairly, if it is not so conducted the purchaser is entitled to damages.

Maung Gyi Maung *vs.* Moosaji Ahmed 209

6.—SECTION 160.—RETURN OF BAILED GOODS.

The bailee or his legal representative after his death is bound to return the goods bailed on expiry of the term of the bailment, and would be liable for conversion if he refuses to return them.

E. A. Mehter *vs.* S. Balthazar 224

CONVERSION.

MEASURE OF DAMAGES.

In actions for conversion of goods the measure of damages is the value of the goods at the time of the conversion, and the bailor is not entitled to anything more by way of damages for wrongful use.

E. A. Mehter *vs.* S. Balthazar 224

CO-OWNERS.

1.—SUIT FOR RENT.

A suit for damages for use and occupation of land by one co-owner against another will not lie, such suit being founded on an agreement, but a co-owner can sue for a rateable share of the profits of land till he is put in possession.

Swan Tee and one *vs.* Ma Ngwe 69

2.—See under Landlord and tenant 110

CORPORATION.

SUITS BY.

Order XXIX, Rule 1 of the Code of Civil Procedure applies only to corporations strictly so-called. An officer of an unincorporated association can sue only with special permission of the court under Order I Rule 8.

Ma Gyi and others *vs.* Pat Lon 247

COURT FEES ACT.

SECTION 5.

The provisions of the Court Fees Act relating to the levy of additional court-fees apply only to pending cases and not to cases which have been finally decided.

Shanghai Life Insurance Co. *vs.* H. C. Brown 43

C—*continued*. PAGE.

COURT OF SMALL CAUSES.

JURISDICTION.

Suit by executor or administrator for possession of moveable property belonging to the estate is cognizable by a Court of Small Causes.

Ma Pu *vs.* Ma Su 201

CRIMINAL PROCEDURE CODE.

1.—SECTION 106.—OFFENCE INVOLVING A BREACH OF THE PEACE.

House-trespass with the object of causing hurt is an offence involving a breach of the peace.

Sit Hon *vs.* King-Emperor 204

2.—SECTION 110.

The words "any person within the local limits of his jurisdiction" include a person undergoing a sentence of imprisonment in a jail within the local limits of a magistrate's jurisdiction.

Emperor *vs.* Nga Saing 39

3.—SECTION 195.—SANCTION TO PROSECUTE.

Application for sanction to prosecute for giving false evidence should be made to the court in which the false evidence was given. When application is made to another court, notice should be sent to the opposite side to show cause.

An order granting sanction should show the reasons why sanction was granted.

Nga Aung Gyi and others *vs.* King-Emperor 202

4.—SECTION 195.—SANCTION TO PROSECUTE.

An order granting sanction to prosecute for giving false evidence ought to specify the statement alleged to be false.

It is no offence to make a false statement to the police.

Nga Po Yin and one *vs.* King-Emperor 203

5.—SECTION 195(6).—SANCTION TO PROSECUTE.

Power to remand.—In an appeal under section 195(6) from an order on an application for sanction to prosecute, the Appellate Court has no power to remand a case for further consideration.

Sit Taw *vs.* Maung Gee 128

6.—SECTION 293.

If a sessions judge thinks it necessary to visit the place of occurrence of an offence under trial, he should give notice to the parties and assessors. He should not go without such notice, nor after the assessors have delivered their opinion.

Deiya *vs.* King-Emperor.. 133

7.—SECTION 337 (3) PROCEDURE ON GRANTING PARDON. ..

When an accomplice has been granted and has accepted pardon, he should unless he is on bail, be detained in suctody till the termination of the trial.

Maung Po Hla *vs.* King Emperor 76

8.—SECTION 339.—FORFEITURE OF PORDON.

A pardon once tendered and accepted is forfeited only by wilfully concealing any thing essential, or by giving false evidence. Absconding before conclusion of cross-examination does not amount to wilful concealment.

Maung Po Hla *vs.* King-Emperor 76

C—*concluded.* PAGE.

9.—SECTIONS 348 AND 349.

When a previous conviction of an offence against coinage or stamp law or property is proved against a person who is accused of a similar offence the magistrate is bound to commit the case to the sessions or to district magistrate, unless he is of opinion that he can pass an adequate sentence.

If the magistrate proceeds with the case and submits the proceedings to the district magistrate after recording his opinion that the accused is guilty, the order finding the accused and the submission are illegal and ultra vires.

King-Emperor *vs.* Po Yin 213

10.—SECTION 350.

Only those magistrates who have heard the whole of the evidence can decide a case. Section 350 does not apply to cases heard by benches of magistrates.

Itala *vs.* King-Emperor 203

11.—SECTIONS 417 AND 439.

In cases of acquittal, the revisional jurisdiction of a high court should ordinarily be exercised sparingly, and only where it is urgently demanded in the interest of public justice, and revision of an order of acquittal ought not to be entertained at the instance of a complainant after the local government has declined to appeal against it.

J. F. Graham *vs.* H. E. Elsey 47

12.—SECTION 423 (1) (b).—JUDGMENT IN APPEAL.

The judgment in an appeal from a conviction should state whether the appellant is acquitted, or discharged, or ordered to be retried, especially when the conviction is reversed on a technical point.

Ma Sein *vs.* King-Emperor 193

13.—SECTION 488.—ORDER FOR MAINTENANCE.—RESTITUTION OF CONJUGAL RIGHTS.

A Magistrate's order of maintenance is determined by the wife's refusal to comply with a decree for restitution of conjugal rights.

Maung Tha U *vs.* Ma Mya Khin 162

14.—SECTION 520.—CONFISCATION OF PROPERTY.

An order for the confiscation of property in regard to which an offence has been committed should not be modified by an appellate court without notice to the parties interested in it.

Ma Sein *vs.* King-Emperor 193

15.—SECTION 537 (a) AND (b).—WANT OF SANCTION.

Want of sanction to any proceedings if curable at all, is curable only under section 537 (b); section 537 (a) has no application to such cases.

Nga Po Chein *vs.* King-Emperor 217

CUSTOMARY LAW.

The customary law of the various communities living in the Indian Empire is to be applied to them without regard to the law of the part of the country in which they are settled or domiciled.

Foesan and one *vs.* Adi Chandro Borwa 248

D

DECREE.

1.—TRANSFER OF DECREE.

Transfer of a decree for foreclosure is not a transfer of land.

K. E. Mahomed *vs.* Ma O 121

D—*concluded.* PAGE.

2.—TRANSFERS OF PRELIMINARY AND FINAL DECREE.

When there is a conflict between the transferees of a preliminary and a final decree for foerclosure the transferee of the preliminay decree in entitled to have his name substituted in preference to the transferee of the final decree.

K. E. Mahomed *vs.* Ma O 121

DIVORCE.—EVIDENCE OF ADULTERY.

A court may presume adultery where it is satisfied that a guilty attachment subsisted between the parties, and that opportunities occurred when a guilty intercourse might with ordinary facilities have taken place.

Maung Pya Gyi *vs.* Maung Po Kha 74

DIVORCE ACT.

SECTIONS 3 (9) AND 14.—DESERTION—UNREASONABLE DELAY.

Desertion means abandonment against the wish of the person charging it.

Whether the desertion was or was not against the wish of the party charging it is a question of fact to be inferred from the circumstances of the case.

Unreasonable delay in presenting a petition is delay from which it would appear that the petitioner was insensible to the injury, or condoned it. In considering what is unreasonable delay regard must be had to the circumstances of the parties.

Ma Array *vs.* Maung E Po 207

E

EASEMENTS ACT.

SECTION 7, ILLUSTRATION (j).—NATURAL STREAM.

A natural stream is a stream flowing by operation of nature alone, in a natural and known course.

Maung Kaw Le *vs.* Maung Ke 183

EJECTMENT.

SUIT FOR EJECTMENT. BURDEN OF PROOF.

Ma Shwe Yat Aung *vs.* Maung Da Li 152

ENGLISH MORTGAGE.

The law governing English mortgages in India is that contained in the Transfer of Property Act and not the English common law.

T. P. C. P. Rowther *vs.* Mamakanthakath and others 243

EQUITABLE MORTGAGE.

1.—SCOPE OF SECURITY.

When title-deeds are deposited as security for a loan without any agreement, written or verbal, the scope of the title is the scope of the security. When there is an agreement accompanying the deposit, the agreement must rule. When the agreement is in writing, the writing, and the writing alone determines the scope of the security.

Pranjivandas J. Mehta *vs.* Chan Mah Phee 125

2.—SUIT FOR SALE.

The proper remedy of a mortgage by a deposit of title-deeds is a suit for sale.

Badier Rahman Choudhry *vs.* M. A. R. R. M. R. M. Chetty firm .. 245

E—*concluded.* PAGE.

EVIDENCE ACT.

1.—SECTION 18.

Statement by persons from whom the parties have derived their interest.

Maung Shwe Yat Aung *vs.* Maung Da Li 152

2.—SECTION 65.—SECONDARY EVIDENCE.

Whether loss has been proved so as to enable secondary evidence to be given is a question for the court of first instance.

Ma Paik *vs.* Ma Nwe Pauk 174

3.—SECTIONS 65 AND 66.

In a mortgage suit when the mortgagee is in possession of the mortgage-deed and fails to produce it, oral evidence of the mortgage is admissible under sections 65 and 66 of the Evidence Act.

Mi Amin Nissa *vs.* Mi Sura Bi 52

4.—SECTION 91.—ORAL EVIDENCE TO VARY A WRITTEN DOCUMENT.

Oral evidence is inadmissible to prove that a deed purporting to be a sale is in reality a mortgage.

Ma Paik *vs.* Ma Nwe Pauk 174

EXECUTOR.

1.—See Court of Small Causes 201

2.—LIABILITY FOR CONVERSION.

An executor refusing to return goods bailed to the deceased would be personally liable for conversion.

E. A. Mehter *vs.* S. Balthazar 224

3.—See Civil Procedure Code O. II, R. 5 226

4.—POWERS OF.

Powers of an executor are much wider than those of an administrator and are limited only by restriction contained in the will itself.

Ram Dhon Dhor *vs.* Sharfuddin and others 236

F

FINAL DECREE.

NOTICE.

Before passing a final decree the court ought to issue notice to the judgment-debtor.

Badier Rahman Choudhry *vs.* M. A. R. R. M. R. M. Chetty .. 245

FRAUD.

BURDEN OF PROOF.

When the execution of a mortgage or conveyance is proved no further evidence is needed to show that the interest in the property has passed to the purchaser. The purchaser need not prove that consideration did pass. The burden of proving fraud is on the party alleging it.

K. Y. K. M. Chetty *vs.* S. N. V. R. Chetty 199

G

GOVERNMENT WASTE LAND.

See Jurisdiction 55

G—*concluded.*

PAGE.

GUARDIAN AND WARDS ACT.

SECTIONS 17 AND 19 (b).

The word "father" in section 19 (b) means the father of a child born in wedlock and does not include the natural or putative father.

The only point to be considered in appointing or declaring the guardian of a minor is the welfare of the minor.

Ma Myo and another *vs.* Maung Kyan 205

H

HEIR.

POWER TO ALIENATE.

Alienations of an estate by an heir not being the executor or administrator are valid to the extent of the interest of the alienor in the estate.

Ram Dhon Dhor *vs.* Sharfuddin and others 236

J

JURISDICTION.

1.—CIVIL COURTS.

Civil Courts have jurisdiction to entertain suits for rent even though the land be government waste land provided the plaintiff had let the land out to the defendant.

Ahamut *vs.* Kalu 55

2.—COURT OF SMALL CAUSES.

A court of small Causes has jurisdiction to go into a question of title arising incidentally in a suit for damages for use and occupation.

Yoo Joo Sein and one *vs.* Maung Ba Tin and one 60

3.—See Court of Small Causes 201

4.—See Provincial Small Causes Court Act 163

L

LANDLORD AND TENANT.

1.—SUIT BY ONE OF SEVERAL LANDLORDS.

One of several landlords can sue for rent or ejectment without joining the other landlords as plaintiffs or defendants.

A suit for rent is not a suit for determination of title to immoveable property.

K. P. Mahomed Ebrahim *vs.* K. E. Mahomed 110

2.—SUIT FOR RENT.

A person who lets out land to another can recover rent from him though he has no title in law to the land.

Ahamut *vs.* Kalu 55

3.—SUIT FOR RENT.

A presumption of a contract to pay rent arises from occupation. A purchaser of property occupied rent free can sue the occupant for damages for use and occupation after notice to pay such damages.

Yo Joo Sein *vs.* Maung Ba Tin and one 60

4.—Tenant's right to Compensation for building.

See Transfer of Property Act Section 108 (h) 101

L—*continued.* PAGE.

LIFE INSURANCE.

REFUSAL BY INSURER TO ACCEPT PREMIUM—Remedy of the insured.

Once the insurer refuses to accept premiums, the insured is not bound to go on tendering premiums in order to keep the policy alive. He can sue for damages on the refusal, or refuse to treat the contract as ended.

Shanghai Life Insurance Co., *vs.* C. Brown 43

LIMITATION ACT.

1.—APPLICABILITY OF ACT.

The limitation act does not apply to applications to a court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministuial character.

Moolla Cassim *vs.* Moolla Abdul Rahim 148

2.—APPLICABILITY OF ACT.

The limitation act does not apply to reference to a judge on an order of by a deputy registrar of the Chief Court.

K. Hill vs. M. M. Greenberg 226

3.—INTERPRETATION.

The Limitation Act being one in which rights are rendered ineffective, if not abrogated, must be construed strictly.

Maung Shwe On *vs.* Maung Kywet and one 45

4.—SECTION 5.—PAUPER APPEAL.

When an application for leave to appeal in forma pauperis, presented beyond the proper time is admitted under section 5 of the Limitation Act, and enquiry as to pauperism is directed, but full court-fees are paid before the enquiry is concluded, the appeal must be deemed to have been presented on the day on which application for leave to appeal as a pauper was presented.

Swan Tee *vs.* Ma Ngwe 69

5.—SECTION 5.—SUFFICIENT CAUSE, DISCRETION OF COURT.

When the failure of the court to give notice of the date of delivery of judgement has led to a delay in filing the appeal that ought to be considered sufficient cause for extending time.

Whether time should be extended is a matter of discretion for the court before which the appeal is filed and its discretion should not be interfered with in appeal unless it has been exercised arbitrarily or illegally.

Ma Hla Dun *vs.* Maung Shwe Ya 250

6.—SECTION 11.

The law of limitation is lex fori, and a foreign rule of limitation is no defence to a suit instituted in British India on a contract made in a foreign country, unless such rule not only bars the remedy, but also extinguishes the right.

S. King *vs.* D. J. Buchanan 106

7.—SECTION 18.

Neglecting to settle accounts with the object of concealing his misconduct from his principal is not fraud within the meaning of section 18.

Ardikappa Chetty *vs.* K. A. R. Kadappa 130

L—*concluded.* PAGE

8.—ARTICLE 90.

Suit by principal against agent for neglect or misconduct.—A suit by a principal to recover from his agent unauthorised payments made by the agent is governed by article 90. Time for such suit begins to run not from the date on which the agency terminated, but when the neglect or misconduct of the agent actually becomes known to the principal.

Ardikappa *vs.* K. A. R. Kadappa 130

9.—ARTICLE 113.

A suit for specific performance of a contract to sell land is governed by article 113 and can be brought within three years from the date of the urchaser's knowledge that the vendor refuses to perform the contract when no specific date is fixed for performance.

Maung Shwe On *vs.* Maung Kywet and one 45

10.—ARTICLE 113.

Article 113 applies to suits to compel the execution of registered document by way of specific performance, and when no date is fixed for performance time runs from the date when plaintiff has notice of refusal.

Maung Ne Dun *vs.* Ma Le and others 86

11.—ARTICLE 120.

Article 120 is a residuary article which cannot be applied unless there is no other article specially applicable to the case.

Ardikappa *vs.* K. A. R. Kadappa 130

12.—ARTICLES 142 AND 144.

Article 124 applies only to suits based on an allegation of possession lost by dispossesion, or discontinuance, article 144 to suits for possession on title.

In suits to which article 144 applies plaintiff must prove his title before defendent can be called on to prove adverse possession.

Aung Hla *vs.* Ton Gyi and others 242

13.—ARTICLE 144.

In a suit to which article 114 it is for the plaintiff in the first place to prove title and if be succeeds in proving title, the onus of proving adverse possession for 12 years is on the defendant.

Ma Nyein Me *vs.* Ma May and others 84

14.—ARTICLE 144.

Adverse Possession. When the parties are working land in turns by mutual agreement there is no adverse possession.

Ma Min Kyin *vs.* Maung Wa and others 53

LOTTERY.

1.—See Penal Code 124

2.—A lottery is a bet, and participating in a lottery is gaming or gambling, but if money won in a lottery is paid to a third person as agent for the winner, the winner can bring a suit for recovery of the money as from an agent.

Maung San Ya *vs.* I. T. A. Club and others 228

M

MAHOMEDAN LAW.

1.—APOSTASY.

See under Restitution of conjugal rights 251

M—*continued.* PAGE.

2.—PUBLIC AND PRIVATE CHARITIES.

Powers of court.

Mahomed Ismail Ariff and others *vs.* Haju Hamed Moola Dawood .. 141

3.—RESTITUTION OF CONJUGAL RIGHTS.

A Mahomedan husband cannot get a decree for restitution of conjugal rights against a wife who has apostatized from Mahomedanism.

Ali Ashgar *vs.* Mi Kra Hla U 251

MALICIOUS PROSECUTION.

In a action for damages for malicious prosecution the plaintiff has to prove

(a) that he was innocent.

(b) that his innocence was pronounced by the tribunal before which the accusation was made.

A man is not to be mulcted in damages merely because he fails to prove another's guilt, nor is a man to receive compensation merely because there is a reasonable doubt about his guilt.

Maung Tha Hla *vs.* Mokhlas 48

MASTER AND SERVANT.

WRONGFUL DISMISSAL—REASONABLE NOTICE—DAMAGES.

When a servant is wrongfully dismissed, he can sue for damages and the amount of damages to be awarded will depend on the nature of the hiring contract, and the wages agreed upon.

In the case of a domestic or menial servant, or clerk, one month's wages would be reasonable damages.

M. E. Moola *vs.* K. C. Bose 61

MORTGAGE.

1.—EXTINGUISHMENT OF MORTGAGE.

A purchaser of mortgaged property who pays off the mortgage at the time of purchase cannot claim the rights of the redeemed mortgagee as against a subsquent purchaser, the mortgage having been extinguished as soon as the money was paid.

Ma Kyun and others *vs.* Nyaing Shain 234

2.—PERSONAL DECREE.

A court can pass a personal decree for balance due on a mortgage under Order XXXIV, R. 6 only when the balance due after sale is legally recoverable otherwise than out of the mortgaged property and after notice to the judgment debtor.

Badier Rahman Choudhry *vs.* M. A. R. R. M. R. M. Chetty .. 245

3.—SUIT FOR REDEMPTION—BURDEN OF PROOF.

In a suit for redemption, when the plaintiff is out of possession he must prove the mortgage, and cannot depend on the worthlessness of the defendant's case. His case cannot be held to be true because the defendant has failed to prove his defence.

La Aung *vs.* Maung So 57

4.—SUIT FOR REDEMPTION.

In a suit for redemption in which the defendant denies the mortgage and sets up a sale to him, the plaintiff cannot succeed when he cannot prove the mortgage, and the defendant cannot prove the sale.

In re Ma Htwe *vs.* Maung Tun 114

M—*concluded.* PAGE

5.—TENDER OF MORTGAGE MONEY.

Actual production of money is not necessary to constitute legal tender of the money due on a mortgage.

Maung Po Tun *vs.* Ma E Kha 117

MORTGAGOR.

Lease by mortgagor for a term of years.

See Transfer of Property act section 66. 243

N

NOVATION.

Novation of a debt whereby one debtor is substituted for another is not binding on the creditor unless he has consented to the novation.

Malayandi Chetty and others *vs.* Narayanen Chetty and others .. 239

O

OATHS ACT.

SECTION 13.—OMISSION TO TAKE AN OATH.

The words "omission to take an oath or make an affirmation" include only an accidental not a deliberate omission to take an oath or make an affirmation.

Deiya *vs.* King-Emperor 133

P

PARENTS' PROMISE TO MARRY THEIR CHILDREN.

If parents promise to make or compel their child to marry, the court cannot enforce such promise or give compensation for its breach.

Maung Thein and one *vs.* Thet Hnin and one.. 77

PARTNERSHIP.

WINDING UP.

When a partnership is being wound up no single partner has authority to borrow money, or mortgage partnership property, or to acknowledge a debt so as to bind other partners.

Malayandi Chetty and others *vs.* Narayanen Chetty and others .. 239

PAUPER.

APPLICATION TO SUE.

Cf. Civil Procedure Code O. XXXIII, R. 5 228

PENAL CODE.

1.—SECTION 294A.—LOTTERY.

The essence of a lottery is distribution of prizes by lot or chance, it makes no difference that the distribution is part of a genuine mercantile transaction.

It is not necessary for the offence that the place should be kept solely for the purpose of drawing a lottery.

G. C. Chakrabatty and one *vs.* King-Emperor 124

2.—SECTIONS 441 AND 442.—HOUSE-TRESPASS.

The panatchut or outer verandah where shoes are taken off is part of a Burmese dwelling-house, and a person committing criminal trespass on a panatchut commits house-trespass.

Sit Hon *vs.* King-Emperor 204

P—*continued.* PAGE.

3.—SECTION 409 EXCEPTION 8.

A defamatory statement made without express malice, and with a bona fide belief in its truth against one whose conduct has caused the accused an injury to one whose duty it is to enquire into and redress such injury is within this exception.

In such a case it is not necessary to show that the imputations are true in fact. The accused has only to show that he acted with due care and attention.

Nga Poona and others *vs.* King-Emperor 136

PERMISSION TO MORTGAGE.

See Probate and Administration Act Section 90 236

PLAINT.

AMENDMENT OF

See Civil Procedure Code O. 6, R. 17 .. .. .. 150 and 177

POWER OF ATTORNEY.

SCOPE OF AGENT'S AUTHORITY.

A general power to mortgage implies a power to borrow money, and to create an equitable mortgage, but not to execute pro-notes for the principal.

M. A. R. R. M. R. M. Chetty *vs.* Badier Rahman 166

PRACTICE.

SEPARATE TRIAL OF ACCUSED CHARGED WITH ONE OFFENCE.

When two persons are separately tried for the same offence, and one of them is a witness at the trial of the other the statements made by him as a witness at the other trial cannot be used against him at his own trial.

Ram Sarup *vs.* King-Emperor 135

PRESIDENCY TOWNS INSOLVENCY ACT.

SECTION 17.—PENDENCY OF PROCEEDINGS. LEAVE TO SUE.

The refusal of a discharge is a final disposal of a petition of insolvency, and proceedings are no longer pending.

No leave is necessary for an application to arrest an insolvent whose discharge has been refused.

In the matter of Ko Shwe Gya 252

PROBATE AND ADMINISTRATION ACT.

1.—APPLICABILITY OF ACT.

The probate and administartion act applies to Mahomedan estates.

Ram Dhon Dhor *vs.* Sharfuddin and others 236

2.—SECTION 90.

An administrator under the act has no power to mortgage or transfer without the previous permission of the court. Permission to mortgage does not include permission to sell.

Ram Dhon Dhor *vs.* Sharfuddin and others 236

3.—SECTION 98 (3).

It is not obligatory on the court to require an executor or administrator to exhibit an inventory or account.

Moolla Cassim *vs.* Moolla Abdul Rahim 148

PROTECTION ORDER.

A protection order is vacated ipso facto by a refusal of discharge.

In the matter of Ko Shwe Gya 252

P—*concluded.*

PROVINCIAL INSOLVENCY ACT.

SECTION 22.

Section 22 of the Provincial Insolvency Act does not contemplate a lengthy enquiry in a complaint against irregularities in a sale held by a receiver in an insolvency case. Under that section a court simply ratifies, reverses, or modifies the executive act of its officer, and a party aggrieved by an order under that section has a remedy by a suit for specific performance against the receiver.

A. K. R. M. S. Raman Chetty *vs.* A. V. P. Firm 61

PROVINCIAL SMALL CAUSES COURT ACT.

ARTICLE 32.—SUIT FOR SALVAGE.

Suit for services rendered in saving cargo is not a suit for salvage.

M. V. Pillai *vs.* C. K. Sheikh Ebrahim 163

PUBLIC CHARITIES.

SUITS RELATING TO

See Civil Procedure Code Sections 92 and 93.

Mahomed Ismail Ariff and others *vs.* Hajee Hamed Moolla Dawood and others 141

R

RAJBANSIS.

Burmese Buddhist Law is not applicable to the Rajbansis even if they are Buddhists. The law applicable to them is the customary law prevailing amongst them in Chittagong.

Foesan and one *vs.* Adi Chandro Borwa 248

REFERENCE TO ARBITRATION.

EXECUTION.

To be binding on any of the parties a reference to arbitration should be executed by all the parties to the reference. If not so executed it is void even as to those who have executed it.

The authortiy of the arbitrators does not begin till all the parties have signed the reference.

Nga Tha Zan and others *vs.* Nga Kyaw Kaing 253

REGISTRATION ACT.

1.—SECTION 17.

When the effect of an agreement is to create a right of redemption of immoveable property worth more than Rs. 100|- the writing falls within section 17 (1) of the Registration Act, and requires registration.

Ma Thin *vs.* H. M. Yassim 67

2.—SECTION 17.—OPTION TO PURCHASE.

A document creating an option to purchase does not require registration.

Maung Shwe U and others *vs.* Maung Po Lu and one 177

3.—SECTIONS 32 AND 33.—PRESENTATION OF DOCUMENT FOR REGISTRATION BY AGENT.

Although a person who can present a document for registration is present and acquiesces in the presentation, yet if he is not the person who presents the document the registration is invalid.

The burden of proving that the person who presented it had a duly authenticated power of attorney is on the principal.

A. M. V. Chetty *vs.* Subaya and others 197

R—*concluded.* PAGE.

RESTITUTION OF CONJUGAL RIGHTS.

See Criminal Procedure Code Section 488.

Maung Tha U *vs.* Ma Mya Khin 162

2.—See under Mahomedan Law (3) 251

RIGHT OF WAY.

See Transfer of Property Act Section 54 222

RIPARIAN OWNERS.

The only questions in a suit to enforce water rights are (1) whether the stream in question is a natural stream (2) whether the plaintiff is a riparian owner (3) whether the defendant has any right by custom, prescription or grant. It is not necessary for the plaintiff to prove that he has suffered any damage.

Maung Kaw Le *vs.* Maung Ke 183

S

SETTING ASIDE A DECREE.

An application to set aside a decree ought to be made to the court which passed it, not to the appellate court which confirmed it.

Badier Rahman Choudhry *vs.* M. A. R. R. M. R. M. Chetty .. 245

SPECIFIC RELIEF ACT.

1.—SECTION 9, SUIT FOR POSSESSION.—PHYSICAL POSSESSION.

Suit can only be brought by the person in physical possession.

San Hla Baw *vs.* Hla Paw and others 172

2.—SECTION 21.

See Civil Procedure Code Schedule II. Article 22.

Ma Yon *vs.* Maung Kya Gaing 98

3.—SECTION 42.

An attaching creditor who has withdrawn his attachment can file a suit for a declaration that the property sought to be attached belongs to the judgement-debtor.

Chan Tat Thai *vs.* Ma Lat and one 89

4.—SECTION 42.

Failure to add a claim for consequential relief.—When a plaintiff does not sue for consequential relief on the ground that he is in possession, and fails to add a claim for consequential relief when he has an opportunity of amending the plaint, the suit should be dismissed if it is found that he was not in possession.

Ma Shwe Yu and one *vs.* Maung Sok Nyun 90

5.—SECTION 42.

See Civil Procedure Code (18) 199

STAMP ACT.

SECTION 2 (5) BOND:—SCHEDULE I. ARTICLE 5. EXEMPTION (A). ARTICLE 15.

An agreement to deliver merchandise for consideration under a penal clause is not a bond, and is exempt from stamp duty under article 5.

Collector of Rangoon *vs.* Maung Aung Ba 111

SUCCESSION ACT.

SECTIONS 179 AND 190.—RIGHT TO DECEASED PERSON'S PROPERTY.

The executor or administrator is the legal expresentative of a deceased person, and no right to the property of such a person can

S—*concluded* PAGE.

be established till probate or letters of administration have been granted.

P. L. M. Firm *vs* Daisy M. Stacey 122

SUIT FOR LAND.

See Civil Procedure Code section 16 119

T

TAX RATE OR ASSESSMENT.

See Burma Town and Village Lands Act. Sections 24, 25, 26.

Swan Tee *vs.* Ma Ngwe 69

TITLE.

PROOF OF TITLE.

The fact that land is shown as falling within plaintiff's holding is not sufficient to establish his title.

Aung Hla *vs.* Ton Gyi and others 242

TRADING WITH ENEMY.

Accepting a boil of exchange drawn against goods coming from Germany and paying their price is trading with the enemy.

S. K. R. Cama & Co. *vs.* K. K. Shah 99

TRANSFER OF PROPERTY ACT.

1.—SECTION 41.—TRANSFER BY OSTENSIBLE OWNER.

The transferee of a decree for land is not entitled to the benefit of the provisions of section 41.

K. E. Mahomed *vs.* Ma O 121

2.—SECTION 53 (2). GRATUITOUS TRANSFER.

Burden of proving fraud.

Ma Nyun *vs.* Maung Ba Tha 157

3.—SECTION 54.

A sale of land worth more than Rs. 100|- without registration is in law a mere contract to sell, and does not create an interest into or a charge on the land.

Ma Shwe On *vs.* Maung Kywet and one 45

4.—SECTION 54.—TRANSFER OF OWNERSHIP OF LAND.

The creation of an easement is not a transfer of ownership of land, and need not be in writing.

A right of way can be created by a verbal agreement.

Gum Sone *vs.* Cassim Dalla 222

5.—SECTION 55 (6) (b). CHARGE ON LAND FOR PURCHASE MONEY.

Section 55 (6)·(b) applies only to the case of a buyer who has paid the purchase money in anticipation of delivery of possession not to a buyer who has accepted delivery without a registered sale-deed.

In re Ma Htwe *vs.* Maung Lun 114

6.—SECTION 58.—MORTGAGE.

The test for determining whether a document is a mortgage or a sale is whether the relation of creditor and debtor subsists between the parties.

Ma Shwe U and others *vs.* Maung Po Lu and one 177

7.—SECTION 66.

A mortgagor in possession can exercise all the rights of an owner in possession provided he does not render the security insufficient. He

T—*concluded.* PAGE.

can grant a lease for a term of years and recover rent in advance for the whole term unless the security is thereby rendered insufficient.

T. P. C. P. Rowther *vs.* Mamakanthakath and others . .. 243

8.—SECTIONS 76 (i) AND 84.

A suit for redemption is an offer to redeem and if the defendant contests it, and his case is not true he must account for his gross receipts from the mortgaged property from the date of institution of the suit, and also forfeit all interest from that date.

Maung Po Tun *vs.* Ma E Kha 117

9.—SECTION 100.

A document purporting to be a mortgage that cannot operate as a mortgage for want of registration cannot be treated as creating a charge on the property under Section 100.

Ma Bon Lon and others *vs.* Maung Po Lu 64

10.—SECTION 106.

The presumption of a tenancy from month to month arises only in the absence of a contract to the contrary.

Pazundaung Bazar Co., Ltd. *vs.* T. Gwan Chan 80

11.—SECTION 107.—TENANT'S REMEDY UNDER AN UNREGISTERED LEASE.

If a landlord wrongfully neglects or refuses to register a lease which requires registration the tenant is not restricted to the remedy by a suit for specific performance. He can also resist a suit for enhancement of rent or ejectment before expiry of the term of the unregistered lease.

Pazundaung Bazar Co., Ltd. *vs.* T. Gwan Chan 80

12.—SECTION. 108 (h).—TENANT'S RIGHT TO COMPENSATION FOR BUILDINGS.

The tenant is not entitled to any compensation for buildings erected by him, but he may remove at any time during the continuance of the lease all buildings which he has attached to the earth, provided he leaves the property in the state in which he received it.

The court may give the tenant reasonable time after the termination of the lease to remove the buildings.

Moola Mahomed Bin Moolla Mahomed *vs.* P. K. Ebrahim .. 101

13.—SECTION 123.

Gift of property by a bridegroom to bride must be in writing and registered or it is void.

Maung Shwe Kho *vs.* Ma Mya 87

V

VENDOR AND PURCHASER.

A vendor is bound to do all things necessary to complete the purchaser's title.

Maung Ne Dun *vs.* Ma Le 86

W

WINDINGUP.

See PARTNERSHIP 239

WORKMEN'S BREACH OF CONTRACT ACT.

SECTION 2.

The act applies only to artificers, labourers and workmen not to contractors.

Baba Khan *vs.* Maung Ba Naing 108

THE

BURMA LAW TIMES.

VOL. IX.] JAN. & FEB. 1916. [No. 1.

PRIVY COUNCIL.

APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

THE BANK OF BENGAL ... ... PLAINTIFF—APPELLANT.

vs.

RAMANATHAN CHETTY, and others ... DEFENDANT—RESPONDENTS.

Viscount Haldane, Lord Wrenbury, Sir John Edge Mr. Ameer Ali Present.

Heard, 16 and 17 November 1915.

JUDGMENT, 16 DECEMBER 1915.

Principal and agent—Business of money-lenders and financiers—Agent's authority to guarantee advances to constituents by others—Pledging security for principal—Construction of power—Necessary implications arising from nature of business—Nature and extent of authority, practice among moneylenders, as evidence of—Benefit from the transaction, if essential—Onus.

Where an agent of a firm carrying on a general money-lending business, who had express authority " to borrow money from any bank or banks, firm or firms, person or pesons, either with or without pledge of securities for moneys advanced to various persons," guaranteed a loan made to a constituent of the firm by a third party:

Held, in a suit by the latter against the firm, that the firm was bound by the act of the agent.

That the authority of the agent to enter into the transaction was to be found in the document itself by necessary implication from the nature of the business, with the general management of which he was entrusted.

Bryant v. *La Banque on Peuple* (1) *followed.*

That the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents.

Held, further, that if authority is established, the mere fact that the principal did not receive any benefit does not rid him of his liability.

(1) [1893] A. C. 170, 177.

Appeal from a decree, dated the 26th March 1914, of the Chief Court of Lower Burma, (Ormond and Parlett, JJ.), which reversed a decree of Robinson, J., of the same Court.

The facts of the case sufficiently appear from their Lordships' judgment. The case raised the question of an agent's authority to stand as a guarantor for a certain person, and thereby make his principal liable for the money. The trial Judge held that the principal was liable, but his judgment was reversed on appeal. Mr. Justice Ormond, in whose judgment Parlett, J., concurred, said as follows :—

"The agent therefore had a general authority to carry on the business of a Chetty banker and money-lender on behalf of his principal as the sole proprietor of the business and an express power to borrow money and to endorse Promissory notes for the purposes of that business. He would not be authorised (without an express power to that effect), to enter into any transaction under which his principal incurred a liability, unless such transaction was a necessary incident in the carrying on of a Chetty banking and money-lending business. If the transaction entered into by the agent is, on the face of it, authorized by the power-of-attorney, the Bank need not look to the application of the money by the agent; but if it is shown that the Bank had notice of the real nature of the transaction and such transaction is not within the scope of the agent's authority, the principal would not be liable. In this case the agent endorsed a promissory note in favour of the Bank in the name of his principal, and he has an express power to do so; but at the same time he signed for his principal on a letter of guarantee in favour of the Bank on behalf of Hashim Ebrahim for the whole amount for which the promissory note was given. The Bank therefore knew that none of the money was being taken by the agent as a loan to his principal. The agent was given certain specified or express powers, but they do not include a power to make his principal a surety for another's loan; [illegible] include a power to borrow money in his principal's name for another, or to sign promissory notes for his principal jointly with another principal. If he had been given such a power as the last, an authority to guarantee the debt of another might well be inferred because since he clearly has no power to thrust a partner upon his principal if he had the power to sign promissory notes for his principal jointly with another, the manifest effect of such a transaction would be that, as between the two makers of the note each is a surety for the other as to the amount taken by that other. The sole question then is—is it a necessary incident of the business to guarantee the loans of others? If such transactions are entered into for a commission, the business would not be so much a money-lending business as an insurance business. If such transactions are merely mutual accommodations, it must be shown that such mutual accommodations are necessary. Loans can be raised on security without sureties, and the fact that the

Presidency Banks Act requires two independent signatures for a loan on a promissory note, is not sufficient to show that such mutual accommodations are necessary for the business.

* * * * *

"Mr. Giles contends that inasmuch as the Presidency Banks Act requires the signatures of two persons (who are not partners) for a loan on a promissory note, the Defendant must have known from the cash credit account at the Bank of Bengal that other persons had stood guarantee for him and that therefore he must have assumed that his agent was standing guarantee for others, and that it is a normal feature to mutually guarantee, in Chetty banking business. It is not shown that the Defendant would know of the cash credit account at the Bank of Bengal; and I do not think it is made out that it is a necessary incident in a Chetty banking and money-lending business that the Chetty must necessarily guarantee another Chetty. It is certainly not made out in this case that it is part of the Chetty business to stand guarantee for others who are not Chetties. Powers-of-attorney must be construed strictly and unless there is an express power given to the agent to enter into contracts of guarantee on behalf of others or to execute negotiable instruments jointly with others, it rests on the bank or other person lending the money to show that the agent had in fact authority to enter into such a transaction."

Hence this appeal.

Sir Erle Richards, K. C., and *Mr. Coltman* for the Appellant, submitted that the terms of the general power-of attorney in favour of the agent were very wide. The agent was to conduct his principal's general money-lending business. He had express authority to borrow money for his firm presumably for lending money to his clients. The authority to borrow necessarily implied an authority to pledge the credit of his principal. The effect of the transaction in question was that instead of the agent receiving the money himself, and lending it to the firm's client, he authorised the Appellant Bank on the pledge of the firm's credit—to advance money to the client. The Presidency Banks Act, XI of 1876, sec. 37, required the signatures of two persons, who are not partners, for a loan on a promissory note. The agent's principal must have known that money-lending firms in Rangoon stood guarantee for one another, in opening cash and credit account.

The Appellate Court had failed to appreciate the nature of the money-lending business of the Chetty firm in question. That business necessarily involved the transaction now impeached by the Respondent. Even the Appellate Court had held that the agent had power to endorse the promissory note. The guarantee given by the agent amounted practically to the same. Nay, it was a little less, inasmuch as it cut down the liability of the principal. The Respondent did not produce his books of account, and it ought to be presumed under sec. 114 of the Indian Evidence Act, that the books of account which were withheld by

the Respondents would, if produced, have shewn that the guaranteeing of loans and overdrafts was part of the firm's business, and that the firm derived profit therefrom. The guarantee in question was within the scope of the agent's authority, and the Respondents were liable therefor.

Mr. Newbold, K. C., and *Mr. Sanders* for the Respondents, submitted that the Respondents were not liable for the guarantee. Chetty's business was an ordinary money-lending business—to lend money on security or interest. There was no suggestion that mutual accommodation was a part of the business of moneylending. The Appellants raised the plea of ratification, but that plea could only be on the assumption that the agent had no authority to enter into the transaction. Reference was made to *Jacobs* v. *Morris* (2).

The general words used in the power-of-attorney did not authorise the agent to give the guarantee. These words were restricted by the object of the power. Powers-of-attorney should be construed strictly. *Bryant & Co.* v. *La Banque on Peuple* (1). There was nothing in the books of account which could have helped the Appellant, nor was it necessary to examine the agent. The onus lay on the Appellant to establish conclusively that the execution of the guarantee was within the scope of the agent's authority. The agent could not do anything not within the scope of the business on which he was employed. *Re Dowson* and *Jenkins' Contract* (3).

Reference was made to the following authorities:—*Ode* v. *Ness* (4), *Cooper* v. *Gibbons* (5).

JUDGMENT.

This is an appeal from the Chief Court of Lower Burmah,* and the sole question for determination is whether the agent in Rangoon of the original defendant to the action, Lutchmanan Chetty, since deceased, now represented by the respondents, had authority to enter into the transaction with the plaintiff bank on the basis of which it seeks to enforce the present claim against the principal.

Lutchumanan Chetty was a native of Madras, and ordinarily resided there. He belonged to the well-known Chetty money-lending caste, and had a large and apparently lucrative money-lending business in Rangoon, which he carried on by agents, under the name and style of "Ana Roona Laina," or shortly "A. R. L. Chetty." Previous to 1904 he had two partners, but after the death of one and the retirement of the other in that year, he was the sole owner of the business.

By a power of attorney dated the 24th of October 1904, he appointed one Ramaswamy Chetty, described in the document as "at present of Rangoon," as his attorney under "the style or firm "of Ana Roona Laina or A. R. L. Ramaswamy Chetty." On the

(2) [1901] 1 Ch. 261 affirmed on appeal: [1912] 1 Ch. 816.
(1) [1893] A. C. 1 0, 177.
(3) [1904] 2 Ch 219.
(4) 33 L. J. Ch. 155 (1844).
(5) 3 Camp 363 (1813).

* See 7 Bur. L. Times p. 126 for the judgment under appeal.

15th of May 1905 Ramaswamy, by the power reserved to him in his appointment substituted in his place one Chockalingum Chetty "as the attorney and agent" of the defendant. And since his appointment Chockalingum admittedly has managed the entire moneylending business of the defendant's firm in Rangoon.

The transaction which forms the basis of the present claim was entered into in May 1908. It appears that about this time one Hassum (or Hashim) Ebrahim, with whom Chockalingum had previous dealings and who was evidently a constituent of the firm, applied to him for financial assistance. He acceded to the request, and the arrangement that was come to between them was in substance this, that Chockalingum should pledge the firm's credit with the plaintiff bank to enable Ebrahim to have a cash credit account opened in his name and obtain from the bank advances not exceeding in the aggregate Rs. 50,000, and that to secure the due repayment of this amount with interest thereon he should execute a promissory note in favour of the defendant's firm which Chockalingum on his side should endorse over to the bank.

It is to be observed in this connection that under the provisions of The Presidency Banks Act (XI of 1876, s. 37, cl. *e*), the bank is precluded from opening cash credits on the security of any negotiable instrument of—"any individual or partnership firm "which does not carry on it the several responsibilities "of at least two persons or firms unconnected with each other in "general partnership."

It was in view of this provision of the law, and the practice of the bank in conformity therewith, that the promissory note for Rs. 50,000, bearing the usual bank rate of interest, was executed on the 23rd May 1908, by Ebrahim in favour of "A. R. L. Chockalingum Chetty," the name under which the defendant's firm admittedly carried on business in Rangoon. This note was endorsed over by Chockalingum to the bank. Thus both Ebrahim and the Chetty firm became severally liable on the note, one as the drawer, the other as the endorser, for advances to Ebrahim on his cash credit account.

At the same time and on the same date Chockalingum gave to the plaintiff bank a letter of guarantee on behalf of his firm. It stated the nature of the transaction and the character of the obligation undertaken by the Chetty firm in these terms:—

"In consideration of the Bank of Bengal having agreed at our "request to grant to Hassum Ebrahim (who is hereinafter referred "to as the Borrower) accommodation by way of Cash Credit to "such an amount from time to time as the Bank in its discretion "shall think proper upon condition that such Cash Credit shall to "the extent of Rs. 50,000 and interest be secured by the Promis- "sory Note hereinafter mentioned we the undersigned A. R. L. "Chockalingum Chetty (Guarantor) have delivered to the Bank of "Bengal a Promissory Note dated 23rd May 1908 for Rs. 50,000 "and interest payable on demand made by the said Borrower in "favour of us and endorsed by us to the said Bank or order (the "said Promissory Note being intended as a guarantee to the extent

"of Rs. 50,000 and interest of the balance from time to time due to "the said Bank from the said Borrower on account of the said "Cash Credit) on the understanding that the Bank shall be at "liberty to take steps to enforce payment of the said Promissory "Note at any time after notice in writing demanding payment "thereof posted to us at our usual or last known address and default "being made in payment for three days after the posting of such "notice."

Ebrahim appears to have drawn considerable sums of money on the cash credit account thus opened. He was adjudicated an insolvent shortly after, and his assets vested in the official assignee. He himself is said to have absconded.

The plaintiff bank thereupon called upon the defendant to pay the amount due from Ebrahim, and on his failure to do so, brought the present action in the Chief Court of Lower Burmah in its original civil jurisdiction. The defence to the action in the main is the denial of authority on the part of Chockalingum to enter into the transaction so as to bind the defendant's firm.

The case was at first heard *ex parte*, owing to the default of the defendant to enter appearance, but the *ex parte* decree was set aside, and the suit came on for trial as a contentious cause on the 17th January 1912, before Ormond, J., who framed the issues and took part of the evidence. It was heard subsequently by Robinson, J. The defendant, besides putting in the power of attorney and the instrument substituting Chockalingum in place of Ramaswamy, adduced no evidence; and Roblnson, J., held in substance that, although there was no express authority to the agent to enter into a transaction of this nature the defendant subsequently ratified and confirmed the act, and was therefore clearly liable. He accordingly decreed the plaintiffs' claim. The Appellate Court did not agree with this view. The learned judges further considered that if guaranteeing the loans of others was to be regarded as "a necessary incident of the business, it would not be so much a "moneylending business as an insurance business."

They accordingly dismissed the suit.

In their Lordships' opinion this judgment cannot be supported. The learned judges seem to have missed the real point at issue. They do not appear to have correctly apprehended the character and extent of the powers entrusted to the agent, or the nature of the business which he conducted and managed on behalf of the defendant in Rangoon.

Their Lordships desire to refer shortly to the principal provisions of the power directly bearing on the question raised in the case. After setting out that he was formerly carrying on the business of "bankers and moneylenders in Rangoon" in co-partnership with two other persons, and that owing to the death of one partner and the retirement of the other, he was then "solely carrying on the same business" unde the style of A. R. L. Chetty, and that he was desirous of appointing Ramaswamy Chetty as his attorney for the general management of his said business, the defendant (Lutchmanan Chetty) proceeds to state the duties with

which he charges the agent and the powers he entrusts him with :—

"To transact, conduct, and manage all and every or any or "the affairs, concerns, matters, and things in which I, the said "L. A. R. L. Lutchmanan Chetty, now am or hereafter may be "in any wise interested and concerned, and for that purpose to "use or sign my name to all and every or any documents or docu- "ment, writings or writing whatsoever. To borrow money from "any bank or banks, firm or firms, person or persons, either with "or without pledge of securities for moneys advanced to various "persons."

The authority to borrow is given in explicit and the broadest terms, "either with or without pledge of the securities" lodged with the agent by constituents for moneys advanced to them.

The power then goes on to declare :—

"To make draw sign accept endorse negotiate and transfer "all and every or any Bills of Exchange Promissory Notes Hundis "Cheques Drafts Bills of Lading and all and every other negotiable "securities whatsoever to which my signature or endorsement "may be required or which my said attorney may in his absolute "discretion think fit, to make draw sign accept endorse negotiate "and transfer in my name and on my behalf."

It is to be borne in mind that the defendant's business was a general moneylending business, in the course of which he financed both Chetties and non-Chetties. The agent had express authority to borrow. For what purpose? To lend to others. It was an essential incident of the business; and the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents. It was a matter of convenience that, instead of receiving the money directly himself and lending it to the borrower, he authorised the lender, in this case the bank, on the pledge of the firm's credit, to advance the money to the borrower.

Applying to the power in the present case the canon of construction laid down in *Bryant, Ld.*, vs. *La Banque du Peuple* (1893, A. C., 170, 177). viz.—"that where an act purporting "to be done under a power of attorney is challenged as being "in excess of the authority conferred by the power, it is "necessary to show that on a fair construction of the whole instru- "ment the authority in question is to be found within the four "corners of the instrument, either in express terms or by necessary "implication," their Lordships consider that the authority to enter into transactions of the nature in dispute is to be found in the document itself by necessary implication from the nature of the business with the general management of which the agent was entrusted. Without such authority it would hardly have been possible to carry on the business of a moneylender and financier.

It is clear from the facts proved in the case that for three years it was accepted, and business was transacted on the basis, that the agent was invested with full authority in that behalf. For between May 1905 and May 1908 Chockalingum entered into twenty-three

identical transactions without, so far as appears on the record, any question being raised that they were in excess of his authority, Besides, there is evidence among these Chetty moneylending firms it is the practice for the agent to pledge the credit of the principal in this manner.

It was urged on behalf of the defendant that it was not shown he had received any benefit from the transaction in question. Their Lordships think that if authority is established the mere fact that the principal did not receive any benefit does not rid him of his liability. But it is to be observed that the case of the plaintiff bank was that the defendant's books of accounts would show receipt of commission on the transaction. It called upon the defendant to produce those books, which he failed to do; nor was Chockalingum called to support his allegation in respect of the non-receipt of commission.

Their Lordships are of opinion that the decree of the Chief Court should be set aside, and that of Robinson J., should be restored. The respondents must pay the costs of this appeal and of the appeal in the Chief Court.

And their Lordships will humbly advise His Majesty accordingly.

PRIVY COUNCIL.

APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

A. K. A. S. JAMAL ... ... APPELLANT.

vs

MOOLLA DAWOOD SONS AND COMPANY ... ... RESPONDENTS

Viscount Haldane, Lord Wrenbury, Sir. John Edge, Mr. Ameer Ali, Present.

Heard 22, October, 1915.

JUDGMENT 3, NOVEMBER 1915.

Indian Contract Act (IX of 1872), secs. 73, 107—Contract to purchase shares—Failure of buyer to take on date of delivery—Subsequent sale by seller at higher than marked price on date of delivery—Buyer's liability—Measure of damages.

The Defendants were purchasers of certain shares from the Plaintiff under a contract note which *inter alia* provided that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction—any loss arising therefrom to be recoverable from the buyer. On 30th December 1911, the date of delivery the shares having fallen largely in value, the Defendants failed to take delivery. The seller sold the shares on various dates from 28th February 1912 onwards, the sales fetching in most instances higher prices than the market rate on 30th December 1912. The Plaintiff sued the Defendants for

the difference between the contract rate and the market rate on 30 h December 1911; but the Appeal Court in India held that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach.

Held.—That upon a true construction of the contract note, property in the shares never passed to the purchaser and sec. 107 of the Contract Act which deals with cases in which a seller has lien on goods or has stopped them *in transitu* had no application to the case.

That the option to resell was only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale.

That the loss to the Plaintiff arising from Defendant's breach of the contract was the loss at the date of the breach, viz., the 30th December 1911. If at that date the Plaintiff could do something or did something which mitigated the damage the Defendants would be entitled to the benefit of it, *Staniforth* vs. *Lyall* (1), but the fact that by reason of the loss of the contract which the Defendants failed to perform, the Plaintiff obtained the benefit of another contract which was of value to him, did not entitle the Defendants to the benefit of the later contract.

Yates v. *Whyte* (2 *Bradburn* v. *Great Western Railway Co.* (3), *Jebsen* v. *East and West India Dock Co.* (4), *Rodocanachi* v. *Milburn* (5) *and Williams* v. *Agius* (6) referred to.

This was an appeal from a judgment * of the Chief Court of Lower Burma (Hartnoll, Officiating C. J. and Young, J.). dated the 24th July 1913, which affirmed a judgment of that Court (Ormond, J.).

The Plaintiff-Appellant sold certain shares to the Respondents and the date for delivery was the 30th December 1911, but the Respondents failed to pay for them and take delivery on the date fixed. The Appellant thereupon intimated that he would hold the Respondents responsible for breach of contract. Subsequently the Appellant sold the shares in some cases with profit. The Appellant brought the present suit to recover damages.

The Courts below held that the Respondents were entitled to the benefit of the increased price which the shares in fact realized by the sale. The trial Judge in his judgment observed as follows:—

"Can then the Defendant-firm claim to have the benefit of the higher prices realized by the Plaintiff? I think they can. If a seller, having the right of resale, elects to exercise such right, he must give notice of his intention to resell; and having done so he has made his election between the two measures of damages that were open to him. After giving such notice, it is his duty to resell either at the time (if any) appointed by the contract or within a reasonable time after the date of the breach. If he delays, he takes upon himself all risk arising from further depreciation. And if he sells at a higher rate, such sale will be taken to be a resale in pursuance of his notice: for otherwise he would be allowed to benefit by his own wrong."

On appeal Hartnoll, Officiating C. J., (Young, J., concurring) delivered the following judgment:—

"There is no doubt as to what Appellant's true measure of damages is. It is the difference between the contract price and

(1) 7 Bing. 169 (1830).
(2) 4 Bing. N. C. 272 (1838).
(3) L. R. 10 Ex. 1 (1874).
(4) L. R. 10 C. P. 300 (1875).
(5) 18 Q. B. D. 67 (1886).
(6) [1914] A. C. 510

*See 7 L. B. R. 252.

the market price when the contracts ought to have been completed, —that is, in this case the date of the breach the 30th December 1911 for the Appellant could then have taken the shares into the market and obtained the current price for them. This was the principle followed in the case of *Pott* v. *Flather* (7). But it was argued that as in the beginning Appellant chose to proceed under sec. 107 of the Indian Contract Act he should be kept to such choice. It is clear that though at first he expressed the intention of pursuing the course set out in sec. 107 he did not keep to his intention for, when he brought his suit he had only sold 100 shares and this was on the 28 h February and he sued for his whole measure of damages. Appellant's counsel urged that, though Appellant at first expressed the intention of following the course laid down by sec. 107 he was not bound to carry out such intention and could change his mind if he liked. This view appears to be correct. The words of sec. 107 are permissive and not compulsory. In the case of *Buldeo Doss* v. *Howe* (8) the view was taken that sec. 107 does not deprive an unpaid vendor of goods of any other remedy he may have. I am therefore unable to agree with the views expressed by the learned Judge on the Original Side as to Appellant being bound to proceed under sec. 107.

"But I think that there is abundant authority for holding that the Respondents are entitled to the benefit of the higher prices realized by Appellant in mitigation of the sum payable by them as damages. The subject is dealt with at pp. 771 and 772 of Leake on Contracts, 6th Ed., and p. 207 of Mayne on Damages, 8th Ed.

"I would especially refer to the following cases:

"In *Oldershaw* v. *Holt* (9) where the plaintiff claimed as damages certain monies from the Defendant owing to his failing to carry out certain terms of a building lease and where Plaintiff entered into a new agreement with another tenant the jury were directed to have regard to the new and ultimately more advantageous agreement entered into in calculating the amount of damages due. In *Smith* v. *M' Guire* (10), which was a suit to recover damages for failure to carry out the terms of a charter party, that is, to load a ship with a cargo of oats Martin B. said: "It would be doubtful whether a party who breaks a contract has a right to say to a person with whom he breaks it. 'I will not pay you the damages arising from my breach of contract, because you ought to have done something else for the purpose of relieving me from it.' I am not satisfied that the person who breaks a contract has a right to insist on that at all; *but if the ship had earned anything the Defendant would be entitled to a deduction in respect to that.*" Again in *Brce* v. *Calder* (11) where the Plaintiff was employed by the Defendants, a partnership consisting of 4 members, as manager of a branch of their business and the agreement was that he was to be employed

(7) 16 L. J. Q. B. 366 (1847).
(8) I. L. R. 6 Cal 64 (1880).
(9) 12 A. & E. 590 (1840);
(10) 27 L. J. Ex. 465; 3 H. & N. 554 (1858).
(11) [1895] 2 Q. B. 253.

for a certain period, but before that period had expired two of the partners retired and the business was transferred to and carried on by the other two, in an action for wrongful dismissal it was held that the Plaintiff was only entitled to nominal damages as the continuing partners were willing to employ the Plaintiff on the same terms as before for the remainder of the period and so the Plaintiff would have suffered no damage. In that in the present case the Appellant reduced his loss by selling the shares at a higher price than obtained at the date of the breach, I think it only equitable to give the Respondents the benefit of the higher prices realized."

Hence this appeal.

Sir Erle Richards, K. C., and Mr. F. J. Coltman for the Appellant submitted that the Courts below were wrong in holding that the Respondents were entitled in mitigation of damages to the benefit of higher prices actually obtained by the Appellant by sale of the shares after the institution of the suit. The Appellant was entitled to recover the whole of the difference between the contract price and the market rate prevailing at the date of the breach. The clause in the contract did not take away any right under the law. It merely gave additional security. Sec. 107 of the Indian Contract Act had no application to the case, and in any case the remedy provided by it was optional. The case was covered by sec. 73 of the Indian Contract Act. The loss to be ascertained was the loss at the date of the breach and the market value on that date was the decisive element. Reference was made to the following:—*Williams* v. *Agius* (6) and *Pott* v. *Flather* (7).

Mr. Frand Dodd for the Respondents submitted that the Appellant having elected to exercise the right of resale was accountable to the Respondents for the proceeds thereof. The Respondents were entitled to the benefit of any matter which went in mitigation of damages. The sales of the shares held by the Appellant were in pursuance of the notice given by him. The principle of sec. 107 of the Indian Contract Act was applicable.

Their LORDSHIP'S JUDGMENT was delivered by

LORD WRENBURY.—Under six contracts made at various dates between April and August 1911 the Plaintiff (the Appellant) was seller to the Defendants of certain 23,500 shares at prices amounting in the aggregate to Rs. 1,84,125-10. The date for delivery was the 30th December 1911. The contract notes contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. In some cases the words ran: "by auction at the Exchange at the next meeting," etc.

By the 30th December the shares had fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding: "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on

(6) [1914] A. C. 510 at p. 520.
(7) 16 L. J. Q. B. 366 (1847).

or about the 2nd proximo, responsible for all losses sustained thereby (*sic*)." The purchasers did not pay the sum demanded. They set up a contention that the seller was indebted to them on another transaction, and they sent cheques for the differential sum of Rs. 75,925-10, and called for a transfer of the shares. On the 2nd January 1912 the seller repudiated the claim to a set-off, and repeated: "We have now to give you notice that our client intends to resell these shares and to institute a suit against you for the recovery of any loss which may result from that course." The purchasers stopped payment of the cheques, and nothing turns upon the fact that they were given.

Negotiations ensued between the parties which extended to 26th February 1912. On that day the seller, by his agents, wrote to the purchasers a letter as follows:—

"71, Phayre Street, Rangoon,
"26th February, 1912.

"Messrs. Moolla Dawood and Sons.

"DEAR SIRS,

"We are instructed by Mr. A. K. A S. Jamal that he has not hitherto taken any steps to enforce his claim against you for failing to pay for and take delivery of 23,500 shares in the British Burma Petroleum Company, Limited, at your request, in order that his claim might, if possible, be settled. It now appears that no active steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rs. 1,09,219-6 is paid to him by way of compensation before the end of this week.

"The amount claimed is arrived at by deducting Rs. 74,906-4, the value of 23,500 shares at 4*s*. 3*d*., from Rs. 1,84,125-10, the agreed price of the shares.

"Yours faithfully,
"GILES AND COLTMAN."

The 4*s*. 3*d*. a share there mentioned was the market price of the shares on the 30th December.

On the 22nd March the seller commenced a suit to recover Rs. 1,09,218-12 as damages for breach measured by the difference between the contract price of the shares and their market price (4*s*. 3*d*. a share) on the date of the breach, the 30th December 1911. This is (with a trifling variance) the same sum and arrived at in the same way as the Rs. 1,09,219-6 mentioned in the letter.

Immediately after the letter of the 26th February 1912, *viz*., on the 26th February, the seller commenced to make sale of the shares. He sold them all at various dates from the 28th February onwards. In one case the sale was at less than 4*s*. 3*d*. (*viz*., at 4*s*.). In one case it was at 4*s*. 3*d*. In every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realised, by

giving him credit in reduction of the damages for the increased prices in fact realised over the market price on the 30th December, the date of the breach. The Appellant contends that this is wrong.

Their Lordships will first deal with the contractual term as to resale. Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages, and the stipulation in question was in their Lordship's opinion only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price. Their Lordships are unable to agree with the original Judge that the plaintiff's letters of the 30th December and 2nd January amounted to an election to take a measure of damages to be arrived at by a resale. Moreover, there never was any sale by auction under the option. Nothing turns upon this provision as to resale.

The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordship's opinion impossible, and the former is equally unsound. If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a Plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach.* If at that date the Plaintiff could do something or did something which mitigated the damages the Defendant is entitled to the benefit of it. *Staniforth* v. *Lyall* (1) is an illustration of this. But the fact that by reason of the loss of the contract which the Defendant has failed to perform the Plaintiff obtains the benefit of another contract which is of value to him, does not entitle the Defendant to the benefit of the latter

(1) 7 Bing. 169 [1830].

contract. *Yates* v. *Whyte*(2), *Bradburn* v. *Great Western Railway Co.* (3) and *Jebsen* v. *East and West India Dock Co.* (4).

The decision in *Rodocanachi* v. *Milburn* (5), that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams* v. *Agius* (6). The breach in *Rodocanachi* v. *Milburn* (5) was breach by the seller to deliver, but in their Lordship's opinion the proposition is equally true where the breach is committed by the buyer.

The Respondents further contend that secs. 73 and 107 of the Indian Contract Act, or one of them, is in their favour. As regards sec. 107 their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lien on goods or has stopped them in transitu. The section follows upon sections dealing with those subject matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares.

As regards sec. 73 it is but declaratory of the right to damages which has been discussed in the course of this judgment.

Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach the seller remained entitled to the shares, and became entitled to damages such as the law allows. The first of these two properties, viz., the shares, he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the orders in the original Court and in the Appeal Court discharged, and judgment entered for the Plaintiff according to his plaint, and that the Respondent ought to pay the costs in the Courts below and of this appeal.

Solicitors: *Messrs. Arnold & Sons* for the Appellants.

Solicitors: *Messrs Bramall and White* for the Respondents.

Appeal allowed with costs.

---

(2) 4 Bing. N. C. 272 [1838].
(3) L. R. 10 Ex. 1 [1874].
(4) L. R. 10 C. P. 300 [1875].
(5) 18 Q. B. D. 67 [1886].
(6) [1914] A. C. 510.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION NO. 6 OF 1915.

In re MA HNYA ... ... DEFENDANT—APPELLANT.

vs.

MA ON BWIN ... ... PLAINTIFF—RESPONDENT.

For Appellant—Ginwala.
For Respondent—May Oung.

Before Sir Charles Fox, Chief Judge, and Messrs. Justices Ormond, Twomey and Parlett.

Dated 20th December 1915.

Buddhist Law—Inheritance—Rights of an illegitimate child to father's estate during the lifetime of his legitimate wife.

Held by Fox C. J. Ormond and Twomey J J, (Parlett, J. dissenting) that where a Burman Buddhist died leaving a widow and an illegitimate child, the latter is not entitled to any share in the estate left by him.

Held further that such an illegitimate child, even if entitled to a share in its diseased father's estate cannot claim and obtain such share in the lifetime of her father's widow.

Held by Parlett J, (Fox C. J. Ormond J. and Twomey J. dissenting) that a step child, though illegitimate has a right of partition against the surviving step-parent when there are no legitimate children and that the daughter in this case is entitled to $\frac{3}{4}$ths of the property taken by the father to the marriage with the surviving widow and to $\frac{1}{8}$th of the joint property acquired during that marriage.

ORDER OF REFERENCE.

Dated 20th July 1915.

FOX, C. J.—One Saya Thi's first wife was Ma Le by whom he had a daughter Ma Mya. Ma Le and Ma Mya predeceased him. He had another daughter, the plaintiff Ma On Bwin, by Ma Kha, but it has been found by both courts that Ma Kha was not his wife. About three months before his death Saya Thi married the defendant Ma Hnya.

The illegitimate daughter brought the suit against the widow claiming three-fourths of Saya Thi's estate. The Divisional Court has passed a decree in favour of the plaintiff awarding her a half-share in the estate. The defendant appeals against such decree. The arguments in support of the appeal are threefold namely:—

(1) That an illegitimate child is only entitled to a share in his or her parent's estate when the parent has left no heir, and that Saya Thi having left an heir in the person of his widow the defendant Ma Hnya, the plaintiff is not entitled to any share in his estate.

(2) That even if she is held to be entitled to a share in the estate, it is not as much as a half-share.

(3) That even if she is entitled to a share, such share is not claimable during the life time of the defendant widow. All of these grounds can scarcely be said to be included in the grounds of appeal to this court, But Mr. May Oung has waived objection to all being considered in view of the desirability of obtaining a final decision on the rights of parties in cases similar to the present.

In *Mo Shwe* [illegible] *Ma Kyin Thaw* (1) which was a case similar to the present, it was not argued that the plaintiff illegitimate daughter was not entitled to demand her full share in the life time of the widow; it was said that if this argument had been put forward it might have been necessary to decide whether it was open to her to do so in view of certain rulings of the court mentioned in the judgment. In the present case the argument is put forward.

One sentence in Sir Herbert Thirkell White chief Judge's Judgment in *Ma Sein Hla* vs. *Maung Sein Hnan* (2) viz:—

"If therefore Po Hlut had died leaving no legitimate offspring, I think there is no doubt that the Respondent Maung Sein Hnan (an illegitimate son of Po Hlut) would have been entitled to share with Ma Min Tun (Po Hlut's widow) in the inheritance of his estate" would apply to the present case, but it is argued that the dictum was unnecessary for the decision of that case, and that it should be regarded as an *obiter dictum*. It appears to me that the present case affords an opportunity of obtaining a final decision on the rights in the estate of a man who dies leaving a widow and an illegitimate child.

Under section 11 of the Lower Burma Courts Act I refer for the decision of a Bench of the Court the following questions:—

1. A Burmese Buddhist man dies leaving a widow and an illegitimate child—is the illegitimate child entitled to any share in the estate left by the man? If so, to what share if the child is a daughter?

2. In the above case can an illegitimate daughter, if entitled to a share in her deceased's father's estate, claim and obtain such share in the lifetime of her father's widow?

ORDER.

Fox, C. J.—After the full discussion which the subject has now received it appears to me that there are no texts in any *Dhammathat* which clearly and without doubt indicate that the answers to the questions referred should be in the affirmative. If there were such texts I would be inclined to follow the course suggested by Jardine, J. C. in *Ma Le* vs. *Ma Pauk Pin* (3) namely try to ascertain the present customs of the people before imposing on them a rule followed in a primitive age but possibly wholly repugnant to the feelings and ideas of the people in the present age.

The *dhammathats*, the rulings of our courts, and Burmese society accord high dignity and great rights to a head wife not only during her married life but also when she becomes a widow whether with children or not. If the position of a widow without children of her own is to be adversely affected by the fact that a *kilitha* child of her husband survives him, and she becomes on that account entitled to smaller rights than those she would have

(1) 3 Bur. L. T. 147.
(2) 2 L. B. R. 54.
(3) (1883) S. J. 225 at p. 237.

had if one of her own children had survived her husband, the position of a childless widow would be not merely anomalous, it would be intolerable. I understood the learned counsel who argued in favour of affirmative answers, (but who of course did not state that in his opinion affirmative answers would be correct) to contend that if the analogy of a step-child were applied, the second question should be answered in the affirmative. Application of the analogy would mean putting the indignity upon the widow of having to recognize as a step-child and sharer with her in her husband's estate the child of a woman whose association with her husband has been devoid of what is at the root of the idea of marriage amongst Burmese as well as other races, namely the continuous living together of a man and woman as mutual helpmates. The widow would have to recognize a woman as her husband's wife who had in fact never been his wife, and who had no enforceable claim on him on her own account.

I should require to be shown very clear and explicit texts before coming to the conclusion that even in archaic times the child of a man by chance intercourse with a woman not his wife was entitled to demand a share in the man's property from his widow. Section 53 of the 10th Book of *Manugye* negatives this right in the case of a *kilitha* child for whom compensation has been paid and who may thus be said to have been acknowledged by the father. It would be very strange if although an acknowledged child had no rights in its father's estate when a widow survived an unacknowledged *kilitha* child could claim a share against the widow.

Some of the passages on page 305 and following passages of Richardson's translation appear to me to be amongst the most confused and unintelligible parts of the *Manugye*; some are inapplicable to and impossible to carry out under the present conditions of of Burmese society whatever their meaning may be. A right of a *kilitha* child to a share in its mother's property when she died leaving a husband but no child by him may have been recognized, but it does not follow that the right of such a child to share in the father's estate with his widow was also recognized. There is no express rule to that effect in the *Dhammathats*, and we are not at liberty to deduce a rule when express rules are not invariably based on obvious logic or on obviously clear principles.

Taking the questions to relate to *kilitha* children, that is to "children begotten in pleasure whose parents do not live openly together," I would answer both the questions referred in the negative.

ORMOND J.—The general rule is that a "*Kilitha*" child *i. e.* "a child, male or female, begotten by a man and woman in pleasure by mutual consent, but who shall not live openly together," is not entitled to inherit" stated in the chapter at the end of Book X of the *Manukye* 1st Edition by Richardson at page 306.

Sections 51, 52 and 53 of Book X are the exceptions to the rule :—A '*Kilitha*' child can in certain circumstances inherit the property of his parents which is in their actual possession. He cannot inherit from the parents or relations of his parents and he

has no right to his parent's undivided share of inherited property. Even if his parents subsequently become man and wife, his position is not altered. His right of inheritance is barred, if his parent leaves a wife (or husband) or legitimate descendants. If his father dies when living with his parents, the child's right to inherit from his father is barred. If his father dies when living with other relations, those relations take half.

Section 51 states the case where the parents subsequently become man and wife. Section 52 deals with the case where the mother takes the child and lives with her parents and dies there :—the child takes its mother's seperate property, subject to the grand-parents' right to retake gifts made by them to their daughter. Section 53 deals with the case of the father :—the child takes his father's actual property, only if the father leaves no heirs, wife, legitimate child or grand-child. If the father was living with his parents they inherit all his property :—if the father was living with other relations, they take one half and the child takes the other half of his separate property :—in this last case it seems to be implied that the child was also living with its father's relations and had "become one of the family."

Sections 52 and 53 no doubt expressly refer to the '*Kilitha*' child as one in respect of whom compensation has been paid by the father. But that I think, only means that the sections refer to cases where the parents of the child have not subsequently become man and wife. Section 26 of Book VI of the *Manukye* shows that the *Dhammathats* contemplate that the father of a bastard child either marries the woman or pays compensation.

Section 50 is not an exception to the general rule first stated : for children born to a couple who have eloped would not be illegitimate. They would be the children of a couple who lived openly as man and wife. If other children are born to the couple after the couple have received the consent of their parents to the marriage, the former children have the right to inherit their parents' and grand parents' property, but they are in the position of younger children.

There are passages in the chapter at the end of Book X which according to Richardson's translation and the translation given in the Kinwun Mingyi's Digest would shew that a '*Kilitha*' child whose mother subsequently marries a husband given her by her parents and dies, has certain rights of inheritance, even though there are legitimate-children of this subsequent marriage. The child is virtually given the status of a legitimate step-child ; but it is not entitled to any share in the inheritance which comes to the mother from her relations, "because he is of the class of children that are like the offspring of animals." Richardson speaks of this child as "chance child" and as the "child of an unknown father"—in the translation in the Digest he is called a bastard. Mr. Justice Parlett shows that a more correct translation would be : "the child whose mother had a husband who was not a permanent husband." "Chance child," "Child of an unknown father, and "bastard," are mistranslations :—the child throughout the passage

is referred to as "the child of the former husband." In Richardson's translation the words, "if his mother has no legitimate children," must mean legitimate children of a previous marriage having a better status than the step child in question, because the very case which is then being dealt with, is the case of the mother leaving at her death legitimate children 'by the husband given her by her parents' *i. e.* the second man. The passage begins by saying:—of children whose mother had a husband who was not her permanent husband, there are those who are entitled to inherit and those who are not. Now if any child is debarred from inheriting because its father was not a permanent husband of its mother; the "*Kilitha*" child must be one of those that are not entitled to inherit *i. e.* in the manner thereinafter stated. The passage must I think refer to a child conceived or born in some sort of wedlock; *e. g.* a child born to a couple who had eloped and lived openly together as man and wife but whose marriage has been terminated by the parents of the girl. In such a case the marriage would be good until it is terminated (see sections 21 and 22 of Book VI).

If the step child referred to may be a "*Kilitha*" a '*Kilitha*' is entitled to inherit along with legitimate children—a proposition that has never been put forward. It would also lead to this anomalous position:—under section 51, a '*Kilitha*,' cannot inherit if his parents subsequently marry and leave legitimate children: *i. e.* he cannot share in the inheritance with his full blood brothers and sisters but under the passage above referred to, he is entitled to share with his half blood brothers and sisters. He is entitled to inherit, if his mother leaves legitimate children by anotherman, but not if she leaves legitimate children by his own father.

But even if the step-child referred to, may be a '*Kilitha*' and may therefore inherit a share of his mother's property though the mother may leave a husband and even legitimate children:—there is nothing to show that a '*Kilitha*' may inherit a share of his father's property, if the father leaves a wife. On the contrary there is the express provision in section 53 to show that the wife precludes him from doing so.

Section 55 implies that a child of a couple regularly given in marriage by their parents but who separate after the child is bigotten, cannot inherit from his father if his father leaves a wife, child or grand-child. See also the passage from the *Dayajja* given at page 366 of the Digest. Yet the status of such a child is higher than that of a '*Kilitha*'.

For the above reasons I would hold that a child begotten in pleasure whose parents do not live openly as man and wife, cannot share with his or her father's widow in his father's estate.

TWOMEY J:—For the purposes of this case the expression "illegitimate child" may be taken to mean the kind of child designated '*Kilitha*' in the '*Manukye*' (P. 306) *viz*: a child begotten in pleasure, whose parents do not live openly together. This is the kind of child contemplated in the various rulings of the Court dealing with the position of "illegitimate" children. For the sake of brevity the term "casually begotten" may be used.

It is established that a '*Kilitha*' may succeed to property left by his parents in the absence of any children of the superior classes. As to whether such a child can claim against the mother's surviving husband, some confusion has been caused by Richardson's incorrect translation of the passage of *Manukye* Book 10 beginning on page 310 (1st Edition) with the words "O King of children whose father is unknown." The opening words in the Burmese refer to the son of a non-permanent husband (Lin-te-ma-shi) and not to the son of an unknown father. Such a son is not necessarily a '*Kilitha*'. The '*Kilitha*' being one of the classes which as a general rule do not inherit, the opening words "of children of a woman by a non-permanent husband there are those entitled to inherit and those not so entitled" presumably indicate that the rules which follow do not apply to '*Kilitha*' children.

The first rule deals with the case of a woman who after having a child by one man takes another "permanent" husband but dies without having any issue by him. It is laid down that the son can claim a share of her original property and of the joint property from the surviving husband, but only if the son and the surviving step-father have been living together.

The next two paragraphs refer. I think, to the same son's position with regard to ancestral undivided property laying down that the son gets none of it unless his late mother's co-heirs choose to give him a share out of affection.

Then follows a paragraph dealing with the same son's position when his mother has left children by her permanent husband. The son of the mother's previous union nevertheless shares with the surviving step-father in this case. In this para the words "child of an unknown father" in the translation should be "son of another (or former) husband."

The next paragraph deals with the position of the same son when both his mother and his step-father have died leaving issue. The son of the mother's previous union (incorrectly described in Richardson's translation as a "chance" child) is allowed to share with his mother's surviving children. But the paragraph winds up with a caution that the foregoing applies only to children of a permanent husband and not to casually begotten children. It appears to me that this caution should be read as governing all the foregoing rules beginning with the passage "O King etc." on page 310.

Next following this cautionary passage there is a paragraph declaring that when there are no "good" children (*i. e.*, children of the inheriting classes) "bad" children (*i e.*, children of the non-inheriting classes) are to inherit and to pay the debts. This is the substantive rule under which a *kilitha* child can come in, and I think it must be construed as applying only to cases where not only the mother but her surviving husband, if any, has died.

Finally, there is a short paragraph declaring that the son of another husband (Ta-lin-tha) cannot demand his deceased mother's property from her relations. The concluding part of this paragraph compares the son under consideration to a brute but the

passage probably applies only to ancestral undivided property and is a mere repetition of the general rule which confines the right of inheritance in such property to the children of unions sanctioned by parental consent.

It does not appear to me that the passages summarized above furnish any support for the view that a *kilitha* child can claim a share of his mother's property from her surviving husband. But even assuming that such a rule can be deduced from *Manukye* chapter X page 310 et. seq., I am unable to concur in the proposition that "the same principle should apply in the converse case when the parent who married is the father and not the mother of the illegitimate child." There is not an inkling in any of the Dhammathats that such a rule is applicable to the case of a father, and I think we must assume that the distinction between the case of a mother and the case of a father was intentional. The reason for it as suggested by Mr. May Oung probably lies in the difficulty of solving questions of disputed paternity. There is never any doubt as to a child's mother, but in the case of a casually begotten child the paternity is often very doubtful and it would give rise to much litigation and confusion and would make the position of a widow intolerable if she were liable to claims of persons setting themselves up as casually begotten children of her late husband. It may be noted that when the Dhammathats lay down a rule of partition on the death of a wife or husband they do not usually leave the converse to be arrived at by the process of inference. For example, Book 10 Section 66 provides for partition among the children of a man's three successive wives, but in Section 67 the compiler is at pains to lay down the corresponding rules for partition among the children of a woman's three successive husbands. I think we should not be justified in applying the rule for mother and child by analogy but should regard the silence of the Dhammathats as negativing any claim by a casually begotten child against his father's widow.

As regards *Manukye* section 53 I doubt whether the reference to payment of a fine has the meaning assigned to it by Mr. Justice Parlett, namely that the father of the casually begotten child having paid a lump sum as compensation has disclaimed all further responsibility for the child and therefore the child has no claim to any of his father's property as against his father's widow, though the child would have such a claim as against collaterals. If such were the intention, the rule would doubtless have been framed so as to exclude in all cases the casually begotten child for whom a fine has been paid, i.e., it would exclude such a child whether the father leaves a widow or not. For if the child's mother has already received in a lump sum all she is entitled to, why should the child be preferred to the father's collaterals any more than to the widow?

The reference to payment of fine in my opinion only shows that the child contemplated in section 53 is one whose paternity is not a matter of dispute. If the deceased paid compensation it may be taken that he admitted his fatherhood. Section 53 in my

opinion will not allow a casually begotten child whose paternity has not been recognised to succeed even against collaterals. And I think the rule must be construed as shutting out such a child altogether (even one whose paternity was recognized) where there is a regular wife surviving the child's father.

The general rule—husband dies, wife succeeds; wife dies, husband succeeds—must prevail unless where there is an exception based on clear authority. The words of Mr. Burgess on this point may be recalled. "Marriage is a most important part of Buddhist Law, and it is necessary to take the greatest care that the mutual rights of husband and wife are not curtailed in any respect unless it is clearly and satisfactorily established that the restriction in question has been introduced by law or custom having the force of law." *Mi Lan* v. *Maung Shwe Daing* (4) It is true that the *Dhammathats* allow children of the classes who do not inherit including *kilitha* children to come in when there are no children of the classes entitled to inherit. But the limitations of this privilege are shown by section 53 Chapter X *Manukye* withholding the privilege from the casually begotten child of a man who has died leaving a regular wife surviving him.

I would dissent from the opinion expressed in *Ma Sen Hla* vs. *Maung Sen Hnan* (2) that (i) as illegitimate children are entitled to inherit in the absence of legitimate children and (ii) as step children inherit from step-parents to the exclusion of collaterals, it follows that in the absence of legitimate step children, illegitimate step-children are entitled to share with the widow of their deceased father in the inheritance of his estate. Mr. Burgess held in *Ma Shwe Ma* vs. *Ma Hlaing* (5) that even the son of an *apyaung* or free concubine, one of the classes of sons entitled to inherit, cannot share as a step-child with his father's widow, and that the rules regarding partition between a step-son and step mother apply only to the son of a regular union (see chapter IX of the Digest.) If the son of an Apyaung cannot claim against the widow much less can a casually begotten child. I think the combination of the principles (1) and (ii) above is not premissible. If a child other than the child of a previous regular union were entitled to claim under the rules in chapter IX as a regular step-child against his father's widow or his mother's surviving husband, it may be asked why is special provision made in the Dhammathats for the child of a non-permanent union claiming against his mother's surviving husband. It will be noticed that these special provisions exclude children of an inferior class from any share in the mother's ancestral undivided property, though there is no such restriction in the case of step-children properly so called. Following the ruling in *Ma Shwe Ma* vs. *Ma Hlaing* (5) I would hold that a casually begotten child can in no circumstances rank as a regular step-son.

---

(4) U. B. R. (1892-96) II 121.
(5) U. B. R. (1892-96) II 145.
(5) II U. B. R. (1892-96) p. 145.

I would answer the reference by saying that an illegitimate child (*i. e.*, a casually begotten child) cannot share with his or her father's widow in the father's estate.

PARLETT, J.—The questions referred to are:—

(1) A Burmese Buddhist man dies leaving a widow and an illegitimate child. Is the illegitimate child entitled to any share in the estate left by the man? If so to what share if the child is a daughter?

(2) In the above case, can an illegitimate daughter if entitled to a share in her deceased father's estate, claim and obtain such share in the life time of her father's widow?

I think some preliminary definitions of terms are desirable. As was remarked by Burgess, J. C. in *Ma Hlang* vs. *Ma Shwe Ma* (6), ' Illegitimacy is an ambiguous and inconvenient word to employ in regard to Buddhist Law. It does not appear in the original Burmese. What is meant by the term is incompetency to inherit under certain conditions, or inferiority and postponement of claims to inherit to those of others."

In *Ma Le* vs. *Ma Pauk Pin and others* (3), the learned Judicial Commissioner of Lower Burma, referring to Major Sparks' Code wrote: He went the length of excluding from inheritance all illegitimate children, provided there were legitimate off-spring. He indicated certain connections as illegal, but he never defined legitimacy; and he left concubinage unmentioned in his Code. "In the Upper Burma case referred to above, it was pointed out that the concubine and the lesser wife are both spoken of as *Maya* or wife in Burmese and the exact distinction between them, if any, intended by the Dhammathats is obscure. Among the sons enumerated at pages 305 & 310 of the Manukye as entitled to inherit are included those of a concubine who is openly co-habited with when there is a chief and a lesser wife, and those of a slave to whom a seperate chamber is given with the knowledge of the wite and of the neighbourhood. In *Maung Twe and one* vs. *Maung Aung* (7), Shaw J. C. points out that such a slave-concubine is styled, apparently quite indifferently, in the various *Dhammathats* as slave, slave-concubine or slave-wife.

At the hearing of this case however the illegitimate child to which the reference applied, was taken to be the offspring of a man and woman to whom no status of wife, however inferior, was accorded and belonging to the class referred to in the *Manukye Dhammathat* as ordinarily not entitled to inherit and described as "begotten by a man and woman in pleasure, by mutual consent, but who do not live openly together, called *Kilitha*," and as "begotten in sport and wantonness, not by a regular and ostensible husband."

I find the following passages in vol. 10 of the *Manukye* bearing upon the rights of such children. Section 50 provides that children of an eloping couple born before they have obtained their parents'

---

(3) (1883) S. J. 225 at p. 237.
(6) II U. B. R. (1892-96) p. 153 at p. 157.
(7) II U. B. R. (1897-01) p. 176.

consent to their union must be postponed in partition of their parents' estate to children born after the consent of the parents has been obtained.

Section 51 provides that a child begotten in wantonness whose parents die leaving no other son succeeds to his parents' seperate property to the exclusion of their relatives (*i. e.*, brothers and sisters) but that the latter exclude him from sharing in the grand-parents' property.

Section 52 lays down that if a child is born after clandestine intercourse and the man instead of marrying the woman, pays compensation and she and her child live with her parents, then upon her death the child takes her separate property. If however she dies after her parents but without getting possession of their property her child obtains no share of that property.

Section 53. I would render as follows: "Let the son for whom compensation has been paid get the actual property of the father who begot him, if that father has no lawful wife and no son, daughter or grand-child of his own to inherit. This applies to separate property acquired while the father has lived as he wished without setting up a household (or without marrying)," The Burmese word (ချစ်း), literally original, used here to qualify each of the words wife, son, daughter and grandchild, means, I think, when applied to a wife 'legally married' or 'recognized,' and when applied to the child of a couple that he is their joint offspring as opposed to a step-child or adopted-child, and I have translated it accordingly. The section continues "A further rule is, if the father has lived with his parents and relatives and has acquired property in common and also has separate property, let his parents alone enjoy the whole. If he lives with relations let the relations with whom he lives take half of the separate property and let the son for whom compensation was paid take the remaining half and let him discharge the debts in the same proportion. Why is this? Because he has entered the same class as a son."

The first paragraph of this section is relied upon as showing that where the illegitimate child's father has left a widow, she entirely excludes the child from sharing in his father's estate and in view of the ruling in *Ma Hnin Bwin* v. *U Shwe Gon* (8) as to the the authority to be attached to the Manukye when clear and unambiguous, it is contended that this rule must be followed unless other passages in the same *Dhammathat* appear to qualify the rule or introduce some ambiguity. But this paragraph by no means refers to all children whom we should call illegitimate but merely to a child for whom the father has paid compensation, that is to say where the father having got a child by a woman without marrying her, instead of marrying her or assuming the care of the child, has paid a lump sum to her or her parents and so to speak has washed his hands of responsibility for the child's upbringing. In such a case it is not unnatural that the child should have no claim to interit any more from his father if he has left a

(8) 8. L. B. R. I.

wife or a child who would ordinarily be his heir. In the present case the illegitimate child does not appear to have been one for whom the father had provided in her infancy intending to have no more to do with her; on the contrary, there is evidence that she lived at any rate intermittently with her father until she was almost of marriageable age. In my opinion, therefore, section 53 cannot be held to govern the present case.

The only other reference I can find to illegitimate children are in the concludidg portion of vol. 10 commencing at page 305 of Richardson's translation. It begins at pages 305 and 306 with a list, reproduced in an abridged and a slightly modified form at pages 309 and 310, of twelve classes of children, the first six of whom are entitled to inherit and the last six are not. On page 307 the maxim "when there is no good son let the bad inherit" is further explained as follows "if there are no honourable and good sons entitled to inherit, then even a son born by chance intercourse must take the property and pay the debts, in consonance with the laws applicable, according to the various rules for partition of inheritance set out above.

I venture to think that this division of children into good and bad is not synonymous with legitimate and illegitimate but it refers to their division into two main classes, one of which is, and the other *prima facie* is not, entitled to inherit. A reference to the list of children in the second class shows that at any rate to the first two and the last no stigma could justly attach, and that there is no apparent reason why they should not inherit in the absence of children with a better right to do so. I think, therefore, that what the explanation of the maxim given in the text means is, that where no children falling in the first class exist, then a child in the other class is allowed to inherit, even if he be merely one begotten in chance intercourse. At pages 310 and 312 are to be found the following provision relating to children of an unknown father. The Burmese refers to the father by the word used for husband, but this euphemism is still employed to denote any man with whom a woman has connection without marriage, and throughout this passage such expressions as 'son of the former husband' refer to a child begotten out of wedlock by a man whose identity is concealed. I think, moreover, the comparison of such a child to an animal is not a term of degradation but rather a reference to his not knowing his own father. I would render the passage *in extenso* as follows; "Among children whose mother has no permanent (or regular) husband, there are two cases—one in which they ought to inherit and one in which they ought not; as to these two cases, a child is begotten by one man (literally husband) and the mother lives with a subsequent husband permanently by whom she has no children; if before she took the subsequent lesser husband, she has acquired property or incurred debts, if there is no son born of her by the subsequent husband and the son and the step-father be living together at her death, let her property brought in at the time of marriage be divided into four shares and let the son of the former husband have three shares of debts and assets and the step-father

one. If there be property acquired by the mother and step-father when living together, let it be divided into six shares and let the son of the former husband have one share of debts and assets and let the step-father have five. If the step-father brought in property at the time of marriage, let the son of the former husband have a one fourth share of debts and assets. This is said when the couple has no children " (the negative is omitted in the Burmese version of Richardson).

" As to the ancestral property of the wife, should she die in reach of the inheritance if the new husband was taken with the knowledge of her parents and relations, he alone shall succeed to it: the son shall not say " I am her son," because he is the son of another man. When living together with them the old son is entitled to enjoy the separate property of his mother and the property of his step-father, as mud comes from water and water comes from mud. On the other hand, if his uncles and aunts say " though his father be unknown he is the son of our relation (*i. e.*, Sister) and is attached to us and is our nephew," let the son by another husband get what they give him: the step-father shall have no right to demand a share. Why is this? Because it is a gift of affection. If the son demands the property of his mother from his relations on the ground of being her son, as he is not entitled to it unless they choose to give it to him, he only earns disgrace.

If the mother has children by the husband given her by her parents with the knowledge and consent of her relations and she has separate property at the time of her death, the law of partition with the step-father is, let it be divided into four parts of which let the other children have three, if there are no children entitled to inherit, but of the joint property, let him have one eighth.

If the step-father dies after the mother, he has a right to the whole of the property brought in by her at the time of marriage and of her separate property, and if the child of the former husband has not demanded his share from the step-father let the sons born of the mother by the step-father have one half and let the other half be divided between them and the children of the former husband according to their ages. Of the property acquired by the mother and step-father let their children have one half and let the other half he divided between them and the children of the former husband according to their ages and let them pay the debt in the same proportion.

Of the inheritance which comes to the mother from her relations, the child of the other man shall have no share, because he is of the class of children that are like animals let the children of the pair have all the hereditary property they may be in reach of and let the debts he paid in the same way.

If the parents and step-parents be both dead, let the property brought in at the time of marriage be divided into three shares; let the children of the first family have two and those of the last one share, and of the property acquired during the marriage, let the children of the last family have two shares and those of the first one. This is only said of the children of a regular husband;

the children begotten inconsiderately like animals shall have no share. The separate property of the mother, and the property obtained by her and a lesser husband, and the separate property of the father and the property obtained by him and a lesser wife, if there be no good children "(i. e., in the six superior classes)" let the bad "(i. e. the inferior classes)" inherit and pay the debts. If the children by another man, their mother having no good children, demand her property from her relations there is no law that they should get it, nor even if it be demanded from the mother in her life time. They are in the class of animals."

These are all the provisions I can find in the *Manukye* bearing upon the subject; nor do I find anything substantially different in the texts collected from other *Dhammathats* in sections 220, 231 and 300 to 304 of the Kin Wun Mingyi's Digest Vol. I.

It will be seen that the illegitimate child referred to in the above quotation is one whose father has never acknowledged his paternity and who has been brought up by the mother as the child of an unknown father even such a child if his mother marries but dies leaving no legitimate children, has a right to claim from the step-father a share both of the separate property which the mother took to the marriage and of the property acquired during the marriage. There appears to be no rule, and I can see no strong reason for holding, that an illegitimate child whose father is known and has openly acknowledged the relationship should be in a worse position, nor for holding that the same principle should not apply in the converse case, where the parent who married is the father and not the mother of the illegitimate child. That principle appears to be to give to the step-child, though illegitimate, a right of partition against the surviving step-parent when there are no legitimate children. In this case there are none. Though the texts quoted speak of the illegitimate child as a son they must be understood as referring to a child of either sex, for where a distinction is intended to be made between the sexes the *Dhammathats* always make it plain.

I would accordingly answer both questions referred in the affirmative and on the first question I would say that the daughter is entitled to three fourths of the property taken by her father to the marriage with the surviving widow and to one sixth of the joint property acquired during that marriage.

JUDGMENT.

In accordance with the opinions of the majority of the Full Bench on the reference made in the case, the appeal is allowed and the decree of the Divisional Court is set aside and that of the Sub-Divisional Court is restored.

The plaintiff must pay the defendant's costs in this Court and in the Divisional Court.

Appeal Allowed.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE * No. 12 OF 1915.

ARISING OUT OF CIVIL REVISION No. 84 OF 1915.

IN RE G. HURRY KRISHNA PILLAY ... DEFENDANT—APPLICANT.

VS.

M. ADILUTCHMI AMMALL ... ... PLAINTIFF—RESPONDENT.

For Defendant—Applicant—Giles.
For Plaintiff—Respondent—N. M. Cowasjee.

Before Sir Charles Fox, C. J., Mr. Justice Robinson and Mr. Justice Parlett.

Dated 10th January 1916.

Contract Act—S. 23 and 27—Illegal consideration rendering contract void—Restraint of trade illegal and void.

Where defendant appellant entered into an agreement with the plaintiff-respondent that the latter should not set up and carry on a stevedoring business in Rangoon and 3 other places or in any way interfere with the former's business of stevedoring in those places and agreed to pay her regularly every month during the life of the plaintiff-Respondent the sum of Rs. 350.

Held by the Full Bench that the whole agreement is void as the plaintiff-Respondent's undertaking is in restraint of trading is of no binding effect and it would be contrary to all sound principle to allow a plaintiff to recover because she had carried out an unlawful promise.

ORDER OF REFERENCE.

18th November. 1915

PARLETT, J:—The plaintiff-respondent is the widow of P. M. Madooray Pillay who carried on the business of stevedore in Rangoon, Akyab, Moulmein and Bassein. with the defendant as his general manager. After Madooray Pillay's death, the defendant started a stevedoring business of his own in the same four places and the parties entered into an agreement whereby, in consideration for plaintiff not directly or indirectly setting up and carrying on a stovedoring business in Rangoon, Akyab, Moulmein and Bassein or in any way interfering directly or indirectly with defendant's business of stevedore in those places, the defendant covenanted to pay her regularly every month during the term of her natural life the sum of Rs. 350. Three such monthly payments were made and the present suit was brought to recover two more which had fallen due. The plaintiff was granted a decree it being held that though her covenant was not enforceable by law, as being in restraint of trude, yet she having in fact performed it was entitled to recover the payment due therefor in terms of the

* Reference by the Hon. Mr. Justice Parlett under sec. 11, Lower Burma Courts Act.

agreement. In this Court both parties have raised points which they do not appear to have advanced in the Court below. For the defendant it is argued that plaintiffs' covenant will last until her death and has not yet been fully executed, and the effect of the Lower Court's decision is to split up the single consideration into an indefinite number of monthly considerations thereby altering the contract. This argument which would appear to have been applicable to certain English cases which have been referred to, was not raised in them, and is not, I consider, sound. The wording of the agreement makes it clear, I think, that the intention of the parties was that the monthly payment should be made after every month during which the plaintiff had abstained from carrying on a business herself or interfering with defendant's business. Her covenant was a continuing one, as might be one for personal service at a monthly wage, and in either case payment would become due after every month during which she had observed her covenant. For the plaintiff it is argued that the agreement mentions two considerations, the setting up of a business and otherwise interfering with defendant's business, and that though the former is void, the latter is not. The nature of the interference sought to be guarded against is not specified, nor is it easy to see what effective interference was to be feared from a purdanashin lady. A promise to refrain from illegal interference would be no consideration and reading the agreement as a whole I think that the interference referred to meant interference by way of competition, and that there was but one consideration. In this view the plaintiff's promises were void as being in restraint of trade, and this brings us to the main question, in the case, namely whether she having observed them for several months is entitled to be paid the remuneration fixed in the agreement for doing so. Plaintiff's case, as I understood it, was that section 27 of the Contract Act makes an agreement in restraint of trade void to that extent only, that is to say that the promise to obstain from trading was not enforceable by law (section 2 (g)) against the person making it, but that there was no provision of Indian Law preventing such a person who has submitted to the restraint from recovering the consideration agreed upon for his so doing. The section however says that the agreement so far as it restrains trade is void, not merely that the promise not to trade is void. I think that the effect of the words "to that extent" is that if the contract can be brought under section 57 or 58, there being either two sets of promises, or alternative promises, one of which is legal and the other illegal, then if the illegal portion is separable from the other, the legal part may be enforced. I have however already held that in this agreement there was but a single consideration, and that it was wholly void.

For the defendant, sections 23, 24 and 25 are relied upon and it is argued that the object of the agreement is unlawful being forbidden by law and opposed to public policy, that being the basis of the law as to contracts in restraint of trade. The consideration for the promise to pay the monthly allowance being unlawful the

whole agreement is void under sections 24 and 25, none of the exceptions to the latter section applying to the present cuse The consideration being bad vitiates any contract founded on it.

The cases chiefly relied upon for the plaintiff are *Wallis* vs. *Day* (1) and *Bishop* vs. *Kitchen* (2). The actual decision in the former case does not help the plaintiff as it was held that the covenant in restraint of trade in that case was not void, but reliance is placed upon the opinion of Abinger C. B., expressed in the course of the argument that he "should require a strong authority to say (although the prohibition would not be binding as against the party himself) that, there being nothing criminal in the contract, he should not have the benefit of it, where he has in fact performed it." For the defendant it is pointed out that even if this had been an actual decision, it would proceed upon the English principle only, whereas the decision in the presont case must be based upon the Indian Law. In this connection I would note that section 23 of the Contract Act places immoral considerations upon the same footing as those opposed to public policy, declaring them both unlawful and I gravely doubt whether, in the case referred to in illustration (K) to section 23 A could recover the amount of hire agreed upon because the other part of the agreement had in fact been performed.

In *Bishop* vs. *Kitchen* (2) the plaintiff was a traveller in hops and defendants had purchased the goodwill and interest of plaintiff in his connexion among the buyers of hops. The defendants undertook to pay plaintiff an annuity af £ 100 during his life and agreed to employ him as their traveller on a salary of £ 250 per annum, payable quarterly, with a proviso that so long as the plaintiff should be so employed and in receipt of the salary the annuity should be suspended. After the making of the agreement and while the plaintiff was not employed as a traveller of defendants or in receipt of the salary of £ 250, four quarterly payments of the £ 100 a year became due; and the plaintiff did all things necessary to entitle him to be paid the same and all things happened and all times elapsed to entitle the plaintiff to be paid the same. An action was brought to recover arrears of the annuity the consideration for which was an agreement by the annuitant that he would not, at any time thereafter, either on his own account or on account of any other person or persons whomsoever, excepting the defendants, solicit orders for hops from any of the customers in the West of England, or in South Wales, or any District whatsoever. It was demurred that the agreement was bad as being in general restraint of trade, and even if the part as to trading in particular districts were separated from the rest, it was still greater than necessary and so unreasonable. It was held, without deciding whether the restraint of trade so far as it regarded the West of England and South Wales be enforced that plaintiff who had performed his part of the contract was entitled to recover the consideration.

---

(1) 2 M. & V, 273 56 R. R. 602.
(2) 58 L. J. Q. B. 20.

This case is at once distinguished from the present one by the fact that there was a sale of the good-will of the business which would, in India, have brought it under the first exception to section 27 of the Contract Act. The case of *Harbhai* v. *Sharafuli* (3) is also relied upon for the plaintiff where one of the learned Judges pointed out the difference between an action brought to enforce the illegal restraint and an action brought to recover the consideration for the restraint. The actual decision however does not help the plaintiff as it was held that the consideration relied upon in that case was not an agreement in restraint of trade.

Other cases quoted for the plaintiff are *Bank of Bengal* v. *Vyabhoy Gangji* (4) and *Belchambers* v. *S. C. Ghose* (5). Both relate to agreements entered into without the sanction of the Court required by section 257A of the Civil Procedure Code 1882, and merely serve to support the proposition that though an agreement may not be enforceable by law, yet that does not prevent the consideration for such an agreement being recovered, if the agreement has been carried out. The former case decided that "where an agreement to give time not sanctioned by the Court as required by section 257A, formed part of the cosideration for the bond, and has actually been enjoyed by the obligor of the bond, such cosideration not being in in its nature illegal, and not having as a fact failed, there is no reason why the obligee should not enforce the terms of the bond." It may be noted that here the void agreement was not the sole consideration for the bond, though probably the line of reasoning followed would have led to the same conclusion even if it had been. The later case decided that a provision as to giving time to execute a decree is not illegal, though it may be incapable of enforcement as an agreement made without the sanction of the Court under section 257A of the Civil Procedure Code.

For the defendant *Madhub Chunder Poramanck* v. *Rajcoomar Doss* (6) is relied upon. There the plaintiff consented to cease carrying on his business in consideration of the defendants reimbursing him advances made to his workmen. He ceased carrying on business and then sued for his money. It was held 1st that section 27 of the Contract Act applies to partial and not merely to total restraint of trade and 2ndly that there is no foundation for the opinion that though the agreement on the part of the plaintiff might be void, he might enforce the agreement for the payment of money. In the judgment it was said "If the agreement on the part of the plaintiff is void, there is no consideration for the agreement on the part of the defendants to pay the money; the whole agreement is a void agreement and plaintiff has no right to recover the money." This is a clear pronouncement of the law of India applicable to a case like the present. It cannot be assumed that the learned Judges who made it overlooked the English cases referred to above. No subsequent case in which it

(3) XXII Bom. 861.
(4) XVI Bom. 618. (1891)
(5) XXXV Cal. 870. (1908)
(6) 14 Ben. L. R. 76.

has been expressly dissented from has been cited, and I should be disposed to follow it. As however the point is one of some difficulty and considerable importance I think it desirable that it should be decided by a Bench, and I accordingly refer the question whether the plaintiff having refrained from setting up or carrying on the business of a stevedore and from otherwise interfering with defendant's business during the months of November and December 1914 is entitled to recover the allowances of Rs. 350 in respect of each of those months claimed in this suit.

JUDGMENT.

FOX C. J.:—The question is whether a dictum of Lord Abinger in *Waltis* v. *Day* (1) and the ruling in *Bishop* v. *Kitchen* (2) are applicable in India. We have to look to the Indian Contract Act alone. Sec. 27 of that Act says that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void. The agreement now in question does not fall within any of the exceptions stated in the section. In it is embodied a promise and undertaking by the plaintiff that she will not in any way set up or carry on a stevedoring business and a promise and undertaking by the defendant that in consideration of the plaintiff's promise and undertaking he will pay her Rs. 350 per mensem during her life. The agreement extends to nothing more; consequently and owing to the plaintiff's undertaking being in restraint of her trading the whole agreement is void. If the plaintiff's promise is of no binding effect, then there is no consideration to make the defendant's promise binding on him and it is a *nudum pactum* and void under section 25 of the Act.

The plaintiff's promise was under 23 of the Act unlawful. It would be contrary to all sound principle to allow a plaintiff to recover because she had carried out an unlawful promise.

The answer to the question referred should in my opinion be in the negative.

ROBINSON J.:—This suit is apparently based on an agreement which it is sought to enforce. The agreement consists of single reciprocal promises each of which is the consideration and the sole consideration for the other.

Plaintiff's promise is void being in restraint of trade and defendant cannot enforce it, that is, compel her to abide by it, and he has no relief against her if she ceased to carry it out.

But she has, so far, performed it and defendant has enjoyed the consideration he bargained for. Is this sufficient consideration to render his promise enforceable?

It is urged that section 27 of the Indian Contract Act makes every agreement in restraint of trade to that extent void and that the section declares the agreement, not merely the promise, void. Further as plaintiff's promise is void and as it is the sole consideration for defendant's promise there is no consideration to supp ort defendant's promise and no suit can therefore be on the agreement.

(1) (1837) 2 M. and W. 274.
(2) (1868) 38 L. J Q. B. 20.

For plaintiff it is argued that section 27 only makes the agreement void "to that extent" and that these words show that the whole agreement is not void. With this I cannot agree. Agreements may consist of several covenants and these words are, I consider, merely intended to provide against the whole agreement being treated as void in cases where there are perfectly legal covenants which can be clearly separated from the objectionable covenant in restraint of trade. In the present case there being only single reciprocal covenants the section will act as if those words were not there.

I will next consider the authorities that have been relied on. In *Wallis v. Day* (1) the agreement was held not to be one in restraint of trade and it is therefore no authority but Abinger C. B. in the course of the argument said "I should require a strong authority to say, (although the prohibition would not be binding as against the party himself), that, there being nothing criminal in the contract, he should not have the benefit of it, where he has in fact performed it."

The facts in *Bishop v. Kitchen* (2) were very simalar to those of the present case. The only question argued was whether part of the contract which was in partial restraint of trade was bad as being unreasonable. The defendant was not called upon, but counsel interpolated that the suit was not to enforce the agreement but to recover the consideration for the restraint on the Plaintiff. The Judgement was as follows—"The agreement having been executed and the Plaintiff having submitted to the restraint, he is clearly entitled to recover the consideration due in respect of it." This was a decision of four Judges.

As regards this case it must be remembered that the law as to restraint of trade is different in England to what it is under our contract Act. Contracts in partial restraint are not there necessarily bad; it is only when they are considered to be against public policy as being unreasonable that they are held objectionable. In India all agreements in restraint of trade, in partial as well as in general restraint, are declared void. Moreover the learned Judges were not dealing with express provisions of a statute as we have to do.

M. Haribhai v. *Sharafali* (3) it was held that there was a lawful agreement founded on consideration, viz, the mutual agreement to share profits and that it might he enforced. The learned Judges did not come to any decision as to whether another covenant in the agreement was in restraint of trade and were inclined to differ on this point.

The *Bank of Bengal v. Vyabhoy Gangji* (4) was a case where the sanction of the Court to an agreement to give time for the satisfaction of a judgement debt had not been obtained. It was pointed out that the expression "void" in section 257 A of the Code

1. 150 Eng. Rep. 759, S. C. 46 R. R. 602.
2. 38 L. J. N. S. 20.
3. L. B. R. 22 B. 861.
4. I. L. R. 16 Bom. 618.

of Civil Procedure is not equivalent to illegal in the sense of prohibited by law but only means that it is not capable of being the foundation of any legal right. The consideration was however not only to give time but also to accept Rs. 5,000 in full discharge of a debt of Rs. 11,900 odd. The court held that the contract was "not invalidated in its formation by the legal failure of part of the consideration; and no part of the consideration has failed in point of fact so as to give the debtors a counter claim of any description."

In *Belchambers v. S. C. Ghosh* (5) the same view was taken and in this case also there was consideration over and above the agreement to give time.

Daotat Singh v. Paudu (7) is a similar case in which it is pointed out that even if part of the bond is void this would not invalidate the rest of the agreement if the former part can be separated from it.

Madhow Chunder *Poramanick v. Rajcoomar Das* (6) is a case exactly in point. It was held that there was no foundation for the opinion that although the agreement on the part of the Plaintiff might be void he might enforce the agreement for the payment of the money to himself. The ground given is—"If the agreement on the part of the Plaintiff is void there is no consideration for the agreement on the part of the defendant to pay the money; and the whole contract must be treated as one which cannot be enforced.

This case was followed in *Nur Ali Dubash* v. *Abdul Ali* (8) n which the opinion was expressed that section 24 also probably rendered the agreement void.

The only decisions in India therefore actually in point hold the Plaintiff cannot recover as there is no consideration to support defendant's promise to pay and regard the contract as one and entire and wholly void. The rulings with reference to the section of the Code of Civil Procedure may lend some colour to the argument advanced for the plaintiff but those authorities appear to me to be influenced by the fact that a question of procedure was involved and that no active legal principle would be infringed. In the present case we have to deal with an express provision of statute law intended to render every agreement in restraint of trade void.

Plaintiff's case is really based on the decision in *Bishop v. Kitchen* (2). It is urged that it was not illegal for her to promise not to carry on the trade and that this promise is a good consideration and sufficient to support Defendant's promise.

Section 10 of the act provides that an agreement to amount to a contract and to be enforceable by law, must, amongst other things, be made for a lawful consideration and with a lawful object and be not expressly declared void.

As I have pointed out the consideration here are the reciprocal promises. If one fails the other falls with it. Plaintiff's promise

---

5. I. L. R. 35 Cal. 870.
7. I. L. R. 9 Bom. 176.
6. 14 B. L. R. 76.
8. I. L. R. 19 Cal. 765.

must impose some burden on her as well as confer some benefit on Defendant. Her promise amounted to nothing for she might treat it as nought at any moment and defendant could not compel performance or obtain any recompense for payments made to her. Her promise must be of some value but the giving of it made no difference in her position.

The agreement must also be made with a lawful object or purpose. The object was to effect a restraint of trade and if permitted would defeat the provisions of section 27 and is therefore unlawful nor can Plaintiff be allowed to shift her ground, if this is being attempted, or to make a case based on an executed consideration, for the plea that she has so far performed her promise only amounts to this that she should be allowed to enforce the agreement. To allow her claim on any ground is really to enforce an agreement expressly declared void.

In my opinion therefore Plaintiff's suit must fail.

PARLETT J:—I agree that the question referred should be answered in the negative and have nothing to add to the remarks which I made in referring it.

IN THE JUDICIAL COMMISSIONER'S COURT, UPPER BURMA.

CIVIL REVISION CASE No. 160 OF 1915.

NGA TIN GYI ... ... APPLICANT.

vs.

NGA TWE AUNG, minor by his next friend Mi La Ma ... ... RESPONDENT.

For Applicant.—Mr. Dutt,
For Respondent. –Mr. Chatterjee,

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

Dated 24th January, 1916.

Benami Transaction-Presumption of advancement-English principle not applicable to India—Burmans more oriental than European-Presumption-Burden of proof.

Held that when a purchase is made by a Hindu or Mahomedan in the name of his son, the presumption is in favour of its being a *benami* purchase and it lies on the son to prove that he is solely entitled to the legal and beneficial interest in the estate.

The burden of proof lies with more than the ordinary weight on the preson alleging that the purchase was intended for the benefit of the son whenever the rights of creditors are in issue in such a transaction.

The English principle of "advancement" is not applicable to India.

JUDGMENT.

One Mg. Tin Gyi having obtained a decree against Tet Pu, in execution of that decree attached a house in the occupation of Tet Pu. Thereupon Tet Pu's minor son Maung Twe Aung by his next friend Ma Le Ma applied for removal of the attachment on the

ground that the house belonged to him. The District Court allowed the application and removed the attachment, and the Decree-holder comes to this Court in revision.

The case for the minor was that the house in suit had been bought for him by his father by a registered deed of sale which was put in evidence. For the Decree- holder it was urged that the transaction was benami and fraudulent. The District Court found that the sale was not benami. One of the grounds for this finding appears to have been that the money with which the house was purchased was not all the father's but at any rate partly the son's. There is no explanation of this in the learned judge's judgment. Apparently the minor's case was that the house was bought with the proceeds of jewels belonging to his mother who was dead, and it is urged by his learned advocate that on the father's remarriage which had taken place before the house was purchased, the son had a share in the jewels which he could claim. But it was held in *Ma Min Tha* vs. *Ma Naw* (1) that children have no vested interest in parental property during the life time of either parent, and this view has been consistently followed by this Court. The fact that a child can claim under certain circumstances does not prevent a surviving parent from disposing of the whole of the property or give the child any interest until such claim is made.

The second reason given by the District Judge was that it was not the father who bought the house but an uncle. The Court might perhaps have made this point a little more clear, but it appears from the evidence that the house belonged to the uncle and if the uncle claims to have bought and sold his own house in the name of the minor, the transaction certainly appears to be open to suspicion considering that the house was in the occupation of the judgment-debtor who subsequently mortgaged it to obtain a loan by depositing the title deeds including the deed of sale now relied upon. I fail to understand how the Court can have held that the purchaser was the uncle. The uncle said that the jewelry was put aside for the son and left with him and that he sold it and with the proceeds purchased the house, but he failed entirely to explain how the title-deed came into the possession of the Judgment-debtor. The document itself upon examination appears to be rather a remarkable document. The child Mg. Twe Aung on whose behalf the present claim is made has been produced in court and is a child of 8 or ten years of age He must have been a mere infant at the time when the document was executed, Dec. 1912, and yet he is shown as having presented the document for registration and the endorsement to this effect purports to be signed by the person who so presented it. The child by name is Mg. Twe Aung; the purchaser's name in the document and the name of the person who presented the document for registration is Mg. Tun Aung. No attempt has been made to reconcile these discrepancies. The signature "Mg. Tun Aung" is obviously not that of a child. The case of *Meyappa Chetty*, vs. *Mg. Ba Bu* (2) was brought to the notice of the District

(1) II. U. B R. (92-96) p. 581
(2) III. B. L. T. 62.

Judge, and I am quite at a loss to understand how in view of that ruling he was able to come to the decision he did come to. It was there pointed out that as far back as 1854 it was decided by the Privy Council that the presumption made in English law that when a person purchasing property takes the conveyance in the name of a relation that the purchase is for the benefit and advancement of the relation does not apply in India, and that the presumption in India is that the purchase is benami and that the burden lies on the person to whom the conveyance has been made of proving that he is entitled to and beneficially interested in the property.

In Mayne's Hindu law and usage, 6th Edition, page 571, the origin and objects of benami transactions are explained.

It is argued for the respondent that the rules which apply in the case of Indians do not apply to Burma and that the same presumptions cannot be made in Burma. But I cannot accept this argument. There can be no doubt that in matters of this kind, Burmese methods are oriental and are much more akin to Indian than European or English methods. It was held in *Maganbhai* vs. *Abdulla* (3) that when a purchase is made by a Hindu or Mahommedan in the name of his son, the presumption is in favour of its being a benami purchase; and it lies on the party in whose name it was purchased to prove that he is solely entitled to the legal and beneficial interest in the estate. When the rights of creditors are in issue in such a transaction, very strict proof of the nature of the transaction should be required from the objector to such rights, and the burden of proof lies with more than the ordinary weight on the person alleging that the purchase was intended for the benefit of the son.

Here we find the son living only occasionally with his father in occupation of the purchased property, the father raising money upon it and only when the creditor seeks to realise debts by attaching the house the suggestion is made that the son is the real owner. The house was bought with the father's money. The document itself which purports to be a conveyance to a minor, if not to a mere infant makes no mention of the incapacity of the vendee and it purports to be signed by him though the signature is obviously not that of a child. It appears to me to be a clear case of a benami transaction entered into with a view to committing a fraud upon his creditors by the Judgment debtor in case at some future date he should wish to do so. Such a transaction cannot be sustained.

The order of the District Judge must be set aside and the attachment will be restored.

The Respondent will pay the costs of this application—two gold mohurs.

(3) VI Bom. 717.

IN THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.

CIVIL 2ND APPEAL No. 109 OF 1915.

NGA KYET SEIN ... ... APPELLANT.

vs.

MI KYIN MYA & 1 legal representatives of Nga Chu Ni deceased ... ... RESPONDENTS.

Mr. C. G. S. Pillay—For Appellant.
Mr. S. Vasudevan—For Respondent.

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

Dated the 1st February 1916.

Slander—damages for—does a 2nd appeal by plaintiff's representative abate on death of plaintiff?—Principle obtaining in such cases.

A sued B for damages for slander and obtained a decree for Rs. 100 and costs. On appeal this decree was set aside and the suit was dismissed. A then died.

On a contention that A's legal representatives cannot continue the 2nd appeal filed by A.

Held that the appeal does not abate on account of A's death since in the present appeal he is not endeavouring to enforce his personal right of immunity from slander but to recover the benefit which accrued to his estate in consequence of the judgment of the 1st Court and of which he has been deprived by the judgment of the Lower Appellate Court.

JUDGMENT.

The plaintiff Appellant sued Maung Chu Ni for damages for slander and obtained a decree for Rs. 100 and costs. On appeal this decree was set aside and the suit was dismissed. The plaintiff Appellant then appealed to this court and after the appeal was filed Maung Chu Ni died and his legal representatives were brought on to the record. Their advocate now takes a preliminary objection that as the right to sue does not survive, the appeal must abate.

It is contended on the other hand that as the plaintiff-appellant obtained a decree in the court of first instance, thereby potentially increasing his wealth he must have the right to get rid of the decree of the Lower Appellate court which has deprived him of that benefit. Reliance is placed on *Gopal Ganesh Abbyankar* vs. *Ramchandra Sadashiv Sabasrabudhi* (1). In that case the position was reversed; the plaintiff having lost in the first court obtained a decree for damages in the Lower Appellate Court. One of the Judges before whom the second appeal came was of the opinion that no distinction should be drawn between an appeal by a plaintiff and an appeal by a defendant and that in the case of an action for slander an appeal must abate on the death of one of the parties whichever side appealed but the majority of the Judges held that though in such a case an appeal by a plaintiff must abate, an appeal by a defendant did not, because his estate was affected by the decree.

(1) 26 Bom. 597.

It seems to me that though the position is reversed the same principle applies in the present case. If the defendant had died during the pendency of the first appeal, his legal representatives would have been entitled to prosecute that appeal on the authority of the ruling above cited which was followed in *Paraman Chetty* vs. *Sundararaja Naik and another* (2) and on their succeeding the plaintiff appellant would undoubedly have had a right to contest the correctness of the decision in this court, because if the right to continue the appeal in the Lower Appellate Court survived, it could not be extinguished by the judgment. I am unable to see on what principle the fact that the defendant died after the second appeal was filed and not during the pendency of the first appeal can make a difference. In the Bombay case Fulton J. interpreted the "right to sue" as the right to seek relief." If therefore the 'right to sue' in the case of the 1st appeal meant the defendant's right to appeal against a decree which affected his estate, I do not see why in the present appeal against a decree which affected his estate the words should refer back to the original cause of action. The plaintiff-appellant is not now endeavouring to enforce his personal right of immunity from slander but to recover the benefit which accrued to his estate in consequence of the judgment of the Township Court and of which he has been deprived by the judgment of the Lower Appellate Court. I am of opinion therefore that the appeal does not abate and it will now be heard on the merits.

IN THE CHIEF COURT OF LOWER BURMA.

FULL BENCH.

CRIMINAL REFERENCE No. 81 OF 1915.

29th November 1915.

EMPEROR ... ... APPLICANT.

vs.

NGA SAING *alias* AH SAING ... ... RESPONDENT.

10th January 1916,

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

11th January 1916.

Criminal Procedure Code (Act V of 1898), s. 110—"Any person within the local limits of his jurisdiction".

The words "any person within the local limits of his jurisdiction" in section 110, Criminal Procedure Code, apply also to a person undergoing a sentence of imprisonment in a Jail within the local limits of the Magistrate's jurisdiction.

Emperor v *Po Thaw*, 4 L. B. R. 148; 7 Cr. L. J. 447, overruled.

Queen-Empress v. *Chi Do Bon*, P. J. L. B. 204, *Empesor* vs. *Bapoo Yellappa*, 9 Bom. L. R. 214, 5 Cr. L. J. 247. *In re Kora Rangan*, 17 Ind, Cas 413; 13 Cr. L. J. 781; 36 M. 90; 23 M. L. J. 535, referred to.

(z) 26 Mad. 499.

The appear from the following Reference made by the Sessions Judge of Maubin Division, in his Criminal Revision No. 188 of 1915, dated the 14th October 1915.—

"Ah Saing was ordered to enter into a bond in Rs. 75 with two sureties for a term of six months under section 3 of the Opium Law Amendment Act and in default sentenced to six months' imprisonment to take effect from the expiry of the sentence which he was undergoing by Maung Po To, First Class Sub-Divisional Magistrate, Yandoon.

The Magistrate fixed no date for his order to take effect and presumably, therefore, the period for which security was to be given dated from the date of the order, August 8th 1915.

The order for imprisonment, therefore, contravenes section 123 of the Criminal Procedure Code, which lays down that, if the person, ordered to give security is already in prison he shall be detained in prison until the period for which security was ordered expired.

Ah Saing was sentenced to six months' rigorous imprisonment under section 353 of the Indian Penal Code by the Additional Magistrate, Donabyu, in Criminal Case No. 78 on the 23rd July 1915 during the pendency of the security proceedings.

I consider the proceedings under the preventive section should have been closed, when the accused received a sentence of imprisonment in another case."

The present order is entirely opposed to the principle laid down in the cases of *Queen Emperess* v. *Chi Do Bon* (1) and *Emperor* v. *Po Thaw* (2).

I recommend that the order to furnish security be quashed."

The reference came up for hearing before Twomey, J., who referred it to a Full Bench by the following

ORDER.—This case has been submitted for orders in revision by the Sessions Judge, Maubin Division.

A Chinaman, named Ah Saing, was convicted of assaulting an Excise Sub Inspector and was sentenced by the Additional Magistrate, Donabyu, to rigorous imprisonment for six months under section 353, Indian Penal Code, on the 23rd July 1915.

On the 8th August 1915, the Sub-Divisional Magistrate, Yandoon, passing orders under section 3 of the Burma Opium Law Amendment Act, 1909, read with section 118 of the Code of Criminal Procedure, 1908, required Ah Saing to furnish security for his good behaviour for six months and at the same time directed that as the accused could not furnish security he should be kept in rigorous imprisonment for six months. The warrant which is dated 13th August further directs that the "sentence" should commence to run after the expiry of the sentence passed in the case under section 353, Indian Penal Code.

The learned Sessions Judge recommends that the order to furnish security should be set aside as being entirely opposed to the principles laid down in the cases of *Queen-Empress* v. *Chi Do Bon* (1) and *Emperor* v. *Po Thaw* (2).

---

(1) P. J. L. B. 204. (2) 4 L. B. R. 148 ; 7 Cr. L. J. 447.

I am doubtful whether the principles ennunciated in the two cases cited can be reconciled with the provisions of section 120 (1), Code of Criminal Procedure, which certainly appears to contemplate the case of a man who is undergoing a sentence for a substantive offence and who is ordered, while undergoing that sentence, to furnish securlty that he will be of good behaviour when he is released from Jail. Mr. Justice Irwin thought it obvious that the words of section 110 (and the same words are repeated in section 3 of the Burma Opium Law Amendment Act) "any person within the local limits of his jurisdiction" were not intended to cover the case of persons undergoing imprisonment within the local limits of the Magistrate's jurisdiction. This is not at all obvious to me.

In the present case, for example, I see no good reason why the accused should not be required to furnish security that he will be of good behaviour for six months after the expiration of his sentence of six months' rigorous imprisonment under section 353, Indian Penal Code. It seems to me that the Sub-Divisional Magistrate went wrong only in passing orders under section 123 Criminal Procedure Code, and issuing a warrant of imprisonment while the sentence of six months' rigorous imprisonment under the Penal Code was being served. It is only if the accused fails to furnish security on the expiration of that sentence that action should be taken under section 123 (1.)

As the view I take is in conflict with that of the learned Judges in the cases cited above, I refer to a Bench of this Court the question, whether the words "any person within the local limits of his (*i. e.*, the Magistrate's) jurisdiction" in section 110 of the Code of Criminal Procedure apply to a person undergoing a sentence of imprisonment in a Jail within the local limits of the Magistrate's jurisdiction.

The order of reference came up for hearing before a Full Bench consisting of Fox, C. J., and Robinson and Parlett, J J., who deilvered the following

JUDGMENT.

Fox, C. J.—The wording of section 120 the Criminal Procedure Code clearly shows that it was contemplated that an order requiring security for keeping the peace or for maintaining good behaviour may be made against a person sentenced to or undergoing a sentence of imprisonment.

The decision in *Emperor* v. *Po Thaw* (2), in so far as it held that a Magistrate had no jurisdiction to commence proceedings under section 110 against a person undergoing imprisonment in a Jail, appears to me erroneous. Whether a Magistrate should do so is a matter of discretion to be exercised according to the circumstances of each case, it being remembered that the only object of the provisions of Chapter VIII is to ensure, if possible, the keeping of the peace or good behaviour for a limited period. If a person is in Jail under sentence for a long period, his keeping of the peace and good behaviour, so far as the outside public is concerned is assured for such period, but if a person is undergoing only a short sentence:

it may be that in some cases there may be reason for calling upon him to give security for keeping the peace or for his good behaviour for a period subsequent to the expiration of the sentence on him.

My answer to the question referred is in the affirmative.

ROBINSON, J.—I presume the prisoner ordinarily resided within the local limits of the Magistrate's jurisdiction. The Magistrate could not take action against a man residing outside his jurisdiction, even if he was habitually a thief within the jurisdiction.

Otherwise, I can see no ground for holding that because he was in Jail he ceased to be within the local limits of the Magistrate's jurisdiction.

Section 120 (1) contemplated an order under section 118 being made at a time when the person against whom it is made is in Jail and section 123 does the same.

If a man in Jail was not within the local limits of the jurisdiction of some Magistrate he could not be tried or committed for trial for an offence committed while in Jail.

In *Queen-Empress* v. *Chi Do Bon* (1) it is merely laid down that security should not be demanded and that proceedings already begun can be renewed. That may be and no doubt is a wise course in certain cases, as, for instance; where the sentence being undergone is for a long term but it is not ruled that to do so is illegal.

In *Emperor* v. *Po Thaw* (2) no reasons are given. I would answer the question referred in the affirmative.

PARLETT, J.—I do not think a Magistrate's jurisdiction under section 110 of the Criminal Procedure Code should be limited to persons who ordinarily reside within the local limits of his jurisdiction. An opposite view has been taken in *Emperor* v, *Bapoo Yellappa* (3) and *In re Kora Rangan* (4). I would answer the question referred in the affirmative, without any such proviso.

FINAL ORDER.

TWOMEY, J.—It has now been held by a Bench of this Court overruling the decision in *Emperor* vs. *Po Thaw* (2) that the words "any person within thr local limits of his jurisdiction" in section 110 of the Criminal Procedure Code apply to a person undergoing a sentence of imprisonment in a Jail within the local limits of the Magistrate's jurisdiction.

The Sub-Divisional Magistrate went wrong only in passing orders under section 123 of the Criminal Procedure Code and issuing a warrant of imprisoment while the substantive sentence of rigorous imprisonment for six months under the Penal Code, section 353 was being served. It is only if the accused Ah Saing fails to furnish security on the expiration of his substantive sentence that action should be taken under section 123 (1). The warrant issued under that section should be withdrawn.

The substantive term of imprisonment expires on 21st January 1916. The accused should be given a reasonable opportunity of

(3) 9 Bom. L. R. 244, 5 Cr. L. J. 247.
(4) 7 Ind. Cas. 413 ; 2 M, L. J. 535 ; 13 Cr. L. J. 781 ; 36 M. 96.

furnishing security for his good behaviour for six months from that date. If he fails to furnish security as required, fresh action can be taken under section 123 (1).

The proceedings are returned to the Sessions Court with copies of the order of reference to a Bench and the judgments passed thereon.

Order accordingly.

IN THE CHIEF COURT OF LOWER BURMA:

CIVIL FIRST APPEAL No. 135 OF 1914.

THE SHANGHAI LIFE INSURANCE CO., LTD. ... ... DEFENDANT.—APPELLANT.

VS.

MRS. HELEN CONSTANCE BROWN AND ANOTHER ... ... PLAINTIFFS.—RESPONDENTS.

Mr. McDonnell, for the Appellant.
Mr. Villa, for the Respondent,

Before Mr. Justice Twomey and Mr. Justice Ormond.

Dated 25th November, 1915.

Insurance life—Refusal by insurer to accept premiums, effect of—Court Fees Act (VII of 1870), S. 5—Additional Court-fees, levy of, after decision of case, whether allowa le.

Once the insurer refuses to accept premiums, the insured is not bound to go on tendering successive premiums in order to save the right to recover the amount insured; he can sue for damages at that time or refuse to treat the contract as at an end, as the insurer's refusal to accept premium is a continuing refusal.

Honour v. *Equitable Life Assurance Society of the United States*, (1900) 1 Ch. D 852, 69 L. J. Ch. 420; 82 L. T. 144; 40 W. R. 347, referred to.

The provisions of the Court Fees Act relating to the levy of additional fees apply only to cases which are pending and cannot be enforced in cases which have been finally decided.

Mahadei v. *Ram Kishen Das*, 7 A. 528; A. W. N. (1885) 140, followed.

JUDGMENT.

ORMOND, J.:—Three "incontestable" policies of insurance upon the life of the plaintiff's debtor were effected with the defendant Company and were handed over by the defendant to the plaintiff, the insured debtor having been passed by the Company's doctor and accepted by the defendant as a first-class life. The original premiums were paid by the plaintiff on the 30th November 1909 and the second premiums were paid by her to the Company on the 1st March, 1910. When the plaintiff tendered the next premiums, they were refused on the ground that the insured debtor was not a first class life, he having previously applied for a policy to this office when he was offered a "lien" policy only, as he was then not considered to be a first class life. The Company cancelled the policies unless the insured submitted to further medical examination and was again passed as a first class life. The

insured debtor was away. Correspondence ensued; the plaintiff repeated her tender and held the Company to their contract. On the 3rd May 1913, the assured debtor died and the plaintiff instituted this suit to recover the amount due on the policies. The plaintiff obtained a decree and the defendant appeals.

The defence is that although the defendant purported to terminate the contract, the plaintiff could not recover the amount insured, because she did not tender the successive premiums and that her only remedy, therefore, was to sue for damages as at the time when the defendant cancelled the contract; and in support of that contention, the defendant's Advocate refers us to a passage in May on Insurance at page 346, which says that upon a refusal to receive a further premium, the policy-holder has three-fold remedies (1) to treat the policy as rescinded and sue for its present value, (2) to continue to tender premiums, and, on the death of the insured, sue for the amount insured, (3) to go into equity and ask to have the policy declared in force. He also cites a passage from Macgilliveray on Insurance at pages 247 and 248, which refers to some American decisions which are not before us. He also refers us to the case of *Honour* v *Equitable Life Assurance Society of the United States* (1). That case only shows that the assured is not entitled, on account of the insurer's refusal to receive the premiums, to a declaration of the Court that his policy is valid; because the plaintiff has then no claim against the defendant and the Court refuses to determine the right before the time has arrived at which the right is enforceable. In that case the suit was dismissed on the defendant's undertaking that if any action is thereafter brought on the policy they would not rely as a defence on the non-payment of the premiums on the dates. That case does not amount to a decision that, after the cancellation of the contract by the insurer, it would be necessary for the policy-holders to go on tendering premiums in order to save the right to recover the amount insured. The tender is merely evidence of readiness and willingness to perform the contract. The plaintiff, no doubt, could have accepted the repudiation by the defendant and have sued him for damages as at that time; but the plaintiff refused to treat the contract as at an end and she kept the defendant to the contract. The plaintiff in effect said: "It is no good going on tendering the premiums; the policies are cancelled." The defendant's refusal to perform his part of the contract was a continuing refusal; and the plaintiff having kept him to his contract, the defendant could at any time perform the contract by intimating to the plaintiff that he was willing to receive the premiums; *i. e.*, it was open to the defendant also to treat the contract as subsisting; but in order to do so, he would have to give notice to the plaintiff of his change of mind, in order that the plaintiff might tender the premiums. The plaintiff alleges that she was ready and willing to pay the premiums, and that is not refuted. She is, therefore, entitled to the amount insured less the amount of premiums unpaid, *i. e.*, she is entitled to the decree she has obtained.

(1) (1900) 1 Ch. D. 852; 69 L. J. Ch. 420; 82 L. T. 144; 8 W. R. 347.

I would dismiss the appeal with costs.

TWOMEY, J.:—I concur.

[After the judgment in appeal was delivered the Assistant Registrar on the Appellate Side brought to the notice of the Court that the proper Court-fee should be Rs. 525, and not Rs. 425 only ordered to be paid on the Original Side and Appellate Side, both the suit and appeal being *in forma pauperis*.

The Advocates for the appellant and respondents both argued that in the absence of one of the Judges who heard the appeal a single Judge cannot pass any order, relying on the provision in the Lower Burma Courts Act requiring two Judges to hear an appeal from the Original Side of the Chief Court and also on *Mahadei* v. *Ram Kisken Das* (2), which states that the provisions of the Court Fees Act regarding the levy of additional Court-fees apply only to pending cases.

On the 6th January 1916. Twomey, J., passed the following

ORDER.—After hearing Counsel in this matter, I am of opinion that I have no power in the absence of Mr. Justice Ormond to pass orders unless by consent of parties. But I note that I concur in the opinion of the learned Judge in *Mahadei* v. *Ram Kishen Das* (2) that the provision of the Court Fees Act relating to the levy of additional fees apply only to cases which are still pending and cannot be enforced in cases which have been finally decided.

No further action will be taken to recover the additional Court-fees in this case.

Appeal Dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 1 OF 1915.

MA SHWE ON ... ... PLAINTIFF—APPELLANT.

vs.

MAUNG KYWET AND ANOTHER ... ... DEFENDANTS.—RESPONDENTS.

Mr. *May Oung*, for the Appellant.

Ba Thein, for the Respondents.

Before SIR Charles FOX, KT., Chief Judge.

Dated 16th November, 1915.

Transfer of Property Act (IV of 1882), S. 54—Sale, non-registration of, effect of—Land worth more than Rs 100—Contract to sell—Specific performance, suit for—Limitation Act (IX of 1908), Sch. I, Art. 113.

A sale of land worth more than Rs. 100 without registration, as required by section 54 of the Transfer of Property Act, is in law a mere contract to sell and does not of itself create an interest in or charge on the land contracted to be sold.

A suit for the specific performance of such a contract is governed by Article 113 of the Limitation Act and can be brought within three years from the date of the purchaser's knowledge that the vendor refused to perform the contract, when no specific date is fixed for the performance.

The Limitation Act, being one in which rights are rendered ineffective if not abrogated, must be read strictly.

(2) 7 A. 528; A. W. N. (1885) 140.

JUDGMENT.

In 1907 the plaintiff-appellant's husband bought some lands from the respondent-defendants for Rs. 765. They delivered possession of the lands, and a report of the transaction was made to the Thugyi, but no document of sale was executed and registered. Consequently no "sale" of the lands was completed, because section 54 of the Transfer of Property Act being then in force in Lower Burma there could be no "sale" *i. e.*, "transfer of ownership of immoveable property in exchange for a price paid or promised or part-paid and part promised" without an instrument in writing executed and registered.

In 1912 the defendants and two others, who were all heirs of one Myat Tha Dun, brought a suit against the appellant as legal representative of her husband for possession of the lands. It was held that the respondents were the owners of the lands when they sold them, these lands having been alloted to them as their share of the property left by Mya Tha Dun. The respondents admitted having sold the lands to the appellant's husband. A decree for possession was, however made in their favour on the ground that no "sale" as defined in the Transfer of Property Act had been effected. In law the transaction had not got beyond the stage of a contract for sale, which section 54 of the Act says does not, of itself, create any interest in or charge on the land contracted to be sold.

In 1913 the appellant brought the suit in which the present appeal arises. Her claim in it is that the defendants may be ordered to execute and register a deed of sale or to make a valid transfer of the lands to her.

It is in effect a suit for the specific performance of the contract of sale entered into seven years previously. The Sub-Divisional Judge made a decree in the plaintiff's favour. This decree was reversed on appeal by the Divisional Court on the ground that the suit was barred by limitation.

The Article of the Limitation Act applicable to the case is Article 113, which prescribes three years as the period of the limitation and makes this commence from the date fixed for the performance of the contract or, if no such date is fixed, when the plaintiff has notice that performance is refused. In the present case no date was fixed for the performance of the contract, consequently the latter part of the Article is the only part applicable. So far as the record shows the suit brought against her by the respondents and other heirs of Myat Tha Dun was the first thing which occured to give her any sort of notice that the respondents were going to try and get back the lands. Even if the date on which she received the summons in that suit is taken as the date on which she had notice that performance was refused, her present suit having been brought within three years of that date is within time.

The Limitation Act, being one in which rights are rendered ineffective if not abrogated, must be read strictly.

The decree of the Divisional Court is set aside. There will be a decree ordering the respondents to specifically perform their contract of sale of the lands described in the plaint, by whatever

holding numbers they are now known, and ordering them, on the plaintiff filing in Court a properly drawn and stamped instrument of transfer of such lands to her, to execute such document, and to attend before the Registration Officer with a view to its proper registration, and ordering them also to deliver possession of the lands to the plaintiff if she is not now in possession of them, and to do all other things necessary to complete the transfer of the lands to her. The respondents must pay the plaintiff's costs in all the Courts.

If the respondents fail to comply with the decree so far as it directs them to execute a valid transfer, the Sub-Divisional Judge should execute it under Order XXI, rule 32.

Decree set aside.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION * No. 350 B OF 1915.

J. & F. GRAHAM & CO. ... ... APPELLANT.

VS.

H. C. ELSEY ... ... RESPONDENT.

For Applicant—McDonnell.

Before Sir Charles Fox, Chief Judge.

Dated 14th January, 1916.

Criminal Procedure Code (Act V of 1898), s. 417—Acquittal, revision of order of—Local Government refusing to appeal—Jurisdiction of High Court.

In cases of acquittal of an accused the revisional jurisdiction of a High Court should ordinarilly be exercised sparingly and only where it is urgently demanded in the interests of public justice, and a High Court should not entertain an application by a complainant to revise an order of acquittal after the Local Government has declined to direct an appeal against it.

Faujdar Thakur v. *Kasi Chowdhury*, 27 Ind. Cas. 186; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122; 42 C. 612, followed.

THE JUDGMENT.

Fox C. J.:—This is an application made by the complainants in a case to have an order of acquittal of the accused considered and set aside or in the alternative to have certain passages in the magistrate's judgment, which are alleged to be defamatory of the complainant, expunged from the record. The advocate for the complainant has informed me that application was made to the Local Government to order an appeal against the acquittal under section 417 of the Criminal Procedure Code, but the Local Government has refused to do so. It has been urged that nevertheless this court has power to consider the case in its revisional jurisdiction. This is so, but I entirely agree with Jenkins, C. J., when he said in *Fauzdar Thakur* v. *Kasi Chowdry*, 1914. (1)

---

* Review of the order of the District Magistrate of Rangoon, dated the 31st July 1915, passed in Criminal Trial No. 13 of 1915.

(1) (1914) I. L. R. 22 Cal. 612.

that in cases of acquittal the revisional jurisdiction of a high court should ordinarily be exercised sparingly and only where it is urgently demanded in the intersts of public justice. It has been urged that the present is a case in which interference is called for urgently in the interests of public justice. I cannot assume that the Local Government has refused to direct an appeal in such a case. There is no precedent of a high court entertaining an application by a complainant to revise an acquittal after the local government has declined to direct an appeal against it. The allowance of even an appeal from an acquittal is peculiar to India alone of all his Majesty's dominions. It is safeguarded by confining the power to direct an appeal to the local government. The reasons for this safeguard presumably were that it should not lie with complainants to decide whether an appeal should be made and that the authority who should decide this should be the highest authority in each province. It may be presumed also that the legislature intended that the exceptional power to direct an appeal should not be exercised, except in cases in which the local government considered that the interests of public justice called for further consideration of the case by the highest court in the province. When the local government has considered a case in that light and has declined to direct an appeal it would not, in my opinion, be a proper or fitting exercise of the discretion of a judge of this court to even entertain an application by a complainant to interfere with the acquittal. I reject the application.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 259 OF 1913.

MAUNG THA HLA ... ... APPELLANT.

vs.

MOKHLAS ... ... RESPONDENT.

For Appellant—Sin Hla Aung.
For Respondent—J. E. Lambert.

Before Mr. Justice Young.

Rangoon 16th August, 1915.

Malicious prosecution—Damages for—Suit for—Proof essential—Damages when awarded—

In an action for malicious prosecution, the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the Tribunal before which the accusation was made.

A man is not to be mulcted in damages merely because he fails to prove another's guilt, not is he a man to receive compensation merely because there is a reasonable doubt about his guilt; if there is any doubt about his innocence, he fails to prove the absence of reasonable and probable cause.

A man is acquitted in a criminal case if there is a reasonable doubt as to his guilt but a Civil Court will not award him compensation in a subsequent suit for damages for malicious prosecution unless it has not only itself no reasonable doubt as to his innocence but considers the prosecutor either had or should as a reasonable man have had, none either.

JUDGMENT.

YOUNG J.:—This is a suit brought by a Revenue Surveyor named Maung Tha Hla against one Mokhlas for damages for an alleged malicious prosecution in which Mokhlas charged Maung Tha Hla under S. 161, I. P. C. with taking from him a bribe of Rs. 15. The complaint was dismissed and characterised as false and malicious. Maung Tha Hla then prosecuted Mokhlas under Section 211, I. P. C. for bringing a false charge against him. In this he, in his turn, was unsuccessful. He then brought the present suit in which he succeded in the Court of first instance but failed in 1st appeal. He now appeals to this Court. I may say at once that I agree with the decision of the Lower Appellate Court. It is one of those almost hopeless cases in which a person of ordinary common sense should have realised that any further attempt to vindicate his honour than that afforded by his acquittal was under the circumstances doomed to failure. Maung Tha Hla who was admittedly within a mile or two of the defendant on the day on which he was charged with having extorted a bribe from him, completely failed to show where he was at the time when he was alleged to have committed the offence. One of his witnesses knows nothing of his movements after 8 o'clock in the morning; the other commences his story at a time when the plaintiff might well have been to the defendant and returned. The defendant's witnesses were not materially shaken by cross-examination. The defendant, it is true, delayed in bringing his charge, and it is very probable that in bringing it he was actuated by malice, but it need hardly be said that this is very poor evidence, that the charge was false, and that however malicious a charge may be, the Courts must convict if satisfied of its truth. As a fact the charge of taking a bribe was found to be unproved; the complaint against the plaintiff was dismissed and was classified as false and malicious. But in these criminal proceedings Mokhlas had to prove that Maung Tha Hla had actually taken a bribe, in the civil proceedings brought by Maung Tha Hla. Maung Tha Hla had to prove his innocence; vide per Bowen L. J in *Arbrath* v. *N. E. Railway Coy.* (1) a decision confirmed by the House of Lords in 11 Appeal Cases 247 (2) in which that learned Judge remarked "In an action for malicious prosecution the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made. It may be at once admitted that the *dictum* as to its being necessary for the plaintiff to prove his innocence was not necessary for the decision of the case, and that the exact point seems never to have been actually judicially decided in England vide Lord Halsbury's Laws of England, but it has been so decided in India vide *Nalliappa Goundan* vs. *Kailappa Goundan* (3) and I agree with the decision. A man is not to be

(1) 11 Q B. D. 440; 52 L. J. Q. B. 620; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692.
(2) Also reported at 55 L. J. Q. B. 457; 55 L. T. 63; 50 J. P. 659.
(3) (1900) 24 Mad. 59.

mulcted in damages merely because he fails to prove another's guilt and a man is not to receive compensation merely because there is a reasonable doubt about his guilt. Usually speaking if there is any doubt about his innocence, he will fail to prove the 2nd essential ingredient to success namely the absence of reasonable and probable cause, which is perhaps the reason why the point has never apparently been actually decided in England, when the reported cases do not appear to have been based on the direct testimony of the prosecutor, but upon information given to him and the question has been whether the prosecutor believed this information and whether he was justified in doing so. Unless the plaintiff can prove either that the defendant did not believe the information on which he launched his prosecution or that if he believed it, he ought not to have done so and in so doing did what a reasonable man would not have done, he will fail. If there is however at the close of the case any doubt in the mind of the Court not only as to his acquittal but as to his actual innocence, it is difficult to see how a Court can find a man had no reason to believe evidence which leaves the Court itself doubtful. There are however, cases when as here the prosecutor, to adopt Bowen L. J's words, must know whether his story is false or true, and when if the accused is innocent, the prosecutor must be telling a falsehood and there must be want of reasonable and probable cause. This was the line adopted by appellant's counsel before this Court. He argued that Mokhlas himself professed to have given the bribe and that therefore as Maung Tha Hla was acquitted on the charge of having received a bribe, the accusation was not only false but false to Mokhlas' own knowledge, or at any rate that it was for him (Mokhlas,) in the events that had happened, to prove that the decision was wrong and that Maung Tha Hla had really taken the bribe, a shifting of the onus which would obviously lead to his client's victory; The reasoning however seems to me fallacious. A man is acquitted in a criminal case if there is a reasonable doubt as to his guilt, but a Civil Court will not award him compensation in a subsequent suit for malicious prosecution unless it has not only itself no reasonable doubt as to his innocence, but considers that the prosecutor either had or should as a reasonable man have had none either. If the plaintiff had either been able to account for his own movements on the day in question or so to shatter by his cross-examination the defendant's witnesses as to leave no doubt that their story was false, he would have won, but he has failed in doing so and having failed, though I dare say that it is through no fault of his own, I cannot hold that he has proved his case, though I desire to say that the evidence leaves me without a doubt that Mokhlas entirely failed to substantiate his charge and that the verdict of not guilty was absolutely correct.

I also desire to say that the learned Judge of the District Court erred in not considering the evidence brought before him. He virtually treated the acquital of Mokhlas on the charge under section 211, Indian Penal Code, as decisive of the present case. I must doubt whether the judgment was even evidence. *A*

fortiori he erred in criticising the reasoning of the magistrates who tried the two cases and in hinting that they were biassed when he was not exercising appellate jurisdiction over them. I desire to say that I have read the report of the one Magistrate and the Judgment of the other in the two cases and consider that each dealt with the case carefully and that the criticisms are in my opinion unjustified. It is obviously a case when neither litigant could prove that the other was guilty. The appeal was dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE NO. 10 OF 1915.

M. MEYER ... ... APPLICANT.

vs.

MRS. C. LEA ... ... RESPONDENT.

PRESENT:—Mr. Justice Ormond and Mr. Justice Twomey.

November 22, 1915.

Alien enemy—Licence to trade—Suits, right to bring.

An alien enemy who has been licensed to trade in British India, has access to the Courts and may bring suits.

Schaffenius v. *Soldberg*, (1915) T. L. R. 31 referred to.

The facts of the case appear from the following Order of Reference made by the Judge, Small Cause Court, Toungoo:—

"The facts of the case are, that one M. Meyer, who is a Turkish Jew, born in Bagadad, in Asia Minor, files a suit for the recovery of a sum of Rs. 13-8-0 due by the defendant Mrs. Lea, for balance of price of the goods sold and delivered to her by the plaintiff.

The defendant admits purchasing goods as alleged by the plaintiff, but she denies owing any sum to the plaintiff, as she has fully discharged her debt. She also contends that the plaintiff being an alien enemy, has no right to sue.

The plaintiff obtained on the 21st April 1915 a license to continue his business of a shop-keeper. The license does not indicate that the plaintiff can institute a suit in a Court for the recovery of any sum. From reading the licence of the plaintiff, I am of opinion that the plaintiff has no right to sue, but I am doubtful whether I am correct in my view.

I, therefore, most respectfuly beg to refer this point for the decision of the Hon'ble Judges of the Chief Court, under Order XLVI, rule 1 of the Code of Civil Procedure."

JUDGMENT.

ORMOND, J.—In view of the decision in *Schaffenus* vs. *Soldberg* (1) I would answer the question referred to this Court in the affirmative.

---

(1) (1915) T. L. R. 31; 20 C. W. N. p. l.

TWOMEY, J.—It is quite clear from the case cited by Mr. Justice Ormond that an "alien enemy" who has been licensed to carry on his trade or business in British India has access to the Courts and may bring a suit. Meyer may, therefore sue.

REFERENCE ANSWERED IN AFFIRMATIVE.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL No. 258 OF 1914.

PRESENT:—Mr. Justice Parlett.

MI AMIN NISSA and others ... ... PLAINTIFFS—APPELLANTS.

vs.

MI SURA BI and others ... ... DEFENDANTS RESPONDENTS.

Mr. N. C. Sen for the Appellants.
Mr. S. M. Bose for the Respondent.

November 16, 1915.

Evidence Act (I of 1872), ss. 65, 66—Redemption, suit for—Mortgage-deed in mortgagee's possession—Oral evidence, admissibility of.

In a suit for redemption when the mortgagee is in possession of the mortgage-deed and fails to produce it, oral evidence is admissible under section 65 (*a*) read with proviso (2) to section 66 of the Evidence Act.

JUDGMENT.

I am at a loss to understand the District Judge's statement that there is nothing in the plaint about a mortgage deed. The plaint itself is headed "a suit for recovery of 1·90 acres of land mortgaged by a deed" and the 1st paragraph expressly sets out that such a deed was executed. The document would naturally be in the possession of the mortgagees, that is, the defendants, and from the nature of the case they must know that they would be required to produce it. Oral evidence was, therefore, admissible under section 65 (a) read with proviso (2) to section 66 of the Evidence Act.

Next, I do not understand the District Judge's reference to a doubt as to the identity of the land. The plaintiffs fully described and attached to their plaint a plan of the 1·90 acres of land they sought to redeem: the defendants alleged that this very land had been bought by them. The identity of the land was never in question.

Again, I do not understand the District Judge's doubt as to defendants having deposed that the witnesses to their deed were all dead. Their agent, Abdul Ali, who conducted the case for them, named them all unequivocally and said they were all dead. Finally as to the defendants having cited other witnesses, it is true that they cited six, whom they did not examine. The record makes it quite clear that they did not tender any of them for examination.

It remains, therefore, to consider the evidence on the record. The plaintiffs have produced two of the witnesses who were present at the mortgage and attested the deed and there appears no ground to disbelieve them. As against this, defendants merely produce a deed of which there is not only no proof but which does not even purport to be signed by their alleged vendor. In my opinion the decision of the Township Court was correct. I reverse the decree of the District Court and restore that of the Township Court with costs throughout, Advocate's fees in this Court two gold mohurs.

APPEAL ALLOWED.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL No. 296 OF 1914.

MA MIN KYIN ... ... PLAINTIFF—APPELLANT.

vs.

MAUNG WA and others ... ... DEFENDANTS RESPONDENTS

Mr. May Oung—for the Appellant.

Mr. C. R. Connell—for the Respondents.

PRESENT:—Mr. Justice Parlett.

December 10, 1915.

Buddhist Law—Partition during step-father's lifetime—Practice—Appeal—New defence inconsistent with orginal, if allowed—Limitation.

A Court should not allow a new plea to be raised in appeal which is inconsistent with the original one in the lower Court.

It is for the Judge to decide questions of law arising in the course of trial and he should not accept a view suggested by Counsel unless satisfied as to its soundness, it being quite different from an admission of fact by Counsel or from his waiving or withdrawing any part of his client's claim under instructions.

Under Burmese Buddhist Law, partition can be claimed by a step-child during the step-father's lifetime.

Mi So v. *Ma Hmat Tha*, S. J. 177. referred to.

When the parties are working lands in turns by mutual arrangement, there is no adverse possession.

Ma Le v. *Ma Hmyin* 3 Bur. L. T. 1; 5 L. B R. 112, referred to.

JUDGMENT.

Plaintiff-appellant was the daughter of Maung Shwe Dok and Ma Ke; the former died in the infancy of the plaintiff-appellant, and Ma Ke then married Maung Wa, the 1st defendant-respondent, by whom she had seven children, the other defendants-respondents. The suit was brought after Ma Ke's death to recover a three-quarters share of certain land alleged to be the joint property of Maung Shwe Dok and Ma Ke and a one-eighth share of other lands acquired during the marriage between Maung Wa and Ma Ke.

The defence set up was that all the property was acquired during Ma Ke's second marriage, and that the suit was barred by limitation, time running from the date of Ma Ke's death which occurred over 18 years before the suit was filed.

The plaintiff alleged that Ma Ke's death occurred only some 10 years before the suit and the lower Court found that it occurred less than 12 years before and that the suit was in time. It held that a portion only of the property alleged by plaintiff to have belonged to Maung Shwe Dok and Ma Ke did so belong, and that all the rest was acquired during the second marriage and granted a decree for a three-fourths share of the former and one-eighth of the latter.

Maung Wa and one only of his children appealed and they raised an entirely new defence, which they ought not to have been allowed to do and one which was totally inconsistent with their main defence of limitation, namely, that the suit for a share of property acquired during the marriage of Maung Wa and Ma Ke was premature, and could not be brought before Maung Wa's death. The plaintiff's legal adviser acceded to this proposition of law and the Divisional Judge accepted it without discussion as to its soundness, and in the result, having held that all the property was acquired during the second marriage, he dismissed the suit entirely. I must point that it is for the Judge to decide questions of law which arise in the course of the trial, and that he should not accept a view of it suggested by Counsel unless satisfied of its soundness. It is quite a different matter from an admission of fact by Counsel, or from his waiving or withdrawing any part of his client's claim under instructions. In this case, as remarked above, the defence ought not to have been allowed to be raised at all at this late stage of the proceedings, and from the fact that it had never been suggested before, it behoved the Judge to consider it with particular care before deciding it. An attempt has been made in this appeal to bolster up this defence by arguing that as children cannot claim partition of their parent's estate during the life-time of either parent a step-child should not be in a better position; and that though the *Dhammathats* declare the shares to be allotted on such a partition being made, they do not expressly say a partition can be claimed. So far as I am aware that is the usual form in which the case is stated in the *Dhammathats*, and the declaration that a person is entitled to a certain share connotes that he may sue for it. Section 230 of Volume I of the Digest of Buddhist Law is quite clear on the point, and leaves no doubt whatever that the partition can be claimed during the step-father's life-time, as he is allotted the largest share. *M. So* v. *Ma Hmat Tha* (1) is in point, and there are doubtless numerous other cases. The decision of the District Court that the suit is premature is reversed.

At the hearing of this appeal appellant's Counsel accepted the Divisional Court's finding of facts that all the property in suit was acquired during the 2nd marriage. Appellant's share of all

(1) S. J. 177.

of it is, therefore, one eighth. The Divisional Court expressly held the suit not barred by limitation. At the hearing of this appeal the respondent's Counsel desired to support the dismissal of the suit as barred by limitation. Under rule 22 of Order XLI he was not really entitled to do this as he had filed no cross objection in the time allowed. But Appellant's Counsel raised no objection to the point being raised, and he was afforded an opportunity of quoting further ruling, and of being heard again on the point. I have, therefore, considered it, and have not the slightest doubt that the suit was in time.

Upon the evidence I consider the Sub-Divisional Court's finding as to the date of Ma Ke's death was palpably wrong. There can be no doubt whatever that she died more than 12 years before the suit was brought, but since her death the plaintiff and her step-brothers and sisters have admittedly been working all the lands in suit in turns by mutual agreement, and, therefore, it is perfectly obvious that there has been no possession adverse to the plaintiff. [See *Ma Le* v. *Ma Hmyin* (2).]

The appeal is allowed and there will be a decree for a one-eighth share of all the plaint lands in favour of the plaintiff, with costs in all Courts calculated on that basis.

Appeal allowed.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL No. 357 OF 1914.

AHAMUT—PLAINTIFF—APPELIANT.
vs.
KALU—DEFENDANT—RESPONDENT.

For the Appellant.—Mr. Campagnac.
For the Respondent.—Mr. Sin Hla Aung.

Before Mr. Justice Ormond.

Dated 25th November 1915.

Lessor and lessee—Land let out by person having no title—Suit for rent, maintainability of—Jurisdiction.

A person who lets out land to another, can recover rent from him, though he has no title in law to the land, and Civil Courts have jurisdiction to entertain suits for such rent even though the land be Government waste land.

Maung Naw vs. Ma Shwe Hmat, Bur. L. T. 191 (F. B.), referred to.

JUDGMENT.

The plaintiff sued the defendant to recover Rs. 25 rent in respect of 5 *kanies* of grazing land let out by him to the defendant. The defendant denied that he had agreed to pay any rent to the plaintiff and alleged that the land was Government waste land. The Township Court gave a decree to the plaintiff. On appeal, the District

(2) Bur. L. T. 135; L. B. R. 112.

Court remanded the case to the Township Judge to enquire in his capacity as Revenue Officer whether the plaintiff had acquired the status of a landholder. The Township Officer found that it was Government waste land in occupation of the plaintiff who had not acquired the status of a landholder and reported to the District Court, who then dismissed the suit on the ground that Civil Courts have no jurisdiction. Plaintiff now appeals.

The question whether the plaintiff had acquired the status of a landholder does not arise in this case, and from the recent Full Bench decision in *Maung Naw* v. *Ma Shwe Hmat* (1) it is clear that if *A* lets out land to *B*, though he has no title in law to the land, he can recover rent from *B* (*i. e.*, defendant). The Civil Courts have jurisdiction in the present case, even though the land was Government waste land. It is contended by the respondent's Advocate that there is no sufficient evidence to establish the tenancy between the defendant and the plaintiff. Plaintiff's case, I think, is that he bought this land from Abdul Ywathugyi who, perhaps, was Abdul Gafur referred to in the cross-examination of the 2nd witness for the defendant. The only evidence that the plaintiff produced to show that there was an agreement by the defendant to pay him rent for this land, is the evidence of two witnesses who say they went with the defendant to the plaintiff and agreed to take a certain number of *kanies* at Rs. 5 a *kani* for grazing. If the land was Government waste land in the ordinary sense, *i. e.*, not occupied by any one, there is a strong presumption that one individual would not agree to pay rent to another individual for such land. Plaintiff should have called the previous owner or occupier of this land from whom, he says, he bought it; and he could probably have called previous tenants of his. The evidence is very meagre, as it stands, as to any agreement by the defendant to pay rent; and it would appear that the land in fact is Government waste land. In my opinion, the plaintiff has not made out his case. I, therefore, dismiss the appeal with costs.

Appeal dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL No. 10 OF 1915.

MAUNG PO SAING and others ... ... APPELLANTS.

vs.

MAUNG SAN MIN and others ... ... RESPONDENTS.

For the Appellants.—Ba Thein.

Before Mr. Justice Parlett.

Dated 30th August 1913.

Burmese Buddhist Law—Widow's power of disposal.

Under the Burmese Buddhist Law, a widow has an absolute power of disposing of the whole property subject to the right of others.

Ma Sein Ton v. *Ma Son*, 8 Burma Law Times 203 referred to.

(1) 8 Bur. L. T. 191 (F. B.)

JUDGMENT.

The land in suit belonged to San Ya and Ma Min Tha. After Maung San Ya's death a decree was obtained against Ma Min Tha in execution of which the land was sold, and it passed into the hands of the 3rd appellant Maung Po Myaing. The respondents who are the children of Maung San Ya and Ma Min Tha sued to recover half the land, on the ground that Ma Min Tha's interest in it was one-half. The suit was dismissed, but on appeal, was decreed, following the rulings that the widow's absolute right of disposal extended to only one-half of the joint property of herself and her late husband. A Full Bench of this Court has now ruled in *Ma Sein Ton* v. *Ma Son* (1), that, subject to restrictions which do not apply to the present case, she has a right of disposal over the whole property. The plaintiffs accordingly had no right of action and their suit must be dismissed. The decree of the Divisional Court is reversed and that of the Sub-Divisional Court restored with costs throughout. Advocate's fees in this Court two gold *mohurs*.

Appeal accepted.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 19 OF 1915.

LA AUNG ... ... APPELLANT.

vs.

MAUNG SO ... ... RESPONDENT.

For Appellants—Mr. J. E. Lambert.

Before Mr. Justice Maung Kin.

Dated 9th December 1915.

Mortgage—Redemption, suit for—Burden of proof—Court's duty in such cases.

In a suit for redemption, the plaintiff when he is put to strict proof and is out of possession, must stand or fall by the strength of his evidence and cannot depend upon the weakness of his adversary's case. In such cases, it is absolutely wrong to deal with the case of the defendant first and prove it to be worthless and then turn to that of the plaintiff. The Court should see whether the plaintiff has discharged the burden lying upon him ; his case cannot be held to be true because the defendant has failed to prove his defence.

Ma Ya v. *Maung Kyaing*, S. J. 482; *Po Shwe Aung* v. *Po To Bya*, S. J. 404, referred to.

JUDGMENT.

The respondent Maung So sued the appellant La Aung for redemption of two pieces of land. Maung So's case was that his mother, Mi Than Da Bon, mortgaged the lands to her brother, Maung Hnaung, some 25 years ago for the sum of Rs. 200 on condition that Maung Hnaung should take possession of the lands and enjoy the profits thereof in lieu of interest on the loan. Both

(1) 8 B. L. T. 203.

Mi Than Da Bon aud Maung Hnaung are dead. La Aung is Maung Hnaung's son. In his defence he says that he does not know whether there was a mortgage or not and puts the plaintiff to strict proof thereof.

Now, the onus of proof is very heavily on the plaintiff, so much so that he must stand or fall upon the evidence he produces and cannot depend upon the weakness of his adversary's case. See *Ma Ya* v. *Maung Kying* (1) and *Po Shwe Aung* v. *Po To Bya* (2). In a case like this, it is absolutely a wrong method to deal, as the lower Appellate Court appears to have done, with the case of the defendant first and prove it to be worthless and then turn to that of the plaintiff, as if the Conrt had to say whether the one or the other of the two cases is true. All that the Court has to do is to say whether the plaintiff has discharged the onus which is upon him, his case cannot be held to be true because the defendant has failed to prove his defence, nor can one relax the strictness with which one has to approach the plaintiff's case because of the weakness of the defence.

Let us now consider the evidence adduced by the plaintiff.

He himself says that he was present at the mortgage but does not say who else was present. At any rate, he has not produced any witness who was present on the occasion.

Obviously, his evidence alone is not sufficient. His witness Thauk Ka Pyu says that, though he was not present when the loan was given, he one day heard Mi Than Da Bon say to Maung Hnaung. "You can enjoy the lands, but you must give me back the lands when I want to redeem them." He also says that, when he heard this, the money had been paid 2 or 3 days before. What led to this statement by Mi Than Da Bon and how the witness knew that the money had been paid, the record does not show. When he gave the evidence he was 49. So he must have been 24 or so when the transfer of the land took place. Even if he was present when there was a conversation between Mi Than Da Bon and Maung Hnaung about the lands, it is difficult to see how he could remember the terms of it 25 years afterwards, when we know that he could not have been—he does not say he was—called in to witness a transaction which was going to take place. On reading his evidence carefully, one gets the idea that he must have been, if at all, present quite casually, so that there would be no reason why he should afterwards remember anything at all about it. I consider his evidence worthless.

Some reliance has been placed upon the admitted fact that Maung Hnaung shortly before his death said that the plaintiff might be allowed to redeem the property. In my judgment this does not prove the transfer to be a mortgage. Maung Hnaung and Mi Than Da Bon were brother and sister and it might be that Maung Hnaung wanted his nephew, the plaintiff, to have his mother's lands, if he could pay the money for which the transfer

(1) S. J. 482. (2) S. J. 494.

was made. The issue involved cannot be held to be proved by such evidence of admission alone.

I hold that the plaintiff has failed to prove his case.

The decree of the lower Appellate Court is reversed. The respondent will pay costs throughout.

Decree reversed.

IN THE CHIEF COURT OF LOWER BURMA.

SECOND CIVIL APPEAL NO. 58 OF 1915.

MI NYIN THA ME AND ANOTHER ... ... PLAINTIFFS—APPELLANTS.

vs.

MI NYO WUN ME AND OTHERS ... DEFENDANTS—RESPONDENTS.

For the Appellants.—Mr. J. E. Lambert,
For the Respondents.—Mr. May Oung,

Before Mr. Justice U Kin.

Dated 9th December, 1915.

Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Judgment, contents of—Appellate Court, duty of.

An Appellate Court should not dispose of appeals coming before it in a judgment which does not show the points raised and the reason for its decision.

Saravana Pillai v. *Sesha Reddi*, 31 M. 469; 18 M. L. J. 34; 3 M. L. T. 71, *Assanullah* v. *Hafiz Mahomed Ali*, 10 C 932 at p. 935, referred to.

JUDGMENT.

This is an appeal from the Judgment and decree of the District Court of Kyaukpyu confirming the judgment and decree of the Township Court of Ramree.

The only ground of appeal is that the judgments of the lower Courts are unintelligible and not according to law. That the judgments are open to this criticism, Mr. May Oung, Counsel for the respondents, admitted at the hearing. He even suggested that both the judgments should be set aside and the lower Courts called upon to write proper judgments. I agree that they are not in accordance with law. But I do not think it necessary to set aside the judgment of the Township Court and order it to write a proper judgment. The lower Appellate Court being a Court of fact may deal with the case as it appears on the record. With regard to the judgment of the lower Appellate Court the proper course is to set aside its judgment and decree and remand the case to it to be disposed of according to law. See *Saravana Pillai* v. *Sesha Reddi* (1).

Order XLI, rule 31, provides that the judgment of the Appellate Court shall state (*a*) the points for determination, (*b*) the decision thereon, (*c*) the reasons for the decision and (*d*) when the decree

(1) 31 M. 469; 18 M. L. J. 34; 3 M. L. T. 71.

appealed from is reversed or varied, the relief to which the appellant is entitled. These requirements are provided for in order, as stated in *Assanullah* vs. *Hafiz Mahomed Ali* (2) to afford the litigant parties an opportunity of kno ving and understanding the grounds upon which the decision proceeded with a view to enable them to exercise, if they see fit and are so advised, the right of second appeal conferred by section 100 of the Code of Civil Procedure. An Appellate Court should not, therefore, dispose of appeals coming before it in a judgment which does not show the points raised and the reasons for its decision, for the effect of such a non-compliance with the law might be that the right of second appeal was altogether neutralized

The judgment and decree of the lower Appellate Court are set aside and the case is remanded to it for disposal according to law. In dealing with the case, that Court will adopt the procedure laid down at page 471 of the judgment in the Madras case cited above.

The costs of this appeal will abide the result

Decree set aside.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION NO. 113 OF 1915.

YOO JOO SEIN AND ANOTHER ... ... DEFENDANTS.—APPLICANTS.

vs.

MAUNG BA TIN AND ANOTHER ... ... PLAINTIFFS.—RESPONDENTS.

For the Applicant.—Mr. Halkar,
For the Respondents.—Maung Ba Shin,

Before Mr. Justice Ormond.

Dated 24th November, 1915.

Small Causes Court—Jurisdiction—Damages for use and occupation, suit for—Title determination of—Presumption from occupation—Rent.

A Court of Small Causes has jurisdiction to go into the question of title arising incidentally in a suit for damages for use and occupation.

A purchaser of immoveable property can sue its occupant for damages for use and occupation, if the occupant had occupied the premises with the consent of the previous owner but had been served with a notice that he would no longer be allowed to occupy it free of rent. A presumption to pay rent arises from occupation.

JUDGMENT.

This is an application by the defendants in revision from the judgment of the Small Cause Court passed against them for damages for use and occupation of a certain house. The plaintiffs bought the house from the previous owner by a registered transfer, The previous owner, according to the defendants, allowed them to occupy it free of rent in lieu of interest, which was payable on a loan owing

(2) 10 C 932 at p. 935.

by the previous owner to them. The defendants have no legal charge on the property. The plaintiffs served a notice on the defendants requesting them to vacate the premises and giving them notice that, if they did not do so, they would be charged Rs. 20 a month. The defendants knew that the plaintiffs were the owners of the property.

It is contended that the Small Cause Court had no jurisdiction to go into the question of the plaintiff's title. The Court has jurisdiction to entertain a suit for damages for use and occupation and the question of title arises in this suit incidently; therefore, it must be determined by the Small Cause Court in order that the Small Cause Court should determine the suit. It is urged that section 100 of the Transfer of Property Act applies and creates a charge on the property in favour of the defendants as against the plaintiffs, *i. e.*, it makes a transaction which is not recognised by law, valid, which of course, is absurd. The section does not apply. It is contended upon the authority of *Ramrick Dass* v. *Mohamed Yacubji Dudah* (1), that there being no express agreement between the plaintiffs and the defendants, *i. e.*, no privity of contract, the plaintiff's only remedy was to sue their vendor for possession and mesne profits. In that case, it was held that the defendant did not occupy by the permission or sufferance of the plaintiff. A presumption, however, of a contract to pay a reasonable sum arises from the defendant's occupation of the plaintiff's property. The previous owner, by giving notice to the defendants that he would no longer allow them to occupy it free of rent, would have been entitled to sue for damages for use and occupation, and the plaintiffs having acquired the previous owner's title, they have that right. (See Foa on Landlord and Tenant at page 399 and the cases there cited.) No ground, therefore, is made out for this application which is dismissed with costs, two gold *mohurs*.

Application dismissed.

NI THE CHIEF COURT OF LOWER BURMA,

CIVIL MISCELLANEOUS APPEAL No. 89 OF 1915.

A. K. R. M. S. RAMAN CHETTY, ... APPELLANT.

VS.

A. V. P. FIRM ... ... INSOLVENT.—RESPONDENT.

For the Appellant.—Mr. S. N. Sen,
For V. T. Sithambaram Chetty, Creditor.—Mr. C. R. Connell.
For. S. H. Chetty firm, Creditor.—Mr; Chari,

Before Mr. Justice Ormond and Mr. Justice Twomey.

Dated 7th September, 1915

Provincial Insolvency Act (III of 1907), s. 22—Receiver—Court's functions—Remedy of purchaser in auction.

(1) 2 L. B. R. 122.

Section 22 of the Provincial Insolvency Act does not contemplate that a lengthy inquiry should be held in a complaint against the irregularities of a sale held by a Receiver in an insolvency case as if the matter was a regular claim for specific performance. Under that section the Court simply ratifies, reverses or modifies the executive acts of its officer and any order under that section does not preclude a party from pursuing his ordinary remedy by a suit for specific performance against the Receiver.

JUDGMENT.

The firm of A. V. P. at Moulmein was declared insolvent. A Receiver was appointed to sell the assets. There was some immoveable property in the Ramnad District. The Receiver at Moulmein appointed the Official Receiver of Ramnad and Madura to sell the property as his agent. The property was put up for auction at Madura and the appellant was the highest bidder. Complaints were made to the Receiver at Moulmein and also to his agent, the Official Receiver of Madura, that the property had been sold for less than its value, owing to the sale not having been properly published. The Receiver at Moulmein accordingly refused to complete the sale and convey the property. The appellant applied to the District Judge of Amherst under section 22 of the Provincial Insolvency Act to order the Receiver to complete the sale. The learned Judge after reading the report of the Receiver and his agent, the Official Receiver of Madura, refused to interfere with the action of the Receiver; and the appellant now appeals from the District Judge's order of refusal.

He complains that a proper enquiry was not held under section 22 and that he was not given the opportunity of adducing evidence that the sale was unconditional and that the proclamation of sale was duly published. Section 22 does not require the Court to hold any enquiry. The section does not contemplate that a lengthy enquiry should be held as if the matter was a regular claim for specific performance. Under that section, the Court simply ratifies, reverses or modifies the executive acts of its officer; and any order under that section does not preclude a party from pursuing his ordinary civil remedy. The District Court was of opinion *prima facie* that the sale had not been properly advertised; that the purchaser, the appellant, was very probably acting on behalf of the insolvent, and that it was through the action of the insolvent that the inadequate price was obtained. The Court apparently overlooked the statement of the Official Receiver of Madura in his letter to the Receiver at Moulmein, stating that the sale was made subject to confirmation of the Receiver at Moulmein. In that case, the appellant has no cause to complain; the Receiver at Moulmein has thought fit not to confirm the sale. Under section 22, the Court would be entitled to accept that statement by the Official Receiver of Madura as a fact, without postponing the enquiry to enable the complainant to adduce evidence to the contrary. The appellant has the remedy by a suit against the Receiver for specific performance, if he is so advised.

This appeal is dismissed with costs, three gold *mohurs*.

Appeal dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION * No. 195 OF 1915.

M. E. MOOLA ... ... DEFENDANT—APPLICANT.

vs.

K. C. BOSE ... ... PLAINTIFF—RESPONDENT.

For Appellant:—Israil Khan.

Before Mr. Justice Twomey.

Dated 9th February.

Master and servant—wrongful dismissal of servant—damages—month's pay—reasonable damages—reasonable notice.

When a servant is wrongfully dismissed he can sue for damages and the amount of damages to be awarded for such a wrongful dismissal will depend on the nature of the hiring contract and the wages agreed upon.

In the case of a domestic or menial servant and also in the case of a clerk a month's wages would be reasonable damages.

In the absence of any definite agreement or established custom the contract of service is terminable by a reasonable notice.

JUDGMENT.

TWOMEY J:—In this case the Plaintiff Respondent was engaged as a clerk at Rs. 60 a month by the Applicant and was dismissed summarily after he had served for only 13 days. He sued the Defendant Applicant for his wages for the 13 days and for a month's pay in addition in lieu of notice. The Defendant Applicant pleaded that the man was only taken on on trial and as his work was unsatisfactory, he was dismissed after 13 days. The Defendant offered to pay the wages due for 13 days but Plaintiff refused to take them.

The learned Additional Judge of the Small Causes Court found that the Plaintiff had been irregular and unpunctual in his attendance but that the Defendant had not proved incompetence or disobedience. The Judge apparently considered that the Defendant discharged the Plaintiff without due cause and this question cannot be opened in revision. He held that there was no agreement as to notice, the Defendant should have given Plaintiff at least 15 days' notice and a decree was granted accordingly for 28 days' pay in all.

When a servant is wrongfully dismissed he can sue for damages and the amount of damages to be awarded will depend on the nature of the hiring contract and the wages agreed upon. (1) In the case of a domestic or menial servant damages amounting to a month's wages might be given and it certainly could not be held that a

---

* Revision of the Judgment and decree of the Additional Judge of Small Cause Court, Rangoon in Civil Regular No. 5222 of 1915 dated 11th October 1915.

(1) See Smiths' Law of Master and Servant, 6th Edn. cases cited at p. 148.

month's wages would be excessive in the case of a clerk. Moreover in the absence of any definite agreement or established custom the contract of service is terminable by a reasonable notice (2) In the case of a clerk hired by the month, fifteen days' notice is certainly not unreasonably long.

It is clear therefore that the Applicant has not been dealt with too severely and that his application in revision cannot be entertained. It is dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL SECOND CIVIL APPEAL NO. 170 OF 1915.

MA BON LON and others—DEFENDANTS—APPELLANTS.

vs.

MAUNG PO LU—PLAINTIFF—RESPONDENT.

For the Appellants.—Mr. N. N. Sen.

Before: Mr. Justice U Kin.

Dated 10th January 1916.

Transfer of Property Act (IV of 1882), s. 100, applicability of—Charge—Mortgage—Security, when amounts to charge.

Section 100 of the Transfer of Property Act does not enable a mortgage to be converted into a charge if it cannot operate as a mortgage by reason of non-compliance with the formalities prescribed by the law, such as that of registration prescribed by section 59 of the Transfer of Property Act, the case being otherwise, if the relation of mortgagor and mortgagee does not exist between the parties.

Case-law on the point reviewed.

JUDGMENT.

The point for decision is whether the transaction in question operates as a charge or not under section 100 of the Transfer of Property Act.

The nature of the transaction is explained in the first paragraph of the plaint in these words :—

" The 1st defendant, being unable to repay the sum of Rs. 125 which she had borrowed from Maung Shwe So on the mortgage of the paddy land, was about to lose the same; so she asked the plaintiff to redeem the land with his own money and take possession of it and work it without paying any rent or charging any interest. The plaintiff accordingly paid Maung Shwe So the principal and interest amounting to Rs. 154 about the month of *Taboung* 1272 B. E. (1911) and redeemed the land in question and took possession of it and has since been working and enjoying it."

It is clear from this description that the transaction is a usufructuary mortgage.

The Township Court dismissed the suit, holding that the mortgage was invalid on the ground that it was not made by a

(2) Ibid. Cases cited at p. 60.

registered deed, as it should have been under section 59 of the Transfer of Property Act, and that consequently the plaintiff was not entitled to a mortgage decree.

The District Judge on appeal to him also held that the plaintiff was not entitled to a mortgage decree, but he said that he was entitled to a charge on the land and made a declaration to that effect. He cited as his authority a ruling of Ormond, J., in *Ma Lon* vs. *Mg. Po Oh* (1).

In my opinion that case is different from the present. There the plaintiff at the request of the defendants redeemed a mortgage which they had made. He did not get possession of the property. Nor was it agreed that he should be given possession, as security for the money he had paid on behalf of the defendants. This seems quite clear, for two years later, he sued the defendants for specific performance of a contract to sell. As he did not prove the contract he alleged, the Court of 1st instance dismissed his suit. On appeal, however, the Divisional Court gave him a decree for possession as mortgagee, it is difficult to understand for what reason. Ormond, J., on second appeal, held that the plaintiff was entitled to a charge on the land to the extent of Rs. 1,200 (that being the amount for which he had redeemed the land) and to a declaration to that effect. It is clear that there was no mortgage within the meaning of section 58 of the Transfer of Property Act to the plaintiff as a result of his payment of Rs. 1,200.

In this case there is clearly an usufructuary mortgage for the sum for which the plaiutiff redeemed the mortgage which had been made by the defendant.

Section 100 of the Transfer of Property Act provides that when immoveable property of one person is, by act of parties, * * * * * * * made security for the payment of money to another, the latter person is said to have a charge on the property, *if the transaction does not amount to a mortgage*. The qualifying words, "the transaction does not amount to a mortgage" are all-important and effect must be given to them. In *Pran Nath Sarkar* vs. *Jadu Nath Saha* (2) Maclean, chief Justice, says, "what we have to consider is whether the present transaction amounted to a mortgage. The expression 'amount to a mortgage' in section 100 means such a mortgage as is defined by section 58 of the Act." Therefore, having regard to the terms of the latter section, the question to ask is, is the transaction in question a transfer of an interest in specfic immoveable property for the purpose of securing the payment of money advanced by way of loan? If the answer is in the affirmative, the transaction is a mortgage and if by reason of any of the formalities of the law not having been complied with, it cannot be enforced as such, no charge can arise under section 100. In reality that section means that there is no charge in such a case. The Court is not at liberty to go against this statutory provision and apply general equitable principles and say that there is a

(1) Special Civil Second Appeal No. 140 of 1913.
(2) 32 C. 729 ; 9 C. W. N. 697.

charge in such a case; because in England under English Law where a mortgage fails for want of some formality, the transaction may be valid as an equitable charge. "It is an established doctrine that equity will not contravene the positive enactments or requirements of law and defeat its policy by supplying, under the guise of amending defective instruments, those deficient elements of form without which the agreement is absolutely void, even as between the parties to it." Per Mookerjee, J., in *Royzuddi Sheik* vs. *Kali Nath Mookerjee* (3). But where the transaction does not amount to a mortgage, the matter is different. The above view has been uniformly maintained in the Calcutta High Court both before and after the case above cited. See *Sreemutty Rani Kumari Bibi* v. *Rajah Srinath Roy* (4); *Tofaluddi Peada* v. *Mahar Ali Shaha* (5); *Girendra Nath Mukerjee* v. *Bejoy Gopal Mukerjee* (6); *Royzuddi Sheik* v. *Kali Nath Mookerjee* (3) & *Debendra Chandra Roy* v. *Behari Lal Mukerjee* (7). The Bombay High Court has adopted the same view, following the Calcutta cases. See *Narayan B baji* v. *Lakshmandas Harachand* (8). In Madras, however, there are two cases which point to the contrary view. See *Rangasami* v. *Mutukumarabpa* (9) and *Mithiram Bhat* v. *Somantha Naicker* (10). But in a later case the Madras High Court adopted the same view as Calcutta. See *Konchadi Shanbegne* v. *Shiva Roa* (11) It must, therefore, he held that section 100 of the Transfer of Property Act does not enable a mortgage to be converted into a charge, if it cannot operate as a mortgage by reason of non-compliance with the formalities prescribed by law.

In the present case the transaction set up is clearly a mortgage, but it cannot operate as such because it was not made in accordance with the requirements of section 59 of the Transfer of Property Act. In the case decided by Ormond, J., there was something short of a mortgage the relation of mortgagor and mortgagee not existing between the parties, and it was right, and not contrary to the provisions of section 100 of the Transfer of Property Act, to hold that the transaction created a charge.

For the above reasons I hold that the transaction before me does not operate as a charge.

The appeal is allowed with costs throughout.

Appeal allowed.

---

(3) 33 C. 985 at p. 995; 4 C. L. J. 219.
(4) 1 C. W. N. 81.
(5) 26 C. 78.
(6) 26 C. 246; 3 C. W. N. 84.
(7) 15 Ind. Cas. 665; 16 C. W. N. 1075.
(8) 7 Bom. L. R. 934.
(9) 10 M. 509.
(10) 24 M. 397.
(11) 28 M. 54.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL NO. 16 OF 1915.

MA THIN ... ... APPELLANT.

vs.

H. M. YASSIM ... ... RESPONDENT.

For Appellant :—Villa.
For Respondent :—Ginwalla.

Before Mr. Justice Parlett.

Dated 5th November 1915.

Registration Act (XVI of 1908), s. 17 (1) (b)—Sale and re-sale—Immoveable property—Agreement creating right of redemption, requires registration.

Where the effect of an agreement set up is, to create a right of redemption of immoveable property worth over Rs. 100, whether absolutely or for a time, the writing falls within the meaning of section 17 (1) (*b*) of the Registration Act and, therefore, requires registration.

Mutha Venkatachelapathi v. *Pyanda Venkatachelapati*, 2, *M. 348*; *Suraj Pershad* v. *Phul Singh*, A. W. N. (1906) 180, referred to.

JUDGMENT.

On the 24th September 1912 appellant sold a house and site to one Babu for Rs. 1,500 by registered deed. On the same or the following day, Babu gave appellant a promise in writing to the effect that he agreed to sell to her the same house and ground, provided she at any time paid him Rs. 1,500. Babu died and on 27th July 1911 his widow Ma Cho sold the property to the respondents. Appellant then sued the respondents for specific performance of Babu's promise to sell the property to her, and obtained a decree that they should convey the property to her within one month on payment of Rs. 1,500. On appeal this decree was reversed and the suit was dismissed on the ground that Babu's agreement was inadmissible in evidence for want of registration. Plaintiff now appeals. It is argued that as a contract for the sale of immoveable property does not create any interest in such property, such contract, if in writing, is not compulsorily registrable under section 17. Looking, however, at the substance of the matter it appears to me that the effect of the agreement set up would be to create a right of redemption of the property for Rs. 1,500, in favour of the appellant, whether absolutely, as the agreement in its terms implies, or for a term of ten years, as appellant alleges was subsequently agreed between them orally. In either case I consider the writing falls within the meaning of section 17 (1) (*b*) of the Registration Act, and, therefore, required registration. The case appears to me to be similar to *Mutha Venkatachelapati* v. *Pyinda Venkatachelapati* (1) and *Suraj Mershad* v. *Mhul Singh* (2). On other grounds, moreover, I am of opinion that the suit must fail.

(1) 27 M. 438. (2) A. W. N. (1906,) 180.

Appellant alleges that about two months before the sale to respondents she borrowed Rs. 1,200 and took it to Ma Cho and offered to buy the property. There is no evidence whatever of this fact except appellant's bare word, but even she admits that upon Ma Cho advising her not to purchase with money borrowed at interest, she did not insist, but let the matter rest. Nothing more was done until respondents had bought the property. In my opinion, therefore, it cannot be said that there has ever been an acceptance of Babu's proposal to sell the property to appellant for Rs. 1,500. "An engagement to keep an offer open for a given time does not * * * bind the person making the offer, but it operates as an intimation to the party addressed that no acceptance will be received after the lapse of the time named." Cunningham and Shephard's Contract Act, 8th Edition, page 25. "An offer, for instance, to sell goods at a price named with a promise to keep it open to a certain day is *nudum pactum*, and can at any time before acceptance be recalled. Such promise does not prevent the person, who has made the offer, selling the goods meanwhile to a third person, unless by a distinct contract, founded on a distinct consideration, he has engaged not to do so. Thus where defendant offered to plaintiff certain wool for sale with three days' grace to make up his mind, and within three days plaintiff on going to accept the offer was told that the wool was sold to another, it was held there was no contract, because when the plaintiff signified his acceptance, the defendant did not agree" Cunningham and Shephhrd's Contract Act, 8th Edition, pages 22 and 23.

The appeal is dismissed with costs.

APPEAL DISMISSED.

THE

BURMA LAW TIMES.

VOL. IX.] MAR. & APR. 1916. [NOS. 3 & 4.

IN THE CHIEF COURT OF LOWER BURMA.

FIRST CIVIL APPEAL No. 201 OF 1914.

SWAN TEE and another ... ... APPELLANTS.

vs.

MA NGWE ... ... RESPONDENT.

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

For Appellants.—Mr. Halkar.

For Respondent.—Mr. Higinbotham.

Pauper appeals—Payment of court fees before conclusion of enquiry into pauperism—appeal if within time—Limitation Act (IX of 1908, s. 5—Co-owner's suit for share of profits—"Tax, rate or assessment" meaning of—Lower Burma Town and Village Lands Act (IV of 1898) ss. 24, 25, 26—Burma Land and Revenue Act (II of 1876.)

When an application for leave to appeal in form a pauperis, presented beyond the proper time, is admitted under section 5 of the Limitation Act, and enquiry as to pauperism is directed, but full court fees as on an ordinary memorandum of appeal are paid before the enquiry is concluded, the appeal must be deemed to have been presented on the day on which application for leave to appeal as pauper was presented. Skinner vs. Orde 2A., 241. 6, I. A. 126; followed.

Although a suit for damages for use and occupation of land by one co-owner against another will not lie, such suit being founded upon an agreement between the parties, a co-owner is entitled to a share of the reasonable profits of the land, till he is put in possession on partition, and he should not be deprived of his rights merely because he put his claim in wrong and inappropriate words.

Under English law, ground-rent would not come within any of the terms "taxes, rates and assessments," but under sections 24, 25 and 26 of the Lower Burma Town and Village Lands Act, ground rent due to government is in a different position from ground or other rent due to an ordinary landlord. These sections virtually make ground rent payable to government a tax or assessment.

JUDGMENT.

Fox, C. J.—The first matter to be dealt with is whether the appeal is barred by limitation.

The decree appealed against is dated the 8th April 1914, and the judgment on which it is founded was delivered on that day, but the case was ordered to be put down to speak to the minutes of the decree. On the 9th April it was ordered that the method of partition of the property should stand over for a month so that the parties might have an opportunity of coming to an agreement in

regard to it. They did not agree, and on the 11th May the learned Judge added a sentence to his judgment directing a reference to the Collector for him to partition the property.

The plaintiffs presented an application on the 18th May to have an alleged clerical error in the judgment corrected under section 152 of the Code. This was rejected on the 5th June, and a copy was delivered on the 24th July. The petition for leave to appeal as paupers was presented on the 25th July. The application was time-barred, but after hearing the respondent the application was admitted under section 5 of the Limitation Act on the 30th November. At the same time further inquiry as to the pauperism of the appellants was ordered. Before the enquiry was concluded the appellants furnished the proper Court-fees for an ordinary memorandum of appeal. On the 2nd February 1915 the appeal was admitted subject to any objection at the hearing. In view of the decision in *Skinner* vs. *Orde* (1) the appeal must be deemed to have been presented on the 25th July 1914. The overtime up to that date must be deemed to have been considered when dealing with the application for leave to appeal as paupers, and the question as to this to be concluded by the order admitting that application.

The many-times amended plaint was based on the plaintiffs being heirs of the former owners, and on a lease to the defendant of three plots of land by the plaintiffs' mother, Ma Shwe Tsee, as administrator of the estate of Maung Sine, deceased. This lease is dated the 14th October 1904 and is for ten years. Two of the plots of land were the property of Government, and had apparently been included within the Rangoon Town limits for a long time. The other plot was formerly in Hanthawaddy District but on extension of the Rangoon Town limits was included within the latter district. Over this plot Maung Sine had apparently acquired a landholder's right under the Burma Land and Revenue Act. Ma Shwe Tsee died on the 27th July 1907. She and the plaintiff Kyee Swan had borrowed money from the defendant. The latter brought a suit in 1909 to recover what was due on two promissory notes and deposit of title-deeds of the land and obtained a mortgage decree in respect of $\frac{3}{4}$th share of the properties; the other $\frac{1}{4}$th share was taken to be the share and interest of the plaintiff Swan Tee who was a minor at the time. In that suit the defendant claimed no interest on the promissory notes up to the date of filing the suit which was the 15th March 1909, but she claimed interest accruing after that date and was awarded Rs. 4,472-13-7 up to the date of decree, *i. e.*, the 31st January 1911.

The reason for her not claiming interest before suit was that what she had to pay for rent under the lease of 1904 was by agreement set off against what Ma Shwe Tsee and Kyee Swan had to pay her for interest on the promissory notes.

It may be noted here that if there had been an administrator of Maung Sine's estate at the time, the defendant would have had to pay to him or her the full rent of Rs. 275 per mensem under the

(1) 2 A. 241 6 I. A. 126 P. C.

lease between the above dates of 15th March 1909 and the 7th March 1912; under her decree, however, she was entitled to interest at the rate of 6 per cent. per annum on the amount decreed from the 31st January 1911. If the previous arrangement of setting off interest against rent had been continued the balance of rent payable would have far exceeded Rs. 63-8; for the 6 per cent. interest allowed in the decree would not have come to as much as the 18 per cent. interest payable on the promissory notes.

The plaint in the present suit sets out that owing to the sale of the properties under the decree the lease terminated by operation of law. This is an example of the confused ideas which permeate the case. The lease was a lease by the administratrix of an estate. The sale under the decree was a sale of the personal rights of Ma Shwe Tsee and Kyee Swan in the properties. These properties had never been conveyed by the administratrix to the heirs of Maung Sine. The rights of the heirs were to obtain their share from the administratrix. The distinction between the rights of a constituted legal representative of the estate and the personal rights of the heirs of Maung Sine has been overlooked throughout.

The plaintiff claimed first possession of a $\frac{1}{4}$th share of the properties. His other claims were for (1) balance of rent after deducting interest from the 1st July 1907 to the 15th March 1909 at the rate of Rs. 63-8 per mensem, amounting to Rs. 1,270, (2) rent from the 16th March 1909 to the 7th March 1912 at the rate of Rs. 275 per mensem amounting to Rs. 9,826-10-0, (3) damages for use and occupation of $\frac{1}{4}$th of the land from the 8th March to the 5th December 1912 at the rate of Rs. 68-12, *i. e.*, $\frac{1}{4}$th of Rs. 275 per mensem, amounting to Rs. 616 and (4) mesne profits from the date of institution of the suit, *viz.*, the 7th January 1913.

In her amended written statement the defendant took the objection that the suit would not lie but this was not gone into. It was apparently not pressed. Of the specific sums of Rs. 1,270, Rs. 6,826-10 and Rs. 616 claimed, the defendant's Advocate disputed the last sum only (see the Judge's note in the course of Kyee Swan's evidence on paragraph 8 of the written statement); the defendant admitted that as an heir of Maung Sine and Ma Shwe Tsee the plaintiff Swan Tee was entitled to a $\frac{1}{4}$th share of the properties. She, however, claimed that she was entitled to set off against what was payable by her the various sums set out in the written statement. The only issues fixed were:

1. Whether the defendant is entitled to set off any and which of the items specified in clauses 5 to 9 of the written statement?

2. Whether the plaintiffs or either of them is entitled to claim damages for use and occupation, and if so how much?

In paragraph 5 of the written statement the defendant alleged that she had paid Rs. 1,150 for the funeral expenses of Ma Shwe Tsee and two sums of Rs. 50 to the plaintiffs personally. In paragraph 6, 7 and 9 of the written statement she said she had paid Rs. 543-5-4 and Rs. 5,975 for ground rent to Government of part

of the properties. In paragraph 8 she stated she had paid Rs. 900 as expenses incurred in some land acquisition proceedings in connection with the properties.

The learned Judge disallowed the plaintiff's claim for Rs. 616 for damages for use and occupation of the plaintiffs' ¼th share of the land from the 8th March 1912 to the 5th December 1912 on, the ground that one tenant-in-common could not sue another tenant-in-common for damages for use and occupation. The plaintiffs appeal against this decision. No doubt a suit for damages for use and occupation by a co-owner against another co-owner will not lie, for such a suit is founded upon an agreement between the parties, express or implied, for the occupier to pay reasonable compensation for the use and occupation fee. (Foa on Landlord and Tenant, Chapter 14, and Bullen and Leake, Precedents of Pleadings, 7th Edition, page 171.) There was in the present case no allegation that the defendant occupied the land with the plaintiff's permission: she occupied it because she had a right to do so as a co owner from the 8th March 1912.

What I take it was meant to be claimed for the plaintiff Swan Tee was, a quarter share of the reasonable profits of the land. Assuming that he and the defendant were, co-owners of the land from the time of her purchase of the interest of Ma Shwe Tsee and Kyee Swan, he was entitled to such share in the profits and he should not be deprived of his rights merely because his pleader put his claim in wrong and inappropriate words. I would allow Swan Tee's appeal in so far as it appeals against the disallowance of the Rs. 616 claimed in the plaint. The learned Judge did not deal with the claim for mesne profits from the date of suit until realization. The plaintiff Swan Tee was and is clearly entitled to a quarter share of the profits of the land, until he receives a quarter of it on partition, and the decree should be amended accordingly.

The learned Judge disallowed the defendant's claim to set off the sums of Rs. 1,150 and Rs. 100 mentioned in the 5th paragraph of the written statement, and Rs. 900 mentioned in the 8th paragraph. The defendant has not appealed against this decision.

In regard to the sums of Rs. 543-5-4 and Rs. 5,975 paid for ground rent to Government, he held that the defendant was entitled to set off what she had paid on this account up to the 21st December 1911, the date of Exhibit V, a lease to her by Government of holding No. 2, one of the plots included in the lease of 1904, Exhibit I. He held that this ground rent was not a tax, rate or assessment which she was bound to pay under this last mentioned lease, and that clause (*g*) of section 108 of the Transfer of the Property Act allowed her to deduct what she had paid for ground rent from the rent she had to pay under Exhibit I. Under English Law ground rent would not come within any of the terms "taxes, rates and assessments"; but it does not follow that what is charged by Government in this country does not do so. Under section 24 of the Lower Burma Town and Village Lands Act, 1898, all sums of money payable to Government in respect of land, including sums for rent, are recoverable as if they were arrears of land revenue

under the Burma Land and Revenue Act, 1876. Under section 25 every sum due to Government in respect of any land is given priority over every other charge on the land, and under section 26, every sum due to Government in respect of land is payable by all persons in possession (which means occupation) of the land, at the time the sum is demanded, and by all persons in possession during the period for which the sum is payable. These provisions put ground rent due to Government in a very different position from ground or other rent due to an ordinary landlord. They virtually make ground rent payable to Government a tax or assessment. Moreover it seems clear that the parties to the lease regarded the Government charge as falling within what the lessee had to pay. From the receipts in the bundle, Exhibit B, it appears that Ma Shwe Tsee paid only Rs. 8-12 per annum as rents of lots 2 and 3 from 1897 to 1905. No receipts from 1905 to 1908 have been produced, but from the first receipt in the bundle, Exhibit II, it appears that the defendant was assessed for a payment of Rs. 543-5-4 from the 18th September to the 31st December 1908.

Kyee Swan says that there had been a previous increase of the ground rent to Rs. 75-11 per annum which the defendant paid. She herself said that she had paid rent to Government because Government gave her notice to do so, and she also said that she paid ground rent to Governmant through Ma Shwe Tsee every year, since the commencement of the lease of 1904.

It is not clear how it came about that the Government demand for rent was made in 1908 from the defendant. In paragraph 8 of her amended written statement the defendant states that in 1908 the Collector took proceeding to acquire the land at a low figure and she contested the proceedings for the benefit of the estate of Ma Shwe Tsee. The proceedings are not before us. Exhibit D is a notice from the Collector to the successors of Ma Shwe Tsee to show cause why they should not be evicted. There is a letter, Exhibit A, from the defendant's Advocate to Kyee Swan's Advocate, asking for some notice from the Collector to facilitate payment into Court, but what the money was for, does not appear. The next document in order of date before us is the Collector's receipt for Rs. 513-5-4, the date of payment entered on it being the 28th January 1909. Exhibit E shows that on the 20th March 1909 the defendant accepted an offer of the Collector to give her a lease at a rental of Rs. 175 per mensem which would amount to Rs. 525 per quarter. This was paid by her from the 1st April 1909. Something further must have happened, for Exhibit III dated the 19th November 1909, shows that a penal rent was at one time assessed on the land, but was afterwards cancelled and the defendant was called on to pay the usual rent of Rs. 525 for the previous quarter. She had been paying at that rate up to the 21st December 1911 when she obtained Exhibit 5, a quarterly lease at a rate of Rs. 120 a quarter for lot No. 2. What has happened as regards lot No. 3 does not appear. I gather from the document that to avoid possible eviction of the plaintiffs from these lots and her own possession of the lands being thus brought to a close,

the defendant must have put herself forward as the person who had the best right to occupy the land, and that thus she obtained recognition by the Government who treated her as its tenant from certainly the 18th September 1908. She, however, has never claimed either in the suit of 1909 or in this suit that the heirs were ousted from all rights to these two lots. She put herself forward and accepted personally a heavier burden in the way of a higher ground rent, and it appears to me that it is not open to her to now claim a set-off from the plaintiff for this ground rent. Her claim is a stale one and is evidently an after-thought, for if she had understood that the ground rent was not payable by her she would have set if off against the rent she had to pay under the lease of 1904, when calculating what was due to her, before bringing her suit in 1909. In my opinion her, claim to set off the two sums of Rs. 543-5-4 and Rs. 5,975 should have been disallowed. I would allow the appeal, set aside the decree of the original Court, and give the plaintiff Swan Tee a decree against the defendants for possession of ¼th of the lots of land mentioned in the plaint, the land to be partitioned by the Collctor, and for payment by the defendant of Rs. 11,712-10-0 and costs on the amount and directing an enquiry under clause (c) of rule 12 of Order XX as to rents and mesne profits of the lands, from the institution of the suit until delivery of possession of ¼th of the lands to the plaintiff Swan Tee or the expiration of three years from the date of this judgment, whichever, event first occurs. I would also order the defendant to pay Swan Tee his cost of this appeal and would order Swan Tee to pay the Court-fees which would have been payable if he had wholly succeeded in the suit originally and if he had not been allowed to sue as a pauper.

PARLETT, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL No. 355 OF 1914.

MAUNG PYA GI ... ... DEFENDANT—APPELLANT.

vs.

MAUNG PO KA ... ... PLAINTIFF—RESPONDENT.

Before Mr. Justice U Kin.

For Appellant—Mr. Ko Ko Gyi.

For Respondent—Mr. Halkar.

Burmese Buddhist Law—Evidence of Adultery—Divorce—Separation of property,

According to Burmese Bdddhist Law if a wife commits adultery, her husband is entitled to discard her and send her away with nothing but the clothes on her person. If it is proposed to abandon her for adultery, and she leaves her husband's house there is a divorce from the time she leaves her husband and the holder of a decree against her can not attach property in her husband's possession as she is no longer entitled to a share in it. A court may presume adultery where it is satisfied that a guilty attachment subsisted between the parties, and that opportunities occurred when a guilty intercourse might with ordinary fasilities have taken place.

JUDGMENT.

The only question is whether, at the time of the attachment of the property in suit in execution of a decree against Ma Kyay U, there had been a divorce between her and Maung Po Ka, the plaintiff, and whether as a result thereof the plaintiff had become the sole owner of the property which before the divorce was the joint property of the two.

The evidence shows clearly that Po Ka had, for sometime, been suspecting his wife of committing adultery with one Aung Saw. One day he caught them being alone in a *ya* and charged her with having committed adultery. She denied the act of adultery but afterwards gave in, allowed her husband to abandon her without giving her even a two-anna worth of property and left the conjugal home with clothes she was wearing.

It has been contended that there was no evidence of adultery and none has been adduced in the case. But the question is whether there was a divorce or, to put more particularly, an abandonment of the wife by the husband on the ground of adultery, to which abandonment the wife had assented, but not whether there was any case for it.

The Burmese Buddhist Law which governs this case is clear that if a wife commits adultery, the husband is entitled to discard her and send her away, with only the clothes on her body. So if it is proposed to abandon her for adultery and she agrees to it and the terms of it and leaves the conjugal home there is, in my opinion, a divorce, from the time she leaves it.

There is absolutely no doubt on the evidence that Po Ka passed his sentence of banishment upon Ma Kyay U and that she assented to it by going away leaving behind everything. It must, therefore, be held that there was a divorce from the time the woman was discarded. That was long before the attachment. She had, therefore, no interest in the property when it was attached.

Even if it was necessary to decide whether there was adultery, the result would be the same.

It is not necessary to prove the direct fact of adultery. In almost every case, the fact must be a matter of inference as a necessary conclusion. [See *Allen* v. *Allen and Bell* (1) approving *Loveden* vs. *Loveden* (2)]. And it has been held that the Court may presume adultery when it is satisfied that a guilty attachment subsisted between the parties and that opportunities occurred when a guilty intercourse might, with ordinary facilities, have taken place.

In this case, besides the evidence of the husband who caught the wife alone with another man in a most compromising place, we have also the evidence of Maung Shwe Zet, a man of 51 years, who also saw her alone with the same man in a *ya*. We also have reliable evidence that she made no complaint as regards the treatment she received at the hands of the husband. The evidence is

(1) (1894) P. 248 ; 63 L. J. P. and M. 120.
(2) 2 Hagg. Cons. Rep. 1 at p. 2.

sufficient to prove that there was a guilty attachment between the woman and Aung Saw and they had opportunities of committing adultery with much facility. To a Burman the inference would be that the two had committed adultery.

For the above reasons, the appeal must be dismissed and it is dismissed accordingly with costs.

Appeal dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 16 OF 1916.

MAUNG PO HLA ... ... APPELLANT.

vs.

KING-EMPEROR ... ... RESPONDENT.

Before Mr. Justice Twomey.

Criminal Procedure Code secs. 337 (3) and 339—Pardon—Procedure on grant of pardon—Omission to keep approver in custody—Wilfully concealing anything essential absconding before conclusion of cross-examination—Forfeiture of pardon.

When an accomplice has been granted and has accepted a pardon he should unless he is on bail, be detained in custody till the termination of the trial by the Court of Sessions or High Court. A pardon once tendered and accepted is forfeited only by wilfully concealing anything essential, or by giving false evidence. Absconding before conclusion of cross-examination does not amount to wilful concealment.

JUDGMENT.

TWOMEY, J:—The appellant, Po Hla, was tendered a pardon as an approver in a dacoity case, and he has now been convicted and sentenced to seven years' transportation for the dacoity in respect of which the pardon was tendered to him, the Sessions Judge holding that he forfeited his pardon.

There seems to be no doubt that Po Hla absconded after his examination-in-chief because, as one of the assessors puts it, "the offence he committed was a serious one and he did not quite trust the pardon granted to him."

A pardon is tendered to an approver "on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof". Section 339 lays down the circumstances in which a person to whom a pardon has been tendered may be tried for the offence in respect of which he was pardoned. It must be shown that he has forfeited the pardon either, (*a*) by wilfully concealing anything essential, or (*b*) by giving false evidence.

It is not contended that Po Hla gave false evidence. But the learned Sessions Judge has held that "by deliberately withdrawing himself from cross-examination he has concealed something essential, to wit, the whole of the answers which he would have been compelled to give in cross-examination." This view, in my opinion, involves an unwarranted straining of the provisions of

section 339. Po Hla had made a full disclosure before two Magistrates and it lay on the prosecution in the present case to prove strictly that he had concealed something essential. The prosecution had to show definitely that he had with held evidence of some particular fact which was within his knowledge, and the prosecution was clearly unable to do this. It is a pure assumption unsupported by any proof that there are unknown facts which the accused persons at the trial could have compelled Po Hla to disclose in cross-examination. They had cross-examined him in the previous June in the Subdivisional Magistrate's Court but nothing essential came out in that cross-examination.

The Legislature has not expressly provided for the case of an approver who after being examined for the prosecution absconds without submitting himself to cross-examination and the reason no doubt is that such a case is nearly impossible where the provisions of section 337 (3), which were disregarded in this case, are duly complied with. But I think it is clear that section 339 must be construed strictly and that according to the provisions of that section the appellant has not forfeited his pardon.

IN THE CHIEF COURT OF LOWER BURMA.

SECOND CIVIL APPEAL NO. 345 OF 1914.

MAUNG THEIN AND ANOTHER ... ... APPELLANTS.

vs.

MA THET HNIN AND ANOTHER ... ... RESPONDENTS.

Before Sir Charles for Kt. Chief Judge.

For Appellants:—Mr. A. C. DHAR,

For Respondents:—Mr. KO KO GYI,

Burmese Buddhist Law—Breach of promise to marry, compensation for—Consent of children to proposed marriage—Parent's promise to marry their children if enforceable.

The rule of Burmese Buddhist Law that a female, whether a minor or not, cannot be married without her consent, or against her will applies a fortiori to a male. If parents promise to make or compel their child to marry, the court cannot enforce such promise, or give compensation for its breach, because in so doing it would infringe the principle that the consent of parties to a marriage must be free.

Maung Taik vs. *Ma Cho.* (1) U. B. R. 1897—1901 II 197 referred to.

JUDGMENT.

The first plaintiff is a spinster of over 20 years of age; the 2nd plaintiff is her adoptive mother. The 1st defendant is a bachelor who is also above the age of minority; the 2nd defendant is his father. The suit was for Rs. 300 as compensation for breach of promise of marriage. It presents novel features.

The plaint sets out that in the spring of 1913 the young man and woman loved each other, and went off and lived together as husband and wife by mutual consent for about a week. In other words, they eloped without the consent of their parents, and behaved

or rather misbehaved in the manner in which eloping couples may be presumed to do. It is not alleged that the young man promised the young woman marriage either before or after the elopement. The second plaintiff's husband found out the runaways and according to the plaint he called away the young woman and looked after her. According to the written statement he took her away and hid her, and in consequence the young man was not able to continue living with her. The plaint alleges that shortly after this the second defendant went to the second plaintiff and promised her that he would choose a propitious day, provide suitable marriage presents for the young couple, and would give his son in marriage to the young woman. In her evidence the second plaintiff said he asked her to allow him to make his son marry her daughter. She consented. When, however, she sent an intermediary to ask the second defendant to carry out his promises he refused to do so, and said that the plaintiffs might take any action they chose. Rupees 300 was claimed because the second defendant had property worth between Rs 3,000 and Rs. 4,000 and according to second plaintiff and her father, it was customary in their part of the country and considered proper that a father with such means should on his son's marriage give the young couple property worth what would be about a tenth of his own property. The second defendant repudiated having made the promises alleged. His version of what happened was that when a Sub-Inspector of Police came to him about the matter, presumably about a possible charge of abduction against the young man, he told the officer that he would make the young man and woman marry if they consented to do so. Subsequently his son refused to marry the young woman. The Courts have found that the father did make the promises alleged by the second plaintiff and have given decrees in favour of both plaintiffs against both defendants. The Township Court's decree was for Rs. 200 but this was reduced by the District Court to Rs. 100 with costs. Both sides have appealed to this Court, the defendants on the ground that neither of them was liable, and the plaintiffs on the ground that the District Court was wrong in reducing the compensation and in not sufficiently taking into account the injury done to the young woman's future prospects of marriage, and to her feelings, affections and social position. One of the witnessess called by the plaintiffs said that he did not think that the young woman's reputation was affected in consequence of her having eloped with a bachelor. The ideas prevailing in the particular part of the country appear to be peculiar. The claim was based not upon injury to reputation, injured feelings or anything remotely connected with love and romance, but upon the monetary and, some may think, sordid aspect of matrimony. Wounded feelings at promises made by the father not being carried out must have weighed less with the plaintiffs than the hope of getting as much as they could out of him.

The legal question involved in the case is whether the breach by the father of his promises to give his son in marriage to the young woman or to make his son marry her, and to give the couple

marriage presents suitable to his position in life, afforded the plaintiffs jointly, or afforded either of them, a cause of action on which the Courts could make a decree for compensation. The Township Judge gave both plaintiffs a decree because he understood the Burmese Buddhist Law to allow compensation to be given for breach of promise of marriage to the parents of the party injured as well as to that party. The District Judge was led to uphold the decree by reference to sub-section 2 of section 25 of the Contract Act, but he does not work out in his judgment how that can be applicable to the case.

No doubt some texts in some Dhammathats, for instance those in sections 54 and 56 of the Kinwun Mingyi's Digest, contemplate penalties on parents who refuse to carry out a promise to give a child in marriage, but these texts apply to parents of a girl only. I can find no similar provision penalizing parents of a male child. But even if there were one, the provision would be one which it would not be possible for our Courts to carry out in these days. Our Courts must recognize that the free consent of the actual parties is essential to a marriage between an adult man and an adult woman. No giving in marriage by parties in such a case can be recognized as constituting a marriage unless the actual parties consent to be married. In *Maung Taik* vs. *Ma Cho* (1) it was held that among Burmese Buddhists a woman, whether a minor or not, cannot be legally married without her consent or against her will; *a fortiori*, a male, whether a minor or not, cannot be married without his consent or against his will. If the second defendant's promise was to give his son in marriage to the first plaintiff, the fulfilment of the promise by his informing the plaintiffs that he gave the son in marriage to the first plaintiff would have no legal effect, consequently the plaintiffs could not be given compensation for breach of a promise the fulfilment of which would be useless and of no effect. If his promise was to make or compel his son to marry the girl, the Court could not enforce such promise or give compensation for breach of it, because by so doing it would infringe the essential principle that the consent of parties to a marriage must be free.

Neither Court stated the ground on which it made the first defendant liable. It was not alleged that he had ever made a promise to marry the girl. He clearly was not liable for any breach of promise to marry.

For the reasons I have stated, his father cannot be held liable to compensate either or both of the plaintiffs for breach of the promises he was held to have made.

The appeal is allowed. The decrees of both the lower Courts are set aside, and the suit is dismissed with costs.

Appeal allowed.

(1) U. B. R. 1897-1901, II, 197.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION NO. 141 OF 1915.

PUZANDAUNG BAZAAR Co., LTD. ... APPLICANT.

vs.

T. GWAN CHAN ... ... RESPONDENTS.

Before Mr. Justice Robinson.

For Applicant—Mr. Cowasji.
For Respondent—Mr. Higinbotham.

Transfer of Property Act (IV of 1882) Sections 106 and 107. Unregistered lease for three years—Tenant's remedies against landlord wrongfully refusing to register lease—Presumption of monthly tenancy.

If a landlord wrongfully neglects or refuses to register a lease which requires to be registered under section 107 of the Transfer of Property Act the tenant is not restricted to the remedy by a suit for specific performance. He can also resist a suit for enhancement of rent or ejectment before expiry of the term of the unregistered lease.

The presumption of tenancy from month to month under section 106 arises only in the absence of a contract to the contrary.

JUDGMENT.

Plaintiffs admittedly leased a certain building to defendant for one year from 16th October 1911 with an option to renew for a further term of one year. It is also admitted that later on the parties entered into a contract to lease these premises for a term of three years from the 15th August 1912, and that on the 15th August 1913 a lease in accordance with this agreement was drawn up and executed by both parties. The rent throughout was fixed at Rs. 125 per mensem.

The document was after execution returned by defendant to plaintiffs but they did not register it. Defendant paid the rent.

On 1st December 1914, plaintiffs wrote to defendant alleging that he had broken the terms of the document of lease and had thereby put an end to the lease. They requested him to quit within a week's time. In his written statement defendant alleges that they realized that they had no grounds for their allegation, waived their notice, and requested him to pay the rent due up to the end of January 1915, which he did. These allegations were admitted. On the 11th February 1915 plaintiffs served defendant with a notice to quit by the end of that month. They said they had discovered that the document of lease was not registered and must be regarded as of no effect. Defendant did not vacate the premises and plaintiffs now sue for rent for the month of February and for damages for use and occupation at Rs. 200 a month up to 8th June 1915.

It is urged that section 107 of the Transfer of Property Act renders a registered document compulsory to create a lease for a term of three years, and that there being no registered lease, the presumption created by section 106 of that Act arises and that defendant must, therefore, be deemed to be a monthly tenant. If that is so, the notice to quit is adequate.

It is, I consider, proved and it is admitted that the parties came to an agreement that a lease for three years certain should be given and accepted at a monthly rental of Rs. 125. This was carried out in so far that defendant was left in possession, and plaintiffs received and accepted the agreed rent. Plaintiffs should have registered the document but did not, and they now seek to take advantage of their wrongful neglect to do so. It is true that defendant could have called upon them to do so and he can now bring a suit for specific performance. It is said that the grant of this relief is purely discretionary and that defendant has so delayed that it would never be granted, but I am not prepared to agree with this suggestion.

As to section 106 no presumption arises if there is a contract to the contrary and there is one here: *Bibi Jawahir Kumari* v. *Chatterput Singh* (1).

The same authority disposes of the argument that the provisions of section 107 would be renderred nugatory if this view be not taken.

The position then is that defendant continued in possession in the expectation that the lease executed by the parties would be duly registered and that he had, and still has a right to compel plaintiffs to execute and register a lease as required by section 107. As between plaintiffs and defendant their position is that of landlord and tenant under the terms and conditions of the original agreement, and as if the lease had been duly registered. To hold otherwise would be to permit plaintiffs to take advantage of their own fraud or wrongful neglect to force defendant to pay a higher rent. This is the view taken in the case cited above. Reference may also be made to *Ittapan* v. *Purangodan Nayar* (2) The petition is dismissed with costs. Advocate's fees five gold mohurs.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 261B OF 1915.

MA SHEIN ... ... APPLICANT.

vs.

KIM SEIN *alias* SAW CHEM SEIN ... RESPONDENT.

Before Mr. Justice Ormond.

Chinese Buddhist Law—Marriage—Presumption from long cohabitation.

Though there are usually six preliminary steps to a marriage in China, these forms are not indispensable, and there is nothing to show that any particular ceremony is necessary for a valid marriage under Chinese Buddhist Law.

If the parties have lived for several years as man and wife the presumption that there was a valid marriage must prevail.

ORDER.

The petitioner Ma Shein applied under section 488, Criminal Procedure Code, for an order for maintenance against her husband,

(1) 2 C. L. J. 343. (2) 21 M. 291.

the respondent Kim Sein. The respondent denied that petitioner was his wife, because neither his parents nor her parents gave him in marriage when he was young. The parties eloped when they were each 16 years of age and respondent took the petitioner to his father's house where they lived for one month as husband and wife. They then stayed a day or two in petitioner's parents' house. Respondent then went to school at Moulmein for three years and spent his holidays partly with his father and partly with the petitioner. During this period of three years respondent's step-mother gave petitioner a monthly allowance of Rs. 10. When respondent left school, the parties lived four months in respondent's uncle's house and then for about a year in petitioner's parents' house. About three years ago the parties got a divorce from the headman, but were reconciled that night and continued to live together as man and wife. About five months before her application, the petitioner became pregnant by the respondent. The respondent has now taken another wife. The parties are apparently well-to-do. The respondent's father is Chinese and his mother a Talaing.

The Magistrate dismissed the petitioner's application because there was no marriage ceremony as is required by Chinese Buddhist Law and he held that there was no valid marriage.

From the evidence, I think, it is clear that according to Burmese Buddhist Law there was a valid marriage, which has been sanctioned by the parents of both the parties. It may be open to question whether a foreigner who contracts a marriage in a British dominion which is valid according to the law administered in that place, is entitled to repudiate the marriage on the ground that certain formalities were not observed which are requisite for a valid marriage according to his personal law as administered in the foreign country. But it is unnecessary to go into that question, because in Parker's Essay on Comparative Chinese Family Law which has been accepted as an authority in *Ma Thein Shin* v. *Ah Shein* (1), it is stated that though there are usually six preliminary steps to a first class marriage in China, those forms are not indispensable.

Assuming, therefore, that Chinese Buddhist Law is applicable to the case, there is nothing to show that any particular ceremony is essential for a valid marriage under that law. And the parties having cohabited for several years as man and wife, the presumption that there was a valid marriage must prevail.

I set aside the order of the Magistrate, and direct that the petitioner's application be proceeded with, and the amount of maintenance to be awarded to her determined.

Order set aside.

(1) 7 Bur. L. T. 246.

IN THE CHIEF COURT OF LOWER BURMA.

SECOND CIVIL APPEAL No. 362 OF 1914.

KO BAT AND OTHERS ... ... APPELLANTS.

VS.

MAUNG KYA BAW AND OTHERS ... ... RESPONDENTS.

Before Sir Charles for Kt. Chief Judge.

For Appellants.—Mr. Munshi.

For Respondents.—Mr. Rutledge.

Civil Procedure Code (Act V of 1908), s. 151—Inherent powers of Court-time fixed for deposit of money—Extension of time on Application after expery of time fixed.

When appeal is filed against a decree or order directing deposit of money by a certain date, application for extension of time should be made before the date fixed for payment, but under section 151, Civil Procedure Code, a court has power to extend time even on an application made after such date if it is necessary for the ends of justice.

JUDGMENT.

The suit was, *inter alia*, for specific performance of a contract for sale of land. On the 30th July 1913 a decree was passed ordering that on the plaintiffs depositing in Court Rs. 400 before the end of the Burmese year 1275 (the 14th April 1914) the 1st defendant should execute a deed of sale to the plaintiffs of the land, and in default of the deposit being made the suit would stand dismissed. An appeal was preferred against the decree but it was dismissed on the 7th April 1914. The plaintiffs did not deposit the money payable by them until the following month. Their reason for not depositing the money until then was that they did not hear of the result of the appeal until shortly before doing so. They applied that the defendants should be ordered to execute a transfer document. Objection was taken that not having deposited the money within the time mentioned in the decree the plaintiffs were not entitled to the order they asked for and the suit stood dismissed. The Sub-Divisional Judge did not think it was within his power to extend the time allowed for the deposit of the money, and dismissed the plaintiffs' application. They appealed to the Divisional Court, and the Judge considered that it was open to him to extend the time even at that stage.

The procedure was, no doubt, irregular. The plaintiffs should have applied before the 14th April 1914 for extension of time, and the Divisional Judge should have fixed a new period within which the deposit should be made seeing that the date of his giving judgment was so near the time fixed in the original decree.

There can be no question that he would have had power to do this.

An extension of time, after the period fixed by the orginal decree had passed, can only be upheld as an order contemplated by section 151 of the Code as necessary for the ends of justice.

I am not prepared to hold that it was not within the power of the Divisional Court to extend the time by virtue of that provision. The appeal is dismissed with costs, two gold *mohurs*.

Appeal dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL SECOND CIVIL APPEAL No. 67 OF 1915.

MA NYEIN ME ... ... APPELLANT.

vs.

MA MAY AND OTHERS ... ... RESPONDRNTS.

Before Mr. Justice Twomey.

For Appellant—Mr. Hamlyn.

For Respondents—Mr. Ba Dun.

Burmese Buddhist Law—Joint undivided ancestral property—Adverse possession—Burden of proof—Limitation Act (IX of 1908), Sch. I, Art. 144.

In a suit to which Article 144 of the First Schedule of the Limitation Act applies it is for the plaintiff in the first place to prove title and if the plaintiff succeeds in proving title, the onus of proving adverse possession for 12 years lies upon the defendant.

Ma Pe v. *Maung Hlaw*, 2 L. B. R. 184, distinguished.

JUDGMENT.

The defendant-appellant, Ma Nyein Me, is widow of Maung Tun, the eldest son of Ma Shwe La, and the plaintiffs-respondents are other children and grand-children of Ma Shwe La. The property in dispute is a house and house site which were attached in execution of a decree against Ma Nyein Me and sold as her property. The plaintiffs-respondents having failed to obtain removal of the attachment sued for a declaration of their right to the property. Their suit was dismissed by the Township Court, but the District Court on appeal held that the property was the joint family property of all Ma Shwe La's children and accordingly gave the plaintiffs a declaratory decree in respect of 8/9ths of the property, the remaining 1/9th being deceased Maung Tun's share.

The plaintiffs' case was that the property belonged to their mother Ma Shwe La who died about 20 years ago, that on her death about 15 years ago it became the property of all her children although it was assessed to revenue in the name only of the eldest son Maung Tan and his wife.

The defendant-appellant Ma Nyein Me at first contended that the land was given to Maung Tun by his mother Ma Shwe La, but afterwards receded from this position and said she did not know how Maung Tun had got it She relied, however, on adverse possession for upwards of 12 years.

In suits to which Article 144 of the first Schedule of the Limitation Act applies, it is for the plaintiff in the first place to prove title, and if the plaintiff succeeds in proving title the onus of proving adverse possession for 12 years lies upon the defendant.

In this case it is clearly proved by the plaintiff's witness that the house and site were left by Ma Shwe La on her death and according to the ordinary law of inheritance all her children inherited the property as co-heirs. It is shown that the house was occupied after the mother's death not by Maung Tun alone but by other children as well. It was only after some years as the family grew that Maung Tun was left in sole occupation of the house, and even then two other children (Ma Me and Ma Tu) of Ma Shwe La built houses on the same piece of land and they and their families have continued to live in these two houses ever since. It is true that after Ma Shwe La's death the land was transferred to Maung Tun's name alone, but that circumstance is explainable by the fact that the co-heirs were numerous and it was convenient to constitute the eldest son as representative of all in dealing with the Revenue authorities. There is evidence which seems trustworthy that Maung Tun was asked by the other children of Ma Shwe La to partition the site and that he procrastinated. He never seems to have set up a claim to own the property to the exclusion of his brothers and sisters. I think the evidence produced by the plaintiffs strongly supports their contention that the property is joint undivided ancestral property, that Maung Tun was not in sole possession of the site but was in possession jointly with the two other co-heirs who had built houses on the site and that these co-heirs together with Maung Tun were in possession on behalf of the general body of co-heirs.

Mr. Hamlyn relies strongly on the case of *Ma Ye* v. *Maung Hlaw* (1), in which the defendant was allowed by his co-heirs to remain in possession of certain land for 13 years without any agreement on the part of the defendant that he held on behalf of the co-heirs or any acknowledgment of the co-heirs' rights. The plaintiffs' suit was held to be barred by limitation. That case, however, is sharply distinguished from the present case by the fact that Maung Tun's sisters and co-heirs Ma Tu and Ma Me were in possession of the site in dispute jointly with Maung Tun and that Maung Tun promised to partition the land with his brothers and sisters. It was clearly treated all along as joint family land.

The plaintiffs proved their title and the defendants failed to prove adverse or even separate possession.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 2 L. B. R. 184.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL SECOND CIVIL APPEAL No. 364 of 1914.

MAUNG NE DUN ... ... APPELLANT.

vs.

MA LE AND OTHERS ... ... RESPONDENTS.

Before Mr. Justice U. Kin.

For Appellant.—Mr. Agabeg.
For Respondents—Mr. Ba On.

Vendor and Purchaser—Specific performance of contract to sell—Vendor bound to do all things necessary to complete purchaser's title—Limitation Act (IX of 1908) Sch. I Art. 113.

A vendor is bound to do all things necessary to complete the title of his vendee and where section 54 of the Transfer of property Act applies to execute a registered conveyance. Article 113 of the first schedule of the Limitation Act applies to suits to compel the execution of a registered document by way of specific performance, and when no date for performance is fixed, time runs from the date when plaintiff has notice of refusal.

JUDGMENT.

In 1907 defendants-respondents sold the land in suit to plaintiff-appellant for Rs. 750. They transferred it into the name of the plaintiff and gave him possession The plaintiff has been in possession ever since. These facts are not disputed. The parties are at variance as to whether defendant promised to execute a registered conveyance. The plaintiff's case is that they did so promise and instead of fulfiling it, they claimed to be entitled to get back the land on the ground that no title had been acquired by the plaintiff for want of a registered deed, and they threatened to sue him for the recovery of possession of the land. The plaintiff, therefore, sues the defendants for specific performance of their agreement to sell, praying that they may be compelled to execute a registered conveyance.

The defence is that there was no agreement to execute a registered conveyance and that the suit is barred by limitation.

In my judgment it is clear law that it is immaterial whether there was an agreement to give a registered document. The vendor is bound to do all things necessary to complete the title of his vendee and according to section 54 of the Transfer of Property Act, which applies to this case, the transaction must be by a registered deed in order to pass a valid title from the vendor to the vendee. The suit must therefore, be decreed, if it is within time.

The question then is, is the suit barred by limitation? Article 113 of the Limitation Act applies. The period of limitation provided for thereby is three years and it is made to run from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. The way to interpret this provision of law is as pointed out by the present Chief Judge who in *Ma Shwe On* vs. *Maung Kywet* (1) said: "The Limitation

(1) 32 Ind. Cas. 536.

Act being one in which rights are rendered ineffective, if not abrogated, must be read strictly."

No date was fixed for performance in this case. Therefore limitation will run from the date the plaintiff had notice that performance was refused. That must in this case be the date on which the defendants claimed the land back from the plaintiff. That was admittedly shortly before plaintiff's suit, said to be a few months. The suit was therefore, clearly within time.

The appeal is allowed with costs in all the Courts and there will be a decree ordering that the defendants do execute a registered deed by which their title in the property in suit is conveyed to the plaintiff for the consideration of Rs. 750 which they have already received.

Appeal allowed.

IN THE CHIEF COURT OF LOWER BURMA.

SECOND CIVIL APPEAL No. 128 OF 1916.

MAUNG SHWE KHO ... ... APPELLANT.

vs.

MA MYA ... ... RESPONDENT.

Before Mr. Justice U Kin.

For Appellant—Mr. Po Thit,
For Respondent—Mr. D. N. Palit,

Burmese Buddhist Law—Kanwin and payin property—Gift. Transfer of property Act S. 123.

Kanwin property is the property given by the bridegroom to the bride at the time of marriage for the joint purposes of the married pair. Such a gift if not in writing and registered as required by section 123 of the Transfer of property Act is void, and if there is a divorce by consent without fault on either side it must go to the husband.

JUDGMENT.

The plaintiff Ma Mya sued for a half of the land in suit.

It appears that she married the defendant Maung Shwe Kho about 3 years before the suit, both being *eindaunggyis* at the time. She alleged that the land in suit was among other property brought by the defendant to the marriage and given to her as *kanwin* property and that thereafter the parties lived and cohabited as husband and wife. Subsequently for reasons stated in the plaint, which it is not necessary to reproduce here, there was a mutual divorce between them, but no division of property was then made. The plaintiff now claims a half of the land in suit.

The defendant's case is that the property was his *payin* and that he never gave it as *kanwin*.

Both the lower Courts have found that the property was given as *kanwin*.

In this appeal, this court is asked to decide whether the gift was valid, in view of the fact that the transaction was alleged to have taken place at the marriage which was solemnized three years

before the suit, a long time after certain sections of the Transfer of Property Act had come into operation.

In *Ma E Nyun* vs. *Maung Tok Pyu* (1) *kanwin* is defined as property given by the bridgegroom to the bride at the time of marriage for the joint purposes of the married pair. This definition is quite in accord with the ideas of the Burmese on the subject. In the case above cited the gift was alleged to have been made by a document which ought to have been but was not registered, and the Judicial Commissioner held that there was no admissible evidence of the gift. In the present case section 123 of the Transfer of Property Act must be applied and the gift, not being made by a registered document in accordance with the section, must be held to be void. Thus the property still remains *Payin* and there being a mutual divorce with no fault on either side, it must go to the husband.

I must not be understood as approving the ruling above cited in its entirety; I have followed it only in part. As a fact, the learned Judge, who gave it, doubted it, as Chief Judge of this Court, as to the division of property; see *Ma San Shwe* vs. *Vulliappa Chetty* (2).

The appeal is allowed and the suit dismissed with costs throughout.

Appeal allowed.

IN THE CHIEF COURT OF LOWER BURMA.

SECOND CIVIL APPEAL No. 56 OF 1915.

MA U AND OTHERS ... ... APPELLANTS—

vs.

MAUNG LU GALE AND OTHERS ... ... RESPONDENTS—

Before Mr. Justice Ormond.

For Appellants—Mr. Sohan Lal.
For Respondents—Messrs. Maung Thin and Ginwala.

Civil Procedure Code Act V of 1908—S. 11—Res judicata—*Previous suit between vendar and purchaser—subsequent suit between two purchasers from the same vendor—Parties whom they claim.*

In order that a previous decision against a transferor may operate as *res judicata* against the transferee as claiming under the transferor the transferee's title must have arisen subsequently to the commencement of the first suit.

Held, that a suit by a vendor against a purchaser of land for cancellation of sale did not bar a subsequent suit for possession by another purchaser against the vendor and the first purchaser if the second purchaser's title had arisen before the institution of the first suit.

JUDGMENT.

The plaintiffs sued four defendants for possession, their title being that they had bought the property from the first two defendants, the defence of the 3rd and 4th defendants being that they

(1) U. B. R. 1897—1901) II, 39.
(2) 10 Bur. L. R. 49.

(3rd and 4th defendants) had bought the property from the 1st and 2nd defendants 13 days before the alleged sale to the plaintiffs. Plaintiffs asserted that the alleged sale to the 3rd and 4th defendants was void for want of consideration. After these two alleged sales by the 1st and 2nd defendants, the 1st and 2nd defendants sued the 3rd and 4th defendants for cancellation of the deed of sale to the 3rd and 4th defendants on the ground of failure of consideration. In that case on appeal to this Court, it was found that there was consideration and, therefore, that the sale to the 3rd and 4th defendants was good In this present suit, both the lower Courts have held that that decision is *res judicata* as against the present plaintiffs. But at the time of the previous suit, the plaintiffs in that suit, *i.e.*, 1st and 2nd defendants, had no longer any interest in this land. They could not, therefore, bind the present plaintiffs by litigation determining the title of the land. For the previous decision to be *res judicata* as against the plaintiffs, the plaintiffs' title must have arisen subsequent to the commencement of the previous suit. (See Mulla's Civil Procedure Code at page 47 and the cases there cited).

The decrees of the lower Courts are set aside and the case is remanded under Order XLI, rule 23, to be determined on its merits. Appellants will obtain a certificate for refund of Court-fees on this appeal under section 13 of the Court Fees Act. Costs of this appeal will abide the result.

Decrees set aside; Case remanded.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL SECOND CIVIL APPEAL NO. 126 OF 1915.

CHAN TAT THAI ... ... APPELLANT.

vs.

MA LAT AND ANOTHER ... ... RESPONDENTS.

Before Mr. Justice U Kin.

For Appellant—Mr. Rahman.
For Respondents—Mr. Wiltshire.

Civil Procedure Code (Act V of 1908), o. XXI r. 63—Specific Relief Act s. 42—suit for declaration after withdrawal of attachment.

Although an attaching creditor who withdraws his attachment cannot file a suit under Order XXI, rule 63 he can file a suit under section 42 of the Specific Relief Act for a declaration that the property sought to be attached belonged to his judgment-debtor.

JUDGMENT.

The plaintiff sued for a declaration that the property attached in Civil Suit No. 8622 of 1912 of the Court of Small Causes, Rangoon, was the property of his judgment-debtor, Ho Lam Seng, and was liable to attachment and sale in execution of his decree against the said judgment-debtor.

The plaintiff had, of his own motion, withdrawn the attachment.

That being the case, the Divisional Court on appeal held that the suit was not maintainable under Order XXI, rule 63. This it did, not by following the case of *Maung Shwe Tha* v. *Maung Tha Dun Aung* (1) where it was held that as the attachment was withdrawn by the attaching creditor, he had no right to institute a suit under section 283 (now Order XXI, rule 63) of the Code of Civil Procedure. In that case the suit was expressly brought under section 283 of the old Code and the learned Judge decided that such a suit did not lie.

The present suit was not brought under Order XXI, rule 63. It has been held in *Societa Coloniale Italiana* v. *Shwe Le* (2) that independently of section 283 of the old Code a decree-holder who has attached property as being the property of his judgment-debtor, and whose right to do so has been disputed, may sue for a declaration that the property belonged to his judgment-debtor. It was argued before me that the case last cited was in conflict with the case first cited. I do not agree. The result of these two rulings is that although, under circumstances such as these in the present case, you may not have the right to sue under Order XXI, rule 63, you still have a right to sue under the Specific Relief Act.

The appeal is allowed with costs. The Divisional Court is directed to readmit the appeal under its original number and proceed with the appeal on the other points raised.

Appeal allowed.

IN THE CHIEF COURT OF LOWER BURMA.

FIRST CIVIL APPEAL No. 143 OF 1913.

MA SHWE YU AND ANOTHER ... ... DEFENDANT—APPELLANTS.

vs.

MAUNG SOK NYUN ... ... PLAINTIFF—RESPONDENTS.

Before Mr. Justice Twomey and Mr. Justice Ormond.

For Appellant.—Mr. J. N. Lentaigne

For Respondent.—Mr. Maung Kin and Mr. Harvey.

Specific Relief Act (I of 1877) S. 42—Declaratory suit—Consequential relief—Plaintiff not in possession—Failure to amend plaint by adding claim for possession.

Chokalingapeshana Naicker vs. *Achiyar* 1 M. 40 followed.

When a plaintiff does not sue for consequential relief on the ground that he is already in possession, and has an opportunity of amending the plaint and adding a claim for consequential relief when the issue is framed, and fails to do so, the suit should be dismissed if it is found that he was not in possession.

(1) 1 Bur. L. T. 34.
(2) 4 L. B. R. 252; 14 Bur. L. R. 135.

JUDGMENT.

The plaintiff sued for a declaration that he was the owner of certain paddy-land measuring 130-90 acres in the Hanthawaddy District and in a lengthy plaint he asked also for a declaration that a certain mortgage of these lands effected by him in favour of U Baw in May 1902 for Rs. 3,000 had been paid off and discharged in 1907. U Baw had two sons Po Cho and Po Sin. Po Cho died in 1907 leaving the 2nd defendant, his widow, and the defendants Nos. 3—5, his children him surviving. First defendant Po Sin admits the plaintiff's claim; except that he puts the plaintiff to prove that the mortgage had been paid off. He did not appear at the hearing. The District Judge has found that the plaintiff has not proved that he was in possession; but he has found that the plaintiff was the owner and has paid off the mortgage; and he has ordered the defendant to execute a conveyance of the property in favour of the plaintiff. In the written statement, the defendant raises the defence that the plaintiff is entitled to a declaration and that he was not in possession; and an issue was raised as to whether the plaintiff was in possession or not. The Judge has found that the plaintiff has not proved his possession. The plaintiff, therefore, was not entitled under section 42 of the Specific Relief Act, to a declaration without asking for consequential relief. When the fact of his possession was put in issue and the plaintiff failed to ask for consequential relief and pay the necessary Court-fees, the plaintiff must be deemed to have relied upon the issue as framed and to have decided to stand or fall by the determination of the issue. In this case his suit should have been dismissed on the Judge's finding that he had not proved his possession; but on appeal he is entitled to support the decree (which we may regard as recognizing his ownership) upon the ground that the Judge should have found that he was in possession. We think the Judge was right in holding that the plaintiff had not proved his possession. He himself states that he received rents over a period of four years and gave the names of the tenants. He called Mutia, who states that he was the plaintiff's tenant and produces three cancelled tenancy bonds. These bonds do not identify the land which they purport to let and Mutia cannot describe the land. There are discrepancies between Mutia's statement and the Land Records Register of tenants. Another witness, Maung Gauk, states he worked the land for two years but no trace of his tenancy is found in the register. On the other hand, the land has remained all along in the names of U Baw's two sons, Po Cho and Po Sin; the Revenue Records, therefore, would show that the persons occupying those lands were occupying under Po Cho and Po Sin. In our opinion the District Judge was right in holding that the plaintiff had not proved his possession and, in consequence, the suit should have been dismissed. We may refer to the case of *Chokalingapeshana Naicker* vs. *Achiyar* (1) as an authority to show that when a plaintiff does not sue for consequential relief on the ground that he is

(1) 1 M. 40.

already in possession, and he has an opportunity of amending his plaint and paying the additional Court-fees and adding a claim for consequential relief when the issue is framed, and he fails to do so, the suit should be dismissed, if it is found that he was not in possession.

The appeal is, therefore, allowed and the suit dismissed. Respondent will pay the appellant's costs in both Courts.

Appeal Allowed.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL SECOND CIVIL 2ND APPEAL NO. 363 OF 1914.

SHWE BON ... ... PLAINTIFF—APPELLANT.

vs.

MI U THA NYO, by her agent SAN DO AUNG ... ... DEFENDANT—RESPONDENT.

Before Sir Charles Fox, Kt., Chief Judge.

For Applicant—Mr. S. M. Bose.
For Respondent—Mr. J. E. Lambert.

Civil Procedure Code (Act V of 1908), O II, r, 2, O. XX, r. 12—claim for mesne profits, subsequent to suit for possession, if barred.

A suit for possession of immoveable property without a claim for mesne-profits will not bar a subsequent suit for mesne-profits accruing after date of institution of first suit.

JUDGMENT.

On the 13th February 1911, which corresponds with the 15th Waxing Tabodwe 1272, Burmese Era, the plaintiff instituted a suit, against the defendant who is her brother-in-law for possession, as heir of her deceased husband, of a half share of certain lands and moveable properties inherited by the two brothers from their father. She obtained a decree for half of certain properties on the 31st July 1912.

On the 4th June 1914, the plaintiff instituted another suit against the defendant for mesne profits of the portions of the lands allotted to her for the years 1272 and 1273.

Objection was and is taken that her claim for mesne profits for these years is barred under Order II, rule 2, of the Civil Procedure Code, because it was not included in the plaintiff's first suit. That suit was virtually a suit for a share of inherited property and partition. Even if it could be regarded as merely a suit for recovery of immoveable property from a person who wrongfully was in possession of it, the plaintiff's present suit would not be barred by the rule above quoted, because her claim is in respect of years subsequent to that in which the plaintiff's first suit was brought.

She might possibly have included a claim for mesne profits in her first suit, and under rule 12 of Order XX the Court might in its decree have made provision for mesne profits accruing after the

institution of the suit, but although she may have been bound according to the ruling in *Ma Nyein* vs. *Ma Kon* (1) to include in her first suit a claim to mesne profits up to the date on which that suit was instituted, there is no rule which obliged her to include a claim for any mesne profits which might accrue after that date. According to *Dubash Kader* vs. *Fakeer Meera* (2) she was not bound in any case to include a claim for mesne profits in her first suit. The learned Judge who decided that case considered that the present Code had altered the law as declared in *Ma Nyein* vs. *Ma Kon* (1). Without expressing any definite opinion on the question I think his view is open to doubt. The Bench ruling, however, does not apply to the present case, the claim in it being for mesne profits which accrued after the institution of the first suit.

Another objection taken to the plaintiff's claim is that her agent accepted a sum of money from the defendant in full satisfaction of all her claims in respect of the rents and profits of the properties received by the defendant. This question depends upon verbal evidence which is not altogether clear: moreover, there is nothing to show that the plaintiff's agent was authorized to accept less than what was actually due.

I agree with the District Judge in thinking that the plaintiff's claim was not barred on this ground.

The appeal is dismissed with costs.

Appeal dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

SECOND CIVIL APPEAL NO. 299 OF 1914.

MAUNG ON GAING and another ... ... APPELLANTS.

vs.

MA ON SIN ... ... RESPONDENTS.

Before Mr. Justice U Kin.

For Respondent.—Mr. Po Han,

Civil Procedure Code, (Act V of 1908). O. II r. 2 cl (3)—Omission to obtain leave for suit for other reliefs on same cause of action—Subsequent suit barred—Jurisdiction to grant leave.

Omission in a previous suit for cancellation of a deed to ask for leave to bring a separate suit for possession will bar a subsequent suit for possession under O II r. 2 cl. (3).

The competence of a court to give leave to a plaintiff to omit to sue for a relief to which he is entitled does not depend on the pecuniary value of the claim in respect of which such leave is sought.

JUDGMENT.

This is an appeal arising out of a suit for possession of a piece of land instituted in the Sub-Divisional Court of Zigon (Civil Regular No. 46 of 1913 of that Court).

---

(1) 3 L. B. R. 56.
(2) 3 Bur. L. T. 56.

The history of the case between the parties is as follows:—

In Civil Regular No. 145 of 1913 of the Township Court of Gyobingauk the respondent sued the appellant for cancellation of a deed of sale affecting the land in the present suit, alleging that her father had fraudulently sold the same to the appellant. The consideration for the deed was Rs. 500; that being the case, the value of the suit for the purposes of the court-fee and the jurisdiction of the court was the same, namely, Rs. 500 So that the suit as laid was within the jurisdiction of the township court. That court passed a decree ordering that the deed be cancelled.

The cause of action upon which that suit was based gave rise to two reliefs, namely, the cancellation of the deed and the recovery of possession of the property affected by the deed, as the property was in the possession of the appellant. The respondent omitted to sue for possession without asking for leave to sue for the relief afterwards.

The respondent next filed the present suit for possession. The appellant contested it on the ground that it was barred by the provisions of Order II, rule 2, sub-rule 3, of the Code of Civil Procedure. The point was also raised in the Divisional Court on appeal, but it does not appear to have been decided by either Court. Both the lower Courts decided the suit in favour of the respondent, holding that it was not *res judicata* inasmuch as the township court would have had no jurisdiction to try if it was instituted therein.

To my mind there was no question of *res judicata* and the point raised should have been decided solely by reference to the provisions of Order II, rule 2, of the Code.

Order II, rule 2, sub-rule 3, runs thus: "A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

The respondent has omitted to sue for possession without the leave of the township court, so that, according to the plain wording of the provisions above quoted, the present suit for possession is barred. It is, however, contended that the township court would have had no jurisdiction to try the present suit if filed in it, as the value of the land would determine as to what court would be competent to try it and that, therefore, the fact that no leave was applied for from the township ourt would not prevent the present suit from being triable by the sub-divisional Court. There is no doubt that the township court would have had no jurisdiction to try the original suit if there was an additional prayer for possession but the question is whether this fact makes any difference. In my judgment it does not. It is not within our province to read into the provisions above quoted such words as these: "provided that the relief so omitted is within the jurisdiction of the court." We must consider the provisions as they stand. In *Muhammad Fayaz Ali Khan* v. *Kallu Singh* (1) the Additional Judge of the

(1) 33 A. 244; 7 A. L. J. 1201.

High Court held that the competence of a Court to give leave to a plaintiff to omit to sue for a relief to which he may be entitled is not affected by the pecuniary value of the relief in respect of which such leave is sought.

In the present case, the respondent deliberately chose the township court and asked for the relief which that court had the jurisdiction to give and if she had the intention of suing for possession afterwards, she should have applied to the township court for leave to sue for such relief afterwards. That court would then exercise its discretion whether such leave should be granted or not. If it refused to grant the application, then she would have been at liberty to go on with her suit as laid or to withdraw it with a view to file a suit for possession as well in a Court having jurisdiction to entertain such a suit. She could not have filed her suit as laid in the sub-divisional court, because she would then be met with the provisions of section 15 of the Code of Civil Procedure, which says that every suit shall be instituted in the Court of the lowest grade competent to try it and would be referred to the township court; so that the proper court to grant leave to sue for possession afterwards must be the court in which the suit as laid is filed. I would, therefore, hold that the respondent's suit for possession is barred by the provisions of Order II, rule 2. sub-rule 3. The appeal is, therefore, allowed and the suit is dismissed with costs in all the courts.

Appeal allowed.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL SECOND CIVIL APPEAL NO. 331 OF 1914.

CHAN THA AND ANOTHER ... ... APPELLANTS.

vs.

MI MA PYU ... ... RESPONDENT.

Before Mr. Justice U Kin.

For Appellants.—Mr. J. E. Lambert.
For Respondents.—Mr. Ba Dun.

Burmese Buddhist Law—Inheritance—Grandchildren by a predeceased orasa son—children of the same parents.

If an *orasa* son or daughter predecease, his or her parents, his or her eldest son or children together receive on the death of the grand parents the same share as their youngest uncle or aunt.

Children of the same parents take the portion received by them in equal shares.

JUDGMENT.

The three pieces of land in question in this case are alleged to form the estate of Gouk Ra and Mi Nyo Wan, both deceased. They left a son of their own, Beloo, by name, and the 1st plaintiff alleges that he was their son by adoption. He states in paragraphs 2 and 3 of his plaint that Beloo is the elder son and that he (Beloo)

predeceased Gouk Ra and Mi Nyo Wan, leaving him surviving Phu Tha Aung the 2nd plaintiff and Mi Kauk Phet who is said to be still a baby. First plaintiff claims that the two children of Beloo are entitled to one-fourth of what would have been their father's share, had he survived his parents and that he is entitled to the rest of the estate.

The defence is that the 1st plaintiff received Rs. 20 from Gouk Ra and Mi Nyo Wan in full satisfaction of whatever claim he might have had by way of inheritance. The defence further states that, as regards one of the said three pieces of land, the defendant's mother had had it given to her 20 years before the suit by Mi Nyo Wan and Mi Ma Ye. The 2nd plaintiff being a minor sues by his guardian (should be next friend) the 1st plaintiff, and the defence objected that the 1st plaintiff should not be allowed on the record as guardian of the 2nd plaintiff.

The findings of the Court of first instance are (1) that the gift alleged by the defence was not valid; (2) that there is no proof that the 1st plaintiff allowed himself to be cut off with Rs. 20; and (3) that there was no objection raised as to the guardianship of the 2nd plaintiff by the first from the beginning. The Court then says "For these reasons I grant a decree in favour of the plaintiff with costs", but does not say what decree. The decree passed orders that plaintiff shall get the lands from the defendants as prayed for.

The findings of the District Court on appeal are (1) that the 1st plaintiff was not an adopted son of Gouk Ra and Mi Nyo Wan and (2) that he should not have been allowed to represent the 2nd plaintiff, followed by a dismissal of the suit.

This appeal is by both plaintiffs.

At the hearing the learned counsel for the defence said that he could not support the ground of the District Judge's decision, though he would support the decision itself in part. He argued that one of the properties should be held to be outside the estate, as it had been given to Mi Mai Pyu by Mi Nyo Wan and her sister.

I think the evidence on the point is very meagre and I find it impossible to accept the contention of the defence.

The only question I have now to decide is as to the shares of the heirs to the estate.

In *Po Sein* vs. *Po Min* (1), White, C. J., lays down the law in these words.—"The rules as to the shares of grandchildren in the estate of their grandparents, when their own parents have died before reaching the inheritance, are contained in sections 162, 163 and 164 of Volume I of the Digest of the Buddhist Law. There is an unusual unanimity in the texts. If the *orasa* son or daughter predeceases his or her parents, his or her eldest son, or his or her children together receive the same share as their youngest uncle or aunt." In the present case Beloo was the *orasa*. His two children will, therefore, together receive a share equal to that of their uncle, the 1st plaintiff. The latter's share would be

(1) 3 L. B. R. 45 at p. 46.

one-half, if he had to share with Beloo see *Ma Kyi Kyi* vs. *Ma Thein* (2). The children of Beloo will together get one-half.

The *next* question is how should that one-half be divided amongst them. On the authority of *Ma Kyi Kyi* vs. *Ma Thein* (2) I think they being children of the same parents they should share it equally.

There will be a decree declaring (1) that the estate of Gouk Ra and Mi Nyo Wan consists of the three pieces of land mentioned in the plaint: (2 that the 1st plaintiff is entitled to one-half of the estate; (3) that the 2nd plaintiff is entitled to one-quarter of the same, and ordering that the defendant do give up possession to the plaintiffs of their respective share in the said estate.

Each party will bear his or her own costs in all the Courts.

IN THE CHIEF COURT OF LOWER BURMA.

SECOND CIVIL APPEAL NO. 3 OF 1914.

MAUNG SHWE BON and 1 ... ... APPELLANTS.

vs.

MAUNG PU *alias* MAUNG THA ZAN ... RESPONDENTS.

Before Mr. Justice Twomey and Mr. Justice Ormond.

For Appellants—Mr. Sin Hla Aung.
For Respondents—Mr. Po Thit.

Burmese Buddhist Law—Inheritance—Partition on re marriage of mother—Shares of children by first marriage and second husband in unpartitioned prope ty Court-fees.

When children partition with their mother upon her remarriage they have no further right in the share taken by her. Her second husband becomes the heir to their exclusion.

Of the property that was left unpartitioned the children of the first marriage take three fourths, and the second husband takes one fourth.

The plaint must be stamped according to the plaintiff's valuation of his share.

JUDGMENT.

Maung Pu, the plaintiff, is the son of Maung Bwe and Ma Hmat. Maung Bwe died in 1902, Ma Hmat married in 1904 Maung Shwe Bon, the 1st defendant, Ma Hmat died in 1909. Maung Shwe Bon then married Ma Than the 2nd defendant, Maung Pu sues for his share of the property left by his mother. The plaintiff states that at his mother's remarriage there was a partition of property but that a certain house and 2 gardens were not partitioned. That house and the gardens have been sold by Maung Shwe Bon for Rs. 400. Ma Hmat's share of the partitioned property was Rs. 3,100. According to the Dhammathats mentioned in section 213 of the Kin Wun Mingyi's Digest and also section 26 of the Manu Wunnana it is clear that when children

(2) 3 L. B. R. 8.

partition with their mother upon her re-marriage they have no further right in the share taken by her. Her second husband becomes the heir to their exclusion. The text quoted by the District Judge from Section 230 of the Digest does not apply to this case, because there were no children of Ma Hmat's second marriage. The property that was left unpartitioned must be divided as if there had been no partition of any other property; and under the texts quoted in Section 211 of the Digest it is clear that the children of the first marriage take a $\frac{3}{4}$ths share of the property brought by their mother to her second marriage and the step father takes $\frac{1}{4}$th. This property was brought by the mother to her second marriage. The plaintiff was one of two children of the mother by her former husband; he would therefore be entitled to half of $\frac{3}{4}$ths of Rs. 400 i. e. Rs. 150. The decree of the Appellate Court will be set aside and there will be a decree for the plaintiff for Rs. 150 with costs in the original court and with costs in divisional court on that amount. The 1st and 2nd defendants who are the appellants will have their costs of this appeal on the amount in respect of which they have succeeded which is Rs. 1,187-8. As regards the court fees payable on the plaint, it should be stamped according to the value put by the plaintiff on his share which he sought to recover which is Rs. 4,336-4 as assessed by the divisional judge.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 29 OF 1915.

MA YON and others ... . APPELLANTS.

vs.

MAUNG KYA GAING and another .. RESPONDENTS.

Before Mr. Justice Twomey.

For Appellants - Mr. Naidu.
For Respondents—Mr. Halkar.

Arbitration. Specific Relief Act (I of 1877) s. 21. Civil Procedure Code Act V of 1908 schedule II (cls.) 18 and 22.

Under clause (22) of the second schedule of the Civil Procedure Code the last thirty-seven words of section 21 of the Specific Relief Act do not apply to any agreement to refer to arbitration, or to any award to which the provisions of that schedule apply.

A valid award will bar a suit based on any of the claims embraced in the submission and covered by the award.

JUDGMENT.

This case has been needlessly complicated and protracted by reason of the failure of the lower courts to apply the correct law, They have proceeded on the assumption that section 21 of the Specific Relief Act governed the case, having overlooked the provisions of clause 22 of the second schedule to the Civil Procedure Code of 1908. Since that code came into force the law governing

such cases has been contained in clause 18 of that schedule, and all previous decisions in so far as they proceeded on section 21 of the Specific Relief Act have become inapplicable.

In this case the first and second appellants and the respondent agreed on 11th March 1914 to refer to arbitration the matters in dispute in this suit. On 4th June the respondents filed the suit. There was considerable delay in serving the defendants who did not appear till 22nd August. Meanwhile on 19th July an award had been made, and in their written statement filed on 27th August the defendants besides raising a defence on the merits produced this award, and claimed that its existence was a bar to the suit. Subsequently on 16th September plaintiffs amended their plaint, and on 22nd September defendants filed an amended written statement. The amendments however do not affect the aspect of the case with which we are concerned.

The only issue framed was whether section 21 of the Specific Relief Act barred the suit. In view of the written statement, the issue should have been whether the award barred the suit. If the award is a valid award, it will bar a suit based on all claims embraced in the submission and covered by the award see *Bhajahari Saha Benikya* vs. *Bahori Lal Basak* (1) and the Privy Council case of *Muhamed Newaz Khan* vs. *Alam Khan* (2). It will however be open to the plaintiffs to impugn the validity of the award, or to show that some part of their claim was not covered by it, and if they succeed in the latter, such part as the award leaves undetermined can be dealt with on its merits, Though therefore I disagree with the grounds on which the Divisional Court acted, I consider the actual order of remand was right, and I dismiss this appeal but make no order as to costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 104 OF 1915.

S. K. R. CAMA & Co. ... ... APPELLANT.

vs.

K. K. SHAH ... ... RESPONDENT.

Before Sir Charles Fox Kt. Chief Judge.

For Appellant.—Mr. N. M. Cowasji.
For Respondent.—Mr. Barnabas.

Contract—Trading with enemy—Contract becoming illegal after it is made—Effect of accepting bill of exchange.

Accepting a bill of exchange drawn against goo 's coming form Germany and payment of their price after the proclamation forbidding any trade in such goods are acts of trading in c nnection with them.

If after a contract is made it becomes illegal to carry it out, it cannot be enforced.

Nissim Isaac Bekhor v. *Sultanalli Shustary*, 28 Ind. Cas 433, 17 Bom. L. R. 249; 40 B. 11, followed.

---

(1) 33 Cal. 881. (2) 18 Cal. 414.

JUDGMENT.

On the 5th June 1914 the defendant signed an indent to the plaintiff firm which carries on business in London, requesting and authorising it to purchase, from a factory designated by number, cases of rubber sole shoes of descriptions indicated, and to ship and insure the cases on certain terms.

The indent authorized Cama & Co. to draw a bill of exchange on the defendant at 30 days' sight with shipping documents attached for the total amount of their invoice, and the defendant bound himself to accept the bill on presentation and to pay it at maturity. Cama & Co. bought the goods, but it is not shown from whom they bought them.

The plaint states that they were shipped at Hamburg on the 24th June 1914 on a steamship which belonged to a German company. Cama & Co. drew a bill on the defendant on the 31st July 1914 for the amount of their invoice. This bill with the bill of lading, an insurance certificate of a German insurance company and Cama & Co's invoice was presented to the defendant for acceptance on the 20th August by a bank to which the bill of exchange and bill of lading had been endorsed. The defendant refused to accept the bill of exchange. Cama & Co. sued the defendant for the equivalent in rupees of the amount of their invoice and for interest

The learned Judge dismissed the suit, on the ground that if the defendant had accepted the bill of exchange he would have infringed the Proclamation against Trading with the Enemy made by His Majesty the King on the 5th August 1914 and published in India on the 7th August.

That proclamation warned all persons resident in the King's Dominions (*inter alia*)—

"Not to obtain from the German Empire any goods, wares or merchandise nor to obtain the same from any person resident, carrying on business or being therein, nor to obtain from any persons any goods, wares, or merchandise by any way of transmission from the German Empire or from any person resident, carrying on business or being therein, nor to trade in any goods, wares or merchandise coming from the German Empire or from any person resident, carrying on business or being therein."

Presumably Cama & Co. had paid for the goods before they were shipped, and the goods were theirs at the time of shipment. It is not disputed that they are British subjects residing in the King's dominions. According to the bill of lading the cases bear marks showing that the goods were made in Sweden: it does not follow that Cama & Co. bought them from a Swede residing in Sweden. They were shipped in Germany on a German vessel before the outbreak of the war. It is supposed that the vessel took refuge in Antwerp after war was declared, and if the defendant had accepted the bill it is unlikely that the vessel would ever have brought the goods to Rangoon. The loss must fall on one of two

contesting British subjects. In *Duncan, Fox & Co.* v. *Schrempft & Bonke* (1) both firms were said to be English although the names in the defendant firm's style sound very German. That case is not on all fours with the present case, because the goods in reference to which shipping documents were presented and for which payment was demanded were in a German vessel on its way to Germany. In the present case the goods, when war was declared, were in a German vessel destined for Rangoon. Atkin, J., held that if Schrempft and Bonke had accepted the shipping documents they would have acted in direct violation of the Proclamation, because they would be either supplying goods to persons resident or carrying on business in the German Empire or would be trading in merchandise destined for that Empire, and to deal in such way in respect of such goods would be illegal.

The facts in connection with the purchase of sugar in the case of *Nissim Bekhor* v. *Sultanalli Shustary* (2) on the Original Side of the Bombay High Court resemble the facts in the present case more closely.

The goods were coming from Germany, and the Proclamation forbade any trading in such goods. The acceptance of a bill of exchange drawn against the goods and the payment of their price would be acts of trading in connection with them, consequently the defendant would have violated the Proclamation if he had done either. If after a contract is made it becomes illegal to carry it out, it cannot be enforced.

The decision of the learned Judge was, in my opinion, correct.

The application is dismissed with costs; two gold *mohurs* allowed as Advocate's fee.

Application dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

1ST CIVIL APPEAL NO. 159 OF 1915.

MOOLLA MAHOMED BIN MOOLLA MOHAMED ... ... APPELLANT.

vs.

P. K. EBRAHIM ... ... RESPONDENT.

Befor Sir Charles Fox Kt. Chief Judge and Mr. Justice Twomey.

For Appellant.—Mr. J. R. Das,

Landlord and Tenant—Transfer of Property Act S. 108 (h)—Ejectment—Tenant's right to compensation for buildings or for time to remove them after expiry of term.

The erection of buildings by a tenant on lease-hold land without any objection by the landlord does not change the tenant's right of tenancy into a perpetual right of occupation though the landlord may have allowed and even recognised the tenants' right to free sale of houses erected on the land by them and accepted purchasers of the building as his tenants.

Nor is the tenant or a purchaser from him entitled to any compensation for the cost of the building on the ground that the landlord in permitting the sale, and recognising the purchaser as his tenant has encouraged the expectation on the part of the

(1) (1915) 1 K. B. 365. (2) 28 Ind. Cas. 433. 40B. 11.

tenant that he would be entitled to compensation if suddenly ejected. To create an equitable estoppel against the landlord in such a case it is incumbent on the tenant to show that the landlord's conduct amounted by plain implication to a contract to change the right of tenancy into a perpetual right of occupation.

The rule established in India in such cases is that of section 108 (*h*) of the Transfer of Property Act which provides that the lessee may remove at any time during the continuance of the lease all buildings which he has attached to the earth provided he leaves the property in the state in which he received it.

Semble.—The court may give the tenant reasonable time after the termination of the lease in which to remove the buildings.

For such further time the landlord is entitled to damages for use and occupation or mesne profits at a fair and reasonable rate.

Case-law on the subject reviewed and discussed.

JUDGMENT.

Fox C. J. The suit was brought by an owner of land to eject one of his tenants who occupied two plots of it on which he had two houses. Some years before he had bought the houses on the plots. One of these houses had to be pulled down in consquence of orders from the Municipal Committee. The defendant built a plank house and in it he had a shop. This he valued at Rs. 5000. The older house he valued at Rs. 1000. The whole of the plaintiff's land was similarly let out in plots, which had been built upon by the tenants. The plaintiff charged and collected a monthly rent for each plot. The collection of 230 houses on the land formed a basti or village. The plaintiff enhanced the rents from time to time, and when the defendant built the superior house his rent was doubled. The defendant refused to pay this large increase, and the plaintiff failed to get it by a suit in the Small Cause Court. He then gave the defendant notice to quit, and brought the present suit claiming ejectment, arrears of rent, and damages for use and occupation at the enhanced rate.

The defendant claims that he had acquired a permanent right of occupancy so long as he paid the rent payable when he bought the houses, or the rent immediately prior to the suit or in the alternative that the plaintiff was not entitled to a decree for ejectment without paying him compensation for his houses. The learned Judge has held that the plaintiff is entitled to an ejectment decree, but that he must pay the defendant compensation as to which an enquiry was ordered.

The plaintiff appeals against this part of the decree. During the course of the case the plaintiff agreed to allow the defendant two months within which to remove his buildings and property from the plots.

The grounds on which the learned Judge found that the defendant was entitled to compensation were that the land had been let for building purposes, and houses had been transferred by owners to purchasers whom the landlord recognised, and he thereby encouraged expectation on the part of the tenants that they would be entitled to compensation if they were suddenly ejected. He therefore considered that the plaintiff was estopped from denying liability to grant compensation. As authority in support of

this proposition he referred to *Dattatraya Rayaji Pai* v. *Shridar Narayan Pai* (1) *and Yeshwadabai* vs. *Ramchandra Tukaram* (2). These decisions were prior to that of His Majesty's Privy Council in *Beni Ram* vs. *Kundan Lal* (3), and it may be doubted whether after this decision which is binding on all the courts in India they would be followed even in the courts of the Bombay Presidency. They were not followed in *Ismail Khan Mahomed* vs. *Jaigun Bibi* (4). The facts in the case before the Privy Council were that in 1858 the landlords let the land for the term of the current settlement for the construction of a saltpetre factory; this factory was carried on for four or five years only, and since then for many years the tenants had put the land to other uses. Shops had been built on the land for 20 years, and pucca shops had been built on it 12 or 14 years previous to the suit. A considerable amount of money had been spent on other structures on the land. The owner of the land at the time saw the buildings and did not prohibit their construction. The plaintiff landlords put an end to the tenancy and brought the suit for ejectment and asked for a decree for removal of the material of the houses.

The appellate courts in India affirmed the original court's dismissal of the suit on the ground that the original lessor not having objected to the erection of the buildings, and having continued to receive rents after their erection and after the saltpetre factory ceased to exist, was estopped from suing the lessees for ejectment. They adopted a principle stated in the following words:—"If a man permits another to build upon his land, and with the knowledge that the building is being erected, stands by and does not prevent the other from doing so, then no doubt, equity comes in, and by the rules of equity which in this respect are the same as the rules of law, he cannot eject that other person." Their Lordships of the Privy Council describe this statement as a loose and inadequate statement of the rule of equity, and they proceeded to state what the rule was in the following words:—

"In order to raise the equitable estoppel which was enforced against the appellants by both the appellate courts below, it was incumbent upon the respondents to show that the conduct of the owner whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation." Later on they say:—"The rule established in India is that of section 108 of the Transfer of Property Act which provides that the lessee may remove at any time during the continuance of the lease all buildings which he has attached to the earth, provided he leaves the property in the state in which he received it." They adopted

(1) 7 Bom. 736.
(2) 18 Bom. 66.
(3) 21 All. 496.
(4) 27 Cal. 570.

the following words of Lord Chancellor Cranworth in Ramsden vs. Lee Dyson (5) "If any tenant builds on land which he holds under me he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to extend money on a title he knew would or might soon come to an end." They pointed out however that the maxim in English law "quicquid inaedificatur solo, solo cedit" did not apply. The result of the decision was that, the plaintiffs obtained an order for removal of the tenant's houses without compensation. The case does not differ in essential respects from the present case, but no express letting of the plots of the land for building purposes is proved in this case. A reasonable inference from the circumstance is that tenants took their plots for the purpose of putting up houses on them, and that the plaintiff knew that they were taking them for this purpose. According to the decision, the erection by a tenant of permanent structures on the land let to him to the knowledge of, and without interference by the lessor will not of itself suffice to raise an equitable right against the lessor preventing him from ejecting the tenant at the end of the tenancy.

As regards the question whether the landlord is bound to compensate the tenant for his buildings or for removal of them, it may be observed that in the Privy Council case counsel for the tenants did not even suggest that his clients were entitled to compensation of any sort. The rule of equity stated by their Lordships is a rule under which a tenancy for a limited time can under some circumstances be held to have been changed into a perpetual right of occupancy. It has nothing to do with compensation to the tenant for his property on the land.

The effect of the Privy Council decision and the whole question as to the rights of landlord and tenant to buildings erected by the latter has been elaborately discussed in the Madras High Court.

In Ismail Kani Rowthan vs. Nazarali Sahib (6) Bhashyam Ayengar and Moore, J. J. held that a tenant who erects a building on land let to him can only remove the building, and cannot claim compensation. In that case there was a decree for ejectment but the tenant was allowed one month in which to remove his buildings.

In Angammal vs. Malick Saeed Aslam Sahib (7) the plaintiff sued for a declaration that she was the owner of a house and for possession of it, or in the alternative to be paid compensation for it, or to be allowed to remove the building. She had held the land under a document which created only a monthly tenancy. The house had been built many years previous to the determination of the tenancy. The ground landlord had obtained an ejectment order against her in the Presidency Small Causes Court, and she had not been allowed to raise her claims in that court, nor had

(5) 1865 L. R. 1. E. & I. A. 129.
(6) 27 M. 211.
(7) 11 Ind. Cases 745.

time been given by the decree to remove her buildings which she valued at Rs. 5,000. It had been erected with the knowledge of the ground landlord and without protest from him. Willis, J. in the original court held (1) that a tenant has only a right to remove buildings during the continuance of the tenancy, and (2) that a tenant is not entitled to any compensation for his buildings, or to remove them after the determination of the tenancy, the only right of removal recognised being that in clause (h) of section 108 of the Transfer of Property Act. He consequently disallowed the plaintiff's claims and dismissed her suit.

On appeal Arnold White C. J. agreed with him, but Shankar Nair J. after an elaborate examination of the authorities disagreed. His comment on clause (h) of Section 108 of the Transfer of Property Act was that it was only an enabling provision, and it left untouched rights which the lessee may have otherwise than under that section. He held that under the law prior to the act the tenant had the right to remove after the expiry of their tenancy superstructures erected by him during it or to claim compensation. His comment on the Privy Council case was that it did not deal with those questions, Another appeal in the same case under the names *Angammal* vs. *Malik Mahomed Syed Astam Sahib* (8) was heard by the same Judges sitting with Millar J. The Chief Justice adhered to his previous opinions and Miller J. agreed with him that the plaintiff was not entitled to any of the reliefs she asked for. Miller J. however held that according to the customary or common law of the land, the lessor on determination of a lease has the option to take the lessee's buildings on it on paying compensation, but if he is unwilling to pay such compensation he must allow the tenant to remove his buildings. If he elects to allow the tenant to remove the buildings, he must allow a reasonable time after the determination of the tenancy for the tenant to do so. If the tenant has had such reasonable time, and has not done so before he loses possession, he has no further right to time for removal of the buildings. On the question of compensation he held that apart from estoppel or contract the tenant has no right to compensation for his buildings. Shankar Nair J. held that if a landlord is not willing to pay the value of the tenant's buildings the tenant is bound to remove them either before he surrenders possession or within a reasonable time after expiration of the tenancy, but if he does not do so the ownership of the building is not transferred to the landlord. What is open to the latter is to restore the land to its old condition, and to claim damages from the tenant if he incurs any loss. Section 108 of the Transfer of Property Act saves rights derived from contract or local usage from the provisions of the section stating the rights and liabilities of lessor und lessee respectively. Miller J's. statement of the respective rights of lessor and lessee as regards buildings erected by the latter when the tenancy comes to an end was founded on the Full Bench's decision

(8) 21 Ind. Cas. 583.

in the matter of *Thakur Ohunaer Parana nick* (9) which professed to be a statement of what the law was according to the usages and customs of the country. Generally, such customs can scarcely be said to be referred to in the words "local usage" in the opening words of sections 108. It appears to me that the view that the whole law as to the rights and liabilities of lessor and lessee respectively when no contract or local usage is proved and when the rule of equity stated in *Beni Ram* vs. *Kundan Lal* (3) is not applicable is now embodied in sections 108 of the Transfer of Property Act is the correct view. The section says nothing about the lessor being liable to compensate the lessee for his buildings on the land let, and in view of the Privy Council decision it appears to me clear that the plaintiff is not liable to pay compensation to the defendant either for his buildings or for their removal.

The buildings however are his, and at the time the decree was made he had not given up possession of the land. He is bound to give up possession; this involves removing not only himself but all his property from the land. Buildings such as the defendant has on the land cannot possibly be removed instantly, consequently it is necessary to fix a time in the decree within which he must obey it. I would therefore alter the main part of the decree to the following wording.

It is ordered and decreed that the defendant do quit, vacate and give up possession to the plaintiff of the plots of land hereinbefore mentioned, and that he do remove all his property including the materials of his buildings thereon, and that he do restore the land as far as possible to its original state before the expiry of two months from the date hereof, and that he do pay to the plaintiff the sum of Rs. 93-9-5 being arrears of rent up to the date of institution of the suit, and damages at the rate of Rs. 18 a month until he vacates the said plots of land, and that he do pay to the plaintiff his costs of the suit as allowed by the court." It may be doubted whether the plaintiff was entitled to damages for use and occupation or mesne profits at Rs. 18 per mensem in the absence of evidence to show that such rate was fair and reasonable, but the defendant has not appealed or put in a cross-obection against it.

The defendant must also pay the plaintiff's costs of this appeal.

TWOMEY, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REGULAR NO. 231 OF 1915.

S. KING ... ... PLAINTIFF.

vs.

D. J. BUCHANAN and 1 ... ... DEFENDANTS.

Before Mr. Justice Robinson.

For Appellant:—Mr. Giles,

For Respondent:—Mr. Auzam,

Suit on foreign Judgment. Civil Procedure Code (Act V of 1908) S. 13. Jurisdiction. Limitation Act (IX of 1908) S. 11.

(9) Bengal L. R, Full Bench Rulings 595 (3) 21 All 496.

The law of limitation is lex-fori, not lex-loci cont actus, and a foreign rule of limitation is no defence to a suit instituted in British India on a contract entered into in a foreign country unless such rule not only bars the remedy, but also extinguishes the right.

A foreign Judgment is conclusive as to any matter thereby directly adjudicated upon, except in the cases provided for in section 13 of the Code of Civil Procedure.

A claim that would be time-barred in British India cannot be said to be a claim founded on a breach of any law in force in British India.

ROBINSON J. :—This is a suit based on a Judgment of the King's Bench Division. The claim was for price of papers and periodicals supplied. The first defendant has filed a written statement but the second defendant does not appear. The written statement raises seven defences based on section 13 of the Civil Procedure Code, but all but two are abandoned and rightly so. Defendant at first stated that he received no summons, but now admits that he did. He pleads however that he never submitted to the jurisdiction and that, therefore the decree sued on is a nullity. He further pleads that the suit would have been barred by limitation if brought here and the judgment was in breach of the law in force in British India. Mr. Auzam arguing the first point relied on authorities dealing with foreigners not within the jurisdiction at the time of suit. These authorities do not, however, apply in the case of the present defendants, who are British subjects andas they have been served. I can find nothing in the point. The distinction to be made is laid down in *Moazim Hussein Khan* v. *Robinson*, (1). As to the question of limitation, the ordinary law relating to the law of prescription is embodied in section 11 of the limitation act. It is a law relating to procedure, having reference only to the *lefori*. This contract was one in which the price was payable in England and the English court had jurisdiction. The question of limitation is to be decided with reference to the law of England, and the fact that the remedy would be barred had the suit been brought here is no defence to the claim in England. The remedy only would be barred and not the right. *Ruckmabhov* v. *Lalloobhoy Motichand* (2) and *Alliance Bank Simla* v. *Carey* (3). The last clause of section 13 of the Code does not apply to such a point as this. The written statement, therefore, discloses no defence. I am asked to pass judgment at once and no objection was taken to this course. There remains nothing for plaintiff to prove as the payment sued on is to be taken to be conclusive. There will be a decree as prayed with costs.

---

(1) 28 Cal. 641.
(2) 5 Moo. I. A. 234.
(3) 49 L. J. C. L. 781.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 258 B. OF 1915.

BABA KHAN ... ... APPELLANT.

vs.

MAUNG BA NAING ... ... RESPONDENT.

Before Mr. Justice U. Kin.

For Appellant—Mr. Auzam,

Workmen's Breach of Contract Act (XIII of 1859)—S. 2 Applicability of act—Artificer labourer or workman—Contractor.

Workmen's Breach of Contract act applies only to persons falling within the definition of "artificer, labourer or workman." To make the act applicable the relation between the parties to the contract must be that of labourer and employer of labour. A contractor is not ordinarily an artificer, labourer, or workman, and the act does not apply to a contractor of labour or an agent for the supply of goods unless such person has contracted to supply his personal labour.

Respondent lodged a complaint against applicant under section 2 of the Workmen's Breach of Contract Act, 1859 before the first additional magistrate, Rangoon. In his petition to the magistrate the respondent stated that on October 26 1914, the applicant signed an agreement in writing whereby he promised to make bricks for the respondent, that in pursuance thereof he took Rs. 200 by way of advance, that applicant had failed to fulfil his promise and that he had not returned the advance of Rs. 200. By the agreement the applicant agreed to make ten lakhs of raw bricks at the rate of Rs. 35 per 10,000 bricks during a period of one year from Nadaw Lazan. The agreement further has it that in consideration of the undertaking by the applicant the respondent handed over and applicant received Rs. 200 by way of advance. The applicant denied having signed the agreement or having taken the advance as alleged. The magistrate found that applicant executed the agreement and took the advance and with the consent of respondent the order was made for the return of Rs. 200 to respondent within seven days. The learned magistrate appeared to have taken it for granted that the case would come within the purview of section 2 of the Act, if respondent's allegations of facts were proved. He had not classed the applicant under one or the other of the three categories, that was to say, whether he was an *artificer, labourer or workman.* In my judgment it was the duty of the magistrate to attend to the legal aspects of the case, though the applicant had only pleaded to the facts alleged. At the hearing of this application, the learned advocate for the applicant contended that his client was not an artificer, labourer, or workman within the meaning of the act and that the agreement itself showed that the man was a contractor, and relied upon the Upper Burma case of *Asgar Ali* v. *Swami* (1). In that case the accused was described as a coolie gaung and it appeared that he undertook to provide coolies to do earth-work for which he received an advance of Rs. 75 and it was.

U. B. R. (1903) 3 Cr.

admitted that the accused was not a labourer but a provider of labour. It was held by the judicial commissioner, Mr. Copleston, that accused was not an artificer, workman or labourer, and that the act did not apply. The case of *Gilby* vs. *Subbu Pillai*, (2) was referred to as being very similar. In the latter case the learned judges of the Madras High Court said: "The object of the act was to provide a remedy for fraudulent breaches of contract by workmen, artificers, or labourers, who have received advances of money for work they have undertaken to perform or get performed, such persons being for want of means, ordinarily unable to make compensation, when sued for damages. As the act applies to cases in which the workman has undertaken to get work performed, as well as to cases in which he undertakes personally to perform it, there may be cases in which a contractor is liable to proceedings under the act but the contractor must be himself a workman." Later in 1889 there was another case before the Madras High Court, namely the case of *Caluram* v. *Chengappa*, (3) in which accused was a boat owner who plied his boat upon a canal. He took an advance from the complainant after engaging to carry salt, but afterwards broke the contract. The lower courts held that he was a labourer within the scope of the act. The learned judges of that high court held that there was nothing to show that he was himself to render personal labour and that the parties to the contract were not an employer of labour and a labourer res-respectively and that consequently the act did not apply. In a Bombay case, in re-Chinto (4) it was held that a person undertaking to do work as a contractor or a commission agent does not make himself amenable to the penal provisions of the Act and that it makes no difference that he was seen on occasions, taking part in the work contracted to be done. The learned judges remarked: "The work undertaken was manifestly one requiring the labour of many persons and some outlay on carts or other conveyance. The fact that petitioner may from time to time have lent a helping hand would not render him a member of the class to which alone the act is applicable, his ordinary status excluding him from that class." The wording of the Act seems to be quite clear also. It is against the artificer, workman or labourer that the act is directed. The person who agrees to perform the work must himself be a person falling under one or the other of the three categories. The same is the case when he promises to get work performed. So that a contractor who is not himself a workman, skilled or otherwise, would not come within the operation of the act. In the present case the applicant has undertaken to perform a rather extensive contract to carry out which he would require skilled and other labourers. I do not think that the court can conclude that applicant undertook actually to make bricks because the literal meaning of the Burmese word as used in the agreement is "to make." If you ask Ford to make a motor car, Ford would undertake to make you

(2) 7 Mad. 100.
(3) 13 Mad. 351.
(4) 2 Bom. L. R. 801 (1900).

one on condition you pay him his price. Yet Ford does not thereby become an artificer or workman or labourer. So if a contractor undertook to make you a large quantity of bricks, so large that it would be necessary for the contractor to employ a number of labourers, you cannot, without proper materials before you say whether the contractor comes within the purview of the act or not. You would have to ascertain whether he is really a contractor. When satisfied that he is such a person, you would further ascertain whether that person would in the ordinary course of his business do the work that he had undertaken to do or to have done, and if he would so do the work, you would further ascertain whether that person would do it to such an extent as deprived him of the status of a contractor. In this case all these points must be determined in the interests of justice. There is so far no evidence on any of those points. I whould therefore, order the magistrate to take evidence and retnrn findings on the points above mentioned.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL NO. 196 OF 1915.

K. P. MAHOMED EBRAHIM ... DEFENDANT—APPELLANT.

vs.

K. E. MAHOMED ... ... PLAINTIFF—RESPONDENT.

Before Mr. Justice U Kin.

For Appellant—J. R. Das.
For Respondent—Higinbotham.

Landlord and tenant—Suit by one of several landlords—Joinder of parties.

One of several landlords can maintain a suit for rent or in ejectment against a tenant without joining the other co-owners either as plaintiffs or as defendants. The only questions in a suit for rent are (*a*) whether the relation of landlord and tenant subsists between plaintiff and defendant and (*b*) whether the amount sued for is due A suit for rent is not a suit for determination of title to immoveable property.

U KIN J:—This is an appeal from a judgment confirming that of the court of first instance. Both the lower courts have found that plaintiff was a co-owner of the house in suit with another person, that the relation of landlord and tenant existed between plaintiff and defendant respectively and that the rent sued for was due. At the hearing it was pressed upon me on behalf of appellant that plaintiff alone could not sue and that he should have added the other co-owner as plaintiff or defendant as the case may be. The point raised has been disposed of in the case of *Jamshedji Sorabji* vs. *Lakshmiram Rajaram* (1) where it was held that a person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment. This

(1) 13 Bom. 323.

view of the Bombay High Court is supported by Field J's. views as to the nature of a suit for arrears of rent expressed in *Lodi Moola* vs. *Kali Dass Bhoy* (2) in these words:—"A suit for the recovery of rent raises two questions: (1) does the relation of landlord and tenant exist between the plaintiff and defendant? (2) are the alleged arrears of rent due and unpaid?" and also by his views as to the addition of parties in such a case. The learned judge on this latter point says: "When persons sued for rent set up the title of a third person, such third person ought not to be made a party to the case so as to convert a simple suit for arrears of rent into a suit for determination of the title to immovable property." I think the rulings cited above are conclusive against the defence. The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION NO. 125 OF 1915.

COLLECTOR OF RANGOON ... ... APPLICANT.

vs.

MAUNG AUNG BA ... ... RESPONDENT.

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

For Applicant—Mr. Eggar.

For Respondent—Mr. Shaw.

Stamp Act (II of 1899 s. 2 (5) (c) Sch. I articles 5 cl. (a) of exemptions and 15.—Attested Agreement to deliver merchandise with a penal clause

An agreement to deliver merchindise for consideration under a penal clause providing against breach of the covenant is not a bond as defined in s. 2 (5) (c) of the Stamp Act so as to be chargeable *advalorem* under article 15 of the 1st Schedule even though it be attested by witnesses. Such an instrument is an agreement under article 5 (*c*) and falls within exemption (*a*) of that article.

The distinction between a "bond" and a covenant with a penal clause is that the former creates an "obligation" the latter does not, and a breach of an obligation under bond does not "sound in damages," whereas breach of a covenant must be compensated in damages. The fact that it contains a penal clause will not of itself convert an ordinary agreement into a bond.

JUDGMENT.

TWOMEY J:—The following is a translation of the instrument which is the subject of the reference by the Collector of Rangoon under section 11, Indian Stamp Act.

On the 7th waning of Tazaungmon 1,276 this sale and purchase transaction is made between mill-owner Ko Aung Ba of No. 51 Oliphant Street Rangoon of the one part, and Kala Ratanaw of Ywathit village of the other part in respect of 4,000 baskets of Mindon paddy belonging to the latter, at a rate of Rs. 140 per 100 baskets, to be delivered into cargo boat. The paddy shall weigh 52 lbs. (per basket) at least. When the paddy is measured, it shall be

---

(2) 8 Cal. 239 at p, 240. 241.

measured exactly in the basket with the top levelled. The paddy shall be free from yellow or broken or inferior grains, and only good grains shall be measured and given. If there be a breach (of this contract) owing to the variations in the market piece, the party responsible for the breach shall lawfully stand (the loss) as well as the expenses. So agreeing, the contracting parties sign hereunder. An advance of Rs. 200 (two hundred) is made for this paddy.

When the measuring of the paddy is completed (the vendor) shall come and take the price from Ko Aung Ba in Rangoon.

Witnesses,	One Anna,
Sd. KO EIN DA KALA.	Sd. MAUNG AUNG BA.
Sd. TUN HLAING.	Sd. RATANAW.
8th November 1914.	Advance Rs. 200.

It was originally stamped with a one-anna stamp. The first Judge of the Small Cause Court Rangoon to whom it was tendered in evidence, impounded it under section 35 of the Stamp Act, and treating it as an agreement liable to an 8 anna stamp under article 5 (*c*) of schedule I levied a penalty of 5 rupees, and 7 annas deficient duty.

It is suggested now on behalf of the collector that the document falls within the definition of a bond in section 2 (5) (*c*) being an attested instrument whereby one of the two executants rendered himself subject to a legal obligation to deliver grain to the other, and that it was therefore chargeable *advalorem*, under article 15 of the schedule. On the other hand it is contended by the learned counsel for the executant, Aung Ba, that this instrument is merely, as it describes itself, an agreement between two parties one of whom is to supply a specified quantity of paddy at a specified rate to the other party who pays a certain sum as earnest money, and special provision made for damages in the case of a breach of contract by either party. The distinction between a bond and a contract a breach of which has to be compensated in damages is pointed out in the judgment of Garth C. J. in the case of *Gisborne and Co.* vs. *Subal Bouri* (1) from which the following extract is taken :

"The definition of a bond in section 5 of the act is precisely what we understand by a bond in England, and it is an obligation of a different character from a covenant to do a particular act, the breach of which must be compensated in damages. Whether a penal clause is attached to such a covenant or not, the remedy for the breach of it is in form and substance a suit for damages, and by section 74 of the Indian Contract Act the English rule with regard to liquidated damages is abolished, and the plaintiff in such a suit has no right under any circumstances to claim the penalty itself as such. He can only recover such compensation, not exceeding the amount of the penalty as the Judge at the trial considers reasonable;

(1) 8 C. 284.

but he is entitled to that compensation whether he proves any actual damage or not. The remedy upon a bond is very different. The plaintiff in the case of a simple money bond recovers the sum named in the bond, or in the case of a bond conditioned for the performance of covenants he recovers the actual damage which he can prove that he sustained. In either case not only is the bond a contract of a different form and nature from a covenant with a penal clause, but the remedy upon it, and the amount recoverable for the breach of it is also different."

It is clear that the obiligation of the document now under consideration is not such that specific performance could be enforced as in the case of instruments falling under clauses (*a*) and (*b*) of the definition of bond in section 2 (5). The executant Ratanaw does not "oblige himself" to deliver grain in the legal sense but merely contracts to do so. On a proper constructton of section 2 (5) clause (*c*) it would appear that it was intended to apply mainly if not exclusively to instruments securing the repayment of loans in kind and the cases in which the clause has been held to apply are all cases of this nature.

I would hold therefore that the instrument now in question is not a bond but an agreement under article 5 (*c*) of the schedule. As it relates exclusively to the sale of goods it falls under exemption (*a*) of that article, and no stamp was required.

Fox, C. J.—The legislature had necessarily to use in the Indian Stamp Act many words which had technical meanings in commerce and under English law. Where it was intended that such words should cover possibly more than they would under English law, the word "includes" was used in the definition section instead of the word "means." The primary and technical meaning of such words could not be disregarded when considering whether the document falls within any particular article and definition in the Act. Under English law a bond is a deed wherein a party acknowledges himself to be bound or indebted to another in a certain sum of money. It is sometimes called an obligation in a special sense of the word and the parties are called respectively the obligor and the obligee (see Leake on Contract, 6th edition, 96 quoting a case decided in 1670. Donogh in his Indian Stamp Act 5th edition, page 40 quotes similar definitions). A distinction between an obligation under a bond and an obligation under an ordinary contract is that breach of an obligation under a bond does not, to use a legal expression, "sound in damages," whereas, "damages" is what one who breaks an ordinary contract is subjected to. In the definition of "bond" in the Indian Stamp Act the words, "where a person obliges himself," are used in every clause. That indicates that what was in the minds of the lawmakers was a document embodying an obligation in the special sense of the word referred to in Leake. The document now in question does not bind or oblige either of the parties in that sense, and in my opinion, it is not a bond within the definition in the Indian Stamp Act. If it is not a bond, the learned assistant Government advocate admits that it is an agreement for or relating

JUDGMENT.

Fox, C. J.—The case is before this Full Bench merely for answer to the question referred.

No question as to whether an amendment of the plaint should have been or should be allowed is before the Bench.

The case must be dealt with as it stands, that is as a suit for redemption of a mortgage which the plaintiff could not prove.

In *Gopee Lall* vs. *Mussamat Sree Chundraolee Buhoojee* (3) it was taken as a firmly settled rule of law that a plaintiff can only recover according to his allegations and his proofs. In *Mylapore Iyasamy Vyapoory* vs. *Yeo Kay* (4) their Lordships took occasion to repeat the following words of Lord Westbury in *Eshen Chunder* vs. *Shama Churn Bhutto* (5).

"This case is one of considerable importance, and their Lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determination in a cause should be founded upon a case either to be found in the pleading, or involved in, or consistent with, the case thereby made."

The case of *Sheo Prasad* vs. *Lalit Kuar* (6) affords a good example of the application of the principle to the case of a suit on a mortgage. Chief Justice Edge remarked in that case that it is in accordance with principles of sound common sense and justice that a man who brings a case and fails to prove it should not get a decree on a different cause of action from that alleged by him.

An essential part of a cause of action to redeem a mortgage is the mortgage to redeem which the suit is brought. If it is denied, and the plaintiff fails to prove it, the suit must be dismissed.

It appears to me that the cases I have quoted afford a complete answer to the question referred. We have not to deal with the question dealt with in *Kurri Veerareddi* vs. *Kurri Bapieddi*, (7) the plaintiff not having as yet brought a suit for possession based on title as owner of the land apart from any mortgage. I express no opinion as to the correctuess of the views adopted in that case.

I would answer the question referred in the negative.

ROBINSON J.—I agree that the question referred must be answered in the negative.

PARLETT.J—In my opinion the question referred should be answered in the negative.

---

(3) (1872) 19 W. R. 12
(4) (1887) 14 Calc. 801
(5) (1866) 11 Moore's I. A. 7.
(6) (1896) 18 All, 403.
(7) (1904) I. L R. 29 Mad. 336.

THE

BURMA LAW TIMES.

VOL. IX.] MAY 1916. [No. 5.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL 2ND APPEAL No. 82 OF 1915.

MAUNG PO TUN ... ... DEFENDANT—APPELLANT.

VS.

MA E KHA ... ... PLAINTIFF—RESPONDENT.

Before Mr. Justice U Kin.

For Appellant—Mr. Ba U.

For Respondent—Mr. Wiltshire.

Mortgage—Transfer of Property Act (IV of 1882) Ss. 76 (i) and (84)—tender of amount due on the Mortgage—What constitutes tender—Cessation of interest—Account for gross receipts

Actual production of money is not necessary to constitute legal tender of the money due on a mortgage, especially when the mortgagee by words or conduct shows his determination not to accept it

A suit for redemption is an offer to redeem, and if the defendant contests the suit and it is found that his case is not true he must under S. 76 (i) of the Transfer of Property Act account for his gross receipts from the mortgaged property from the date of institution of the suit, and also forfeit all claim to interest from that date under section 84.

JUDGMENT.

U KIN, J:—On the 12th April 1913 the appellant instituted a suit against the respondent for redemption of a piece of land, alleging that he had mortgaged it to the respondent. It is now common ground that the mortgage was a usufructuary mortgage, and that the appellant, the mortgagor became and was, when the suit was instituted, a tenant upon the land. The respondent's defence was that he had bought the property. On the 8th April 1914 the suit was decided in appellant's favour by a redemption decree being passed. The time occupied by the suit coincided with the season 1913-1914, and during that season the appellant worked the land as before.

In the present suit the respondent sued the appellant for rent of the land for the season of 1913-1914. The appellant replied that before he instituted his suit for redemption, he offered to redeem the property and that the respondent refused to allow redemption saying he had bought it outright. The appellant contended that

the respondent ceased to have any further rights as mortgagee from the date of his refusal to allow redemption, inasmuch as where a proper offer to redeem has been made, the mortgagee becomes under section 76 (*i*) of the Transfer of Property Act accountable for his gross receipts if he is in possession and also, subject to the last paragraph of section 84 of the same act loses his claim to further interest. It was stated in argument that though these sections of the Transfer of Property Act are not applicable to the case, the principles enunciated by them do apply. The learned counsel for the respondent admitted that if there was a legal tender, the principles of the sections would apply. He argued that there was no legal tender, inasmuch as no money was produced when the appellant asked to be allowed to redeem, and quoted cases to show that in cases of simple debts, the offer to repay must be accompanied by a production of the exact amount due. On this subject Dr. Ghose (Law of Mortgage in India 4th edition paragraph 232, 233) has said : 'The old cases we find, insisted rigorously on the actual production of the money, for the quaint reason that though the creditor might at first refuse, the sight of the money might tempt him to take it. But it is no longer necessary to place any such temptation in the creditor's way, or even to shake the money in a bag or pocket, so that he may hear the money jingle; for if the creditor by his conduct dispenses with the production of the money, he cannot afterwards object that there was no valid tender." In their Commentaries on the Transfer of Property Act, Shephard and Brown state the law on the subject to the same effect in the following passage: "There must, as a general rule, be an actual production of the money unless there is waiver on the part of the creditor. When by express words, or by conduct he shows his determination not to accept the money offered and the production of it is thus shown to be useless, it has been held that the creditor dispenses with the production." In my opinion the passages above quoted are justified by authority.

In the present case, the appellant went to the respondent and asked to be allowed to redeem and the request was rejected on the ground that there was no mortgage but a sale. Under the circumstances the appellant has done all he could and should. The respondent's subsequent conduct in contesting the appellant's suit for redemption up to this court also shows that he meant seriously by his refusal, and that he did not refuse because he did not see the money. Moreover the suit for redemption is nothing more or less than an offer to redeem and when the defendant in the suit contests it, and it is found on enquiry that his case is not true, should he not be ordered to account for what he has received after the institution of the suit ? In my opinion the principles of sections 76 (*i*) and 84 of the Transfer of Property Act would seem to justify the view that he should.

For the above reasons I set aside the decree of the District Court, and restore that of the Township Court. The respondent will pay costs throughout.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 1ST APPEAL NO. 94 OF 1914.

A. G. MADARI ... ... APPELLANT.

vs.

R. MISSER and 1 ... ... RESPONDENT.

Before Mr. Justice Twomey and Mr. Justice Ormond.

For Appellant :—Mr. Mc Donnell,
For Respondent :—Mr. Giles,

Preliminary decree—Civil Procedure Code (Act V of 1908) S. 2 Cl. (2) explanation. Order XX rules 12 to 18.—Objections to jurisdiction Civil Procedure Code S. 21 —suit or the determination of any right to or interest in immovable property.

If a decision on a preliminary issue merely entitles the plaintiff to go on with the suit it is not a preliminary decree as defined in s. 2 cl. (2) of the Code of Civil Procedure. Unless the decision amounts to a preliminary decree of the nature contemplated in Order XX rules 12 to 18 it is not a preliminary decree as it does not decide any of the matters in controversy in the suit.

Under S. 21 of the Code no objection as to place of suing can be allowed in appeal or revision unless such objection was taken in the court of first instance at the earliest possible opportunity, and unless there has been a consequent failure of justice.

The nature of a suit is determined by the relief asked for in the plaint. A vendor suing for specific performance is not suing for land, or for the determination of any right to or interest in immoveable property. There is a difference between a vendor suing for specific performance and purchaser so suing.

JUDGMENT.

ORMOND, J.—The plaintiffs sold two well sites at Yenangvoung, Upper Burma to the defendant and sued for specific performance of the contract. The plaintiff obtained a decree on the Original side of this court. The defendant appeals on the ground that this court had no jurisdiction under S. 16 (*d*) of the Civil Procedure Code. The defendant abandoned his other grounds of appeal. It is contended that the defendant is out of time, because he should have appealed against the decision of the issue as to jurisdidtion. We decided that point in a case of *Ma Goon and 9 others* vs. *Moniandy Survey* (1). The case of *Sidhanath Dhondev Garud* vs. *Ganesh Govind Garud* (2) has been overruled by a Full Bench of the Bombay Hige Court, *in Chaumalswami Rudraswamy* vs. *Gangadharappa Baslingappa* (3), and has been dissented from in *Kamini Debi* vs. *Promotho Nath Mookerjee* (4). Unless the decree amounts to a preliminary decree as contemplated in Rules 12 to 18 Order XX of the Code, the decision on one out of several issues is not necessarily a preliminary decree. It frequently happens that a preliminary issue, if decided in favour of the defendant results in a decree dismissing the suit, but if decided in favour of the plaintiff, merely entitles him to go on with his case. Such a decision does not amount to a decree within the meaning of S. 2. Sub-Clause (2) of the code. It does not decide any of

(1) Civil 1st Appeal No. 108 of 1911.
(2) 37. Bom. 60.
(3) 16. Bom. Law Reporter, 954.
(4) 20. Cal. Law Journal 479.

the matters really in controversy as for example the right to an account, the right to a partition, or the right to mesne profits. The suit was instituted on the 3rd May 1912; the defendant filed his written statement on the 17th December 1912 and an amended written statement on the 17th of January 1912 and there, for the first time, raised the question of jurisdiction. Under S. 21 of the Code which is a new section in the present Code, unless the defendant takes the objection as to the place of suing in the court of first instance at the earliest possible opportunity the Appellate Court is debarred from entertaining the objection; and there must also have been a consequent failure of justice to empower the Appellate Court to entertain the objection. The objection as to jurisdiction in this case is an objection to the place of suing. It is clear that the defendant did not raise the objection at the earliest opportunity; and he makes no claim that in consequence of the case having been tried in this court, he has suffered any injustice. We think therefore that we are debarred from entertaining or allowing that objection. But having heard the arguments on both sides as to whether this court had jurisdiction or not, we think it well to give our opinion on that point. Clause 12 of the Letters Patent of the High Court of Calcutta, speaks of a suit for "land or other immoveable property." S. 16. (*d*) of the Code refers to suits "for the determination of any other right to, or interest in immoveable property." The nature of the suit must be determined according to the relief asked for in the plaint. The present suit in effect asks for money. In *Nalum Lakshimikantham and another* vs. *Krishnasawmy Mudaliar and others* (5). Mr. Justice Moore says "S 16 appears to me in fact an amplification with detail of the old section of the Act of 1859 on which the clause of the Letters Patent was it appears based." We agree in that view and we think that decisions on clause 12 of the Letters Patent are guiding authorities on the construction of S. 16 (*d*) of the code. In *Land Mortage Bank* vs. *Suderudeen Ahmed* (6) it was held that a vendor suing for specific performance, was not suing for land; and we think that a vendor suing for specific performance is not suing for the determination of any other right or interest in immoveable property. In *Maturi Subbaya* vs. *Kota Krishnayya* (7) it was held that a suit for unpaid purchase money came within S. 16 (*d*) but that view was disapproved in *Sowdagar Nabheekan Sahib* vs. *Muhammed Hussain Sahib* (8). The case of *Land Mortage Bank* vs. *Sudurudeen Ahmed* as to the point referred to above was apparently approved of in the case of *Jagadis Chandra Deo Dhabal* vs. *Satrughan Deo Dhabal* (9). As pointed out in these last two cases, there is a difference between a vendor suing for specific performance and a purchaser so suing. We find that the Court had jurisdiction to try the suit. The appeal must be dismissed with costs.

Twomey J:—I concur.

(5) 27 Mad. 157.
(6) 19. Cal. 358.
(7) 28. Mad. 227.
(8) 9. Mad. Law Times. 372,
(9) 33. Cal. 1065.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL No. 59 OF 1915.

K. E. MAHOMED ... ... APPELLANT.

vs.

MA O ... ... RESPONDENT.

Before Mr. Justice Ormond and Mr. Justice Twomey.

For Appellant—Mr. Giles.
For Respondent—Mr. Palit.

Transfers of preliminary and final decree for foreclosure to different persons. Substitution of names.—Transfer of Property Act (IV of 82) s. 41.

When there is a conflict between the transferees of a preliminary and a final decree of foreclosure on the same land, the transferee of the preliminary decree is entitled to have his name substituted in place of the decree holder in preference to the subsequent transferee of the final decree. After a transfer of the preliminary decree the decree-holder has no interest or property in the decree, and the transferee cannot get more than the transferor's rights.

Transfer of a decree for foreclosure is not a transfer of land, and the transferee of a decree is not entitled to the benefit of the provisions of s. 41 of the Transfer of Property Act which apply only to transfers by obtensible owners of immoveable property.

JUDGMENT.

ORMOND, J:—One Momin Bi obtained a preliminary decree for foreclosure against her mortgagor, Maung Lun Maung. She transferred that decree to the respondent. She then obtained a final decree for foreclosure and then transferred that final decree to the appellant. The appellant and respondent each applied for execution of that final decree and for their names to be substituted on the record. The District Judge found that the respondent's transfer was good and ordered that his name should be put on the record. The Divisional Court upheld that decision and the appellant now appeals.

The appellant is precluded from relying on his 1st ground of appeal—viz. that the District Court has no jurisdiction to decide the rival claims of the two representatives—because he did not appeal from the order of the Divisional Court remanding the case for that question to be decided by the District Court. The question in this appeal is which of the two parties has the better right to be put on the record as decree-holder. Both transfers are admitted: the respondent's is the earlier one in time; and after that transfer, Momin Bi had no property or interest in the decree which she could transfer to the appellant. Mr. Giles, for the appellant contends that the respondent, not having got her name put on the record as decree-holder, allowed Momin Bi to hold herself out as owner of the decree and thereby is estopped from disputing the subsequent transfer. But it is not alleged that the respondent was cognizant of the transfer being made to the appellant, and no duty was cast upon the respondent to have her name put on the record. The respondent's title as transferee of the decree is therefore good. It is then contended that the appellant by his transfer (which was

after the final decree had been obtained) acquired a title in the land itself: and that under section 41 of the Transfer of Property Act the title in the land being in Momin Bi at the time of the final decree and Momin Bi being the ostensible owner, she could give a good title to the appellant who was a bona fide purchaser without notice. But from the document of transfer we think it is clear that all that was transferred to the appellant or intended to be transferred, was Momin Bi's interest in the decree, although in that document she says she transfers and assigns also the possession of the property mentioned in the decree. That means, we think, that she transferred the right to obtain possession under the decree through the court. We cannot construe the document as a conveyance of any interest in the immoveable property itself. Section 41 of the Transfer of Property Act therefore does not apply, and the respondents are entitled to be put on the record as decree holders, We think that both courts rightly decided that the respondent was the purchaser of the decree. The appeal is dismissed with costs.

TWOMEY, J :—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REFERENCE No. 11 OF 1915.

P. L. M. FIRM ... ... APPLICANT.

vs.

DAISY M. STACEY ... ... RESPONDENT.

Before Sir Charles Fox, Kt., C. J. and Mr. Justice Parlett.

For Applicant—Mr. Khastigir.
For Respondent—Mr. Villa.

Procedure—Person admitting debt to a Judgment-debtor but refusing to pay.—Civil Procedure Code (Act 5 of 1898) O XXI r. 46 r. 46 (a) of Chief Court Rules.—Indian Succession Act (X of 1865) ss. 179 and 190.

The procedure to be followed when a debtor who admits he owes money to a judgment-debtor does not pay it into court is laid down in rule 46 (*a*) added to the code by the Chief Court of Lower Burma All that can be done is to warn him that if he fails to pay the amount due by him into court, he may be subjected to a suit. An order directing payment into court cannot be made in such a case under Order XXI rule 6.

Under sections 179 and 190 of the Indian Succession Act an executor or administrator of a deceased person is the legal representative of a deceased person, and no right to any part of the property of an intestate person can be established in a court of justice unless letters of administration have been granted.

A question referred need not be answered if it will arise in the case at a later stage.

The facts of the case appear from the following order of reference made by the judge of the Court of Small Causes Rangoon in civil suit No. 8238 of 1914. "The question which arises on this application is whether the proceeds of a deceased debtor's provident fund is liable to attachment in execution of a decree against his legal representative and nominee after it has been paid to her.

It would seem clear that so long as the money remained in the hands of the Controller of the Provident Fund, even after the death or retirement of the debtor it would not be liable to attachment at all, see *Veerchand Nowla* vs. *B. B. and C. I. Railway* (1), but the question as to whether after it had left his hands it would be liable to the payment of the deceased's debts as forming part of the assets of his estate is one of some difficulty. There appears to be no ruling of the High Courts in point, and I would therefore refer the question which is of considerable importance, to the Chief Court for decision.

JUDGMENT.

The plaintiff obtained a decree against the respondent and her surviving brother and sister as heirs and legal representatives of another brother Norman Stacey, who had died intestate. None of the defendants had taken out letters of administration to the estate. In view of sections 179 and 190 of the Indian Succession Act it is a matter for surprise that such a decree was made. Subsequently the respondent obtained letters of administration to her brother Norman's estate, and was paid the amount standing to his credit in the Rangoon Municipal Committee's Provident Fund for its employees.

The plaintiff applied for execution of the decree against the respondent, and asked for a prohibitory order ordering her to withhold and pay into court Rs. 578 received by her from the committee. An order was issued to her in which she is described not as administratrix of the estate but as 'legal heir and representative of Norman Stacey." It prohibited all the defendants from receiving from her Rs. 578 out of Rs. 3,432 drawn by her from the municipality, and restrained her from making payment of the amount to any person whomsoever or otherwise than into court. She did not pay the amount into court. The plaintiff then applied for an order to her to show cause why the money should not be paid into court towards his decree. This application presumably meant that if she failed to show sufficient cause the court should order her to pay the amount in. Such an order cannot be made under Order XXI rule 46. The procedure to be followed when a debtor who admits he owes money to a judgment-debtor, does not pay it into court, is indicated in rule 46 (*a*) added to the code by this court. All that can be done is to warn him that if he fails to pay the amount due by him into court he may be subjected to a suit.

A fortiori, the respondent who does not admit any debt, and disputes her liability as administratrix or otherwise to devote any part of the sum received by her from the provident fund to paying Norman Stacey's debts, could not be ordered to pay any part of the amount into court to satisfy the plaintiff's decree.

The question referred may and probably will arise in a suit between the parties; consequently we refuse to answer a reference made in a proceeding which will not be final.

---

(1) 29 B 259.

Two gold mohurs are allowed as advocates's fee for appearance on this reference. Under rule 4 of order XLVI the costs consequent on the reference will be costs in the case.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 1098 OF 1915.

G. C. CHAKRABATTY AND ONE ... APPLICANTS.

vs.

KING-EMPEROR ... ... RESPONDENT

Before Mr. Justice Parlett.

Penal Code (Act XLV of 1860), Section 294-A.—Keeping a place for drawing a lottery.—Publishing a proposal to pay any sum on any event or contingency relative to the drawing of any ticket, lot, number or figure in a lottery.

The essence of a lottery is the distribution of prizes by lot or chance, and it makes no difference that the distribution is part of a genuine mercantile transaction.

It is not necessary for an offence under the first part of section 294 A of the Penal Code that the place should be kept solely for the purpose of drawing a lottery.

The first appellant manufactured and sold Lily Pills and Lily Powders. Each bottle of the pills and powders contained a ticket entitling the ticket-holder to a chance for a prize. Prizes were allotted by drawing lots among ticket-holders. The second appellant sold the tickets. The District Magistrate convicted the first appellant under the first and second clauses of Section 294-A of the Penal Code and the second appellant under the second clause holding that the essence of a lottery was the distribution of prizes by lot or chance and that it made no difference that the distribution was part of a genuine mercantile transaction *viz.*, the sale of drugs. He referred to and followed *Taylor* vs. *Smetton* (1) in which coupons for prizes to be drawn by lot were distributed with packets of tea, and the case known as the missing word competition case *Barclay* vs. *Pearson* (2) in wich Pearson's Weekly sold coupons to be filled up with the supposed missing word in a paragraph—the person filling up the missing word in the coupon to be a competitor for a prize.

The accused appealed to the Chief Court which passed the following

JUDGMENT.

The cases quoted at pages 1059—1062 of volume I of Gour's Penal Law of India dispose of the contention that this business was not a lottery because every one got something (pills or powder) for his money and the prizes which went to the lucky

---

(1) 11 Q. B. D. 207. (2) (1893) 2 Ch. 154.

ones were derived from the profits on the sales of drugs. The evidence moreover shows (1) that the purchasers of a dozen tickets got them for the price of ten (2) that the general public bought the tickets for the chance of a prize and not the drugs for the sake of their supposed properties and (3) that some purchasers of tickets never got any drugs at all. Clearly the business was and was intended to be primarily a lottery.

The contention that it was not a lottery, as there was a mutual benefit was not advanced because there was a suggestion that the case could be brought under the category referred to at pages 1063-64 of Gour, but so far as I could understand, because the purchasers (if they did get the drug) got some benefit for their money. This is the point dealt with in the earlier cases cited in Gour.

PRIVY COUNCIL.

APPEAL (No. 89 OF 1915) FROM THE CHIEF COURT OF LOWER BURMA.

PRANJIVANDAS JAGJIVANDAS MEHTA... APPELLANT.

vs.

CHAN MAH PHEE ... ... RESPONDENT.

Present at the hearing: Lord Shaw. Sir John Edge. Sir Lawrence Jenkins.

Equitable mortgage—Deposit of title-deeds accompanied by writing—scope of security.

When title-deeds are deposited with the lender as security for a loan without any agreement, written or verbal, the scope of the title is the scope of the security. When there is an agreement accompanying the deposit, the agreement must rule. When the agreement is in writing, the writing, and the writing alone determines the scope and extent of the security.

This was an appeal from a decree dated 6th May 1914 of the Chief Court of Lower Burma on its appellate side varying a decree of the same court in its original jurisdiction.

The plaintiff-appellant sued alleging he lent Rs. 13,000 to respondent on a promissory note accompanied by a deposit of title-deeds of some properties being lots Nos. 65, 66, 66-A and 67 in Block L I in the town of Rangoon. The promissory note had on the back a note which ran as follows." "As security grant of a house in 14th Street Rangoon." The note on the back was dated 1st June 1906, the day on which the promissory note was executed.

There was a subsequent alteration in the note at the back of the promissory-note by which the words "Strand Road and" were interpolated before the words "14th Street Rangoon." The interpolation was admittedly made months after the execution of the pro-note, and after the alteration the note on the back of the promissory-note read "As security a house in Strand Road and 14th Street." On these allegations plaintiff claimed a decree for

money and a declaration that he was entitled to a lien on the properties, the title-deeds relating to which had been deposited with him. The learned Judge Robinson, J. who tried the case decreed the plaintiff's suit in full, holding that the plaintiff "has proved payments of interest, and has satisfied me that the claim he made in paragraph six of the plaint is a just one. Plaintiff further proves that at the time of the execution of this promissory note the title-deeds of the property in suit consisting of two leases and two sale-deeds were deposited with him as security for the repayment of prior loans and that there was an agreement that these title-deeds should be deposited as security for the repayment of the promissory note. . . . . I must hold that he has a lien for this amount on the properties."

On appeal by the defendant the decree was varied by Twomey J. in whose judgment Hartnoll Off. C. J. concurred, the appellate court observing as follows: "It is clear that the two areas known as No. 87, 14th Street and No. 92, Strand Road have all along been held under separate title-deeds. The plaintiff claims an equitable mortgage over both of them. . . . . The plaintiff's case is that the two leases (or agreements to lease) Exhibits B and C and the two sale-deeds were given over as security when Ma Saw's predecessor in title, Maung Tha Gywe, first borrowed Rs. 5,000 on 10th October 1902 from the firm P. Jagjivan & Company. His claim rests however on the pro-note of 1st June for Rs. 13,000 signed by Ma Saw and endorsed by her with the note:—As security—Grant of a house in 14th Street." The words "Strand Road and" were afterwards written making the note appear as follows:—As security—Grant of a house in Strand Road and 14th Street. The addition was admittedly made several months after Ma Saw had signed the note. The entries in the books of account produced by the plaintiff to prove the various transactions with Ma Saw refer only to the mortgage of "the house" always in the singular. On the evidence produced by the plaintiff it cannot in my opinion be held that the title-deeds of the Strand Road house were delivered to the lenders by way of security. The endorsement signed by Ma Saw at the time related only to the 14th street house, and the entries in the plaintiff's books support the view that only one house and site was given as security.

Plaintiff appealed to the Privy Council. Their Lordships' judgment was delivered by

LORD SHAW:—Their Lordships think it unnecessary in this case to call upon learned counsel for the respondent. They are of opinion that the judgment of the Chief Court of Lower Burma appealed from is correct.

The rights of the parties have to be determined, in their Lordships' opinion, by a written agreement, which is, in their Lordships' view, the limit and standard fully measuring the obligations of Mah Saw, who obtained an advance of 13,000 rupees from the respondent on the 1st June, 1906.

On that date there was a notandum put upon the back of a promissory note then granted, and the notandum is to this effect: "As security, grant of a house in 14th Street, Rangoon." Their Lordships take no stock of an alteration made after that notandum was signed, by which there was an interpolation of the words "Strand Road and," which words would have, in appearance at least, extended the scope of the security from "a house in 14th Street, Rangoon," to "a house in Strand Road and 14th Street, Rangoon." Had an argument been raised as to whether, this alteration having been made, any rights in law could now be founded upon this document, that argument would have been considered: but it is unnecessary to make any pronouncement upon this topic, and accordingly their Lordships deal with the document signed by Mah Saw on the 1st June, 1906 as definitely limiting and describing the scope of the security. It was a "grant," in the singular, "of a house," in the singular, "in 14th Street, Rangoon."

The law upon this subject is beyond any doubt. (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security. In the words of Lord Cairns in the leading case of *Shaw* v. *Foster* (L. R., 5, English and Irish Appeals, at p. 340):—"Although it is a well-established rule of equity that a deposit of a document of title, without more, without writing, or without word of mouth will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

Their Lordships accordingly have admitted in argument the only possible question which remains (standing the document specifying the security and signed by Mah Saw), namely, the question of identification of the term "grant of a house in 14th Street, Rangoon." To identify this grant, a reference has been made by learned counsel for the appellant, to the various title-deeds of the properties called Plots 65, 66, 66A, and 67. These deeds are as follows: With reference to Plot 65, there is a lease of land in favour of a person named Ma Thit, who was the mother of Mah Saw. With reference to Plot 66, and apparently also to 66A, there is a document for sale of a house and of land in favour of Ma Thit. But then, with reference to the last document, namely, as to Plot 67, there is a "grant of a house," a conveyance of a house on the 3rd January, 1901, in favour of Ko Tha Gywe. Ko Tha Gywe was the husband of the grantee, or lessee, of the other plots of ground covered by the other documents. He was the father of Mah

Saw, and it does occur as a matter of interest that this person, the father of Mah Saw, who had a conveyance of a house, that on Plot 67, was himself a borrower from the persons who are interested in this suit, who were bankers and money-lenders in the district. On the 10th October, 1902, he borrowed a sum of 5,000 rupees from them; and a somewhat curious transaction took place, namely, that he deposited with the money-lenders, not only the title of the property belonging to himself, namely, the grant of the house, but also the title-deeds of the other three properties which belonged not to himself, but to his wife. It was on this occasion that all these titles found their way into the hands of the lenders. Mah Saw succeeeed to Ko Tha Gywe in the ownership of the house on Plot 67.

Their Lordships have, in these circumstances, no doubt whatsoever that the identification of the "grant of a house in 14th Street, Rangoon," by her is accomplished by a reference to the conveyance of the house in favour of Ko Tha Gywe, which house had been his property when the original advance of 5,000 rupees, some years before, was obtained by him.

Their Lordships finally remark that, as against this identification of the house in 14th Street there is no evidence at all satisfactory in this case, and it was for the persons holding this security clearly to satisfy the Court of the scope thereof. They have not done so. There is nothing in the case which confirms the view that, under the term "grant of a house," which would be a singular term applicable to a singular title, there was included the subject of three other plots of land under leases. Their Lordships cannot assent to such a construction. They think the security is distinctly and by contract limited, and they cannot extend it as desired. They have no doubt that the Chief Court of Lower Burma has reached a proper conclusion.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 169 OF 1915.

SIT TAW ... ... APPELLANT.

vs.

MAUNG GEE... ... ... RESPONDENT.

Before Mr. Justice U. Kin.

For Appellant:—Mr. Ginwala,

For Respondent:—Mr. Ba Dun,

Criminal Procedure Code (Act V of 1898) s. 195 (6)—Sanction—Powers of courts of appeal or revision in revoking or granting sanction given or refused by a subordinate authority.

Whether an appellate court considering the question of revoking or granting a sanction to prosecute given or refused by a subordinate court be a Civil Court or not its powers are limited by the express provisions of section 195 (6) of the Code of Criminal Procedure to revoking or granting sanction. It has no power to remand a case to a subordinate Court for further consideration.

JUDGMENT.

The applicant in his petition states: "In Civil Miscellaneous No. 3 of 1915 of the Court of the District Magistrate Tavoy, the respondent applied for sanction under section 195 of the Code of Criminal Procedure to prosecute the petitioner under section 210 of the Indian Penal Code. The respondent's application was dismissed on the 13th January 1915.

In Civil Miscellaneous No. 3 of 1915 the respondent appealed to the Divisional Court of Tennasserim and the said court by its order dated 8th September 1915 set aside the order of the District Magistrate and directed that the application for sanction be reheard *de novo* according to law."

The applicant applies to this Court in revision against the order of the Divisional Court on the following grounds:

(1) The Divisional Court had no jurisdiction to order a rehearing of the application as under section 195 (6) such court had jurisdiction only either to revoke or grant sanction.

(2) Non-service of notice upon petitioner was no ground for such remand, when in fact sanction to prosecute petitioner had been refused by the District Magistrate.

The second ground is obviously correct.

The authorities conclusively support the first. The case of *Beni Prasad* vs. *Sarju Prasad Thakuria* is on all fours with the present case. Richards J. said "It must be admitted that the powers of the learned District Judge.....are powers conferred on him by section 195 of the Code of Criminal Procedure. Clause (6) provides that any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, and the learned District Judge has neither revoked nor granted the sanction. His order among other things directs the Munsiff to consider whether or not the latter should exercise the powers conferred on him by section 476 of the Code of Criminal Procedure—powers which the learned judge admits that he himself has not got to exercise in the present case." The learned judge then proceeded to hold that the powers of revision exercisable by the District Judge were confined to those conferred by section 195 Criminal Procedure Code, and that he had no jurisdiction to make the order of remand. This case has been followed by the Punjab Chief Court in *Muhammad Ishaq* vs. *Muqim-udin* (2). In Madras there was the case of *In re Kamma Narayanappa* (3) where the same view was held following the two previous cases of *Rama Aiyar* vs. *Venkatachella Padayachi* (4) and *Krishna Reddi* vs. *Emperor*. (5).

(1) 33 All 512.
(2) P. J. No. 7 Cr. 29.
(3) M. L. J. 97.
(4) 30 M. 311.
(5) 33 M. 90.

The learned counsel for the respondent has argued that the present proceedings arose out of a civil case and that the powers of the divisional court are as given to it under Order 41 rule 33 which gives a Civil Appellate Court power to remand a case for trial on issues framed by it. The same contention was raised in the Allahabad case cited above and the learned judge disposed of it with the following observations "(counsel) relies on the Full Bench ruling of this court which decides that a court exercising the powers conferred by section 195 is a Civil Court and not a Criminal Court, and that therefore the provisions of the Code of Civil Procedure enabling the appellate court to remand cases and send down issues apply. I am of course bound by the ruling in the Full Bench case referred to, but in my opinion even assuming the court to be a civil court, its powers in cases like the present are confined to powers conferred on it by section 195."

There is a consensus of authorities in Madras, Allahabad and Punjab. I must therefore set aside the order of the Divisional Court.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL 2ND APPEAL No. 44 OF 1915.

ARDIKAPPA CHETTY ... ... APPELLANT.

vs.

K. A. R KADAPPA ... ... RESPONDENT.

Before Sir Charles Fox, and Mr Justice Twomey.

For Appellant:—Mr. Bilimoria,

For Respondent:—Mr. Dawson,

Limitation Act (IX of (1908) I Schedule art 90.—Suit by principal against agent for neglect or misconduct.—When neglect or misconduct becomes known to plaintiff's. 18. Fraud of defendant,—keeping plaintiff in ignorance of his right to sue.

A suit by a principal to recover from his agent unauthorized payments made by the agent and money received by the agent on account of the principal is governed by article 90 of the Limitation Act. Time for such suit begins to run not from the date on which the agency terminated or the accounts were made over to the principal, but when the neglect or misconduct of the agent actually becomes known to the principal, a reasonable time after the termination of the agency, and delivery of the account books being allowed for examination of the accounts.

Neglecting to settle accounts with the object of concealing his misconduct from the principal is not "fraud" within the meaning of section 18 of the Limitation Act.

Article 120 is a residuary provision which cannot be applied unless there is no other article specially applicable to the case.

TWOMEY, J:—The only question for determination in this appeal is whether the lower courts were right in holding that the plaintiff respondent's suit was not barred by limitation. The defendant-appellant was the agent at Henzada of the plaintiff-respondent Chetty who carried on business there under the style of K. A. R. Arunachellam Chetty. The suit was brought against the agent to secure Rs. 3475 made up of six items set out in the plaint and consisting of various unauthorized payments made by

the defendant out of the funds of the firm and certain sums received by the defendant on behalf of the firm and not credited in his account.

The findings of the District Court as to the various items in dispute were not questioned at the hearing in the lower appellate court and no question is raised in this court as to those findings. In both the lower appellate court and in this court the argument was confined to the question of limitation. The defendant-appellant's agency terminated on the 1st May 1909, the suit was filed on the 25th May 1912. The defendant alleged that he made over his books to the plaintiff on the 13th May 1909, and that he settled accounts with the plaintiff in the next two-days. The plaintiff denied this, and said that the defendant handed over only some of the books and that the date was the 18th May 1909. He also said that the defendant after making over the books to him went away without explaining the accounts, and that the accounts between them were not settled until four and a half months later when the defendant returned. The district court accepted the plaintiff's version and found that the defendant's conduct in failing to settle accounts with the plaintiff amounted to fraud by which the plaintiff was kept in ignorance of his right to sue within the meaning of section 18 of the Limitation Act, and that, in consequence of this fraud, limitation did not begin to run against the plaintiff until the accounts were actually settled. The district judge decided that article 90 of the schedule to the Limitation Act was the article applicable to the case.

The learned judge of the divisional court took a somewhat different view. He held that the appropriate article was article 89 and that the period of limitation would ordinarily run from the 1st May 1909 when the agency terminated but that the plaintiff was entitled to an extention of time under section 18 of the Act because the defendant failed to settle the accounts.

I think both the lower courts were wrong in applying section 18 of the Limitation Act to the case. The neglect of the defendant to explain his accounts is hardly the kind of fraud which is contemplated in this section.

Before us it is argued on behalf of the plaintiff-respondent that neither article 89 nor article 90 is applicable, but that the suit was covered by article 120. Article 120 however is a residuary provision which cannot be applied unless the court is satisfied that there is no other article specifically applicable to the suit. Articles 89 and 90 deal expressly with suits by a principal against his agent and are presumably intended to cover the bulk of such suits. It would have to be shown that both these articles are in applicable before we could apply article 120.

It was pointed out by the Calcutta High Court in *Jogendranath Roy* vs. *Deb Nath Chatterji* (1) that the terms of article 89 go to show that the suit contemplated must involve the taking of accounts. The present case is not a suit for an account. The accounts of the

(1) 8 C. W. N. 113.

defendant's term of agency have been furnished to the plaintiff and the plaintiff asks for the recovery of specific sums which he claims to be fraudulently withheld from him by his agent, the defendant. The allegations against the defendant are allegations of misconduct and the suit appears to me to fall properly under article 90 according to which the period of limitation would begin when the misconduct of the defendant became known to the plaintiff. Even assuming that the plaintiff has not told the truth in saying that he did not discover the misconduct for four and a half months after receiving the books of accounts, I think there is a strong presumption at any rate that he did not discover it immediately on receipt of the defendant's account books on the 18th or as the defendant says, on the 13th May. He would have to make enquiries as to the defendant's proceedings in Burma, as to the correctness of the various items shown in the accounts and as to what dues were receivable by the firm during the defendant's agency before he would be in a position to say that the defendant had defrauded him. Assuming that the necessary books were made over to him on the 13th May and allowing him only a fortnight from the 13th May for the purpose of making the necessary enquiries he would not have definite knowledge of the defendant's frauds before the 27th May 1909 and counting from that date the suit would be in time.

We have been referred to a case decided by a bench of this court in 1914 *C. P. L. K. N. firm* vs. *R. M. P. W. Pallaneappa Chetty* (2) in which the learned judges (Ormond and Parlett J. J.) expressed an opinion imputing constructive knowledge of an agent's misconduct from the time when the agent's account books came under the control of the principal. But the same bench in another case *P. R. N. Palaniappa Chetty* vs. P. *M. R. M. Firm* (3) said "We are not prepared to hold that in article 90 after the words "becomes known" we should read the words "or might have become or should have become known to the plaintiff." I entirely agree with the latter view. It would clearly be unjust to impute full knowledge of his agent's proceedings to a principal until he has had a reasonable time to examine the accounts and satisfy himself as to their correctness.

I would therfore hold in agreement with the lower courts that the suit is not barred by limitation and would dismiss the appeals.

Fox C. J :—I concur.

---

(2) Civ. F. Ap. No. 49 of 1912.
(3) Civ. F. Ap. No. 69 of 1912.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 315 OF 1916.

DEIYA vs. KING-EMPEROR.

Before Mr. Justice Twomey and Mr. Justice Parlett.

For Appellant—Mr. P. D. Patel.

Criminal Procedure Code (Act V of 1898) secs. 293 and 309 (2)—view of place of occurrence of offence by Judge and jury or assessors.—Notice to parties:—Evidence Act s. 143 leading questions in cross-examination—Procedure when Judge disallows question to witness.—Oaths Act (X of 1873) secs. 6 and 13.—Affirmation by Hindu witness.—Deliberate omission to administer oath.

If a Sessions Judge thinks it necessary to visit the place of occurrence of an offence under trial, he should give notice to the parties and the assessors. He should not go without such notice, nor after the trial has been completed by delivery of the assessors' opinion.

When a Judge disallows a question, counsel, if he wants to make it a ground of appeal should have the question and the order disallowing it recorded.

The words "omission to take an oath or make on affirmation" in s. 13 of the Oaths Act include only an accidental not a deliberate omission to take an oath or make an affirmation.

Q. E. vs. *Maru* (10 all 207) and *Q. E.* vs. *Lal Sahai* (11 all 183) followed. *Pwa Nyun* vs. *K. E* (2 L. B. R. 322) Overruled.

JUDGMENT.

MR. JUSTICE PARLETT.—The appellant was tried before the Sessions Judge with assessors on charges of having murdered her mother-in-law and of having attempted to murder her sister-in-law by pushing them both into a well. The assessors considered neither charge proved, but the Sessions Judge disagreeing with them convicted her of murder and sentenced her to transportation for life, but stayed the trial of the other charge under section 240 of the Criminal Procedure Code.

One of the grounds of appeal is that the Sessions Judge erred in visiting the scene of crime after the assessors had given their opinion and without notice to and in the absence of accused and her counsel. The hearing of the case was concluded, and the assessors' opinion were taken on 21st March 1916. In his Judgment delivered on the 23rd March the Sessions Judge states that on the 22nd be visited the locality alone with the record of the case and the plans filed in it but without notice to any one. One of the witnesses in the case happened to be there and pointed out one of several wells there as the one in which the deceased's body was found, and from the plans and the evidence the Judge was satisfied that it was the one. He made certain observations on the condition of the sides of the well, its surroundings and the vegetation growing there, and drew conclusions therefrom adverse to some of the evidence for the defence. In the first place there are admittedly many wells in the neighbourhood and there is no proof that the well which the Sessions Judge inspected is in fact the one in which the deceased's body was found. In the next place the tragedy occurred on the 11th December 1915 after recent rain when the

condition of the ground and vegetation would be very different from that on the 22nd March after several months' drought. Finally it was not competent to the sessions judge to take into account any observations of the locality made by him alone after the assessors had given their opinions. If at an earlier stage he thought that the assessors should view the place, he should have made an order under section 293 Criminal Procedure Code and he might himself have accompained them. But once they gave their opinions it only remained for the Judge to give judgment under section 309 subsection 2. He had no power to do any thing further. In my opinion therefore the part of the judgment dealing with the sessions judge's visit to the spot and his conclusions from what he saw there must be eliminated, and the case must be considered solely on the admissible evidence on the record.

Another ground of appeal is that the Sessions Judge refused to allow appellant's counsel to put leading questions in cross-examination to one of the witnesses. The refusal to allow a question to be put in cross-examination merely because it was in form a leading question would be illegal, as the judge cannot abrogate section 143 of the Evidence Act. But there is no allegation before us that any such question was in fact disallowed, or what that question was. If that had occurred counsel doubtless would have asked for his question, and the order disallowing it to be recorded, but this was not done.

* * * *

The remaining grounds of appeal deal with the evidence in the case and the chief matter for consideration is the statement of the little girl Sediya, the only eye-witness of the occurrence. She is a Hindu about 8 or 9 years of age, and at the conclusion of her examination the judge noted as follows; "She was not put on oath as I am of opinion that she is not of an age to understand the nature of an oath." Being a Hindu, section 6 of the Oaths Act forbade her being put on oath at all, and the judge can only have meant that she made no affirmation. The printed heading of her statement shows the word "sworn" crossed out and the word "affirmed" left. This was evidently done by a clerk before she was examined by the judge and in view of the judge's subsequent note I have no doubt that the girl made no affirmation. The judge quotes section 13 of the Oaths Act as making her statement admissible in evidence. The point was not argued at the hearing, but I think it must be considered. In *Queen* vs. *Sewa Bhogta* four out of five Judges held that the word "omission" in section 13 of Act X of 1873 includes any omission and is not limited to accidental or negligent omissions. This was followed in *Queen Empress* vs. *Shava* (2) by one out of two Judges, the other deciding the case without expressing an opinion on that point. In *Q. E.* vs. *Virupermal* (3) the two Judges composing the bench disagreed on the point. There are two Allahabad cases to the contrary effect. *Q. E.* vs. *Maru* (4) the decision of a single judge, and *Q. E.* vs.

(1) 14 Ben. L. R. 294 (1874)
(2) 16 Bom 359 (1891)
(3) 16 Mad 105 (1892)
(4) 10 All 207 (1888)

Lal Sahai (5) by a bench of two judges. In Burma I can only find one decision on the point. *Pwa Nyein* vs *K. E.* (6) in which a statement made designedly without oath or affirmation was held to be admissible. I find considerable difficulty in following the reasoning in that judgment. In the first place the head-note is misleading, as it shows *Q.* vs. *Sewa Bhogta* (1) and *Q. E.* vs. *Shawa* (2) as dissented from whereas they are in fact followed. Next the learned judge refers to the latter ruling as dissenting from the former, whereas the one judge who decided the question expressly concurred with the Calcutta case and differed from the Allahabad case (see page 366.) Again the learned judge of this court expresses his concurrence with a passage from the Bombay case which, if read alone, would imply that the deliberate omission to administer an oath or affirmation to a witness is not curable by section 13 of the Oaths Act. Moreover the point is expressly said not to be very material, as there was other reliable evidence of undoubted admissibility sufficient for a decision in the case. Under these circumstances it appears to me that *Pwa Nyun's* case cannot be regarded as a very weighty authority. In my opinion the reasons given in the Allahabad rulings and by the chief justice Sir Arthur Collins in the Madras ruling for not extending section 13 to cases where the omission of the oath or affirmation was intentional are sound, and the view of the dissenting Judge in *Q* vs. *Sewa Bhogta* (1) is correct. If the decision of the majority of that Bench were carried to its logical conclusion, it would give rise to a proposition which a Full Bench of the same High Court has more recently described as "at once novel and startling" *Mendo Lal Bose* vs. *Nistarini Dassi* (7). I am of opinion that the statement of Sadiya recorded at the Sessions trial is not admissible in evidence, and it is necessary that her evidence should be taken under section 428 of the Criminal Procedure Code, and I would direct the Sessions Judge to summon her before him and after causing her to make an affirmation under section 6 of the Oaths Act to take her evidence in the presence of appellant's counsel.

MR. JUSTICE TWOMEY:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 119 OF 1916.

RAM SARUP vs. KING-EMPEROR.

Before Mr. Justice Twomey.

For Applicant.—Mr. Lentaigne.

Practice. Separate trial of two accused persons charged with the same offence—Statement made by one accused at the trial of the other.

---

(5) 11 All 183 (1889) (6) 2 L. B. R. 322 (1904)
(7) 27 Cal. 428 at p. 440 (1900.)

When two persons are separately tried for the same offence, and one of them is a witness at the trial of the other the statements made by him as a witness at the other trial cannot be used against him at his own trial.

Applicant and another were sent up for trial under section 411 I. P. C. The court decided to try them separately. After the trial of the applicant was concluded but before judgment was pronounced, applicant was examined as a witness at the trial of the other accused, and he was convicted on statements made by him as a witness in examination at the trial of the other accused.

Held that such use of the statements made by him as a witness at the other trial was irregular, and was calculated to prejudice the Magistrate in disposing of the case against him.

JUDGMENT.

The applicant was wearing the exhibit ring openly at his stall and when asked where he got it said he had bought it in the bazar for Rs. 14. It appears that he did not give the name of the alleged vendor Ratoo at the first time of asking, but the evidence as to whether he was asked the question or not is contradictory.

* * * *

The Magistrate's procedure in examining the petitioner Ram Sarup as a witness in the case against Ratoo, before passing judgment on the petitioner was irregular and was calculated to prejudice the magistrate in disposing of the charge against the petitioner.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL APPEAL No. 1 OF 1916.

NGA POONA and 5 others ... APPELLANTS.

vs.

KING-EMPEROR ... ... RESPONDENT.

Before Mr. Justice Twomey.

For Appellants.—Mr. Connell.

Penal Code (Act XLV of 1860) section 499 exception (8) Accusation against any person to one who has lawful authority over that person—good faith.

A defamatory statement made without express malice, and with a bona fide belief in its truth against one whose conduct in the respect defamed has caused the accused any injury, to one whose duty it is to enquire into and redress such injury falls within exception (8) to section 499 of the Penal Code. It is not necessary for the accused in such a case to show that the imputations are true in fact. He has only to show that he acted with due care and attention.

JUDGMENT.

TWOMEY J.—The six appellants have been fined by the Subdivisional Magistrate, Rangoon, sums aggregating Rs. 1,100 on conviction for defamation under section 500 I. P. C. The appellants are all substantial rice and paddy traders at Minhla, Tharrawaddy District, and they were prosecuted by the railway station

master at Minhla, Maung Maung Gyi for sending the following telegram on the 25th January 1915 to the traffic manager at Rangoon. "Station Master Maung Maung Gyi supplied waggon Nos. 7933, 7639, 7127 on 24th, sending by 10 down train and waggon Nos. 7826, 8068 on 25th for charcoal bags taking Rs. 6 as bribe for each waggon. He did not supply for rice and paddy; charcoal are loaded 135 to 140 bags to each waggon he stated less bags in railway receipt. Ko Poona, Bokwa, Twaka, Hawlun, Manshin, Bathaw."

The accusation of taking bribes for unduly favouring the charcoal traders in the allotment of waggons and for allowing the charcoal traders to send charcoal in excess of the quantity for which freight had been paid is no doubt injurious to the station master's reputation. A charge of corruption such as this clearly would lower his character in respect of his calling. It is moreover an accusation of an offence under section 161 I. P. C. because all railway servants are public servants for the purposes of chapter ix of the Code. The imputations in the telegram were certainly prima facie defamatory. The railway authorities caused an enquiry to be held into the subject matter of the telegram by a traffic inspector named Peters who recorded the statements of the senders of the telegram and examined some witnesses. After considering Mr. Peters's report the railway authorities decided that the charges against the station master were not substantiated and the station master was told that he was at liberty to take proceedings against his traducers.

Maung Maung Gyi then instituted the present criminal case against the six accused.

The six accused admitted sending the telegram in their joint names. They produced certain evidence to show that the charges against the station master were well founded, but that evidence has been disbelieved by the magistrate.

It was not necessary, however, for the accused to plead that the imputations in the telegram were actually true. It was open to them to take the less difficult course of proving that their action fell under the 8th exception to section 499 of the Code which runs as follows: "It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject matter of the accusation." This plea was actually advanced by the accused. The magistrate, after considering the evidence offered by the accused as to the sources of their information, held that the plea was not established and that they had not acted in good faith in sending the telegram. Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention (section 52 I. P. C.) As the burden of proving that they were within the 8th exception to section section 499 was on the six accused, they had to show that they acted with due care and attention or, in other words, that they had reasonable and probable grounds for making the imputations and did not act with negligence or recklessness.

The prosecution evidence shows that the distribution of waggons is left entirely to the station master, that the weighment of goods is under his control and that if a trader wishes to complain about the station master's actions in these matters the proper authority to apply to is the Traffic Manager. Traffic inspector Peters who held the enquiry for the railway described what each of the accused said to him when he called upon them to substantiate the charges in the telegram. Ko Poona, 1st appellant, was the prime mover. He is a rice mill owner of Minhla and appears to be the principal trader among the accused. If there was a shortage of waggons, he would probably feel it most. He relied on specific information received from his brother-in law Po Hmi, a charcoal trader. It is clear that the six accused consulted together about sending the telegram. It may be assumed that they discussed the subject and learnt from one another the grounds which each of them had for bringing the charge of corruption against the station master.

For the defence, Po Hmi produced certain books of account. Ex. 2. is a day-book beginning in August 1914 and going on to September 1915 and giving details from day to day of his charcoal transactions. Ex. 3 covers the same period as Ex. 2 and is a register of loads of charcoal sent by rail giving the waggon number, capacity of each waggon, weight per waggon, and the various amounts spent on each load, and working out the total expenses of each consignment and the profit derrived from it. Another charcoal trader Nyasul Haq was also examined for the defence and he also produced his accounts.

The evidence of the defence witnesses, if believed is sufficient to show that there was a long standing system at Minhla railway station by which the station master and the station clerks received sums of money from traders for giving them preference in the supply of waggons.

As for the entry "for the station" in Po Hmi's books I have no difficulty in believing that a trader, would as a rule, prefer to use a veiled or ambiguous form in entering in his accounts sums paid as bribes to railway officials, for it is a criminal offence to give such bribes. . . . I am unable to derive from the discrepancies noted by the subdivisional magistrate the sinister inference that Po Hmi's accounts are faked.

Assuming however that the genuineness of Po Hmi's and Nyasal Haq's accounts is not established and that these and the other witnesses for the defence have given false evidence as to the payment made to the station master, should it be inferred as a necessary consequence that Ko Poona and the other accused had no reasonable grounds for sending the telegram? It seems to me that the inference is not warranted. It would still have to be proved that the accused knew or had good reason to believe that the statements of Po Hmi and the other charcoal traders and the account-books showing payments of money, could not be relied upon. If the accused had the information which has been laid before the court by the defence witnesses, it is, in my opinion

impossible to say that they had no reasonable grounds for sending the telegram, even if it should afterwards appear that that information was untrue in whole or in part The subdivisional magistrate saw no reason to think that the accused had, as a matter of fact, been treated unfairly in the allotment of waggons. That view may be correct, but there can be no doubt I think that the accused believed that they were treated unfairly in comparison with the charcoal traders; for otherwise they would not have telegraphed as they did. No suggestion was made in the magistrate's court that the accused were actuated by any other motive in telegraphing. They bore no grudge against the station master. They telegraphed only because at the beginning of the paddy export season they found waggons being allotted, as they thought, unfairly to the charcoal traders and were thus prevented from taking advantage as fully as they otherwise might have done of the fluctuations of the market rate at Rangoon. They complained to the proper authority with a view to having their grievance redressed and they sent their complaint by telegram as the matter was urgent. They did not publish the imputation of bribery beyond sending the telegram to the traffic manager. The imputation has now acquired great publicity, but this is only the consequence of the station master's action in prosecuting the accused. Even if the defence witnesses have given false evidence, it is quite clear that in the matter of overloading the waggons the allegation in the telegram was well-founded.

In the English case of *Toodgood* vs. *Spyring* (1) Baron Park said "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, unless fairly made by a person . . . in matters where his interests are concerned . . . . . If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society and the law has not restricted the right to make them within any narrow limits" Again in *Harrison* vs. *Bush* (2) Lord Campbell C. J. remarked "In this land of law and liberty, all who are aggrieved may seek redress, and the alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and the duty to enquire into it, and to take steps which may prevent the repetition of it." The words of *Fitzgerald, B, in Waring* vs. *M'Caldin* (3) may also be cited: "If without express malice, I make a defamatory charge which I bona fide believe to be true, against one whose conduct in the respect defamed has caused me injury, to one whose duty it is to enquire into and redress such injury, the occasion is privileged; because I have an interest in the subject matter of my charge and the person to whom I make the communication has on hearing the communication a duty to discharge in respect of it. "These principles of English law are

(1) 1834-1, C. M. and R. 181. 3 L. J. Ex. 347, 40 R. R, 528.
(2) 25 L. J. Q. B. 25, 5 E. and Bl. 344, 108, R. R. 507.
(3) I. R. C. L. 288.

embodied in the exceptions 8 and 9 to section 499, Indian Penal Code, and they show the necessity of distinguished bona fide complaints of grievances from defamatory statements maliciously made with the object of injuring another person. In this country even more than in England it is very undesirable that the courts should take any action which may have the effect of stifling legitimate complaints. I do not agree in the magistrate's finding that the accused persons have not shown that they acted in good faith in sending the telegram of 25th January. I think they are entitled to the benefit of the 8th exception to section 499.

The conviction and sentence are set aside and the fines paid by the six accused will be refunded to them.

THE

BURMA LAW TIMES.

VOL. IX.] JUNE 1916. [No. 6.

PRIVY COUNCIL.

APPEALS No. 79 and 80 OF 1914

FROM

THE CHIEF COURT OF LOWER BURMA.

MAHOMED ISMAIL ARIFF and others ... APPELLANTS.

VS.

HAJEE HAMED MOOLLA DAWOOD & another ... ... RESPONDENTS.

MAHOMED ISMAIL ARIFF and others ... APPELLANTS.

VS.

MAHOMED SULEIMAN ISMAILJEE & others. RESPONDENTS.

(CONSOLIDATED APPEALS.)

Present at the hearing. Viscount Haldane. Sir John Edge. Mr. Ameer Ali. Sir Lawrence Jenkins.

Dated 15th May, 1916.

Civil Procedure Code (Act XIV of 1882) S 539.—Suits relating to public charities—Mahomedan Law—Distinction between public and private trusts.—Powers of a Civil court—Condition excluding interference of court.

In giving effect to the provisions of section 539 of the Civil Procedure Code of 1882 (corresponding to sections 92 and 93 of the code of 1908) and in appointing new trustees and settling a scheme the court is entitled to take into consideration not merely the wishes of the founder but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future.

The question involved in suits relating to public charities is not the determination of conflicting rights, but a consideration of the best method for fully and effectually carrying out the purpose of the trust.

The power of appointing or electing trustees of public charities ought not to be left in the hands of an indeterminate and fluctuating body of people whether they call themselves punchayet or jamaet. In order to avoid litigation it is desirable in the interests of the institution which form the primary matter for consideration that the appointment of future trustees should be entrusted to a committee the composition of which should be in the discretion of the court.

The Mahomedan law like the English law draws a wide distinction between public and private trusts. Generally speaking, in the case of a wakf or private trust the Kazi or the Civil Court has in carrying the trust into execution to give effect as far as possible to the expressed wishes of the founder. With respect to public, religious, or charitable trusts of which a mosque is an example, the court's discretion is very wide. It may not depart from the intentions of the founder as to the objects of the benefaction; but as regards management it has complete discretion. Its primary duty is to consider the interests of the general body of the public. It may vary any rule of management which is not practicable, or not in the best interests of the institution.

If the founder makes a condition that the King or Kazi should not interfere in the management of the Wakf, still the Kazi will have his superintendence over it, for his supervision is above everything.

JUDGMENT.

MR. AMEER 'ALI:—The suit which gives rise to these consolidated appeals was brought in the Chief Court of Lower Burma in its original civil jurisdiction, under the provisions of section 539 of Act XIV of 1882, for the appointment of trustees and the settlement of a scheme of management in respect of a mosque, situated in the city of Rangoon. The plaintiffs in the action are five Mahomedan worshippers at the mosque, who trace their origin to a place called Randher, said to be a suburb of the city of Surat in the Bombay Presidency, and in the earlier stages of these proceedings they appear to have claimed it as a Randheria mosque. It is, however, conceded now that it is a public mosque dedicated to the performance of religious worship by all Sunni Mahomedans without restriction as to place of origin, and that it is commonly known as the Sunni Juma Musjid.

To explain the contest between the parties it is necessary to give a short summary of the circumstances that have led to this unfortunate litigation. Like many other places in Burma, Rangoon is inhabited by a large number of Mahomedan emigrants from various parts of India who have domiciled themselves in the country for purposes of trade, and are generally known by the names of the towns or villages whence they orginally came. For example, the plaintiffs, as already stated, derive their origin from Randher and, therefore, call themselves Randherias: whilst the larger community of Suratis or Soortees come either from the city or district of Surat. It is necessary to bear this in mind, as the mosque in question is sometimes called the Surati mosque. The Randherias, though trying to differentiate themselves from the others, form in reality a section of the Surati community. They are mostly Voras, and they all profess the Sunni doctrines.

It appears that the site of the present mosque was formerly occupied by a bamboo structure built in 1854 by one Moolla Hashim, a native of Randher. It was dedicated to the same purpose, and bore the same name as the present masonry mosque. Divine worship was performed here by all Sunni Mahomedans until it was burnt down three years later, when Moolla Hashim replaced it with a building made of wooden planks. This continued to be the public place of worship until 1872, when the masonry mosque was erected.

The land on which the mosque was first built appears to have been afterwards added to by purchases made by Moolla Hashim or by his fellow-townsmen, who made the same over to him as the custodian of the mosque. In 1862 one Moolla Ibrahim, a brother of Moolla Hashim, and two persons of the names of Golam Moideen Moollah and Cassim Azim, obtained from the Government a grant in respect of certain other plots on the express trust "to build and maintain thereon a mosque or place of worship for and to the use of all persons professing the Sunni sect of the Mahommedan religion."

These lands were also added or attached to the existing mosque, and shops were built there to yield an income for its maintenance.

In 1864, Moolla Hashim went on a pilgrimage to Mecca, leaving the management of the mosque in the hands of Moolla Ibrahim and the two persons already mentioned. He returned to Rangoon in 1866, but never resumed his management of the mosque. At this time the person in charge was one Mohammed Hashim Mehtar, who also is said to have been a native of Randher.

In 1870, the Government, finding that no mosque had been built on the lands granted in 1862, and that on the contrary shops had been erected thereon, issued a notice on the grantees to show cause why those lands should not be resumed. A meeting was thereupon held, apparently at the instance of the Randherias, of all the Sunni Mahomedans entitled to worship at the mosque, and it was decided to buy outright from the Government the land, and build on it a proper masonry structure suitable to the growing needs of the community. Although there is some dispute with regard to the contributions of the general body of Sunnis apart from the Randherias, it may be taken as fairly uncontroverted that the bulk of the fund was subscribed by the Randheria section of the worshippers. The conveyance was taken in the names of five persons, named respectively Dooplay, Ariff, Patail, Mohammed Hashim and Ebrahim Ali Moolla, and these men in 1872, whilst the masonry mosque was in course of building, purported to create a new dedication.

The trust deed bears date the 16th March, 1872, and after reciting that it was made between the persons named above, of the one part, and one Mahommed Hashim, representing the general Sunni Mussulman community, of the other part, proceeds to declare that "the pieces or parcels of land upon a certain portion of which the Sunni Jamaet Musjid is erected or is in the course of being built, together with the godowns attached thereto, are solely dedicated for the purpose of divine worship." It then goes on to

provide *inter alia* that its management shall remain exclusively in the hands of the Randheria Jamaet (people or assembly).

The five persons in whose names the conveyance stood and who had executed the trust deed appear to have carried on the management for several years; in course of time some dropped out and others came in as trustees. How these men were placed in charge of the management of the mosque is not clear, for apparently no meeting of the Randheria Punchayet was held until 1894, and none between 1894 and 1906, nor in fact had the Randherias any "organised association" with written rules for the purpose of giving effect to the wishes of their section of the community.

Matters remained in this condition until 1908, when disputes arose regarding the validity of the election of one Hashim Yacub Ally as a trustee in place of another Randheria, who had died the year before. It was in consequence of the quarrels among the Randherias themselves in connection with the election or appointment of this man, that the present suit was launched in the Chief Court of Lower Burmah. The original defendants to the action were four persons who were actually managing the mosque as trustees, but the validity of whose appointment as such was impugned by the plaintiffs. In addition three others were joined as defendants ostensibly to represent the Randheria section, but in reality, as the trustee defendants charge, to represent the plaintiffs' faction.

On the institution of the suit notices were issued by the Court under section 30 of the Civil Procedure Code to all persons entitled to worship at the mosque. Thereupon defendants 12 and 13, representing the general body of Sunni worshippers, and defendants 8 to 11 claiming to represent the Surati community, and 14 to 17 the other Randherias appeared and applied to be joined as parties. Each set of defendants has filed a separate defence. Although the trustee defendants deny the plaintiffs' allegation that the mosque in question is a Randheria mosque, and affirm the validity of their and Hashim Yacub Ally's appointment as trustees, they associate themselves with the plaintiffs and their Randheria co-defendants in claiming that the right of management of the mosque belongs exclusively to their party. And they ask that the scheme, if any is to be framed, should be framed on that basis.

The defendants 12 and 13, who represent the general body of worshippers, controvert in substance the right of the Randherias to a monopoly of the management as opposed to the whole nature of the trust; and they claim that as the mosque is dedicated to the performance of public worship by all Mahomedans of the Sunni persuasion, now that a scheme is proposed to be settled under the direction of the Court they should be allowed a voice in its administration.

The suit proceeded to trial before Mr. Justice Robinson, and the whole dispute centred round two points viz:—

1. The effect of the trust deed of 1872, and

2. Whether the Randherias should or should not have the sole and exclusive charge and management of the mosque.

The Randherias rested their case on the trust deed of 1872; they contended that it created a new trust and that the founders, namely, the five persons in whose names the land had been purchased from the Government, were entitled to provide that the management should remain exclusively in the hands of their own section of the community. The learned trial judge states their contentions in the following terms:—

"It is urged that the original mosque was created by a "Randheria; that the original grant was revoked and the lands "sold outright to Randherias, that they thus became the creators "of the trust and were at liberty to make any lawful condition "they pleased as to the management of the trust."

And his decision is expressed in these words:—

"The position in 1871, then was that the five vendees became "the absolute and uutrammelled owners of these two plots and "could do with them as they pleased. . . . . They became "the owners of the mosque, shops, and lands, and created a trust "of them. It was undoubtedly open to them to manage the "trust themselves or to lay down the manner in which it was to "be managed, and this they did in Exhibit C."

He accordingly came to the conclusion that the Randheria party were exclusively entitled to the management of the mosque.

On appeal by the respondents in the first and second appeals respectively, the learned Judges of the Chief Court, differing from the trial judge, held in substance that the lands which were purchased by or in the names of the five persons in 1871 were acquired by them as trustees for the purposes of the existing mosque and subject to the trust therefor; and that nothing that took place in 1871 or 1872 had the effect of cancelling, or could in law cancel, the original trust; and that as the original trust was for the benefit of all persons "professing the Sunni sect of the Mahommedan religion," they thought that "all Sunni Mahommedans were entitled to a voice and control of the Juma Musjid, of Rangoon."

The plaintiffs and the trustee defendants have appealed to His Majesty in Council, and the same contention that was put forward in the courts below, based on the document of 1872, has been urged on their behalf. It has further been contended that under the Mahommedan law the court has no discretion in the matter and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or *mutwallees*. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussulman law like the English law draws a wide distinction between public and private trusts. Generally speaking, in case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the Kāzi whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public, religious, or charitable, trusts, of which a public mosque is a common and well-known example, the Kāzi's discretion is very wide.

He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution.

Illustrations of this rule are to be found in almost every work on Mussulman law. And the authorities lay down that, "were the *wâkf* (the founder) to make a condition that the King or Kāzi should not interfere in the management of the *wakf*, still the Kāzi will have his superintendence over it, for his supervision is above everything."

Their Lordships agree with the Chief Court that the transactions which took place in 1871 and 1872 in no way affected the existing trust, and that the trust deed of 1872 did not create a new dedication; the mosque remained as heretofore a public mosque, dedicated to the performance of worship by all Sunni Mahommedans as originally founded.

In their Lordships' opinion, the real point in issue in the case, owing probably to the nature of the pleadings, has to some extent been missed by the courts in India. It has been treated as a question involving the determination of conflicting rights rather than a consideration of the best method for fully and effectively carrying out the purpose for which the trust was created. The suit is brought under section 539 of the Code, which vests a very wide discretion in the Court. It declares (omitting the parts not material to this case) that—

"whenever the direction of the Court is deemed necessary for the "administration of any express or constructive trust created for public, "charitable, or religious purposes, the Advocate-General, acting *ex* "*officio*, or two or more persons having a direct interest in the trust "and having obtained the consent in writing of the Advocate-General, "may institute a suit in the High Court, or the District Court within "the local limits of whose civil jurisdiction the whole or any part of the "subject-matter of the trust is situate, to obtain a decree—

"(*a*). Appointing new trustees under the trust;

* * * * *

"(*e*). Settling a scheme for its management;

"or granting such further or other relief as the nature of the case may "require."

In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might

facilitate the work of management, and, if necessary, the appointment of trustees in the future.

In the present case, Moolla Hashim, although he was assisted by several of his compatriots in acquiring the land on which the bamboo mosque was built, was to all intents and purposes its original founder; in 1857, when the bamboo structure was burned down, he replaced it with a plank building; he and his Randheria fellow-townsmen held the *mutwalleeship* until 1871. Since that date also the management has been carried on by people belonging to Randher. In 1862, the lands were purchased with money supplied by them; and in 1871 the bulk of the money appears to have come from the same source. It is not alleged that they have mismanaged the trust or committed any dereliction of duty, or tried to introduce innovations in the services, or otherwise interfered with the rights of the general body of worshippers. In these circumstances it seems to their Lordships, in the exercise of the discretion which the Mussulman law vests in the Kazi, that the Randheria section of the worshippers, all other conditions being equal, are preferably entitled to the *mutwalleeship* of the mosque. With regard to the case of *Ibrahim Esmael* v. *Abdool Carrim Peermamode*, (1) which has been relied upon on behalf of the respondents, their Lordships deem it sufficient to say that the facts to which they have referred differentiate it widely from the present case.

The present case, however, in their Lordships' opinion, illustrates the mischief of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, whether they call themselves *Punchayet* or *Jamaet*. In order to avoid so far as possible a recurrence of the trouble that has brought about this long-drawn litigation, their Lordships think it desirable, in the interests of the institution which form the primary matter for consideration, that the appointment of future trustees should be entrusted to a committee of the worshippers the composition of which should be in the discretion of the Judge, with due regard to local conditions and needs, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Judge should lay down rules for their guidance in the discharge of any supervisitorial functions that it may appear necessary to confide to them and for filling up vacancies on their body subject to his control.

Their Lordships are accordingly of opinion that the orders of the courts of India should be discharged and that the case should be remitted with the following declaration and directions to the Chief Court of Lower Burma to deal finally with the matter: That all other conditions being equal, the Randheria section of the worshippers are preferably entitled to manage and act as trustees of the Sunni Juma Musjid, of Rangoon; that the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which committee should be

(1) L. R. 35, I. A. 151.

in the discretion of the court, with due regard to local needs and conditions, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the court should lay down rules for the guidance of the committee in the discharge of any supervisitorial functions that it may appear necessary to confide to them, and for filling up vacancies on their body subject to its control.

As regards the costs in the courts below, the trustee-defendants will have their costs out of the funds of the institution; the rest of the parties will bear their own costs.

The parties will bear their own costs of these appeals.

And their Lordships will humbly advise His Majesty accordingly.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL No. 21 OF 1916.

MOOLLA CASSIM ... ... APPELLANTS.

vs.

MOOLLA ABDUL RAHIM & another ... RESPONDENTS.

Re the estate of Moolla Hashim deceased.

Before Sir Charles Fox Kt. Chief Judge and Mr. Justice Twomey.

For Applicant—Mr. Hamlyn.

9th February, 1916.

Probate and Administration Act (V of 1881) Section 98 (3) Limitation Act (IX of 1908).

The Limitation Act does not apply to applications to a court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a purely ministerial character.

Section 98 (3) of the Probate and Administration Act does not make it obligatory on the court to require an executor or administrator to exhibit an inventory or account. Section 98 (1) imposes the duty of doing this on the executor or administrator. If he does not do it the court may require him to do it, but that is a matter for its discretion.

JUDGMENT.

Fox, C. J:—The order appealed against was one dismissing as barred by limitation under article 181 of the Limitation Act an application by a grandson of Moolla Hashim asking the court to order the executors of his will to file an inventory of his estate, and an account showing the assets which came to their hands and the manner in which they applied and disposed of them.

Moolla Hashim died in 1884 and probate of his will was issued by the Court of the Recorder of Rangoon to the respondents and another of his sons on the 30th January 1885, they having undertaken to administer his estate and to make a true inventory thereof

and to exhibit the same in the court at or before the expiration of six months and to render a true account of the same within one year from the date of the grant. No inventory is upon the record of the case (Civil Miscellaneous No. 27 of 1885). It appears from it that in May 1888 the executors petitioned the court for leave to transfer the property of the deceased (which they set out in a schedule) for the purposes of the administration of the estate. Leave was granted to them to do so. From the record of Civil Regular Suit No. 150 of 1901 in this court it appears that in 1885 one of Moolla Hashim's widows instituted a suit to have his will set aside, and for administration of his estate by the court. That suit was by consent withdrawn. In 1887 the parties interested referred questions in dispute in connection with the will and the estate to the arbitration of one Moolla Ismail. He made his award dated 21st February 1888.

It dealt minutely with the property of the deceased setting out in detail what each legatee and heir should get. Some property in Rangoon, *viz.* 1st class lot No. 8 in square E and a small amount of cash was allotted to the plaintiff's father as his share, but it was not transferred to him because he had disappeared many years before, and it was not known whether he was alive or not. In 1901 the petitioner appellant brought a suit (No. 150 of 1901) against the executors and the heirs of Moolla Hashim claiming the above-mentioned immoveable property on the ground that his father was dead and that he as his only heir was entitled to it. The petitioner failed in his claim in the suit, in an appeal to this court, and in an appeal to His Majesty in Council. It was held that the burden was on the petitioner to show that his father survived his grandfather, and that as he failed to do so, the well known principle of Mahomedan law applied under which if any of the children of a man die before the opening of the succession to his estate leaving children, these grand children are entirely excluded from the inheritance by their uncles and aunts, see *Moolla* vs. *Cassim Moolla Abdul Rahim*(1). This decision finally decided that the petitioner had no interest in the property which the award had set apart for Moolla Mahomed. . . . . *Prima facie* he has no further interest in the estate of his grandfather, yet in 1915 more than 30 years after the grant of probate to the executors he puts in an application asking that the executors may be called upon to do what they should have done thirty years ago. He states no reason for his wanting the inventory and it is not apparent how they could benefit him in any way.

It has been argued that the court is bound to order the executors to perform the duty imposed upon them by law, and that consequently the Limitation Act does not apply to the case. No doubt it has been held that the Limitation Act does not apply to applications to a court to do what it has no discretion to refuse, nor to applications for the excercise of functions of a ministerial character

(1) 4 L. B. R. 77.

—see *Vithal Janardan* vs. *Vithojirau Putlajirau* (2) and *Madhabmani Dasi* vs. *Lambert* (3), but sub-section (3) of section 98 of the Probate and Administration Act 1881, does not make it obligatory on the court to require an executor or administrator to exhibit an inventory or account. Sub-section (1) of the section itself imposes the duty of doing this on the executor or administrator; if he does not do it the court may require him to do it, but that is a matter for its discretion, and consequently the rulings referred to have no application.

Even if an appeal lies against the order and it is open to the court to make an order under sub-section 3 of the section, it should not in my opinion, do so in view of the circumstances of this case. It appears to me that the application was of the nature of an attempt to abuse the process of the court. I would reject the appeal.

Twomey, J :—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 163 OF 1914.

NAUK TO vs. MA HNIN.

Before Sir Charles Fox Kt. Chief Judge and Mr. Justice Twomey.

For Appellant—Mr. Ko Ko Gyi.
For Respondent—Mr. Wiltshire.

31st January, 1916.

Civil Procedure Code (Act 5 of 1908) order VI rule 17. Amendment of pleadings.

Rule 17 of Order VI of the Code of Civil Procedure is in more general terms than the corresponding section (53) of the Code of 1882. It leaves questions of amendment of pleadings to the discretion of the court, but the discretion must be exercised in accordance with settled judicial principles.

The general rule is that any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid; and the state of facts and the equities and grounds of relief originally alleged and pleaded by the plaintiff should not be departed from.

A suit to enforce a mortgagor's right of redemption cannot be amended so as to convert it into a suit to enforce a right as owner.

JUDGMENT.

Fox C. J.—The plaintiff sued to redeem land for Rs. 1,400 alleging that it had been mortgaged. The defendant resisted the suit alleging that the land had been sold to him for Rs. 2,500. The only issue originally fixed was "Was the land in dispute mortgaged for Rs. 1,400 or sold outright for Rs. 2,500"? It was subsequently discovered that the plaintiff could not prove the mortgage on which she sued and the defendant could not prove the sale because no document had been executed and registered. The plaint was allowed to be amended to a suit for possession on payment of Rs. 1,400. . . . The learned judge found that Ma

(2) 6 Bom. 586. (3) 37 Cal. 796.

Hnin sold the land outright for Rs. 2,500 and he ordered Nauk To to deliver up possession of the land to her on payment of Rs. 2,500. The first ground of appeal is that the learned Judge erred in allowing the plaint to be amended so as to change the nature of the suit from one for redemption to one for possession, in as much as the amendment based it on a different legal relation and was allowed at so late a stage as greatly to prejudice the appellant's case. It is unnecessary to go into the question of whether the appellant was in fact prejudiced. The question is whether the amendment was permissible at all.

Rule 17 Order VI of the present code is in more general terms than section 53 of the last code. It leaves questions of amendment of pleadings to the discretion of the court, but the discretion must be exercised in accordance with settled judicial principles. As stated in Mukhoda Soondury Dasi vs. Ram Churn Karmokar (1) the general rule is that any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid; and that the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from. This is the rule laid down by the Privy Council in Eshen Chunder Singh vs. Shama Churn Bhutto (2). The object of pleadings is to give opposing parties full and exact notice of what each has to meet. As originally laid the present suit was to enforce a mortgagor's right under an alleged mortgage, as altered it is a suit to enforce a right as owner who had not made any valid transfer of interest in the property. The later case is inconsistent with the first and was not raised originally. The amendment was in my opinion not one which should have been allowed. The case is an example of the confusion which may arise if settled legal principles are not adhered to. The defendant could not prove the sale to him owing to there being no document of sale, but nevertheless the learned judge went into the question whether the transaction between the parties had been a mortgage or a sale, and has held that the plaintiff sold the land when according to law no valid recognizable sale was effected, and it was not open to any court to hold that there had been a sale. When it was discovered that no mortgage could be proved, the suit should have been dismissed, or leave should have been granted to withdraw the suit with liberty to file another suit for the same land if the plaintiff asked for it. The plaintiff's advocate in this appeal does not ask for such leave, being confident that another suit based on the plaintiff's right to the land by virtue of her title will lie without any leave from the court being necessary. Under the circumstances I think the only course for this court to adopt is to allow the appeal, set aside the decree appealed against, and dismiss the suit ordering the plaintiff to pay the court fees which she would have had to pay if she had not been permitted to sue as a pauper.

Twomey, J.—I concur.

(1) 8 Cal. 871. (2) 11 Moore's I. A. 7.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 278 OF 1914.

MA SHWE YAT AUNG ... ... APPELLANT.

vs.

MAUNG DA LI ... ... RESPONDENT.

Before Mr. Justice U Kin.

For Appellants.—Messrs. Connell and Rahman.
For Respondent.—Mr. Maung Pu.

3rd March, 1916.

Suit for ejectment—defence of permanent and heritable rights.—Burden of proof. Evidence Act (I of 1872) S. 18—Statements by persons from whom the parties to the suit have derived their interest in the subject matter of the suit.

Where in a suit for ejectment the defendant sets up the defence of heritable and transferable rights in the land, the burden of proving the plea is on the defendant.

Statements made by a person regarding his interest in the subject matter of the suit made after his interest in it has ceased cannot be used as admissions under section 18 of the Evidence Act, and there is no other provision of the law under which they are admissible in evidence.

JUDGMENT.

U KIN, J.—In a number of suits the plaintiff appellant sued the cultivators of land included in the Indawgyi Grant, known as the Kyauk Pyu Waste Land Grant to eject them from the lands in their occupation, and to obtain mesne profits for the period of their wrongful occupation of the same. In the lower courts the plaintiff and the defendants in all the cases agreed to abide by the decision of the courts in the suit out of which this appeal has arisen. Here in this court also, the other appeals being Nos. 279 to 290 inclusive have been heard together with this. One judgment will therefore cover all the appeals.

The plaintiff's case is that the defendant wrongfully entered upon and worked without a lease under section 12 of the Waste Land Grant Rules a piece of land, of which the boundaries are given in the plaint, being part of the plaintiff's grant land, and that on the 14th waxing of Thadingyut 1273 defendant was served with a notice to either take out a lease or quit the land as required by section 12 of the aforesaid rules, but the defendant has not complied with the notice.

The defendants say that they refused to take out leases as they feared that the plaintiff would raise the rent from Re. 1-10 per acre only, which rate they and their predecessors in title had hitherto paid. They further allege that the original grantee Maung Bu, had induced them and their predecessors in title to take up portions of the land on the understanding that the rent would not be raised so long as the Government did not raise the rate of revenue on the grant land and that they were to have heritable and transferable rights in them.

The township court gave a decree to the plaintiff in each of the cases. But I must say that the learned judge did not apply his mind to the real points in the case. The district court on appeal set aside the decrees of the lower courts, and directed the defendants to take out a bond for the amount of rent mentioned in the bill of demand.

The burden of proving that they have a heritable and transferable right in the land in their occupation was upon them see *Nilratan Mandal* vs. *Ismail Khan Mahomed* (1), If they succeed in establishing that there was an agreement between Maung Bu and them or their predecessors in title as alleged, there may or may not be other questions to decide, such as whether the plaintiff had notice of the agreement or whether it was binding on the plaintiff as a condition running with the land in which case there would be no question of notice. But first they must prove their allegation, and if they fail in doing so, there is nothing further to do but to decree the suit as prayed.

Regarding this point the defendants depend upon the evidence of Maung Bu given in several cases which cropped up after he had sold the grant land to Shwe Baw Aung and before it got into the hands of the plaintiff, Maung Bu himself could not be called because he had been dead some years. This evidence of Maung Bu has been strongly relied upon by the district judge. But it is not clear upon what authority the evidence was held admissible. The only section which may be resorted to for the contention that the evidence is admissible is section 18 of the Indian Evidence Act. The part which may be relied on is as follows:—"the statements made by . . . . . 2. Persons from whom the parties to the suit have derived their interest in the subject matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements." The question then is, whether the evidence of Maung Bu is admissible as an admission by a person within the meaning of section 18 of the Evidence Act. Woodroffe says upon this as follows: "Statements whether made by parties interested, or by persons from whom the parties to the suit have derived their interest, are admissions only if they are made during the continuance of the interest of the persons making the statement. It would be manifestly unjust that a person, who has parted with his interest in property, should be empowered to divest the right of another claiming under him, by any statement which he may choose to make. . . . A statement relating to property made by a person when in possession of that property, may be evidence against himself and all persons deriving the property from him after the statement; but a statement made by a former owner that he had conveyed to a particular person, could not possibly be evidence against third persons. If it were so, A might sell and convey to B and afterwards declare that he had sold and conveyed to C, and C might use the statement as evidence in a suit brought by him to turn B out of possession. If such evidence were admissible no man's

(1) 32 C. 51. 31. I. A. 149.

property would be safe." (Woodroffe's Evidence Act 6th Edition pp. 239, 240.) Maung Bu gave the evidence in question long after he had sold the grant land to Shwe Baw Aung. It is therefore not admissible as an admission binding upon his successors in title. In my judgment there is no way of admitting this evidence.

Besides the statement of Maung Bu which I have held to be inadmissible, there is nothing else on the record to prove the point under consideration. . . . . I think the defendants have entirely failed to discharge the burden that was on them. The result is the plaintiff must succeed.

The appeal is allowed, the judgment and decree of the district court are set aside and the judgment and decree of the township court are restored. The respondents will bear costs throughout.

IN THE CHIEF COURT OF LOWER BURMA.

SECOND CIVIL APPEAL No. 135 OF 1915.

MAUNG SEIK ... ... DEFENDANT—APPELLANT.

vs.

MA THIT PU ... ... PLAINTIFF—RESPONDENT.

Before Mr. Justice U Kin.

For Appellant—Mr. May Oung,
For Respondent—Mr. Po Han,

9th December, 1915.

Burmese Buddhist Law—Adoption—Proof of publicity or notoriety—Effect of taking a share in the natural parent's estate—Eldest child's right to a share in the joint estate of the parents.

It is only when the fact of adoption is left to be inferred from past statements and conduct that adequate proof of publicity or notoriety of the relationship should be insisted upon. When there are admissions of the adoptive parents and the positive evidence of persons present at the adoption no further proof of publicity is needed.

When there is positive evidence of adoption, the fact that the alleged adoptive child took a share by inheritance in the estate of his or her natural parents canont overthrow the conclusions derived from such evidence.

The eldest child's right to a fourth share of the joint estate of his or her parents on the death of one of them lapses unless made within a reasonable time after the death of one of them.

Ma Thit vs. Ma Tun Tha 8 B. L. T. 138 approved.

JUDGMENT.

U. Kin J.—The plaintiff respondent sued to be declared an adopted daughter of the defendant—appellant and his deceased wife, Ma Shwe Me.

The plaintiff's parents were Maung Tha Dun Aung and Ma Kwe. They had two children viz the plaintiff and a boy named Po Hla. Ma Shwe Me was a sister of Ma Kwe. On Ma Kwe' death, the plaintiff and her brother were taken over by th

defendant and Ma Shwe Me. At that time the plaintiff was nine years old and Po Hla about ten months. They were brought up and treated alike by the defendant and Ma Shwe Me. The plaintiff was given in marriage by Ma Shwe Me to Maung Shwe Ket, a nephew of the defendant, and the couple lived in the defendant's house until they got their second child, when they went to live in a house of their own within call from the defendant's house. There was no rupture of friendship between the plaintiff and the defendant or Ma Shwe Me. During the latter's last illness, plaintiff looked after her. The above facts are admitted by both parties.

The plaintiff's case is that she and Po Hla were both adopted by the defendant and Ma Shwe Me with rights of inheritance.

The defendant admits that Po Hla was adopted, but says that as regards the plaintiff it was arranged between the defendant and Maung Tha Dun Aung that she was to inherit from the latter and that as a fact she has obtained a share in the estate of Maung Tha Dun Aung who is now dead.

The evidence regarding the adoption is of witnesses who were present at the adoption of the two children and of those to whom the alleged adoptive parents had made admissions, and it is admitted that the plaintiff has received a share in the estate of Tha Dun Aung.

The township court held that the adoption was proved, but refused to grant a decree as prayed for on the ground that the plaintiff had forfeited her right of inheritance by taking a share in the estate of her natural father. The lower appellate court also held the adoption proved, but said that the township court should not have gone into the question whether plaintiff had forfeited her right of inheritance. All that she asked for being a declaration that she was the adopted daughter of the defendant and Ma Shwe Me, the question must be left for determination when she asked for her inheritance on the death of the defendant. The lower appellate court therefore passed judgment giving a decree as prayed for. The defendant appeals to this court on three grounds viz.

1. The suit was bad in law in as much as consequential relief might have been but was not prayed for, the plaintiff being entitled, if adopted, to a quarter share (as eldest daughter) on the death of the mother.

2. The lower appellate court erred in law in not holding that the fact of plaintiff's having received inheritance from her natural parents negatived the alleged adoption.

3. The lower courts erred in not holding that the alleged taking in adoption was not public and notorious.

The first ground was not pressed at the hearing in view of a bench ruling of this court in *Ma Thit* v. *Maung Tun Tha* (1) in which it was held that a claim by the eldest child for a one-fourth share of the joint estate of his or her parents on the death of one of them must be made as soon as possible after that event, and it was admitted that the plaintiff's claim for such a share would have been

(1) 8 Bur. L. T. 138.

barred by this ruling owing to considerable time having elapsed from the death of Ma Shwe Me, when the suit was instituted.

The second and third grounds relate to the question whether the plaintiff was adopted as alleged. I see no reason to differ from the lower courts on this point. The evidence of those who were present at the adoption is clear and positive; one of them, a man of seventy is a relation of the defendant. The evidence of those who speak to the admissions by the defendant and Ma Shwe Me is also definite and unequivocal, one of them an old woman of seventy-four is a sister of the defendant. We have also the admitted facts which constitute circumstantial evidence in favour of the adoption. These are the facts of the children leaving their natural father and going to live with their aunt, the alleged adoptive mother of the plaintiff, the plaintiff being brought up and treated in the same manner as the admittedly adopted son Po Hla, and of the plaintiff marrying a near relative of the defendant and continuing to live there till she got two children.

Counsel for the appellant complains that there is no evidence of publicity or notoriety, and contends that there must be such evidence before the court can hold an adoption proved. The only evidence of publicity or notority is that afforded by the admissions of the alleged adoptive parents, but in my judgment it is sufficient in this case. It is however not at all correct to say that in all cases there must be evidence of publicity or notoriety. See *Ma Ywet* v. *Ma Me* (2) where their Lordships of the Privy Council said: "It would have been easy for the parties, by means of an actual, though not ceremonial adoption in the presence of witnesses to have precluded the raising of subsequent questions. Where that has not been done, and where the fact of adoption is left to be inferred from past statements and conduct, it is in their lordships' opinion, a salutary rule that adquate proof of publicity or notoriety of the relationship should be insisted on."

Regarding the contention that the fact of the plaintiff's having obtained inheritance in her natural parents' estate negatives the idea of there being an adoption, it is not in my opinion, tenable at all. There must be many cases in which a child adopted into another family is allowed to inherit from its natural parents owing to ignorance of the law on the part of the co-sharers. In any case, this fact alone cannot overthrow the conclusion to be arrived at from positive evidence.

I do not express any opinion as to whether this fact will bar the plaintiff's claim for inheritance from the defendant; for I agree with the lower appellate court that the point does not arise in the present suit. The appeal is dismissed with costs.

---

(2) 36 Cal. 978. 5 L. B. R. 118 3. Ind. Cas. 797.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL NO. 172 OF 1915.

MA NYUN ... ... PLAINTIFF—APPELLANT.

vs.

MAUNG BA THA ... DEFENDANT—RESPONDENT.

Before Mr. Justice U. Kin.

For Appellant.—Mr. Rahman.
For Respondent—Mr. Kyaw Htoon.

18th February, 1916.

Transfer of Property Act (VI of 1882) s. 53 (2) Gratuitous transfer—Presumption.

Under section 52 (2) of the Transfer of Property Act there is a presumption that every gratuitous transfer, and transfer for a grossly inadequate consideration is made with a fraudulent intent if the effect of the transfer is to delay or defeat the transferor's creditors, and the burden of proving that it is not fraudulent is on the party seeking to uphold it.

The only point for determination in a case to which clause (2) applies is whether the transfer has the effect of delaying or defeating creditors.

JUDGMENT.

U KIN, J.— Plaintiff appellant sued for a declaration that the plaint lands were the property of her judgment-debtor Ma Hnit, and as such, liable to attachment in execution of a decree against her. The defendant who is Ma Hnit's adopted son claimed the lands under a deed of gift by her. Both the lower courts have found that the deed was genuine and that the gift was valid, being accompanied by delivery of possession. In appeal it is urged that both the lower courts erred in not applying section 53 paragraph 2 of the Transfer of Property Act.

In regard to voluntary transfers that paragraph declares that if they have the effect of defrauding, defeating or delaying creditors, they may be presumed to have been made with fraudulent intent. In C. T. V. R. M. Kaleyappa Chetty vs. Maung E Pe (1) Fox, J. held that the paragraph in question embodies a principle of universal applicability and applied it to the case. Under the paragraph it is not necessary to have proof of actual fraud or of an intention to commit fraud All that is necessary to prove is that the gift necessarily had the effect of defeating or delaying the creditors of the donor. In that case it must be presumed to have been made with fraudulent intent. The result is that the burden of displacing the presumption falls on the donee. The point for determination then is, whether under the circumstances of the case, the gift had the effect of the donor's creditor Ma Nyun, being defrauded, defeated or delayed thereby. In my judgment there can be no doubt as to that. All the property which she had, Ma Hnit has transferred to the donee, though at the time she was indebted to the plaintiff. There was nothing left with her to meet the debt. It must there-

(1) 1903 Bur. L. R. 43.

fore be held that the gift had the effect of the plaintiff's claim being thereby defeated.

I am unable to come to a finding in his favour because at the time the gift was made, the plaintiff was pressing Ma Hnit for payment of the debt; nor can I attach any weight to the fact that some eight years before, the defendant's father had expressed a wish to give the lands to him. . . . . If the defendant had claimed the lands under a gift from his father, the case might have presented quite different features and considerations to those adverted to above. I find that Ma Hnit transferred the lands in suit by the deed of gift with intent to defeat the plaintiff's claim.

The suit must therefore be decreed and the appeal allowed with costs throughout.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 304 OF 1913.

ILAM KALIA and others ... DEFENDANT—APPELLANTS.

vs.

SILAM SITAMA ... PLAINTIFF—RESPONDENT.

Before Mr. Justice Parlett.

For Appellants—Mr. Lentaigne.

16th November, 1915.

Civil Procedure Code (Act V of 1908) s. 99 Or. XXXII E3 (4) suit against a minor without formal appointment of guardian ad litem r. 7. Reference to arbitration by next friend or guardian ad litem without leave of court.

Although a formal appointment of a guardian ad litem is necessary in a suit against a minor under order XXXII rule 3, when a suit against minors has been properly defended by the person who has a prior right under rule 3 (4) to be appointed guardian ad litem, and no ground is shown which would justify a court in excluding him from the guardianship ad litem, the want of formal appointment is only an irregularity that is curable under section 99 of the code of civil procedure.

There is no provision in the civil procedure code for the formal appointment of a next friend in a suit by a minor.

If a next friend or guardian ad litem refers a suit to arbitration without the leave of the court a suit will lie to set aside any decree based on an award of the arbitrators in such reference without leave.

JUDGMENT.

PARLETT, J.—Silam Virabatradu died on the 11th July 1907 leaving two sons, Venketreddy and Pulliah. The former took out letters of administration to his father's estate but died on 26th March 1908 before fully administering the estate. Pulliah then, took out letters to the unadministered portion of their father's estate. Venketreddy left a widow Atchama, the first defendant and four minor children, three of whom are the second, third, and fourth defendants, the other child's name does not appear in the present case though I do not find the reason for the omission stated.

Atchama was appointed guardian of the four minor children, and as such guardian she jointly with Pulliah filed an application on 18th January 1910 under rule 17 of the second schedule to the civil procedure code that all matters in difference between them connected with Virabatradu's estate should be referred to the arbitration of Abdul Gafoor, an advocate who has represented the present plaintiff in the subsequent litigation. The agreement to arbitrate and a further agreement extending the time for the award were signed by Pulliah and by Atchama as guardian of her minor children. An award was made, and on 29th March 1910, Atchama as guardian of her minor children, and Pulliah jointly applied under rule 20 of the second schedule to the civil procedure code that the award should be filed. This was done, and on the same day a decree was passed in terms of the award in Civil Regular case No. 68 of 1910 of the district court. Under that decree a partition was effected whereby one-half of the land referred to in the present suit fell to Pulliah and the other half to the four minors. The court of first instance found that possession of shares was subsequently given, and mutation of names was made in the revenue registers.

On the 17th October 1911 Pulliah died, leaving no children. His widow Silam Sitama, the plaintiff in the present suit, obtained letters of administration to his estate on 20th May 1912. It appears that subsequently Atchama was removed from her guardianship of her minor children on the ground of her unchastity and one Chinta Sashia was appointed in her place.

The present suit was brought in 1912 by Sitama to recover the rent of the half of the land awarded to Pulliah; Atchama and her children, it appears, having demanded from the tenant the rent of the whole of the land. The plaint alleges that Atchama leased both her children's portion and Pulliah's on behalf of both parties to the fifth defendant. Atchama and the fifth defendant appeared but did not contest the suit, the latter being willing to pay the rent to whomsoever the court should direct. The minors and their guardian Chinta Sashia signed a written statement, putting plaintiff to proof of the petition and alleging that Sitama was unchaste at the time she obtained letters of administration and consequently Pulliah's property vested not in her but in the minor defendants. Chinta Sashia engaged a lawyer to defend the suit. Both courts have held the charge of unchastity during Pulliah's lifetime unproved; there is in fact no reliable evidence of unchastity prior to June 1912 when she had already obtained letters of administration. The point is, moreover, immaterial in the present case. She holds letters of administration to Pulliah's estate, and is therefore, whatever her moral character, entitled to recover rents of property forming part of Pulliah's estate.

The court of first instance decreed the suit. Chinta Sashia on behalf of the three minors appealed. He engaged a fresh lawyer who drafted a ground of appeal which it certainly did not lie in the mouth of Chinta Sashia or the minors to raise, but which has been put forward again in their behalf in second appeal and even

advanced as rendering the original decree null and void. This is the failure of the district court to appoint a guardian ad litem to the three minors under order XXXII. It is true that there was no formal appointment under rule 3 of that order, but since the suit was defended on behalf of the minors by Chinta Sashia, since the latter engaged a pleader to defend the suit, and since he and the minors jointly signed the written statement, it is clear that the omission is at most an irregularity curable under section 99 of the code on the authority of *Walian* vs. *Banke Behari Pershad Singh* (1) Not only was no objection taken to the suit proceeding without a formal appointment under rule 3, but Chinta Sashia had a prior right to act as guardian *ad litem* under rule 4, and so far from any suggestion ever having been made that grounds could have been shown to the court sufficient to justify it in excluding him from so acting, Chinta Sashia has continued to act as the minors' next friend by preferring the appeals on their behalf. It is perfectly clear that there is no substance whatever in this ground of appeal. The remaining grounds of appeal were considered by the lower appellate court which confirmed the decree. They are again raised in this second appeal. Briefly, they are first that the proceedings in the reference to arbitration and relating to the filing of the award ending in the decree in terms thereof are bad for want of the appointment of a guardian *ad litem* to the minors. This is strictly speaking a misapprehension, for the minors in both these proceedings (No. 16 of 1910 and No. 68 of 1910) figure as plaintiffs applying by a next friend, and there is no provision corresponding to rule 3 of Order XXXII relating to a next friend. The second ground is that the reference to arbitration, award, decree and partition are all voidable by the minors for want of sanction of the court under rule 7 of Order XXXII. I am however of opinion that the validity of that decree cannot be decided in the present proceedings, though it may be open to the appellants to bring a suit to set that decree aside. The appeal is dismissed.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL NO. 151 OF 1914.

MANEKJI PALONJI ... ... PLAINTIFF—APPELLANT.

vs.

NEDERLANDSCHE HANDEL ... ... DEFENDANT—RESPONDENT.

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

For Appellant—Mr. Cowasji.

For Respondent—Mr. Leach.

10th January, 1916.

Deposit of money in a bank—proof of payment—Burden of proof—fraud.

When a bank denies an alleged deposit of money by any of its clients, it is for the latter to prove the payment and he has proved his case as soon as it is shown that the money was made over in the bank

(1) 30 C. 1021.

premises, to the cashier, or to some employee of the bank authorised to receive money on behalf of the bank, for credit to the client's account. It is unnecessary for him either to allege or to prove fraud on the part of any of the bank's servants.

JUDGMENT

FOX. C. J.—Practically the only question in this case is whether the plaintiff proved that on the 20th May 1913. Rs. 15,000 had been handed over on his behalf to an employee of the bank authorised to receive money from its clients for credit to their account. The learned judge says in his judgment that the onus was on the plaintiff to prove affirmatively that the money was paid in, also to prove the fraud he alleges. The first proposition is correct, but in stating that it lay on the plaintiff to prove that a fraud had been committed the learned judge, in my opinion, erred in law. It was not incumbent on the plaintiff to allege any fraud and he in fact did not do so in the plaint. oon after his cheque for Rs. 45,000 was refused payment, it was no doubt clear to him as well as to the bank's higher officials that a fraud had been committed and the attitude taken by him was that the fraud must have been committed by one or more of the bank's employees but the onus of proving who committed it and how it was done certainly did not lie on him. If he could prove that the money had been made over to a cashier of the bank in the bank premises as an amount to be placed to his credit in the bank's books, he was entitled to succeed in the suit. It is not material whether the amount passed through the bank's books or not. The cashiers of this bank as well as of probably all other banks were its employees held out by it to receive moneys from their clients, and the bank was liable for all moneys paid to one of them in the bank premises for credit to a client's account even if no other official in the bank saw or heard of the money. The plaintiff's case was that the Rs. 15,000 was made over by his son Mutabhoy to one of the bank's cashiers Jugganath P. Pandia on the afternoon of the 20th May 1913. Jugganath denied that any sum had been made over to him by Mutabhoy on that day. The question is fixed down to whether credit is to be given to Mutabboy's statement in support of his father's case as opposed to Jugganath's denial of them.

* * * *

I would allow the appeal, reverse the decree of the original court and give the plaintiff a decree for Rs. 15,216-8-3 plus Rs. 500 as damages, and interest on Rs. 15,000 at 6 per cent per annum from the 26th May 1913 and his costs in the original court and in this court, the costs in the original court to be as settled by that Corrt, and the costs on the appeal to be calculated as usual, but an extra fee of seven gold mohurs to be allowed as advocate's fee for every day after the first on which the appeal was heard.

PARLETT, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 268 OF 1915.

MAUNG THA U ... ... APPLICANT.

vs.

MAUNG MYA KHIN ... ... RESPONDENT.

Before Mr. Justice Parlett.

For Appellant—Mr. Wiltshire.
For Respondent—Mr. Agabeg.

18th November, 1915.

Criminal Procedure (Act V of 1898) sec. 488. Order for maintenance—subsequent decree for restitution of conjugal rights—effect of refusal to comply with decree.

A refusal by a wife to comply with a decree for restitution of conjugal rights terminates a magistrate's order of maintenance under section 488 of the Criminal Procedure Code passed before the suit for restitution of conjugal rights, and the magistrate ought to treat his order as determined by the decree.

In re Bulaki Das 23 Bom. 484 followed.

JUDGMENT.

On 25th April 1913 Ma Mya Kin got an order from the township Magistrate of Taungup for Rs. 25 a month as maintenance for herself and after enforcing the order received Rs. 108-14-0 on 16th October 1913 as maintenance for four months and six days. On 4th October 1913 her husband who was living in Minbu, filed a suit against her there for restitution of conjugal rights and on 25th November obtained a decree, his wife being allowed two months within which to comply with it. She did not do so. The decree was confirmed on appeal on 28th February 1914. On 7th April 1914 she again applied to enforce the order of maintenance and though her husband pleaded that it was superseded by the decree the magistrate ordered payment of arrears of maintenance for eight months holding the maintenance order to continue in force as execution of the decree had not been taken out, and on 7th December 1914 Rs. 203 were paid to Ma Mya Kin. Matters then rested till 16th March 1915, when she applied to the magistrate to recover Rs. 275, arrears for eleven months, from the husband now in Nyaunglebin. He raised the same plea as before, but process was issued against him and he now moves this court to stop further enforcement of the maintenance order against him. There is clear authority that a magistrate ought to treat an order of maintenance made by him as determined if the wife failing to comply with the decree for restitution of conjugal rights refuses to live with her husband. See *In re* Bulaki Das (1) and the cases there cited. It is perfectly clear that she never made any attempt to comply with the

(1) 23 Bom. 484.

decree, either within the two months or afterwards. If her husband took out execution it is clear that he has little or no property to attach, and all he could do would be to commit her to jail for a short time at considerable expense to himself and with scant chance of inducing her to return to him.

* * * * * *

In my opinion the order for maintenance passed on 25th April 1913 is spent and I set it aside.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION NO. 128 OF 1915.

M. V. PILLAI ... ... APPELLANT.

VS.

C. K. SEIKH EBRAHIM ... ... RESPONDENT.

Before Mr. Justice Robinson.

For Appellant.—Mr. Dhar.

For Respondent.—Mr. Maung Pu.

17th December, 1915.

Provincial Small Causes Court Act (IX of 1887) Sch. 2, Article 32 suit for salvage.

A suit for services rendered in saving cargo from a leaky boat is not a suit for salvage and is not excluded from the cognizance of a Court of Small Causes under Article 32 of the second schedule of the Provincial Small Causes Court Act.

JUDGMENT.

It is clear the plaintiff's boat came to the help of defendant whose boat was leaking. Defendant would thus injure some of the paddy he was carrying and did so. I see no reason to doubt that plaintiff's boat was called upon to help and it admittedly did so, taking six hundred baskets over and conveying them to Rangoon. It is clear that plaintiff is entitled to reasonable remuneration for this. He claims what he would admittedly have been entitled to if he had hired out his boat to the owner of the paddy.

* * * * * *

It is said that this claim is really one for salvage as the defendant's boat and the paddy were thereby saved, and that the suit was not therefore cognizable by the court of small causes This is not so as the claim is clearly one for services rendered and it cannot be contended that they were rendered gratuitously.

The application is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 162 of 1915.

MAUNG PO U ... ... PLAINTIFF--APPELLANT.

vs.

MAUNG PO THIN ... ...DEFENDANT—RESPONDENT.

Before Mr. Justice U Kin.

For Appellants—Mr. Agabeg.

21st January, 1916.

Burmese Buddhist Law– ancestral Property. Presumption of separation—Burden of proof,

There is no presumption in Burmese Buddhist Law that property left by a person long deceased is part of an undivided estate. Among Burmese Buddhists division of ancestral property amoug the co-heirs is the rule, cases of co-heirs remaining in commensality being extremely rare.

No general rule can be laid down as to the burden of proving jointness or separation without regard to the facts and circumstances of each particular case.

When land has been in exclusive possession of some of the heirs for a long period it must be presumed that the separate enjoyment is the result of partition and the person asserting that it forms part of an undivided estate should be required to prove it.

Ma Hnin vs. Ma Hnin Yi. Bur- Sel, Judge 22 dissented from.

JUDGMENT.

U Kin J.:—This is a suit for the recovery of a piece of land and also for rent due for the year proceeding the institution of the suit.

The plaintiff's case is that the land in dispute is a half portion of a piece of land which fell to the share of Ma Aung Gyaw mother of the defendant, and Ma Ngwe Than, the deceased wife of the plaintiff, when on the death of Ma Aung Gyaw's father Maung So Lay, the property left by him was divided between her and her two brothers. On Ma Aung Gyaw's death the land which fell to her share was divided equally between the defendant and Ma Ngwe Than and each worked his or her portion. Just before her death which took place about a year before the suit Ma Ngwe Than let her half portion of the land in suit to the defendant for sixty baskets of paddy. The plaintiff now sues as being the person who is now solely entitled to his wife's property, the defendant having refused to give up the land and to pay the rent due to him. The defendant replies that the land still forms part of the estate of Maung So Lay which has never been divided.

The plaintiff has not proved the alleged division of Maung So Lay's estate between his three children on the basis of intestate succession. But the evidence on the record clearly shows that after the death of So Lay his three children divided his lands into three lots and proceeded to work one lot each; that the land of

which the land in suit forms a half was taken by Ma Aung Gyaw who worked it till her death, that after her death the land worked by her was divided into two equal parts between Ma Ngwe Than and the defendant, Ma Ngwe Than taking the land in suit and proceeding to work it till a short while before her death, and that Ma Aung Gyaw's two brothers went into occupation of the lots which fell to them respectively and worked and are still working the same. . . . . The above facts have been clearly proved by the evidence and admissions of the parties.

The learned additional Judge of the District Court held on the authority of Ma Hnin vs- Ma Hnin Ye (1) that the burden of proving the alleged division was on the plaintiff, and that as he had not discharged it he must fail. The ruling in that case is to the effect that the burden of proving the division of ancestral property is upon the party asserting division. It was given by Mr. Sanford Judicial Commissioner of Lower Burma in 1874. No authority is cited in support of it, As a rule of English law it cannot be supported by any known principles of the subject. Nor can I find any authority in the Dhammathats in support of it. I am unable to see how any rule as to the burden of proof can be laid down without reference to the facts of the particular case in which the question arises. All that Mr. Sanford says in his judgment is that he who asserts that an estate is divided must prove his assertion. Upon what facts this view is based I am not able to find in the judgment. With due respect to the learned Judge, I am bound to say that the ruling as stated baldly, cannot be held to be sound, unless Buddhist Law says that ancestral land must be presumed to remain undivided until the contrary is proved. That there is no such presumption in Buddhist Law I have no doubt. No such presumption can possibly be justified, having regard to the fact that among the Burmese Buddhists the division of ancestral estate among the co-heirs is the rule, cases of co-heirs remaining in commensality being extremely rare.

In my judgment, upon the facts found as above in the present case there can be no doubt that the defendant who asserts that there was no division must prove as to how, for what purposes and under what circumstances the three children of So Lay came to take each a lot, without treating what they took as their share of the inheritance. The defendants' uncles merely say that they took a lot each and worked it, but do not state any reason for such an unusual method of dealing with an intestate's estate. In the absence of any satisfactory explanation of how this unusual method came to be adopted, it must in my opinion, be held that Ma Aung Gyaw went into occupation of the lot which she worked as the result of a partition between the children of So Lay on the basis of intestate succession.

My view is supported by the remarks of Mr. Copleston, Judicial Commissioner of Upper Burma who said in Maung Lu Pe vs.

(1) Bur. Sel. Judg. 22.

Maung Lu Gale (2) "There is no presumption that property left by a person long deceased is part of an undivided estate. According to the circumstances of the case, it may require much or very little evidence to sufficiently prove that the property is undivided, but, when land has been in exclusive possession of others for a long period, the person asserting that it forms part of an undivided estate should be required to prove the fact." There is sufficient proof that the defendant rented the land in suit for sixty baskets of paddy for the year preceding the suit. The appeal is allowed. The judgment and decree of the district court are set aside, and those of the township court restored. The respondent will pay costs throughout.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 149 OF 1910.

M. A. R. R. M. R. M. CHETTY ... ... APPELLANT.

vs.

BADIER RAHMAN CHOWDRY ... ... RESPONDENT.

Before ir Charles Fox, Kt. Chief Judge, and Mr. Justice Hartnoll.

For Appellant—Mr. Dantra.
For Respondent—Mr. J. R. Das.

8th July, 1912.

Power of Attorney—Scope of agent's authority. Liability of principal.

A general power to mortgage implies a power to borrow money on the principal's account, and where equitable mortgages are recognized as valid, to create an equitable mortgage by deposit of title-deeds, but not to sign promissory notes on behalf of the principal.

The principal is not liable on a promissory note executed by an agent in professed exercise of a power to mortgage.

JUDGMENT.

Fox, C. J.—The question in this case is whether the power of attorney produced gave powers to Fazlur Rahman Chowdhury as the defendant's agent to borrow money on the defendant's account and to make an equitable mortgage of the defendant's property to which the power of attorney related. The power of attorney is dated the 6th November 1906 and was duly registered on the 10th November 1906 when Fazlur Rahman Chowdhury borrowed Rs. 10,000 from the plaintiff and signed in his favour a promissory note for the amount bearing interest at one per cent. per mensem. He signed the note in the defendant's name and his own name as general agent for the defendant. The power of attorney refers only to the one property of the defendant. Amongst other powers it gives power to the attorney to sell, mortgage or pledge the property for such sum and in such manner as the attorney should think fit.

(2) 2. U, B. R, 418.

It has been held that the power to mortgage did not authorize an equitable mortgage by deposit of title-deeds, and that it did not authorize a mortgage for any but an existing debt of the principal's.

It appears to me that these findings are erroneous. Equitable mortgages by deposit of title-deeds are recognized as valid in certain towns (Rangoon being amongst them) by section 59 of the Transfer of Property Act, and they are just as valid as any other form of mortgage.

The other proposition that the agent could only mortgage in order to secure an already existing debt of the principal's has been pressed upon us as being shown by the authorities, but I fail to see that any of the authorities quoted to us lay down that where a principal gives his attorney power to mortgage his property that attorney is not at liberty to borrow money for the principal on a mortgage. It appears to me that in such a case power to borrow on the principal's account must necessarily be implied. In the present case the attorney was empowered to mortgage the property for such sum as he thought fit.

The agent in this case was not empowered to sign promissory notes for the principal and consequently the defendant is not liable on the promissory note in suit, but I think the agent was empowered to borrow the money, and to create an equitable mortgage over the principal's property to secure repayment of it.

I would allow the appeal, reverse the decree of the original court and give the plaintiff a mortgage decree for Rs. 10,000 with interest calculated according to the practice of the court and I would order the defendant to pay the plaintiff's costs of the suit and of this appeal.

HARTNOLL, J.—I concur. In the present case the power to mortgage is not confined to creating a mortgage to secure an existing debt but it is general—namely to mortgage for such sum and in such manner as the attorney should think fit. When the mortgage is one by which money is lent on the security of the land, it is part of the transaction for the mortgagor to receive the money, and so I agree with the learned chief judge when he says that where the principal gives his attorney power to mortgage his property, power to borrow on the principal's account must necessarily be implied.

THE

BURMA LAW TIMES.

VOL. IX.] JULY & AUG. 1916. [NOS. 7 & 8.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL No. 192 of 1915.

A. M. H. ISPAHANY ... ... APPELLANT.

vs.

N. A. P. K. CHETTY ... ... RESPONDENT.

Before Mr. Justice U Kin.

For Appellants—Mr. J. R. Das.
For Respendent—Mr. N. S. Aiyar.

24th February, 1916.

Civil Procedure Code (Act V of 1908) O, XXI r. 66—Mistake in proclamation of sale—smaller area sold than advertised—duty of court with regard to proclamations—Remedy of purchaser misled by mistake due to carelessness of court.

Where a court sale in execution of a decree is not vitiated by fraud on the part of the judgment-debtor or the decree holder the purchaser buys at his own risk and there is no warranty of title or guarantee that the property will answer to the description.

Sundara Gopalan vs. Venkatavarada Ayengar 17 M. 228 followed.

In sales under the direction of the court it is incumbent on the court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers.

Kala Meah vs. Harperink 36 C. 323 followed.

When owing to a mistake in the proclamation of sale a larger area was advertized for sale than was actually sold, the auction-purchaser can sue either for a refund of a proportionate part of the purchase-money or for a cancellation of the sale. He can sue for either of the two reliefs, and would be entitled to the first if he can prove that the price paid by him is in excess of the fair value of the property, and that he was induced to pay that price by the misdescription in the sale proclamation.

U KIN J:—The facts stated in chronological order are as follows:—

On the 2nd April 1913 the first defendant sued the second defendant for a mortgage-decree on a registered mortgage-deed

whereby the second defendant was alleged to have mortgaged two pieces of land namely holding No. 15 of 1906-07 measuring 25·66 acres and holdings No. 3 and 5 of 1906-07 measuring 29·33 acres. The first defendant filed with the plaint the mortgage-deed and four plans relating to the mortgaged property.

On the 22nd May 1913 the second defendant appeared and confessed judgment and a mortgage decree was accordingly passed. On the 24th November 1913 the first defendant applied for sale of the property. On the 8th December 1913 the decree was made absolute and the sale ordered to take place on the 12th January 1914. On the 17th December 1913 in the presence of the first defendant's agent Latchman Chetty the court declared the proclamation of sale to have been duly posted.

On the 3rd of January 1914 the second defendant in his capacity as judgment-debtor informed the court by a petition in writing that of the holdings No. 3 and 5 of 1906-07 which originally measured 29·38 acres there were then left only 19 acres, as a portion had been acquired for town lands, that of the remaining 19 acres there remained only 7 acres which might be sold as jungle land, and that the other 12 acres were within Penwegon Town limits and the petitioner did not think that the court would have power to sell them. Upon this petition the court passed the following order "Read application of Po Hlaw. The property about to be sold is what was mortgaged by him and it is his interest in the property whatever it is, that is aboet to be put up to auction. There is no use prohibiting sale of interests in lands in town. Petition rejected."

On the date fixed for the sale both the lands were knocked down to the plaintiff, holding No. 15 for Rs. 2,750, and holdings No. 3 and 5 for Rs. 2,050. The next thing that happened was that the plaintiff discovered that there was a shortage in the area of the property sold when compared with the advertized area. The first lot measured only 19·61 acres, and the other 6·61 acres. The plaintiff thereupon applied to have the sale set aside. He succeeded in the subdivisional court, but on appeal by the other side, his application was rejected.

The plaintiff then filed the present suit against the two defendants praying for compensation to the amount of Rs. 2,166 for the missing 21·72 acres alleging in paragraph four of the plaint that "the area of the land is not the same as it was when it was proclaimed for auction sale, that though the defendants were aware of this fact prior to the auction sale, the auction sale was made fraudulently without disclosing the fact." This allegation was in reference to holdings No. 3 and 5 which originally measured 29·33 acres. The first defendant replied that the allegation in paragraph four of the plaint even if true, would not constitute fraud. The second defendant did not appear. Now there is no doubt, in fact it is common ground that there were 21·72 acres missing, but the question is whether the plaintiff is entitled to get compensation as sued for.

What is the law on the subject? The preponderance of authority is in favour of the proposition that a purchaser at a court sale of immoveable property buys at has own risk and there is no warranty of title or guarantee that the property will answer to the description given of it, unless the sale is vitiated by fraud on the part of the decree holder or the judgment-debtor. See Sundara Gopalan vs. Venkatavarada Ayengar (1), Shanto Chunder Mukherji vs. Nain Sukh (2) followed in Mohammad Rahmatullah vs. Bachcho (3) Abdullah Khan vs. Abdur Rahman Beg (4), Birj Mohun Thakur vs. Rai Uma Nath Chowdhury (5) referred to in Sheo Govind Singh vs. Dhamkdhari Singh (6).

The contrary authority is the Calcutta case of Doyal Krishna Naskar vs. Amrita Lal Das (7) in which the Allahabad case of Abdullah Khan vs. Abdul Rahman (4) above cited was dissented from by Maclean C. J. but the decision of the case on the question of fraud was not necessary.

In the present case no fraud was alleged with reference to holding No. 15. The claim in regard to it may therefore be dismissed. It remains to consider whether the allegations contained in paragraph 4 of the plaint constitute fraud and whether the first defendant the decree-holder was guilty of fraud. It was neither alleged, nor was it shown how the first defendant came to know that there were not so many acres in holdings No. 3 and 5 as were advertized for sale nor is there any evidence to show that the first defendant having a knowledge of the shortage, concealed that knowledge. The plaint is defective in that it is not alleged how the first defendant came to know of the shortage.

* * * * *

There was honesty displayed by the judgment-debtor but the court did not think it necessary to enquire into the matter and check the proclamation. Whoever may be to blame for the confusion and trouble which has now arisen, I am unable to find that it is either the judgment-debtor or the decree-holder. But the question before me is whether the plaintiff should be allowed to suffer without any remedy.

All the materials for drawing up a correct proclamation of sale showing the acreage of the lands were before the court. Yet the presiding judge did not avail himself of it. Therefore as held by the learned divisional judge "the only thing proved in the case is inattention on the part of the presiding judge to his duties." This brings me to a consideration of the Privy Council case of Kala Mea vs. Harperink (8) where their lordships of the Privy Council observed." It has been laid down again and again that in sales under the direction of the court it is incumbent on the court to be scrupulous in the extreme, and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The court should, it is said, at

(1) 17 M. 228
(2) 23 A. 355.
(3) 27 A. 537.
(4) 18 A. 322.
(5) 20 C. 8 (P. C.); 19 I. A. 154.
(6) 21 Ind. Cas. 774.
(7) 29 C. 370.
(8) 36 C. 323. 36. I. A. 32.

any rate not fall below the standard of honesty which it expects from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the court were to enforce against a purchaser misled by its duly accredited agent a bargain so illusory and unconscientious as this."

By order XXI rule 66 a duty is cast upon the court to use all possible materials before it in drawing up a proclamation of sale, which will give such information about the property to be sold as may be as fair and as accurate as possible. I venture to think that where the presiding judge has not availed himself of the materials before him, they being such as would have enabled him to avoid the trouble afterwards occasioned, the purchaser who has in fact been misled should have a remedy.

The remedy would be either a proportionate refund of the purchase-money for the missing acres or a cancellation of the sale. The plaintiff would be at liberty to ask for the one relief or the other, and he would be entitled to the first remedy where he is able to prove that the price paid by him is in excess of the fair value of the property and that he has paid that price by reason of the misdescription, See Banerji J's Judgment in Doyal Krishna Naskar vs. Amrita Lal Das (7). Now we have it that the acerage advertized for sale was 29-33 and what the plaintiff actually got was only 7·61, for which he has paid Rs. 2,050. That is obviously very much in excess of a fair price of 7·61 acres of paddy land.

I will therefore allow the plaintiff a decree for Rs. 1,517-12-9 but as the second defendant has received Rs. 351-3-3 out of the sale-proceeds, Mr. Das for the appellant consents to have the amount apportioned between the defendants, that is to say there will be a decree for Rs. 1,166-9-6 against the first defendant with costs. The appeal as regards holding No. 15 is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 36 OF 1914.

SAN HLA BAW ... ... APPELLANT.

vs.

HLA PAW & 2 others ... ... RESPONDENT.

Before Mr. Justice Parlett.

For Appellant.—Mr. S. C. Guha.

For Respondent.—Mr. May Aung.

5th March, 1915.

Specific Relief Act (I of 1877) S. 9. Suit for possession—Physical possession.

Although there is authority for the view that a landlord who has let his land to tenants cannot maintain a suit for possession under section 9 of the Specific Relief Act as he is not in physical possession there is

nothing to prevent the landlord from bringing such a suit if the dispossession took place in the interval between the relinquishment of possession by one tenant and the entry of another tenant.

When the tenant quits the land the landlord's possession revives and continues till the entry of the next tenant.

Jagannath Charry vs. Rama Rayer 28 M. 288 followed.

JUDGMENT.

PARLETT, J.:—Plaintiff let out the land in suit to tenants on yearly leases for a number of years in succession. The last tenancy expired about the beginning of March 1913, when the tenant quitted the land. In June 1913 the first respondent entered upon the land and leased it to second respondent as his tenant. The plaintiff in July filed a suit under section 9 of the Specific Relief Act to recover possession. The third respondent's name was struck off the record, and should not have appeared in the judgment and decree nor in this application. His name will be again struck off the record.

The district court dismissed the suit on the grounds that while plaintiff's tenant was still in possession, plaintiff could not maintain a suit under section 9 of Specific Relief Act, and that after he relinquished possession and before the plaintiff put a fresh tenant in possession the plaintiff himself had not possession and could not maintain the suit. As to the first point there is authority for it Sonaton Shome vs. Sheikh Helim (1) but it does not arise as the dispossession was after the tenancy expired. As to the second it appears to me that the district judge did not apply his mind to the law applicable, nor to the correct state of facts. The plaintiff had for several years been in possession of the land, usually no doubt through tenants whose leases ran roughly from June till March. During the currency of the leases the tenants were in actual possession, which they derived from the plaintiff. Each March when the tenant quitted the land the plaintiff's possession revived and he retained it till he passed it on to the next tenant in June. See Jagannath Charry vs. Rama Rayer (2). In this case before he so passed it on, the defendants entered upon the land and dispossessed the plaintiff, and he was entitled to a decree under section 9 of the Specific Relief Act.

The decree of the district court is set aside, and plaintiff is granted a decree as prayed for with costs in both courts against the defendants. Advocate's fees in this court two gold mohurs.

---

(1) 6 C. W. N. 616. (2) 28 M. 288.

IN THE CHIEF COURT OF LOWER BURMA.

SPECIAL CIVIL SECOND APPEAL No. 40 OF 1915.

MA PAIK ... ... APPELLANT.

vs.

MA NWE PAUK & others ... ... RESPONDENT.

Before Mr. Justice U. Kin.

For Appellant—Mr. J. R. Das.
For Respondent—Mr. N. C. Sen.

6th January, 1916.

Evidence Act (1 of 1872) S. 65 & 91, secondary evidence. Proof of loss of original. Oral evidence to vary a written document.

Whether or not sufficient proof of search for, or loss of an original document to lay a ground for the admission of secondary evidence has been given is a point to be decided by the court of first instance and its conclusion should not be overruled except in a clear case of miscarriage.

Haripria Debi vs. Rukmini Debi 19 C, 484 followed.

Oral evidence to prove that a registered deed purporting to be a sale was in reality a mortgage is inadmisible under section 91 of the Evidence Act.

Maung Bwin vs. Ma Hlaing 3 L. B. R. 100 followed.

JUDGMENT.

U Kin J.—Plaintiff Maung Shwe Lu (since deceased and now represented by the first and second respondents as his legal representatives) and his wife Ma Ngwe Paung sued the defendant appellant in the subdivisional court of Wakema for redemption of certain lands for Rs. 1,000. The plaintiffs allege that in 1260 B. E. (1898-99) Maung Shwe Lu with the consent of Ma Ngwe Paung mortgaged the lands to Kya Tan and Ma Tha Ye (both of whom have since died) by way of usufructuary mortgage as security for a loan of Rs. 1000 and that defendant Ma Paik refused to allow redemption when in May 1913 they requested her to do so. The defence was that there was at first a registered mortgage for Rs. 1,000 with interest at the rate of 3 per cent per mensem, and the condition of the mortgage was that if the mortgagor failed to repay the loan together with interest due thereon in Taboung 1261 B. E. the mortgagees would be at liberty to take over the mortgaged property, and that as he could not repay the amount due the plaintiff made over the property to the mortgagees Kya Ngan and Ma Tha Ya by a registered deed of sale. The defendants allege that the mortgage-deed and the sale-deed have been lost in a fire, and they therefore seek to prove the transactions by certified copies. Exhibit I is a certified copy of the mortgage-deed, exhibit II of the deed of sale.

The plaintiff admitted at the hearing that there was at first a registered deed of mortgage of which exhibit I is a copy, but said that two years later the property was transferred to the mortgagees by way of usufructuary mortgage, and he denied that he ever executed the deed of sale of which exhibit II is a copy.

The sub-divisional court held that the plaintiff had failed to establish that there was a usufructuary mortgage, and that as there was sufficient proof that the original of which exhibit II is a copy was destroyed by fire, the copy was admissible to prove the alleged sale. The court further found that the execution of the original deed of sale had been satisfactorily proved. On these findings it dismissed the suit.

The divisional court held on appeal that there was no evidence on the record to establish or even render probable the destruction of the original of exhibit II and that exhibit II was not admissible in evidence. It held that the suit must be decreed.

The defendant has appealed to this court. In my opinion the divisional judge is in error in holding that the loss of the original has not been proved. The evidence on the point is not only clear and convincing, but also sufficient to establish the loss. . . . . I may also point out that the question whether or not sufficient proof of search for, or loss of an original document to lay a ground for the admission of secondary evidence has been given, is as has been said by their lordships of the Privy Council in Harripria Debi vs. Rukmini Debi (1) "a point proper to be decided by the judge of first instance, and is treated as depending very much on his discretion and his conclusion should not be overruled except in a case of clear miscarriage." Even if I disagreed with the sub-divisional court, I do not think that any case has been made out for overruling the discretion exercised by it.

Upon the evidence I agree with the sub-divisional court, that the original of exhibit II has been satisfactorily proved to have been executed by Shwe Lu and it must be further held that the sale evidenced by the document is binding on his wife Ma Ngwe Paung also, because the plaintiffs admit that Shwe Lu had the consent of his wife to the simple mortgage, and the subsequent transaction as to the nature of which the parties are at variance, and which I have held to be a sale.

Any oral evidence to show that the transaction effected by a registered deed though it purported to be a sale was really a mortgage is barred by the ruling of a full bench of this court in Maung Bin vs. Ma Hlaing and others (2). The plaintiff must therefore fail. The appeal is allowed. The judgment and decree of the divisional court are set aside and the suit is dismissed with costs throughout.

---

(1) 19 C. 438 (2) 3. L. B. R. 100.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION NO. 37 OF 1915.

S. GREENBERG ... ... APPELLANT.

vs.

A. S. PINTO ... ... RESPONDENT.

Before Sir Charles Fox, Kt. Chief Judge.

For Appellant—Mr. Xavier.
For Respondent—Mr. Hancock.

31st March, 1915

Alien enemy—meaning of the term.

The term alien enemy includes not only the subjects of a state at war with Great Britain but also British subjects and subjects of a neutral state who are voluntarily residing in a hostile country.

Kreglinger vs. Samuel 31 Times Reports 162 followed.

JUDGMENT.

FOX, C. J.:—The suit and this application were no doubt intended to be those of Marcus Moses Greenberg executor of Moses (otherwise Maurice) Greenberg, but through the carelessness of the advocates concerned the plaint was instituted in the name of S. Greenberg the attorney of M. M. Greenberg, residing at 36 Soolay Pagoda Road, and the application is that of S. Greenberg without even the addition of "attorney of M. M. Greenberg," The plaint and application deserve to be dismissed on this ground alone. S. Greenberg who is Solomon Greenberg has no right of suit personally, but he may have a right to institute a suit in the name and on behalf of Marcus Moses Greenberg executor of Moses Maurice Greenberg.

The judge took no notice of the objection taken in the written statement that the plaint was defective in form, and I have not been pressed to dismiss the application on the ground that Solomon Greenberg has no locus standi, consequently I will deal with it.

The suit was for rent or possibly it might be taken to be one for use and occupation of three rooms in a house. It was instituted on the 19th August 1914, that is after war had commenced between the British and German Empires but before war had been declared between Great Britain and Turkey.

Moses (Maurice) Greenberg was a German subject by birth but he became a naturalized British subject in India in 1866. There appears to me to be sufficient evidence to show that his son Marcus Moses Greenberg was born in Calcutta 1861 although no British birth certificate was produced to show this.

If he was born in Calcutta he was a natural born British subject although his father was at the time of his birth a German subject.

Persons born within the allegiance of the British Crown include—every one who is born within the dominions of the Crown whatever may be the nationality of either or both of his parents; unless he is either (*a*) a child of a foreign sovereign or any foreign state's ambassador, or, possibly, of any other foreign diplomatic

agent or (*b*) a child born in British territory of alien parents, if the territory was in the occupation of a foreign army at the time of his birth—see Halsbury; Laws of England vol: 1 p. 303.

There was sufficient before the court on which to hold that Marcus Moses Greenberg is a British subject, and the discussion as to whether he became such by reason of his father having become a naturalized British subject was not in point.

A British subject may however have to be treated during a war in which Great Britain is engaged as an alien enemy.

In the recent case of *Kreglinger Samuel and Rosenfeld* (1) the court of appeal in England accepted the following statement by Professor Dicey as correct—"Under the term alien enemies are included not only the subjects of any state at war with us, but also any British subjects or the subjects of any neutral state voluntarily resident in a hostile country."

The affidavits filed in the case show that Marcus Moses Greenberg lived for many years in Rangoon, but he went to Beyrouth which is in Turkish territory in 1911, and was resident there certainly up to the 14th June 1914, since when nothing has been heard from him apparently. In a letter written on that date from Beyrouth he states that he intended to leave for Rangoon about the end of October, but he has not appeared here so far. Possibly he may be dead, in which case Solomon Greenberg would have no right to institute a suit as his attorney. If however he is still alive the only reasonable conclusion to draw is that he is still in Turkish territory. There can be no question as to his having voluntarily resided in Beyrouth. Consequently when war between Great Britain and Turkey was declared he, although a British subject, became an alien enemy of Great Britain as long as he was and is in Turkish territory during the continuance of the war.

The case above referred to shows that any suit of his in a British Court cannot be proceeded with during such period.

The application is dismissed with costs. Two gold mohurs allowed as advocate's fee.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 60 OF 1914.

MA SHWE U & others ... ... APPELLANTS.

vs.

MAUNG PO LU & one ... ... RESPONDENTS.

Before Mr. Justice Ormond and Mr Justice Twomey.

For Appellants—Mr. Palit.
For Respondents—Mr. May Oung.

23rd July, 1915.

Transfer of Property Act (IV of 1882) Section 58 (c) mortgage by conditional sale—Option to repurchase. Registration. Amendment of plaint.

---

(1) (1915) 31 Times Reports 162.

The test for determining whether a document is a mortgage or a sale is whether the relation of creditor and debtor subsists between the parties after execution of the document. If it does, the document is a mortgage.

Ma Hnin vs. Osman Gani 5 B. L. T. 99 followed.

An option to purchase is not an interest in land, and a document creating an option to purchase does not require registration under Section 17 of the Registration Act.

Where in a suit to redeem a mortgage it is found that the document sued on is not a deed of mortgage but a sale deed the plaintiff ought to be allowed to amend his plaint so as to convert the suit for redemption into one for specific performance of an agreement to resell because the relief sought is in effect the same, the facts are the same, and the plaintiff is only asking the relief which is applicable to the facts stated in the plaint.

JUDGMENT.

ORMOND AND TWOMEY, J. J.:—The plaintiffs sued for redemption of three plots of land. On the 4th April 1910 the plaintiffs executed a document of sale exhibit C in favour of the defendants which was registered and on the same-day the defendants executed an agreement exhibit D under which they were to lease the lands to the plaintiffs for a period of three years, and not to lease to anybody else during that period, and to resell the lands to the plaintiffs for the price paid by the plaintiffs plus Rs. 50 if the plaintiffs wish to repurchase within the three years. That document was not registered. Both the lower courts have held that the transaction was a mortgage and that the agreement exhibit D should have been registered as it formed part of the mortgage transaction. The written documents clearly show a sale and an option of repurchase within three years which period had not expired when the suit was brought. The relation of debtor and creditor no longer existed after the execution of these documents. The fact that the purchaser leased out the lands to the vendor and undertook to resell the lands within a certain period at a certain price if the plaintiffs wished to repurchase, is not inconsistent with an outright sale. The case of Ma Hnin vs. Osman Gunny (1) is very similar to the present one. The agreement exhibit D does not confer an interest in land; it merely gives an option of repurchase to the vendor and is an agreement to lease agricultural land which does not require registration (vide section 117 of the Transfer of Property Act). The agreement is in Burmese, and uses the Burmese word "Ywe" for redemption but that should not be taken necessarily in its English technical meaning as applicable only to the case of a mortgage. It means no more than the right to buy back. In the plaint the suit is framed as one for redemption of a mortgage. The plaintiff now asks for leave to amend his plaint by asking for specific performance of the agreement to resell. The relief sought is in effect the same, and the facts are in no way

(1) 5 B. L. T. 99.

different. We think the plaintiff should be allowed to amend his plaint accordingly, in order that he should obtain the relief which is applicable to the facts stated in the plaint, his suit really being beased on the two documents of the 4th April 1910. Mr. May Aung for the defendants states as to costs that if the suit had been framed as a claim for specific performance of a contract to resell, it is possible his client might have admitted the claim and so avoided litigation. The case is remanded under O. XLI r. 23 to be readmitted and determined on its merits. If the defendant admits the claim as amended, each party will bear their own costs throughout; otherwise the costs throughout will abide the ultimate result. A certificate will be granted for a refund of the court fees under section 13 of the Court Fees Act.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEALS NOS. 20 AND 37 OF 1915.

MAUNG SEIN KYI ... ... APPELLANT.

VS.

MA E ... ... RESPONDENT.

AND

MA E ... ... APPELLANT.

VS.

MAUNG SEIN KYI ... ... RESPONDENT.

Before Sir Charles Fox Kt. C. J. and Mr. Justice Parlett.

For Appellant—Messrs. Gregory and Hancock
For Respondent—Messrs. Burjorji Dantra & Doctor.

10th January, 1916.

Burmese Buddhist Law-Marriage between a Chinese Buddhist and Burmese Buddhist woman—The law applicable—Custom in derogation of general law = Damages for breach of contract—measure of Damages.

Per Parlett J. (Fox C. J. dissentiente) There can be no valid marriage between a Chinese Buddhist male and a Burmese Buddhist woman without a due observance of the formalities required by Chinese Customary law.

Pai Beng Teng vs Ko Maung. 2 L. B. R. 261 followed.

Evidence of a few marriages in Burma without the observance of such formalities which have been looked upon as valid only shows that public opinion with regard to such unions is lenient and uncritical, but it falls far short of proving a general custom in derogation of the personal law applicable to the case.

The rule with regard to assessment of damages for breach of a promise to marry is that applicable to all contracts under section 74 of the contract act under which the court can award such compensation not exceeding the amount named in the agreement as appears reasonable. In considering what is reasonable in any particular case regard is to be had not only to the circumstances and position of the parties, but also to any extenuating or aggravating circumstances in the conduct of the defendant.

Per Fox C. J. Where the parties to a marriage are governed by different personal laws, prima facie there is no reason why the personal law of the man should be applied in preference to that of the woman at any rate up to and at the time of marriage. After marriage different considerations arise.

The rule of British courts in such cases is that the validity of a marriage is determined by the lex loci contractus quoad solemnitates and the lex domicilii quoad the capacity of the parties to marry.

Brook vs Brook (1861) 9 H. L. Cases 193 and Brinkley vs Attorney General (1890) 15 P. D 76 referred to.

JUDGMENT.

PARLETT, J.—Ma E sued as a pauper for a declaration that she was the lawful wife of Maung Sein Kyi and for a decree for restitution of conjugal rights or in the alternative for Rs. 5,000 for breach of an agreement to marry her. The learned judge on the original side held in his favour on the former and against him on the latter point and assessed the damages at Rs. 2,000. Both parties appeal, Ma E as a pauper, while Maung Sein Kyi has become insolvent during the pendency of his appeal which has been continued by the official assignee. Ma E asks for a declaration of the marriage and restitution of conjugal rights or in the alternative for the full amount of the damages claimed. Maung Sein Kyi contends that there was no valid agreement between the parties for the breach of which damages could be awarded and that the amount awarded is excessive and he asks that the suit be dismissed.

Ma E is a Burmese Buddhist and Maung Sein Kyi is a Chinese Buddhist, the father of neither is alive. Through a man named Ismail they became acquainted and subsequently became attached to each other but Ma E having had a previous matrimonial venture which proved unfortunate, she and her mother were at first adverse to her remarrying the defendant, but eventually agreed upon his undertaking to sign a document. On the 9th November 1913, the parties went to a house in a garden belonging to Ismail's sister and there executed a document wich was attested by Ismail and Bun sein, a friend of Sein Kyi, in the presence of Ismail's brother in-law. Neither plaintiff's nor defendant's mother was present. The latter has admittedly never consented to the marriage. After the document was executed the defendant cohabited with the plaintiff at her mother's house for five or six months and then moved with her to Bun Sein's mother's house, but subsequently deserted her. There can be no doubt that there cannot be a valid marriage according to Chinese customary law, none of the preliminaries thereto having been observed, in particular no negotiations between the parties' parents having taken place, and the defendant's mother not having given her consent (see Pai Beng Teng vs Ko Maung (1) and Alabaster's notes on Chinese Customary Law page 172). But evidence is offered that in Burma such a union between parties one of whom is Chinese or half Chinese, is recognised as a valid marriage and that the Chinese ceremonies though

(1) 2 L. B. R. 261.

often observed are optional and not essential. Ma Ket Says tha thirty five years ago she married a Chinaman without any ceremony and has since been recognised as his wife, but whatever people may have thought it is clear that at the outset she had not the full status of a wife, for he already had a wife in China who has only been dead about ten years. (See Alabaster page 171.) Her son Ban Sein took a wife of Chinese extraction a year ago. Aung On Shwe, a half Chinese, took a Burmese husband sixteen years ago, in each case without any ceremony, and the parties are recognized as husband and wife. Such evidence appears to me at most to show that public opinion in this country with regard to such unions is uncritical and lenient and I consider it falls far short of proving that they constitute legal marriage. I would hold that there was no marriage effected between the parties to this suit.

The defendant contends that the agreement was not one to marry but to live together in concubinage and as such is void under section 23 of the contract act. In my opinion it cannot bear any such interpretation. The material portion runs as follows: "As I Maung Sein Kyi, will live with Ma E for her whole life as husband and wife, hereafter I, Maung Sein Kyi from the day we thus live as husband and wife throughout my whole life, will never abandon Ma E, whether infirmity or blindness or any affliction overtakes her or any person interferes or makes mischief between us or any relation on my side objects. Handing all my salary as well as all property we may acquire together to her my wife, I will attend to, maintain, look after, and cherish her in conformity with the duties of a husband. If I fail in any of the aforesaid duties I will pay Rs. 5,000 as compensation for damage to the reputation of my wife Ma E. Ma E also, upon Maung Sein Kyi not failing in but performing the duties defined above, will throughout her whole life carry out the various acts of attendance upon her husband in accordance with the duties of a wife. Though her husband become infirm or blind she will not desert him." No wording could, I think, make it plainer that a lifelong and binding union was contemplated by the parties. The defendant admits that his intention was to marry the girl if he could get his mother's consent, and there is no doubt that it was due to her opposition that he failed to carry it out. I am of opinion that there was a promise to marry her, which defendant broke.

The plaintiff contends that she should be awarded the full amount of compensation named in the agreement to be paid in the case of its breach. It appears to me however that under section 74 of the Contract Act it is open to the court to award such compensation not exceeding the amount so named as appears to it to be reasonable. The defendant urges that Rs. 2,000 is an excessive amount to award against a person in his position of a clerk on Rs. 75 a month. As he is insolvent it appears to me improbable that the plaintiff will realize any considerable sum from the defendant himself but as pointed out, his stepfather holds a well paid government appointment, and the defendant's position alone does not justify a reduction of the damages. He has treated the plaintiff in a

shameful and hard-hearted manner, and if, as was stated in this court, and not denied, he has since married another girl, he has put it out of his power to make even tardy amends to the plaintiff by offering her the status of a chief wife. On the other hand Rs. 2,000 is a handsome sum to a girl in the plaintiff's position and is I consider a reasonable compensation under the circumstances. I would dismiss both the appeals and would order Ma E to pay the court fee which would have been paid by her if she had not been permitted to appeal as a pauper, and a copy of the decree to be forwarded to the collector.

Fox C. J.—I hesitate to find that there was no marriage between the plaintiff and the defendant, and I refrain from differing from the decision on the first issue only because the plaintiff appears to be indifferent as to whether that issue is decided in her favour or not, and because there has been no child as a result of the connection between her and the defendant. The case to be dealt with is that of a man of twenty five years born in Burma of a Chinese father and a Burmese mother, the latter of whom is alive and the former dead, hiring a Burmese woman into having connection with him under a formal promise of marriage from the time of connection, the woman not having been likely to consent to connection unless such promise had been given, and unless she believed at the time that she was then the man's wife.

Assuming that the man had been brought up to follow his father's customs, although this seems doubtful, we have the case of one party following or being subject to one customary law that of China, and the other governed by another customary law, that of Burma.

Prima facie there is no strong reason why the customary law of the man should be applied, and the customary law of the woman utterly disregarded, at any rate up to and at the time of marriage. After marriage other considerations apply.

The decisions in this province which have held that in order to constitute a valid marriage between a Chinaman and a Burmese woman, it must be shown that certain formalities and ceremonies enjoined by Chinese customary law were gone through, and that the consent of the parents of the parties must have been given to the marriage, overlook the rule of British Courts stated in Brook vs. Brook (2) and other cases that the lex loci contractus quoad solemnitates determines the validity of a marriage, and the lex domicilü the question of the capacity of the parties to marry. The principle was followed in Brinckley vs Attorney General (3) in which the marriage in Japan of an Irishman with a Japanese woman according to forms required by Japanese law was recognized as valid. Sottomayer vs Du Barros (4) affords an example of the application of the law of domicile. It may be noted that in this last case consent of parents required by the law of France was

(2) (1861) 91. H. L. Ca 193; 131 R. R. 123.
(3) (1890) 15. P. D. 76. 62 L. T. 911.
(4) (1877) 3 p. D. 1: 37. L. T. 415.

considered part of the ceremony of marriage, and not a question affecting the general capacity of the parties to contract marriage.

When there is a divergence between the personal laws applicable to the parties to a marriage or alleged marriage, it appears to me that the principles acted on in the above cases should be followed in determining whether there has been a marriage or not.

Taking it however that there was not sufficient evidence to prove a marriage even according to Burmese ideas and law there can be no question that the defendant promised to marry the plaintiff and that he broke the promise. The agreement is not open to the construction that the union of parties contemplated was a temporary one. I agree in the award of damages to the plaintiff, my only doubt is whether she should not be given the full amount mentioned in the document as was done in Ma E vs Maung San Da (5).

The appeal of Ma E is dismissed with costs as she has succeeded substantially, but she is ordered to pay the court fee which she would have had to pay if she had not been allowed to appeal as a pauper.

IN THE CHIEF COURT OF LOWER BURMA:

CIVIL SECOND APPEAL NO. 140 OF 1915.

MAUNG KAW LE ... . APPELLANT.

vs.

MAUNG KE ... ... RESPONDENT.

For Appellant—Mr. Ginwala.
For Respondent—Mr. Ba Dun.

Before Mr. Justice U. Kin.

24th January, 1916.

Riparian owners—Water rights in a natural stream. Natural stream defined—Easements Act (V of 1882) s. 7 illustration (J) explanation. Creation of easements. Absence of proof of damage—Res judicata.

The only questions for consideration in a suit to enforce water rights are (1) whether the stream in question is a natural stream (2) whether the plaintiff is a riparian owner, (3) whether the defendant has any rights by custom, prescription, or grant.

A natural stream according to the definition in the explanation to illustration (j) of sec. 7 of the Easements Act is a stream flowing by operation of nature alone, in a natural and known course. The root idea of a stream is that it should run in a defined course. Perennial flow is not necessary to the legal conception of a stream, provided that the flow be of constant recurrence, not fortuitous, or temporary.

Secretary of State vs. Balwant Ganesh 28 B. 105 and Taylor vs. St. Helen's Corporation 1877 Ch. D. 274 referred to.

Right to the enjoyment of the water of a river belongs to the occupants of the bank whatever the nature of their tenancy.

Collector of Nasik vs. Shamji. 7 Bom. 209 followed.

---

(5) 4. Bur. L. R. 8. 1 Chan Toon 140.

The owner of a tenement adjoining a stream has no right to divert the water to a place outside the tenement, even though by so doing he does not diminish the flow of water to the lower riparian tenements.

In an action by one riparian owner to restrain another from diverting the water beyond his tenement, it is not necessary for the plaintiff to prove that he has suffered any damage.

As there are no revenue courts in Burma there can be no question of *res judicata* by reason of the orders of revenue officers. The only question that could possibly arise would be whether the jurisdiction of civil courts is barred by any special enactment.

JUDGMENT.

U KIN. J:— The suit is for the removal of a bund across what the parties call a yo. The plaintiff owns a piece of land along a part of which the yo in question runs, and with the water of the yo he irrigates his land. The defendant put up a bund across the yo a little distance above the plaintiff's land, thus completely preventing the flow of the water of the yo to it. The defendant by his written statement replies that the water of the yo does not flow into the plaintiff's land which being low-lying is amply supplied with water independently of the yo; that the land formerly belonged to Maung Kya from whom the plaintiff had bought it, and that about fourteen years ago as the defendant's land was high, and the land in suit was amply supplied with water independently of the yo, Maung Kya allowed the defendant to put up the bund in question. There have been some revenue proceedings before the revenue officers and the result has been adverse to the plaintiff. The township judge held the suit res-judicata by reason of the revenue proceedings and dismissed the suit without going into the merits. The additional judge of the district court on appeal held that the suit was not res-judicata, that the plaintiff as riparian owner was entitled to have the bund removed, as it had entirely stopped the flow of water into plaintiff's land and gave a decree as prayed for.

In this appeal it is necessary to determine only the following points: (1) Is the yo in question a natural stream? (2) Is the defendant a riparian owner? (3) Irrespective of the answers to the above questions has the defendant acquired any right in respect of the bund by custom, prescription, or grant? (4) Does the fact that the plaintiff's land is amply irrigated independently of the yo constitute any defence for the action of the defendant? The plaintiff's claim as a riparian owner must be in respect of a natural stream, and not an artificial waterway. There is no evidence that the yo was made by anybody. The evidence regarding the nature of it is that the water which runs in the yo comes down in the rains from the hills above, that it flows down the yo past the plaintiff's land, and that the plaintiff and his predecesors in title have made use of the water from the yo for the purpose of irrigating the land which they have successively owned. There is no evidence to show how far the yo extends beyond the plaintiff's land. Evidently it is dry for a part of the year probably in March, April and May. It is clear that the yo is a defined channel.

In the case of the Secretary of State vs. Balvant Ganesh Oze (1) at p. 118 a stream is defined in these words "a stream of water is water which runs in a defined course (Taylor vs. St Helen's Corporation) (2) nor is a perenninal flow a neressary condition to the legal conception of a stream provided the source though irregular be one of constant recurrence, and not merely fortuitous or temporary." And the nala in that case was described as follows: "for about one half the year the nala was a running stream deriving its flow of water from sources which though not perennial were constant in their recurrence." Again, we find in the Indian Easements Act a definition which might be referred to as embodying the principles of law involved, although the act does not apply to the case. The definition runs: "a natural stream whether permanent or intermittent, tidal or tideless, on the surface of land or underground which flows by the operation of nature only, and in a natural and known course." Applying these definitious to the yo in question there can be no doubt that it is a natural stream. Mr. Ginwala for the appellant argued that a natural stream must have a source and must empty itself into a river or a lake, and that as there is no evidence where the yo in suit goes to, it cannot be held to be a natural stream. In my judgment the argument cannot be acceeded to. So long as water runs in a defined channel which is not artificial and from a known source, the man past whose land it goes has a right to treat it as a stream from its source as far as the lower end of his land. I am unable to agree with the argument that the water must be proved to empty itself into a lake or a river. There must be many streams which take their rise on the hills, run for a few miles, and lose themselves in a marsh or sandy ground, or the like. The river Tarin which is said in the school geographies to be the shortest river in Asia takes its rise in the Tibetan plateau and loses itself in the Gobi desert. I hold that the yo in question is a natural stream.

The next point is whether the parties are riparian owners. The learned additional judge of the district court says in the course of his judgment that the parties are riparian proprietors and as such are equally entitled to use and consume the water of the stream for drinking, and he also describes them as parties owning lands adjoining a stream. That this is partially wrong will appear presently.

The question has been dealt with in the case of the Assistant Collector of Nasik vs. Shamji Dasrath Patil (3) when it was laid down that the right to the enjoyment of the water of a river belongs to the occupants of the bank, whatever the nature of their tenancy. And in McCartney vs. Londonderry and Lough Swilly Railway Co., (4) which has been followed in Aiyavu vs. Sawminatha (5) it was laid down by the House of Lords that the owner of a tenement adjoining a natural stream has no right to divert the water to a

(1) 28 B. 105.
(2) 1877 Ch. D. 264.
(3) 7 Bom. 209.
(4) 1904 L. R. App. Cas, 301.
(5) 28 M. 236.

place outside the tenement and there consume it for purposes unconnected with the tenement. The inference from this ruling is that a person who owns land which is not on the bank of a river or stream cannot possibly have the rights of a riparian owner, for even a riparian owner properly so called, because he occupies land on the bank of a stream cannot use the water from the stream for the purposes of a piece of land which is not on the bank.

Turning to the facts of the case, we find on reference to the map that the yo runs from the north-east direction past the plaintiff's land on the north west boundary of it, taking a south-westerly course. Just a little above the plaintiff's land there is across the yo a bund marked B in red. From a point a little above the bund we see a canal running through a piece of vacant land on the north-east of the plaintiff's land and then entering the defendant's land which adjoins the plaintiff's on the south-east. The canal is marked C in red. It is admitted that by means of this canal the defendant carried the water of the stream to his land which is not on the stream at all. It is therefore clear that the defendant is not a riparian owner, and has no natural right to the water in the stream. And it is equally clear that the plaintiff is a riparian owner, as his land is on the left bank of the stream.

Regarding the third point I am unable to hold that the defendant has proved any grant from the plaintiff's predecessor in title as alleged by him. Further it cannot be held that he has acquired any prescriptive right over the water, as on his own showing he made the bund and the canal only fourteen years ago. And it is doubtful if it was so long ago as that. There is no question of custom.

The fourth question is whether the fact that the plaintiff's land is amply irrigated independently of the stream constitutes a defence to the plaintiff's suit. There is no reliable evidence to prove the fact. Even if there were, it would be no defence at all. In the Privy Council case of Debi Pershad Singh vs. Joynath Singh (6) it was held that that in order to support an action by one riparian owner to restrain another from diverting the water beyond his riparian tenement it is not necessary that the plaintiff should prove that he suffered any damage. That being the case, the alleged fact, even if proved, does not constitute a defence.

For the reasons above stated the plaintiff must succeed. I may say in passing that assuming that the defendant is a riparian owner I agree with the learned additional judge of the district court in holding that the defendant as such owner has no right to stop the flow of water to plaintiff's land by erecting the bund.

I have not dealt with the question of res judicata, as it has not been raised by the appellant. In this country there are no revenue

---

(6) 24 C. 865.

courts, and there can be no case of res judicata by reason of the orders of revenue officers. The only question that can arise is whether the courts are debarred by any provision of any fiscal enactment from giving the relief asked for in any particular case. In the present case the question of the jurisdiction of the court cannot possibly arise.

The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 117 OF 1914.

MA PWA ... ... APPELLANT.

vs.

YU LWAI and another ... ... RESPONDENTS.

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

For Appellant—Mr. Clifton.
For Respondents—Mr. N. M. Cowasji and Mr. Bannerji.

17th January, 1916.

Chinese Buddhist Law—Adoption—Family house—Forfeiture of widow's right of maintenance by leaving family house.—Administrator General's Act (III of 1913) S. 10.

The customary law of Chinese Buddhists as far as it can be ascertained is the law applicable to questions of adoption and inheritance amongst Chinese Buddhists settled in Burma.

Fone Lan vs. Ma Gyee 2 L. B. R. 95 followed.

An assembly of elders, an entry of the adoption in the genealogical register of the family, a change in the residence of the adopted child, and assuming the name of the adoptive father in place of that of the natural father's are the usual incidents evidencing an adoption according to Chinese customary law, and when none of these usual incidents are proved to have taken place it is a reasonable inference that no adoption took place.

The performance of funeral rites and ceremonies on the death of a person is by itself no evidence that the person performing them is the adopted son of the deceased, such rites and ceremonies being usually performed by a nephew in the absense of a son, and sometimes even by a person hired to perform them.

A family house in Chinese Buddhist law is a house which has belonged to paternal ancestors or one which a man has started for his family and their male descendants. The root idea of a family house is that a family should have lived there continuously for years, and that it should descend as a family house from father to son.

In the absence of any guide as to what would be done in China, any rule of Chinese customary law depriving a widow of maintenance unless she lives in the family house with her deceased husband's relations should not be enforced when the widow leaves the house because the other members of the family make themselves objectionable to her and make it impossible for her to live with them.

An order for issue of letters of administration to the administrator-general can only be made on the application of that official or of one of the parties concerned.

A Chinese widow can adopt a son to her deceased husband with the consent of her deceased husband's nearest male relatives.

Chinese customs relating to adoption and inheritance are not religious in origin, and have no connexion with Buddhism, Confucianism or Taoism.

JUDGMENT.

Fox. C. J.—The relief claimed in the suit was. (*a*) a declaration that the plaintiff is the adopted son of Wun Pain Wain, deceased, and his sole heir, (*b*) a decree for the administration of Wun Pain Wain's estate by and under the directions of the court, and for determination of the rights and shares of the parties in the estate, (*c*) an order for accounts to be taken of the assets and liabilities of the estate, (*d*) an order for appointment of a receiver of the estate (*e*) costs and (*f*) any further and other relief which might be proper.

The plaintiff is the second son of Wun Pain Khain, the elder brother of Wun Pain Wain. He is a minor, and the suit is brought on his behalf by Ma Me, wife of Leong Shain Sway. She is a sister of Wun Pain Khain and Wun Pain Wain. Their father's name was Wun Shan Shoke and their mother's Ma Po. There is another brother Wun Pain Wa, who was a witness in the case.

The first defendant is the widow of Wun Pain Wain, having been his second wife. His first wife was Ma Phee who died in 1907. Wun Pain Khain died in 1909, leaving a widow Ma Ma and children. Wun Pain Wain died on the 10th January 1913. His mother Ma Po died in January of the following year. The second defendant is a girl who is alleged in the plaint to have been adopted by Wun Pain Wain and Ma Phee. Although this adoption is denied by the first defendant in her written statement, she admitted it in her petitions to the elders whose assistance she sought, and it is clearly proved by exhibit A. The first defendant denied the adoption of the plaintiff and adhered to the denial. The first issue in the case was "Was Yu Lwai, the plaintiff, the adopted son of Wun Pain Wain? It lay upon the next friend of the plaintiff to prove affirmatively that Wun Pain Wain had adopted him.

The first question to be considered is the question as to what law is applicable to the parties, Wun Pain Wain's father was a Chinese who settled in Burma and married here. Whether his wife was of mixed Chinese and Burmese blood does not appear. Their children were brought up to follow Chinese customs, funerals of members of the family have been according to rites observed by Chinese. The members who have given evidence profess to be Chinese Buddhists. The first defendant also professes to be a Chinese Buddhist: her father is Chinese. She herself has never indicated a desire to have any but the law applicable to Chinese Buddhists applied either on the question of adoption or inheritance, and the plaintiff's next friend claims to have that law applied. Under the circumstances I think the decision in *Fone Lan* vs. *Ma Gve* (1) should be followed and the customary Law of Chinese Buddhists should be applied in both matters as far as it can be

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

ascertained. A mass of evidence has been given in the case to show what the customary law in China is, and we have been referred to the works mentioned in the judgment of the original court.

Neither from the evidence nor from the works can an entirely confident conclusion be come to as to how the questions in issue would be decided in China.

According to Parker at page 4 of his Comparative Chinese Family Law, the Law Secretaries mentioned by Von Moellendorff are, whether provincial or metropolitan, the true and almost the sole repositaries in China both of the life of the law and the life of official language. They search out and supply the law in each case and draw up the records for submission to the courts of appeal at Peking.

It is evident that the customs as to adoption and inheritance have no connexion with Buddhism, Confucianism or Taoism but they appear to be based to a great extent on the veneration of ancestors which existed before the first teachers of the above religions appeared, and which still is the strongest influence with the majority of Chinese, whichever of the above faiths they profess.

Adoption of children by childless married couples would appear to be more prevalent in China than even in Burma. The dying out of a family appears to be regarded as disastrous. Jerningham says at page 124 of his work, (China in Law and commerce)—"The dying out of a family should be prevented, as by the desolation of the house the dead lost their religious honours, the gods of the family their sacrifices, the hearth its flame, and the fore-fathers their name amongst the living". Adoption is resorted to to prevent these calamities, and the most frequent case is the adoption of a nephew by a childless uncle. According to most of the authors the adopted son takes exactly the same position as a natural son. The adoption of females would not with certainty avoid the calamity of the family in the paternal line dying out, for on marriage a woman becomes a member of the family of her husband, and severs connection with the family of her father. If Wun Pain Wain was strongly imbued with the traditions and feelings of his father's race, one would certainly have expected him to have adopted the plaintiff who is a second son of his elder brother. It is remarkable, however, that his first adoption was of a girl, and that it was clothed with a prominent characteristic of one form of adoption amongst Burmese, namely, a declaration that the child should have rights of inheritance. This points to Wun Pain Wain not being so strongly imbued with the necessity of having a son as the ordinary childless Chinese married man is said to be. No doubt his elder brother had no second son in the year 1896 when the second defendant was adopted, but the younger son or any one may be adopted, and it could scarcely have been difficult for a man of comfortable means to have found parents willing to give him one of their sons in adoption.

If the entries in the Municipal Register of Deaths relating to Ma Phee (Exhibit 4) are correct, she must have been thirty one years of age in 1896 when she and Wun Pain Wain adopted the

second defendant. Her parent's names seem purely Burmese. It isremarkable that one who held himself out as a Chinaman should adopt the child of pure Burmese parents. This again tends to show that Wun Pain Wain had leanings towards the customs of the country in which he was born and bred. Years went by and Ma Phee remained childless. Not until 1905 at the earliest is Wun Pain Wain said to have adopted a son, so that for many years of a childless married life the anxiety of his dying without a son cannot have weighed heavily on Wun Pain Wain's mind. Leong Shaing Sway, husband of Ma Me, said at first that the adoption of the plaintiff took place in 1906, but as he afterwards said that it took place three or four months before Wun Shan Shoke's death, and Exhibit 5 shows that the old man died on the 19th June 1905, February or March 1905, must be intended to be put forward as the time when the alleged adoption took place. No special reason is assigned by any of the family for Wun Pain Wain having woke up to the fact that he must have a son. The account of what was done is bald. Wun Pain Wain and Ma Phee are said to have asked Wun Shan Shoke and Ma Po to allow them to adopt Wun Pain Khain's second son. The father sent for Wun Pain Khain, and he agreed and his wife also agreed. Wun Shan Shoke sent for the other brother Wun Pain Wa and E. Lin Shin, a son of Ma Po by a former husband, and the family was informed about the adoption.

Possibly this assembly may be considered an assembly of agnates, which Parker refers to at page 24 of his "Comparative Chinese Family Law" as generally taking place when adoption of an agnate is made, but no entry in a genealogical register of the family is produced to comfirm the fact of the adoption. According to Parker such an entry is usually made. No change whatever was made in the boy's life. He remained with his natural parents who at the time appear to have been living neither in the house in which Wun Shan Shoke lived, nor in the house in which Wun Pain Wain lived. This absence of change in the boy's surroundings and bringing up is sought to be accounted for by his being only about five years old at the time, but this does not adequately account for a husband and wife anxious to adopt a son leaving the child after the adoption with its natural parents. Ma Phee had already taken and brought up a child who was only four years of age when taken; if the plaintiff was a child of ordinary health at the time, his age alone could not have afforded any reason for his not being taken by the adopters to live with them. The plaintiff was first sent to school in 1907; the name, occupation, and residence of the parent or guardian of the boy received into the school had to be registered. Exhibit 9 shows that Wun Pain Khain's name and residence were given. Two and half years afterwards when the plaintiff was sent to another school his natural father's name and residence were again given. Wun Pain Wain is said to have paid all or contributed towards the school expenses of the boy, but there is nothing to support the statements, and even if he did so, the contributions by a well-to-do but childless brother to the school fees of one of his less

well-to do brother's many children would be by no means extraordinary. The fact however, that it was not proved that from the time of the alleged adoption up to the time of his death Wun Pain Wain wholly supported the plaintiff, goes strongly against the truth of the story. Again, although there probably would be good reasons for an adopted boy of seven years of age remaining with his natural mother, after Ma Phee's death there would scarcely have been cogent reasons why he should remain with her after Wun Pain Wain married the first defendant. The latter was not a young inexperienced girl when they were married, and presumably she was quite capable of looking after a boy of ten years of age. Again Wun Pain Khain was not at all well off in his life time, and he is said to have died penniless. From Exhibit B it would appear that counting in Yu Lwai he had six children; if Yu Lwai had been adopted by his brother, is it likely that Wun Pain Khain and after his death, his wife Ma Ma would not have insisted on the well-to-do brother bearing the whole cost of the feeding, clothing and other expenses of their son whom he had adopted?

These considerations appear to me to lead forcibly to the conclusion that the story of the adoption of the plaintiff is an invention.

The other evidence in support of it is the evidence as to the plaintiff having been put to do what is usually assigned to a son at the funeral of his parents and at the after ceremonies both at and after the funerals of Ma Phee and that of Wun Pain Wain. For those of the latter the arrangements were not made by the first defendant but by the others, and even if Wun Pain Wain chose the plaintiff to perform the acts for his first wife, it by no means follows that he thereby acknowledged him to be his adopted son. Some one had to do the acts, and, in default of a son, a nephew would be the most suitable person. What is done in China can be done even by some one hired to do the acts.

Another piece of evidence offered in support of the adoption is the "Public Proclamation of Injustice," Exhibit D which is in Chinese and bears a date corresponding to the 19th April 1913. It is not clear how it came to be drawn up and what instructions were given to the compiler. It contains a reference to the duty of the first defendant to probably look after and maintain the daughter left by Wun Pain Wain's previous wife, and also his adopted nephew (brother's son). The instructions to the writer are not proved to have come directly from the first defendant, and she does not know Chinese. I attach no importance to the statement in the document. The earlier document in Burmese, (Exhibit 7) dated the 28th February 1913, appears to me to be much more likely to express correctly what she wanted to express, and it appears also to have the ring of truth about it.

According to it Leong Shain Sway and Ma Me behaved to her very disgracefully when she was in a distracted state on the loss of her husband only a few months after the loss of her first and only child.

Some of the statements may be exaggerated, but there is likely to be substantial truth in the document considering that it was her

appeal to the elders of her community to do justice as between her and her husband's family, and it was drawn up within six weeks of her husband's death in order to avoid litigation. The document contains no admission of a son having been adopted, but it mentions that the subject of adopting one of Wun Pain Khain's sons had been mooted, and that she herself wanted to adopt the youngest of them. On the whole evidence I am of opinion that the adoption of the plaintiff is not proved, and consequently I think that the appeal should be allowed and that the suit should be dismissed.

The judgment of the learned judge disallowed the first defendant even the right to maintenance, on the ground that by leaving the family house she lost such right.

I cannot agree in this view, for it appears to me that the house occupied by the plaintiff and her husband was not the family house within the sense in which a house is regarded as a family house in China. I take it that what is referred to is a house which has belonged to paternal ancestors or one which a man has started for his family and their male descendants. The house according to Exhibit B was Ma Po's alone, and was not Wun Shan Shoke's; if it had been it would, on his death, have devolved upon his sons. At times the sons lived there, but they did not do so always. The root idea of a family living together continuously for years in a house regarded as a family house descending from father to sons does not apply to the house in question. Moreover in the absence of any guide as to what would be done in China if the other members of the family made themselves objectionable to a widow of a member and made it impossible for her to live with them in the same house, I think that any rule, there may be depriving a widow of maintainance unless she continues to live with her husband's relations should not be enforced.

That some of her husbands relations did behave badly to her is evident. It is not likely that she would have given up the key of the box containing her husband's papers and valuables unless she was deceived. There could have been no honest reason for the removal of the box from what, according to the case for the plaintiff, was the family house. It was taken to the house of a man who was no relation and whose wife even was according to Chinese ideas not a member of Wun Pain Wain's ancestral family. Even if the plaintiff had been adopted, the first defendant had the right, according to Chinese custom, to administer her deceased husband's property during the plaintiff's minority, and she had the first claim to his guardianship. (See pages 578 and 602 of Alabaster). Yet Leong. Shain Sway and Ma Me get hold of the property, assert that the jewellery which Wun Pain Wain admittedly had at one time had been given to Ma Me after his first wife's death, and one of them attempts to justify their conduct by saying that the estate was all handed over to them before Wun Pain Wain's death. Not content with this, Ma Me a few months afterwards applied for letters of administration of the estate valuing it at first at Rs. 15,070, which did not include the value of any jewellery. Even this valuation was too high for her subsequsntly, and by a further statement of

the assets the value was brought down to Rs. 6,445. When the present suit was brought to assert the rights of a minor the person who comes forward as next friend is not one of the family of the deceased, but a sister of the deceased who had left his family and by marriage had entered another family. In no event could she have any possible claim to the guardianship of the plaintiff, and the facts give rise to the strong suspicion that she and her husband have been the moving spirits throughout, and that their object has been to obtain the property of the deceased, not so much for the minor as for themselves.

The first defendant's application for letters of administration (Civil Regular No, 169 of 1913) was dismissed in consequence of the judgment in the present suit (Civil Regular No. 312 of 1913.) On Ma Me's application for letters the order was also one dismissing her application but the learned judge ordered that letters should issue to the administrator general: in so doing he overlooked the fact that an order for letters to the administrator-general can only be made on the application of that official or of one of the parties concerned, and as no one had applied, the order was *ultra vires*, and nothing further has been done on it.

In the view of the decision on this appeal letters should issue to Ma Pwa if she again applies for them.

No decision can be now given on the rights of the second defendant.

According to Jerningham at page 125 Ma Pwa has power to adopt a son for her deceased husband, but she should ask the consent of her late husband's nearest male relative, who is Wun Pain Wa. Should an adoption be made the right of the second defendant to share in the estate would be abrogated. I would order Ma Me, the next friend of the plaintiff, to pay the first defendants' costs of the suit and of this appeal, and would make no order as to the 2nd defendants' costs in either the suit or appeal.

The advocate's fees in the suit should be allowed as settled in the original court, and on the appeal at five per cent on the amount Rs. 6,445, the value put on the suit and appeal, and a fee of six gold *mohurs* for each day after the first on which the appeal was heard.

Parlett, J—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 254 OF 1915.

MA SEIN ... ... APPLICANT.

vs.

KING-EMPEROR ... ... RESPONDENT.

Before Mr. Justice Parlett.

13th January, 1916.

Criminal Procedure Code (Act V of 1898) sec. 423 (1) (b). Judgment in appeal—sec. 520. Confiscation of property the subject of offence notice—Review of order.

When an appellate court reverses the finding and sentence in an appeal from a conviction, sec. 423 (1) (*b*) requires that the judgment should state whether the appellant is acquitted, or discharged or ordered

to be retried. This is specially necessary when the conviction is reversed on a technical point.

An order for the confiscation of property in regard to which an offence has been committed should not be modified by an appellate court without notice to the parties intrusted in it.

Once a criminal court has passed an order it has no jurisdiction to review or alter it.

JUDGMENT.

PARLETT, J.:—The facts of the case as stated in this court are that Rs. 1,110 were stolen from the Kyaung of the complainant U Nyanoktya, hpoongyi of Marogon. Ba So, a former pupil was suspected, and is alleged to have promised to return the money. A biscuit tin full of money was subsequently found in a straw heap near Po Byo's house. There was evidence that Ba So had deposited it with Po Byo. There was also evidence that after the discovery Ma Sein appropriated the tin of money. In her possession were found Rs. 462-3-0 in cash. It was seized and made an exhibit in court in a trial, which ended in the conviction of Ba So for theft of the hpoongyi's money, of Po Byo for receiving the stolen money, and of Ma Sein for criminal misappropriation of part of the money, and the Rs. 462-3-0 was ordered to be returned to the complainant. They all appealed and the sessions judge reversed the convictions on a technical point of misjoinder, but his judgment did not expressly direct, as section 423 (1) (*b*) of the Criminal Procedure Code contemplates that it should, whether each of the appellants was acquitted, discharged, or to be retried. As regards Ba So and Po Byo, however an acquittal seems to have been intended, for the sessions judge held certain incriminating statements attributed to Ba So to have been made under some inducement or other having reference to the charge in question from a person in authority, and that apart from those statements there was not sufficient evidence against these two accused. As regards Ma Sein I am by no means certain from the judgment what he intended. He considered the evidence against her to be sufficient, but that as the magistrate had dealt with her under section 562 of the Criminal Procedure Code, he thought it unnecessary to order a re-trial. I am bound to say this reasoning does not commend itself to me. I do not know if the sessions judge considered section 562 appropriate to what was in essence an impudent theft of a large sum of money by a woman of thirty. Action under section 562 is moreover, merely a suspension of sentence dependent upon the offender's good behaviour for a future period, and in such a case as the present one, had the offender broken her bond, she should clearly have received a substantial sentence, and in any case I do not think the reason a sound one for acquitting, even granting that it might be for or not ordering a retrial. As however the sessions judge signed a formal order acquitting Ma Sein, her acquittal cannot be doubted, and I have merely mentioned the above points to make the position clear in view of what has followed.

In disposing of the appeals on 17th July the sessions judge made no modification under section 520 of the criminal procedure code of the magistrate's order that the money should be returned to

the complainant. On 21st July Ma Sein applied to the magistrate for refund of the money, which was refused as he had received on order to that effect, but the magistrate applied to the sessions judge for orders on the point. On the 22nd July Ma Sein renewed her application to the sessions judge, whose order passed the same day there on was; "The application is rejected." On the 26th July the magistrate's letter asking for orders came before the sessions judge, who directed a copy of his order on Ma Sein's petition to be sent to the magistrate. He however, on the same day wrote the following note: "I do not consider that the ownership of the money has been established; it should be confiscated, *i. e.*, credited to government.

Ma Sein now applies for that order to be set aside, and for the money to be either paid to her, or kept in court until some one establishes a claim to it. Notice of her application was given to the government advocate and to the complainant. The former does not press for confiscation to the government. The latter asks that the magistrate's order be restored. Assuming that the sessions judge had jurisdiction to make the order of 26th July I feel no doubt that he could not properly make it without first hearing the complainant to whose great prejudice it was, and on that ground alone it cannot be allowed to stand. In the view I take of the case I have no doubt whatever that the order passed by the magistrate was under the circumstances the proper order to pass, and that Ma Sein's application was correctly dismissed on the 22nd July.

I therefore set aside the sessions judge's order of 26th July, and direct that the magistrate's order that the money be repaid to the complainant be restored, and be carried out, a notice being sent to the complainant at once to attend and receive the money, or to depute some one to do so on his behalf.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL NO. 108 OF 1911.

MA GUN AND OTHERS ... ... APPELLANTS.

vs.

R. MONIANDY SURVEY ... ... RESPONDENT.

Before Mr. Justice Ormond and Mr. Justice Twomey.

For Appellant:—Mr. Fagan.
For Respondent:—Mr. Doctor.

2nd June, 1915.

Civil Procedure Code (Act V of 1908) sec. 2 (2)—decree—Order deciding that suit is maintainable—Appeal.

An order deciding that a suit is maintainable is not a decree as defined in sec. 2 (2) of the Code of Civil Procedure as it does not determine the rights of the parties in regard to any of the matters in controversy in the suit, and no appeal lies from such order.

Chanmalswami Rudraswami vs. Gangadharappa Baslingappa 39 B. 339 and Kamini Debi vs. Promothonath Mukherji 19 C. W. N. 755 followed.

JUDGMENT.

ORMOND AND TWOMEY, J. J. :—The plaintiff sued for possession of land and mesne profits. The defendant raised a plea in bar *viz.*, that the suit was not maintainable inasmuch as the plaintiff at the time of the institution of the suit was not registered as the owner of the land in accordance with rule 14 of the Pegu Waste Land Grant Rules of 1863. The district judge held that the rule in question is not in force or at least that it does not affect the jurisdiction of the courts, and he ordered the case to proceed. Against that order the defendant now appeals. The question is whether an appeal lies. It is not an order from which an appeal lies under the code of civil procedure, and it is clearly not a final decree. Is it then a preliminary decree within the meaning of section 2 (2) of the code? In section 2 (2) a decree is defined as being "the formal expression of an adjudication which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final." The above order was an adjudication upon an issue which if decided against the plaintiff would have resulted in a final decree dismissing the suit. There would then have been a conclusive determination that the plaintiff was not entitled in that suit to any of the reliefs claimed by him. But the issue was decided in favour of the plaintiff and the decision only meant that he was entitled to have his claims heard and determined in the suit. There was no determination of the rights of the parties with regard to any of the matters in controversy in the suit, which means a determination of the rights of the parties with regard to any of the reliefs claimed in the suit, *e.g.*, when a plaintiff obtains a preliminary decree, his right to part of the relief claimed by him is determined. Moreover the adjudication was not conclusive, for the judge could at any time before finally disposing of the suit have changed his opinion and dismissed the suit on this issue. Mr. Fagan for the appellant cited the case of Sidhanath Dhondev Garud *vs.* Ganesh Govind Garud (1) but that case has been overruled by a full bench decision in Chanmalswami Rudraswami *vs.* Gangadharappa Baslingappa (2) and has been dissented from in Kamini Debi *vs.* Promothonath Mukherjee (3). The appeal is dismissed with costs.

---

(1) 37 B. 60. (2) 39 B. 339 (3) 19 C. W. N. 755.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 167 OF 1913.

A. M. V. CHETTY FIRM ... ... APPELLANTS.

vs.

SUBAYA & 2 OTHERS ... ... RESPONDENTS.

Before Mr. Justice Ormond and Mr. Justice Twomey.

For Appellants—Mr. Coltman.
For 1st & 2nd Respondents—Mr. Aiyar.
For 3rd Respondent—Mr. Doctor.

10th March, 1915.

Registration Act (XVI of 1908) s. 32. and 33.—Presentation of documents for registration by an agent of executant or claimant.

Althogh a person who can present the document for registration is present and acquiesces in the presentation yet if he is not the person who presents the document for registration, and it is presented by a person who has no authority to present it, the registration is invalid.

Jambu Prashad vs. Mahomed Nowab Aftab Ali Khan 19 C. W. N. 282 followed.

When a document is presented by an agent it is for the principal to prove that such agent held a power of attorney duly authenticated by the registrar within whose district the principal resides, or that the power of attorney was otherwise recognizable under section 33 of the Registration Act.

JUDGMENT.

ORMOND AND TWOMEY, J. J.:—The question in this appeal is whether a mortgage dated the 28th September 1905 which purports to be a registered document was in fact duly registered. The plaintiffs are the Chetty firm of A. M. V. and are the assignees from the mortgagees C. P. M. Their assignment is dated the 21st March 1912 and their suit on the mortgage was instituted on the 23rd March 1912. The mortgagors in their written statement para 11 deny that the document was duly registered in as much as it was not presented for registration by C. P. M. Ramen Chetty but by some other person named Chitambram who personated him The endorsement on the document shows that C. P. M. Ramen Chetty presented the document for registration and that endorsement is signed by Mutu Ramen. Mutu Ramen is a clerk in the firm of C. P. M. One of the mortgagors, Reddiar at least was at the registration office and Ramen Chetty states that he was there when the document was attested. It appears to have been written and attested at the registration office. The signatures to the document were admitted before the registrar, and the mortgagors and the mortgagees acquiesced in the presentation for registration. Ramen Chetty, however, in his evidence on commission taken out by the plaintiffs, stated in answer to cross-interrogatories that he did not present the document for registration and that Mutu Ramen did it under a power of attorney from him. The Privy Council decision in

Jambu Parasad vs. Mohomed Nawab Aftab Ali Khan and another (1) shows that, although a person who can present the document for registration is present and acquiesces in the presentation yet if he is not the person who presents the document for registration and if it is presented by a person who has no authority to do so, the registration is invalid. The question, therefore is, are we to presume or is it proved that Mutu Ramen had an authenticated power of attorney authorising him to present the document for registration. The certificate of registration, no doubt, raises a strong presumption that the document was duly registered; but when on the face of the endorsement it is apparent that a different man presents it for registration from the person who signed the endorsement the presumption that it was duly presented is very much weakened. If Mutu Ramen had an authenticated power of attorney that fact is a matter which would be specially within the knowledge of the plaintiffs or rather of their assignors under whom they claim; but the defendants have produced the sub-registrar of Toungoo Registration Office who gave evidence which shows that no such power was authenticated in that office since 1899. The power must be authenticated at the registry where the principal resides. It is contended for the plaintiffs that there is nothing to show that the principal resides at Toungoo, but the Exhibit A (the mortgage), refers to Raman Chetty as of Kaladan Quarter, Toungoo, and Exhibit B (the assignment) refers to Ramen Chetty as carrying on business as C. P. M. at Toungoo. The defendant could have done no more, though it is urged for the plaintiffs that the defendants should have asked Ramen Chetty where he resides and where an authenticated power of attorney could be found. It was an affirmative matter which, in the circumstances lay upon the plaintiffs to prove.

Under the rules if a document is presented by an attorney the registrar is bound to set out that fact in an endorsement which he has not done in this case. There is, therefore the strongest presumption that Mutu Ramen did not present a power of attorney, to the registrar at the time this document was presented for registration. Therefore although the plaintiffs started with the presumption arising from the certificate that it was duly registered, the endorsement on the face of it shows that there was some irregularity in its presentation which the plaintiff has to explain. He has moreover to overcome a very strong presumption that no power of attorney was produced to the sub-registrar at the time and the consequent presumption that there was no authenticated power of attorney in favour of Mutu Ramen. The statement by Ramen in his evidence on commission, that he had given a power of attorney to Mutu Ramen is not enough. We dismiss the appeal with costs as against the first 2 respondents in their representative capacity. Mr. Aiyer appears for the minors who are the representatives of Kristna Amal deceased one of the two mortgagors, and

(1) 19 C. W. N. 282; 34 A. 331.

Mr. Doctor appears for the other mortgagor Raja Ram Reddia: The interests of all are identical, therefore only one set of costs i allowed. As between themselves, they will share the costs equally that is to say, the representatives of Kristna Amal and Raj Reddiar in two equal shares.

IN THE CHIEF COURT OF LOWER BURMA

CIVIL SECOND APPEAL No. 53 OF 1915.

K. Y. K. M. CHETTY ... ... APPELLANT.

vs.

S. N. V. R. CHETTY ... ... RESPONDENT

Before Mr. Justice U Kin.

For Appellant—Mr. Campagnac.
For Respondent—Mr. Munshi.

18th January, 1916.

Registered sale deed—Failure of consideration—Civil Procedure Code Order XXI r. 63. Suit to establish a right—Specific Relief Act (I of 1877) S. 42.

When the execution of a mortgage or other conveyance is proved no further evidence is needed to show that the purchaser has taken the interest which the document purports to convey. It is not necessary for the purchaser as against a third party to prove that consideration did pass. The burden of proving that the deed is fraudulent and collusive is on the party alleging it.

A suit under Order XXI r. 63 is not controlled by section 42 of the Specific Relief Act and a party against whom an order has been made in an investigation under Order XXI r. 58 although out of possession can sue for a declaratory decree without any further relief.

JUDGMENT.

U Kin J.—This is an appeal from a portion of the judgment of the Divisional Court of Toungoo passing a decree against the appellants in respect of the land specified in paragraph 1 (*a*) of the plaint.

The property along with other properties had been attached by the appellants in execution of their decree against one T. S. Pillai. The respondents had applied for the removal of the attachment and failed. The respondents then sued to have the properties declared to be their absolute property under two deeds Exhibits A and D. By Exhibit D, T. S. Pillay purported to sell among others, the properties in suit to S. N. firm. Exhibit A is an instrument by which S. N. firm purported to convey the same properties to S. N. V. R. firm, the present respondents.

The defence was that the sale by T. S. Pillai to S. U. firm was collusive and was not for any consideration. The learned divisional judge states in his judgment that he could not find any clear admission on the record, whether this sale was admitted by the appellant or not, and that he had not been able to obtain a satisfactory

answer from his pleader in his court. He gathered that the pleader did not wish to dispute the execution of the deed of sale, Exhibit A, but that he would not admit that it was for the consideration stated. The defence would seem to be as stated above by me.

The learned divisional judge held that the execution of the deed had been sufficiently proved and went on to hold on the authority of Chinnan vs. Ramachandra (1) that it was not necessary for the respondents to prove that the consideration stated had passed. It seems to me to be a settled principle of law that where there has been a registered deed of sale which is not tainted by any fraud or the like, the deed passes the title and interest conveyed, although the purchase-money has not been paid. See the case of Krishnan Embrandri vs. Marakkar (2) and the case therein cited.

In my judgment, if a third party alleges that the deed is fraudulent and collusive, the burden would be on that party. The passage quoted by the divisional judge from Chinnan's Case (1) and what follows seem to support this view. The passage runs: "prima facie when the execution of a mortgage or other conveyance is proved.....further evidence is not required to show that the purchaser has taken the interest which the document purports to convey. It is not necessary for him to prove as against a third person that the consideration passed, and proof that the consideration mentioned did not pass, is of no avail to show that the interest which the instrument purported to convey was not conveyed to the purchaser. Such proof is only important, when taken with other circumstances, it tends to show that the instrument was a mere sham not intended to convey any interest to the ostensible purchaser at all."

In the present case, we have nothing on the side of the appellants to show that no consideration had passed for either of the deeds Exhibits A and D or that either of the transactions was made collusively with the judgment debtor, T. S. Pillai, with intent to defeat the rights of his creditors or the appellants in particular. The appellants must therefore, be held to have failed to make out their defence

The next point raised by the memorandum of appeal is that T. S. Pillai was a necessary party. Whatever may be the value of the contention, it is not necessary to go into it, for, in my opinion, the non-joinder did not affect the merits of the case.

The last point raised by the appellants is that the respondent's suit should be held to be barred under Section 42 of the Specific Relief Act, as they were admittedly out of possession and had not asked for consequential relief. The answer to this is to be found in the cases of Kristnam Sooraya vs. Pathma Bee (3) and M. Sappa badi Chetty vs. Maung In (4) where it was held that the right of

(1) 15 M. 54.
(2) 1 Mad. Law Times 432.
(3) 29 M. 151.
(4) P. I. L. B. 481.

suit under section 283 (now order XXI, rule 63) of the Code of Civil Procedure is not controlled by the provisions of section 42 of the Specific Relief Act and that a claimant would have the right to sue for a mere declaration decree.

The appellants have failed upon all their grounds. The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL REVISION No. 88 OF 1915.

MA PU ... ... APPLICANT.

vs.

MA SU ... ... RESPONDENT.

Before Mr. Justice Parlett.

For Applicant.—Mr. Harvey.

For Respondent.—Mr. Vertannes.

6th January, 1916.

Court of Small Causes—Jurisdiction.

Suit by executor or administrator for possession of moveable property belonging to the estate is cognizable by a Court of small causes.

Kapalee Bewa vs. Keshram 11 W. R. 93 and Khurshedji Rustomji vs. Pestonji. 12 B. 573 followed.

JUDGMENT.

PARLETT, J.:—The plaintiff's claim was treated by the judge of the small cause court of Rangoon as twofold, first for the return of property given her by the defendant and then resumed by her, and secondly as administratrix of her son's estate for the possession of moveable property belonging to the estate in the hands of the defendant. The first part of the claim he held not proved on the evidence, and the second as not cognizable by a court of small causes. The latter view is contested by the plaintiff in this court and defendant's counsel does not uphold it. There is authourity to the contrary Kapalee Bewa vs. Keshram (1) and Khurshedji Rustomji vs. Pestonji (2) and I am of opinion that the claim was cognizable. I remand the case for a decision upon the plaintiff's claim as administratrix to the property as part of the estate of her son.

---

(1) 11 W. R. 93. (2) 12 Bom. 573.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION NO. 117 OF 1916.

NGA AUNG GYI & OTHERS ... ... APPLICANTS.

VS.

KING-EMPEROR ... ... RESPONDENT.

Before Mr. Justice Ormond.

For Appellant.—Mr. Lambert.

9th June, 1916.

Criminal Procedure Code S. 195—Proper Court to apply to for sanction—Notice—Order granting sanction.

Ordinarily an application for sanction to prosecute for giving false evidence should be made to the court in which the alleged false evidence was given. When application is made to another court it is incumbent on such court to send notice to the opposite side to show cause.

An order granting sanction to prosecute should show the reasons why sanction was granted.

ORDER.

ORMOND J :—The six petitioners apply for an order to revoke an order made by the sessions judge of Prome sanctioning their prosecution under sec. 194 Indian Penal Code for giving false evidence before the committing magistrate. The case was committed by the magistrate to the sessions when the public prosecutor asked leave to withdraw the prosecution. The sessions judge after perusing the evidence taken by the committing magistrate allowed the case to be withdrawn and intimated that the case appeared to be concocted and that the executive authorities would no doubt consider the propriety of initiating proceedings under sec. 194 Indian Penal Code. The public prosecutor then put in a petition to the sessions judge applying for sanction to prosecute these six petitioners and the sessions judge's order is comprised in the three words "sanction is granted" written at the foot of the petition. Ordinarily an application for sanction in such a case should be made to the court in which the alleged false evidence was given and there is no reason apparently why that should not have been done in the present case. The sessions judge not having been the court before whom the alleged false evidence was given, should have issued notice to the petitioners and have given them an opportunity of showing cause why sanction should not be granted; and the sessions judge should have specified his reasons for having granted the sanction. For these reasons the sanction is revoked. This order does not preclude the public prosecutor from applying for sanction in the proper way.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 206 B OF 1916.

NGA PO YIN & 1 vs. KING-EMPEROR.

Before Mr. Justice Ormond.

21st July, 1916.

Criminal Procedure Code Act V of 1898 section 195—Indian Penal Code (Act XLV of 1860) s 193.

An order granting sanction to prosecute for giving false evidence ought to specify the statement alleged to be false.

It is no offence to make a false statement to the police.

JUDGMENT.

ORMOND, J:—The magistrate has sanctioned the prosecution of the applicant for an offence under sec. 193 Indian Penal Code of giving false evidence. He states that either their statements to the police must have been false or their evidence in the case. Their statement to the police if false would not constitute an offence, and he does not specify the statements made by the applicants which are alleged to be false statements made on oath. The order sanctioning their prosecution must be set aside.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 210 B OF 1916.

ITALA vs. KING-EMPEROR.

Before Mr. Justice Twomey.

6th July, 1916.

Bench of magistrates, absence of some members—Case heard partly by some members partly by other members—Decision after hearing part—Criminal Procedure Code (Act V of 1898) s. 350.

Only those magistrates who have heard the whole of the evidence can decide a case. There is no provision of the law providing for a change in the constitution of a bench of magistrates. Section 350 of the Criminal Procedure Code does not apply to cases tried by benches of magistrates.

Damri Thakur vs. Bhawani 23 C. 194 and Hardwar Singh vs. Khega 20 C. 870 followed.

JUDGMENT.

TWOMEY J:—In this case the prosecution evidence was heard by two honorary magistrates who took no further part in it. The defence evidence was heard by two other honorary magistrates of the same bench and the accused was sentenced and convicted by these two magistrates. The procedure was illegal. Section 350 of the Criminal Procedure Code does not apply to cases tried by benches

of magistrates as pointed out in Damri Thakur vs. Bhawani Sahoo (1) and Hardwar Singh vs Khega Ogha (2) There is no provision of law which provides for a change in the constitution of benches of magistrates and in the absence of any such provision it must be held that only those magistrates who have heard the whole of the evidence can decide the case. The conviction and sentence are set aside.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 222 OF 1916.

SIT HON vs. KING-EMPEROR.

Before Mr Justice Twomey.

19th July, 1916.

Indian Penal Code (Act XLV of 1860) s. 441 and 442 House-trespass. Criminal Procedure Code (Act V 1898) s 106.

The panatchut or outer verandah where shoes are taken off is part of a Burmese dwelling-house and a person who commits pass criminal trespass on a panatchut commits house-trespass within the meaning of section 442 of the Indian Penal Code.

House-trespass with the object of causing hurt is an offence involving a breach of the peace and an order under section 106 of the Criminal Procedure Code can be passed against a person who has been convicted of an offence of house-trespass if his object was to cause hurt.

Tarini Churn Mundle vs. G. Biswa 7 C. W. N. 25 followed.

JUDGMENT.

TWOMEY J :—The *Panatchut* or outer verandah where shoes are taken off is part of a Burmese dwelling house and I see no reason to doubt that a person who commits criminal trespass on a *Panatchut* under the circumstances set forth in section 441, Indian Penal Code commits house-trespass.

The learned sessions judge in his order of reference raises the further question whether the order requiring security to keep the peace under section 106, Criminal Procedure Code is valid seeing that the offence of which the accused was convicted, *i. e.* house-trespass, is not an offence of which breach of the peace is a necessary ingredient. It is clear however in the present case that the criminal trespass was committed with the sole object of causing hurt to one of the persons in the house and I think it is therefore correct to hold that the particular offence committed by the accused in this case was one "involving a breach of the peace" within the meaning of section 106, Criminal Procedure Code. I am fortified in this opinion by the ruling of the Calcutta High Court in Tarini Churn Mundle vs. G. Biswa (1) in which the facts resembled those of the present case.

Proceedings are returned.

---

(1) 23 Cal. 194. (2) 20 Cal. 870.

(1) 7 C. W. N. 25.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPEAL NO. 139 OF 1915.

MA MYO AND ANOTHER ... ... APPLIENTS.

vs.

MAUNG KYAN ... ... RESPONDENTS.

Before Sir Charles Fox Kt. Chief Judge and Mr. Justice Twomey.

For Appellant—Mr. R. N. Burjorji.

For Respondents—Mr. Leach.

31st January, 1916.

Guardians and Wards Act (VIII of 1890) Sections 17 and 19 (b).

The word "father" in section 19 (b) means the father of a child born in wedlock, and does not include the natural or putative father.

Following Hindu and Mahomedan law the Guardians and Wards Act does not recognize the right of the father to the guardianship of his illegitimate child.

The only point to be considered in appointing or declaring the guardian of a minor is the welfare of the minor.

JUDGMENT.

FOX, C. J.:—One Maung Tha Htu applied to be appointed guardian of a minor female Ma Ta Shin who was at the time about twelve years of age. She is the daughter of Ma Mya Thi. In 1903 Ma Mya Thi claimed maintenance for the child from Maung Kyan who she said was its father. Maung Kyan denied being the father of the child and alleged that one Maung Sein was its father. An order for maintenance was made against Maung Kyan and he paid maintenance up to Ma Mya Thi's death. The child is admittedly illegitimate, Maung Kyan and Ma Mya Thi never having married.

She lived with her mother in Thayetmyo: in the same house lived at times Ma Myo a half sister of Ma Mya Thi. She says she nursed the child in infancy, and took part in bringing her up. She has for some time been living separate from her second husband, and had gone back to live with Ma Mya Thi for nearly two years before the latter's death. Her own adopted children are out in the world and do not live with her any longer. She gets Rs. 50 per mensem from her husband. About a year before her death Ma Mya Thi sent the child in Ma Myo's charge to Rangoon to be seen by Maung Kyan with a view to inducing him to put the child into a school where she could get European education. This was the only occasion before Ma Mya Thi's death on which Maung Kyan saw or attempted to see the child. He has a wife and a number of other children. He is a government servant and has to live in whatever station he is posted to.

Both Ma Myo and Maung Kyan objected to Maung Tha Htu's application. An old lady Ma Yon joined Ma Myo in applying to be appointed guardian of the child's person and property and Maung Kyan asked that he be appointed. Maung Tha Htu's

application was dismissed, he having no possible claim. The district judge has appointed Ma Myo and Ma Yon guardians of the property, and Maung Kyan guardian of the person of the minor. He held that the father must be appointed guardian of the person of the minor unless he was shown to be unfit. Ma Myo and Ma Yon appeal against this decision. Maung Kyan seeks to have it upheld and it has been argued that clause (b) of section 19 of the Guardians and Wards Act of 1890 compels the court to recognize him as the guardian of the person of the minor unless he is held to be unfit to be such.

The acceptance of this contention would involve holding that the word "father" in the clause includes the natural father of an illegitimate child as well as the father of a child born in wedlock. This was held in M. O. Rahman and another vs. G. George and another (1).

This cannot in my opinion be the correct reading of the clause for it would involve the conclusion that the legislature had either by design or by inadvertence made an important innovation in the personal laws of the peoples of the country by a sort of side wind.

It is axiomatic that the legislature is most careful not to interfere with such laws and in other parts of the Guardians and Wards Act itself, e.g., the opening words of section 15 care is taken to have the personal law of a minor applied. Both Hindu and Mahomedan law provide for the right to the guardianship of illegitimate children. Under the former a Hindu father has not as against the mother any right to the guardianship of his illegitimate off spring. (Trevelyan On Minors 4th edition page 52) The Mahomedan law does not recognise the right of a putative father to the guardianship of the person or property of his illegitimate child—Trevelyan on page 57. In his comment on sub section (4) of section 17 the learned author in the note on page 61 says that the word "parents" would unless there be anything in the context to the contrary, which there is not in this section, apply only in the case of children born in wedlock. Equally so in my opinion, the word "father" in clause (b) of section 19 can only apply in the case of a child born in wedlock in view of the other construction involving an interference with the laws of the peoples of India which could not have been intended. In this view there is nothing to prevent Ma Myo being appointed guardian of the person of the minor in this case.

The only question to be considered is whether it is more for the welfare of the minor that she should be appointed such guardian than that Maung Kyan should be.

It appears to me that the girl is likely to receive far more affection and attention from her mother's sister who has known her and cared for her from infancy than she is likely to receive from a father who repudiated her from birth, and only contributed towards her support because he was compelled to do so. Moreover the child is arriving at an age when if she lives with her father's legitimate children the stigma of her own illegitimacy may possibly be

(1) II U. B. R. 1892-96 p. 413.

strongly impressed or may strongly impress itself on her mind. It will be far better for her I think to live with a woman who in the ordinary course is more likely than any one else to treat her with affectionate care. and in a place where she is likely to get to understand what her property is, and how it should be dealt with.

I would allow the appeal, set aside the part of the order which appoints Maung Kyan guardian of the person of Ma Ta Shin and would appoint Ma Myo such guardian. I would order Maung Kyan to pay Ma Myo's costs in the district court and this court, 3 gold mohurs advocate's fee being allowed in this court.

Twomey, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 120 OF 1914.

MA ARRAY ... ... APPELLANT.

vs.

MAUNG E PO ... ... RESPONDENT.

Before Sir Charles Fox Kt. C. J. Mr. Justice Hartnoll and Mr. Justice Robinson.

For Appellant—Mr. Gregory.

11th January, 1915.

Indian Divorce Act (IV of 1869) sections 3 (9) and 14. Desertion—Unreasonable delay in presenting petition.

Under the Indian Divorce Act desertion means abandonment against the wish of the person charging it, but it is not always necessary that it should be against the expressed wish of such person.

Yin Ga vs. C. Nash 6 L. B. R. 53 followed.

Whether the abandonment was or was not against the wish of the person charging it is a fact that might be inferred from the circumstances of the case.

Where a husband left his wife telling her an untruth about where he was going, and without doing anything to lead her to suspect that he was going to abandon her, and started another home with a woman by whom he had children, and contributed nothing to his wife's support, it was held that he had deserted her although she never asked him to provide a home for her, or to live with her.

"Unreasonable delay in presenting or prosecuting a petition" contemplated in section 14 of the Indian Divorce Act is delay from which it would appear that the petitioner was insensible to the injury charged, or such culpable delay as amounts to condonation or connivance.

In considering what is unreasonable delay regard must be had to the circumstances and station in life of the petitioner.

JUDGMENT.

Fox, C. J.—The parties are Christian Karens. They were married in May 1910, and they lived together in the petitioner's father's house for about 3 months after the marriage. The petitioner became pregnant and subsequently a child was born to her. The respondent was in the police and was stationed at Mogok. He took leave and was married to the petitioner while on leave.

According to both the petitioner and her father she and the respondent lived happily together whilst living in the father's house On the last day she saw him the respondent told her he was going to Hmawbi to see his parents. He went away and never came back to her. A day or two afterwards she heard that he had gone to Henzada and from there he had gone back to Mogok with a woman. About a month after he left he wrote the petitioner a letter from Mogok saying that he was well, but not asking her to come to him. She replied saying merely that she was well. She did not ask him to provide a home for her at Mogok, and she did not go there. It is proved that the respondent has been living with the woman he took from Henzada, and that she had three children by him. The respondent has not contributed anything towards the petitioner's support since he left her. She took service as a child's nurse to earn her livelihood. She presented her petition for divorce nearly four years after his parting from her. The grounds on which she asked for a divorce were adultery coupled with desertion without reasonable excuse for upwards of two years. Adultery by the respondent has been adequately proved. The divisional judge refused a decree for divorce holding that desertion within the meaning of the Indian Divorce Act had not been proved, and that the petitioner had been guilty of unreasonable delay in presenting her petition.

Desertion under the act implies an abandonment against the wish of the person charging it, but as pointed out in Yin Ga vs. C. Nash (1) it is not a universal rule that the abandonment must be against the expressed wish of that person. In the present case the respondent left the petitioner telling her an untruth about where he was going, and not leading her to suspect in any way that he was going to abandon her. She must have been under the impression that he was coming back to her. She had no opportunity then of expressing any wish against his abandoning her. Shortly afterwards she heard that instead of taking her to where he had to live he had taken another woman to live with him there. This abandonment of her must have been against her wish. No woman who had been so recently married to a man and who thought they were living happily together could have felt other than resentment at such conduct. She was in no way bound to ask him to provide a home for her in which to live together again after such treatment. Section 22 of the Indian Divorce Act gave her a right to a judicial separation. She was not bound to forgive the adultery, and by asking him to live with her she would have done so, and have condoned it. The element of abandonment against the wish of the party charging it seems clear in the present case.

In regard to the question of unreasonable delay the petitioner had to wait for two years before she could present her petition for divorce. Her petition was presented short of two years from the

(1) 6 L. B. R. 53.

time she might have presented it. She says she was told she had to wait three years so that according to her lights she delayed something short of a year.

In Newman vs. Newman (2) Lord Penzance said that the cases which the legislature had principally in view in enacting the provisions regarding unreasonable delay in the English statute were those in which a husband's honour had been wounded and he had put up with his disgrace for a long time. In Pellew vs. Pellew (3) the judges said "we think that the delay intended by the thirty-first section of the Divorce Act must be the sort of delay which would show the petitioner to have been insensible to the loss of his wife, and might almost be said to be equivalent to condonation." In Tollemache vs. Tollemache (4) it was said that the "delay" must be understood to be culpable delay somewhat in the nature of connivance or acquiescence. Considering her station in life and her circumstances it does not appear to me that the petitioner's delay can properly be held to be of the above description.

I would allow the appeal and grant the petitioner a decree for divorce from the respondent.

Hartnoll, J.—I concur.

Robinson, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 48 OF 1914.

MAUNG GYI MAUNG ... ... DEFENDANT—APPELLANT.

vs.

MOOSAJI AHMED & Co. ... PLAINTIFF—RESPONDENT.

Before Mr. Justice Ormond and Mr. Justice Twomey.

For Appellant—Mr. Chari.
For Respondent—Mr. J. R. Das.

2nd July 1915.

Contract of sale—Breach of contract by purchaser—Resale after notice—Effect of invalid sale—Measure of damages.

If in the case of a sale in which the property has passed to the purchaser, the seller exercises his right of resale he rescinds the contract of sale, revests the property in himself, and sells as owner. If at the resale the seller buys the goods, he buys his own property, whether or not the property in the goods has passed to the purchaser, and the defaulting purchaser can treat the resale as invalid because the seller has bought his own property.

A seller of goods who has given notice of resale and has effected an invalid resale can recover damages for breach of contract from the buyer who has committed the breach. The measure of damages in such a case is the market value on the date of the breach.

The seller can revoke his notice of resale. But if the buyer pays the contract price and expenses connected with the resale before the resale is effected, or within a reasonable time after revocation of the notice of resale, the seller must deliver the goods to the buyer.

---

(2) 1870 L. R. 2 P. & D. 57. (3) 1859, 1 S. & T. 553. (4) 1859, 1 S. & T. 557.

After the resale the defaulting purchaser has no rights under the original contract, and he cannot insist on delivery of the goods upon payment of the contract price.

Buchanan vs. Avdall 15 B. L. R. 276. Yule & Co. Mahomed Hossain 24 Cal. 124. Clive Jute Mills vs. Ebrahim Arab 24 Cal. 177 and Angullia & Co, vs. Sasso & Co., 39 Cal. 568 followed.

The resale must be conducted fairly. If it is not conducted fairly, and the property is sold for a smaller price than it would fetch if sold fairly the purchaser is entitled to such damages as would put him in the same position as if the resale had been properly held and a proper price obtained.

If the buyer impugns the resale, but does not claim damages, the seller can claim damages on the basis of the market rate on the due date.

JUDGMENT.

ORMOND, J.:—In September 1909 the plaintiffs agreed to sell to the first defendant 3000 shares (Rs. 5 paid up) in the Twinzas Oil Company 2000 at Rs. 10-8 and 1000 Rs. 11-0, for delivery and payment on 31st March 1910. The defendant admits that the shares were duly tendered and that he committed a breach of the contract by failing to take delivery. The plaintiffs gave notice of resale and sold the shares by public auction on the 11th and 12th April 1910—2000 at Rs. 5-3 and 1000 at Rs. 5-4; but in reality they bought the shares in themselves in the names of two other persons. Subsequently and before the institution of the suit, the value of these shares had risen considerably. The plaintiffs sued for damages in the re-sale; but at the hearing they abandoned their claim to resale damages: and amended their plaint by claiming in the alternative, damages upon the basis of the market rate on the due date. The amount of damages assessed upon the market rate was less than the resale damages; and the plaintiffs abandoned the difference. The suit was instituted on 7th November 1912, when the market rate of these shares was Rs. 9-12. The highest price that these shares touched was Rs. 10-4 on the 20th November 1912.

The plaintiffs' case was that the property in these shares had never passed to the defendant: that there was no resale, because the plaintiffs could not sell to themselves their own property: and that the notice of the resale does not preclude the plaintiffs from claiming damages based upon the market rate. The defence was that the property had passed to the defendant, that the resale was invalid because plaintiffs had bought benami, that the plaintiffs deceived the defendant into believing that they had resold and thus prevented the defendant from subsequently tendering the contract price when the shares went up in value; and that the plaintiffs could not recover any damages without first accounting to the defendant for the shares—upon the authority of Buchanan vs. Avdall (1).

---

(1) 15 B. L. R. 276.

The learned judge on the original side held that as the defendant had not given evidence, he could not presume that the defendant was not aware of the repurchase by the plaintiffs and did not acquiesce in it; and gave the plaintiffs a decree for the amount of damages claimed. The defendant now appeals.

A resale must be conducted openly and fairly. The inference to be drawn from the plaintiffs' buying the shares benami is that they intended to conceal the fact that they had bought in the shares. The onus of shewing that the defendant knew that the plaintiffs had bought the shares was therefore on the plaintiffs. It is not alleged however that the shares were bought in at less than their market value; and the question whether or not the defendant knew of the benami character of the sale is immaterial.

As to the property having passed to the defendant; in a contract for the sale of shares, it would not be unreasonable to presume that the buyer authorizes the seller to appropriate on the buyer's behalf shares answering to the contract. The property in shares would not pass without a written transfer signed by the assignor; and there is nothing in the evidence to shew that the seller had executed a written transfer; but the shares are admitted to have been duly tendered. The parties apparently considered that the property in the shares had passed to the defendant; and I think it must be deemed to have done so. But this question also does not arise in the case; for not only is it the case of both parties that the resale is invalid; but in the case of a sale in which the property has passed to the buyer if the seller resells, he rescinds the contract, revests the property in himself and sells as owner (see Benjamin on sales 8th Edition page 945 and authorities there cited). If then a seller buys the goods at the resale, he buys his own property whether the property in the goods had previously passed to the buyer or not. The defendant would therefore be entitled to treat the resale as invalid;—not because the plaintiffs had bought 'benami,' but because they had bought their own property.

The question then is; Is a seller of goods by giving notice of resale and effecting an invalid resale, precluded from recovering damages against the buyer who is in default? Mr. Das for the plaintiff—respondent cites the case of Jamal vs. Moola Dawood (2) 7 L. B. R. 252 as an authority to shew that a seller may disregard his notice of resale and can recover damages otherwise than on resale. In that case, which was an appeal from a decision of mine on the original side, shares were sold for delivery at a future date, the buyer was in default and the seller gave notices to the buyer that he intended to resell; about two months later he gave notice to the buyer that unless he paid a certain sum by a certain date by way of compensation, he (the seller) would proceed to enforce his rights by suit. The seller during the next 6 or 8 months and before he instituted his suit sold the shares on his own account at prices which upon the average were higher than the market rate on

(2) 7 L. B. R. 252.

the due date. I held that the buyer was entitled to treat those subsequent sales as having been made in pursuance of the seller's notices of resale. The appellate court apparently gave no effect to the notices of resale, but allowed the buyer the benefit of the higher prices realized by the seller in mitigation of damages;—upon the authority of Oldershaw vs. Holt (3) 12 A and E 590—Smith vs. M'Guire (4) 27 L. J. Ex: 465 and Brace vs. Calder (5) 2 Q. B. D. 253. I do not think however that it could have been intended to lay it down as a principle that where shares sold for delivery at a future date are tendered on the due date and the buyer makes default, the seller because he subsequently sells the shares on his own account at a price higher than the market price on the due date,—is precluded from recovering damages based upon the market rate on the due date. In my judgment in that case I did not intend to hold that a seller by giving notice of his intention to resell, altogether precluded himself from claiming damages based upon the market rate on the due date. The seller can revoke his notice of resale. But certain obligations are imposed on the seller by his giving a notice of resale: —He must deliver the goods to the buyer if the buyer pays the contract price and any expenses incurred by the seller in respect of the resale at any time before the resale is effected; or before the notice of resale is revoked and probably within a reasonable time after such revocation. If he proceeds to a resale, he must resell fairly and the buyer can hold him to the resale. If a seller resells at a price higher than the contract price, he cannot put aside the resale and claim higher damages as upon the market rate on the due date. If he sells unfairly at a price less than would have been obtained by any proper resale, the buyer may, by way of set off, or in a separate suit, claim damages and be placed in the same position as if the resale had been properly held and a proper price obtained. But if the buyer impugns the sale and does not claim damages, the seller may renounce the resale and claim damages based upon the market rate on the due date;—which is what has happened in the present case.

In Buchanan vs. Avdall (1) no claim was made for damages upon the basis of the market rate on the due date; there was no evidence of such damages and the resale was invalid. From an observation of Markly, J. during the argument, at page 283, it would appear that he was of opinion that it was then too late to ask for damages upon that basis; and in his judgment he points out that there was no evidence of the market rate apart from the resale, which in that particular case could not be relied on as any indication of the market rate. Although Pontifex, J. at page 292 was of opinion that if the plaintiff's conduct had not been so improper with regard to the resale, he would probably have been entitled to have damages assessed upon the basis of the market value.

---

(3) 12 A and E. 590. (4) 27 L. J. Ex. 465.
(5) 2 Q. B. D. 253.

There are certain observations of Pontifex, J. in that case which are in the plaintiffs' favour showing that the property in the goods after the resale remained in the original buyer. But those observations were 'obiter dicta' and I think the learned judge must have overlooked the fact that the seller was entitled to rescind the contract. A seller by reselling must be taken to have rescinded the contract and to have revested the property in himself; even though the resale, as such, is invalid :—See Hagedorn vs. Laing (6) Taunt ; 162. The defendant therefore after the resale had no further rights under the contract and could not insist upon delivery of the shares upon paying the contract price. There can be no doubt that a plaintiff can sue for damages by way of resale and in the alternative for damages based upon the market rate on the due date. This proposition was assumed in Buchanan vs. Avdall (1) and also in the following cases :—viz., Yule & Co., vs. Mohamed Hossain (7) Clive Jute Mills vs. Ebrahim Arab (8) and Angullia & Co., vs. Sasson & Co. (9). It is matter of common practice and I know of no authority to the contrary.

For the above reasons I think the plaintiffs were entitled to damages based upon the market rate on the due date and I would dismiss this appeal with costs.

TWOMEY, J.—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REVISION No. 76 OF 1916.

KING-EMPEROR vs. PO YIN.

Before Mr. Justice Twomey.

20th March, 1916.

Criminal Procedure Code (Act V of 1898) sections 348 and 349. Procedure when accused has previous of offences against coinage, stamp law or property—Procedure when magistrate cannot pass sufficiently severe sentence. Section 254 Framing and charge.

Under section 348 of the code of criminal procedure as soon as a previous conviction of an offence against coinage or stamp law or property punishable with imprisonment for three years or upwards is proved against a person who is accused of a similar offence the magistrate is bound to commit the case to the sessions or to the district magistrate if the latter is invested with special powers under section 30 of the code, unless he is of opinion that he can pass an adequate sentence on the accused if found guilty. Section 349 has no application to the case of an accused with previous convictions of the offences enumerated in section 348.

Emperor vs. Po Thwe 4 L. B. R. 282 followed.

---

(6) 6 Taunt 162.
(7) 24 Cal. 124.
(8) 24 Cal. 177.
(9) 39 Cal. 568.

If in a case to which section 348 applies the magistrate hears the evidence for the prosecution and submits proceedings to the district magistrate after recording his opinion that the accused is guilty, the magistrate's order finding the accused guilty as well as the submission and all further proceedings on such submission are illegal and *ultra vires*.

Quacre whether a magistrate who tries a case to which section 348 applies being of opinion that he can pass an adequate sentence can at a subsequent stage of the proceedings commit the accused to the sessions under section 347.

Section 349 of the code applies to the case of a magistrate of the second or third class who after hearing the evidence for the prosecution and the accused is of opinion that the accused is guilty and ought to receive a punishment different from or higher than he has power to award. In such a case it is quite legal for the magistrate acting under section 349 to frame a charge against the accused before submitting his proceedings to the district magistrate.

Emperor vs. Hla Gyi L. B. R. 285 F. B. followed.

JUDGMENT.

TWOMEY, J.:—The following reference has been made by the District Magistrate, Tharrawaddy:—

ORDER OF REFERENCE.

"The accused in this case has admitted two convictions one of theft and one under section 215 of the Penal Code respectively. The township magistrate has recorded a finding of guilty against him under the charge framed, namely, of an offence of criminal house trespass combined with assault. He has submitted the record to this court under section 349 of the Code of Criminal Procedure. I am of opinion that the township magistrate could have dealt adequately with the present case. The former convictions were of offences involving dishonesty. The present case is one of trespass and assault. Except in so far as the former offences of the accused indicate that he is of criminal habits generally and does not deserve leniency, I think that they ought not to be taken into consideration to the same extent as they would be considered if the present offence were one of theft, for instance. The offence appears to have been proved against the accused. Following therefore, the usual procedure in such cases I proceed to pass sentence. I direct that the accused Nga Po Yin having been found guilty of an offence under section 452 of the Indian Penal Code, do undergo rigorous imprisonment for a term of six months.

"Being doubtful whether the procedure of the township magistrate of Minhla was correct I submit the record to the Chief Court for favour of a ruling. The case was a warrant case. The procedure in the trial of a warrant case is governed by chapter XXI and among other sections by section 254. Section 254 clearly indicates that only when the magistrate considers that he can punish the offence adequately shall he frame a charge against the accused. The chapter does not say what shall be his procedure when he is of the contrary opinion.

"What therefore, should be his procedure? The answer is I submit, given by section 349. Although this section is generally interpreted in a different sense, I submit that its intention is that the magistrate shall follow the procedure laid down in chapter XXI and in the circumstances described shall stay his proceedings at the point where he has heard all the evidence of the prosecution and has heard the accused in the ordinary course of the trial of a warrant case. He shall not frame a charge; (vide section 254) but shall write a report indicating his opinion and submit the record to the superior magistrate. The latter is given discretion to call the prosecution witness and examine them anew or to continue the trial from the stage at which it has been suspended by the subordinate magistrate, namely, after the examination of the accused.

It appears to me to be entirely wrong in principle that the junior magistrate shall find on the essential question of guilt and the senior magistrate shall merely assess the punishment. It is true that the latter is not bound to accept the finding of the junior magistrate; but I submit that the latter should not frame a charge nor call upon the accused for his defence.

Section 254 practically prohibits the junior magistrate from framing a charge. Section 349 does not authorize him to do so. The language of the latter section does not justify the generally accepted interpretation of its intention, namely that the junior magistrate shall examine the witnesses of the prosecution and of the defence and, therefore, by implication shall frame a charge which section 254 has forbidden him to do.

I submit the record with the above remarks for favour of a ruling on the point.

The question raised in the latter part of the Order of Reference has been settled, so far as Lower Burma is concerned by a Full Bench ruling in Emperor vs. Hla Gyi (1). It will be seen that it is not illegal or irregular for a Magistrate of the 2nd or 3rd class acting under section 349, Criminal Procedure Code, to frame a charge against the accused person.

But in the present case section 349 was not applicable. The accused Po Yin had a previous conviction "for theft under Chapter XVII of the Indian Penal Code, and as he was again accused of an offence under section 452, Indian Penal Code, under Chapter XVII, punishable with imprisonment for a term of upwards of three years, the magistrate had no option but to act in accordance with section 348, Criminal Procedure Code. See Emperor vs. Po Thwe (2). As soon as it was brought to his notice that the accused had a previous conviction of theft, the second class magistrate was bound either to commit to the sessions court or transfer to the district magistrate, unless he thought he could pass an adequate sentence. The magistrate noted his opinion that a more severe punishment than he could impose was required and it makes no difference that the district magistrate afterwards expressed a different opinion. In the circumstances the second class magistrate's finding of the

(1) 2 L. B. R. 285. (2) 4 L. B. R. 282; 8 Cr. L. J. 478.

accused guilty was wrong and *ultra vires*. The subsequent proceedings of the district magistrate were also *ultra vires* as the provisions of section 349, Criminal Procedure Code, had no application to the case.

The conviction and sentence are set aside and it is ordered that the district magistrate shall treat the case as transferred to him under section 348, Criminal Procedure Code, and shall proceed according to law, either trying the case himself *de novo*, or transferring it to some other competent magistrate for trial *de novo*. The accused will be treated as an under trial prisoner until the the new trial is finished, and in case of conviction the period of imprisonment which he has already served should be taken into account in passing sentence.

THE

BURMA LAW TIMES.

VOL. IX.] SEP.—DEC. 1916. [Nos. 9 & 10.

IN THE CHIEF COURT OF LOWER BURMA.

CRIMINAL REFERENCE No. 9 of 1916.

NGA PO CHEIN and others ... ... APPELLANTS.

vs.

KING-EMPEROR ... ... RESPONDENTS.

Before Sir Charles Fox, Kt., C. J. and Justices Twomey, Parlett and Young.

For the Crown—Mr. Ginwala.

21st March, 1916.

Arms Act (XI of 1878) ss. 19, 20, and 29. Offences under sections 19 and 20—Necessity for sanction under s. 29—Criminal Procedure Code (Act V of 1898) s. 537 (a) and (b).

The operation of section 29 of the Arms Act is restricted only to offences punishable under clause (f) of section 19 *i. e.* to one out of the nine offences enumerated in section 19. It does not extend to offences under section 20 and no sanction is necessary for a prosecution under section 20.

The first part of section 20 creates offences distinct from and graver than those punishable under section 19.

Want of sanction to the institution of proceedings, when such sanction is necessary is a defect fatal to any proceedings instituted without such sanction.

Want of sanction is curable if it can be cured at all, only under section 537 (b) of the code of criminal procedure; section 537 (a) has no application to such cases.

ORDER OF REFERENCE.

21st February, 1916.

TWOMEY, J.—In this case one person has been sentenced to suffer rigorous imprisonment for seven years and two others have been sentenced to three years each under section 20, Indian Arms Act,

The prosecution case is that the three appellants were going about with a twelve bore gun and cartridges concealed in a bundle of bedding. They were found by the township officer, Talun seated under a tree with the bundle of bedding close by. The township officer caused the bundle to be searched, and found the gun and cartridges in it. When the police investigation was completed, the case was sent to the township magistrate for trial and it was submitted to the district magistrate for orders. The district magistrate wrote on the diary "the special power magistrate will please dispose of this case," and the special power magistrate did so, convicting the accused as stated above.

The district magistrate, on being asked to report whether the proceedings were instituted with his previous sanction as required by section 29 of the Arms Act reports. "The proceedings were instituted without my previous sanction as such is not necessary under the provisions of Judicial Department Circular No. 20 dated the 19th October 1892 page 104, Burma Arms Manual." The circular referred to was issued under the orders of government and it lays down that sections 29 and 30 of the Arms Act do not apply to cases falling under section 20 of the act. The correctness of this statement seems at least doubtful and a definite ruling on the point is desirable, for if sanction is necessary the want of sanction would not be curable by section 537 of the Code of Criminal Proceedure, and the whole proceedings would therefore be invalid.

In the Calcutta case of Ahmed Hossein vs. Queen-Empress (1) Chief Justice Maclean remarked that "sections 19 and 20 are so closely interwowen that it is difficult to see how an offence can be committed under the first paragraph of section 20 unless an offence under one of the enumerated subsections of section 19 has also been committed." Yet in that case the conviction under section 19 (f) was confirmed though there was no proper sanction. I do not understand how the conviction under section 19 (f) was sustained.

In two Burma cases Bawdu Wadein vs. Queen-Empress (2) and Shunshanisa vs. Emperor (3) the view taken in the Chief Commissioner's Circular of 1892 appears to have been accepted without question. According to Birks J, all that is necessary to validate a prosecution instituted without sanction is to record that concealment was practised and then to convict under section 19 (f) read with section 20. On a question of this kind the views of the executive government are entitled to great respect, but I think the court is bound to examine the question for itself and pronounce definitely as to the proper judicial interpretation of section 29. It is clear in my opinion that "any act mentioned in clause (f) of section 19" is "an offence punishable under section 19 clause (f)" and that therefore, previous sanction is requisite under section 29, whether the act is done in such manner as to indicate an intention to conceal it or not. The only difference is that if the act is done in such manner as to indicate that intention, the offender is liable to higher punishment.

---

(1) 27 C. 692. (2) 5 Bur. L. R. 171. (3) 2 L. B. R. 244.

In order that the question may be definitely settled it seems proper to refer it to a bench and I accordingly refer the following question:—

Is the previous sanction of the district magistrate necessary under section 29 Indian Arms Act 1878, before proceedings can be instituted in respect of an act mentioned in clause (f) of section 19 punishable under the first part of section 20?

The opinion of the bench was delivered in the following

JUDGMENTS.

21st March, 1916.

PARLETT J.—The question referred is:—Is the previous sanction of the district magistrate necessary under section 29 Indian Arms Act 1878 before proceedings can be instituted in respect of an act mentioned in clause (f) of section 19 punishable under the first part of section 20? At the hearing of the reference, the further question was added and argued whether, if such previous sanction is necessary, its absence is a defect fatal to the prosecution. Clause (f) of section 19 provides that whoever has in his possession, or under his control any arms, ammunition, or military stores in contravention of the provisions of section 14 or section 15, which prescribes certain licences permitting such possession and control, shall be punished with imprisonment for a term, which may extend to three years, or with fine, or with both.

The parts of section 20 which are material to the present reference run: "Whoever does any act mentioned in clause (f) of section 19, in such manner as to indicate that such act may not be known to any public servant as defined in the Indian Penal Code shall be punished with imprisonment for a term which may extend to seven years, or with fine or with both." Section 29 provides that where an offence punishable under section 19 clause (f) has been committed, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the magistrate of the district. The question is whether the section requires the previous sanction to the institution of proceedings in respect of an offence punishable not under section 19, but under section 20. The words of the section on the face of them appear to me to show that it does not, nor do I see any reason to interpret them otherwise than according to their plain meaning.

As indicated by the marginal note, section 19 renders punishable breaches of certain sections of the Arms Act and section 20 renders more heavily punishable what are called secret breaches of some of these clauses. Thus section 20 treats certain acts which by themselves constitute offences under section 19, as offences of a graver nature when accompanied by certain attendant circumstances, in this case the intention of concealment from the public authorities. The criminal law furnishes numerous instances of similar provisions *e g.* sections 193 and 194; 323 and 335; 379 and 382; 392 and 394; 406 and 408; 448 and the three following

sections and many other sections of the Indian Penal Cede. In such cases though the commission of the graver offence includes also the commission of one less grave, the graver offence is distinct from and is punishable more heavily than, and under a different section to the minor offence. Some reference was made in the arguments to section 397 and 398 of the Indian Penal Code, but they appear to me to bear no analogy to the sections of the Arms Act now under consideration. They merely prescribe a minimum sentence of seven years' imprisonment to be passed upon an offender convicted of an offence under one of the sections 392 to 395 inclusive, when he is armed with a deadly weapon, or attempts to cause death or grievous hurt. They neither create graver offences nor render offences liable to an enhanced punishment. The offences are punishable under, and their maximum penalties are fixed by sections 392 to 395 and in no instance are they less than seven years' imprisonment. A first offender who commits robbery by day can be sentenced to ten years' imprisonment, although he is not armed. He can be sentenced to no more, however, if he is armed, and it appears to me that sections 397 and 398 merely ensure that if armed he shall be severely punished. On the other hand, in my opinion, distinct offences are created by, and are punishable under section 20 of the Arms Act, and such offences cannot be said to be punishable under, under section 19. Section 29 accordingly does not apply to such offences and I would answer the first question referred in the negative.

The second question should, I think be answered in the affirmative. The want of sanction to the institution of proceedings, when such sanction is required, could only be cured if at all, by clause (b) of section 537 of the Criminal Procedure Code as being an omission in the proceedings before trial. If clause (a) were intended to apply to such cases, not only would clause (b) he unnecessary and redundant, but the want of sanction required by other sections of the Criminal Procedure Code, such as 197, would be a mere irregularity curable under section 537, unless it had in fact occasioned a failure of justice. The very enactment of clause (b) clearly shows that it is the want of sanction required by section 195 alone which is curable under section 537 and that the absence of sanction required by any other provision of law cannot be so remedied. To take the contrary view would I think render almost nugatory the requirements of the law regarding sanction. The legislature has enacted with respect to certain offences that no court shall take cognizance of them or, in the case of section 29 of the Arms Act, that no proceedings shall be instituted in respect of them without the previous sanction of a specified authority. Without such sanction a court is not competent to take cognizance of, or to hold any proceedings in respect of, such offences, and if it does so, its proceedings, unless covered by clause (b) of section 537 are entirely without jurisdiction and invalid. In my opinion the absence of sanction, when required under section 29 of the arms act, is a defect fatal to any proceedings held without such sanction.

Taking the two questions referred together, my view is that proceedings may be instituted against any person under section 20 of the Arms Act for the secret possession of arms in contravention of the provisions of section 14 or section 15 without previous sanction under section 29. If however in such a case a magistrate finds that the intention to conceal the possession is not made out, he should discharge the accused under section 20. Proceedings under section 19 (f) may then be instituted, if and when the necessary sanction thereto is given under section 29.

FOX C. J. I concur.

YOUNG J. I concur.

TWOMEY J.—It was probably the intention of the legislature to confine the operation of section 29 to cases in which no concealment is practised. Such a restriction is commended in the Government Circular of 1892 as not only "harmless but beneficial," It is easy to understand that while allowing prosecutions to be instituted freely when the accused is found to have hidden arms or ammunition, the legislature may have intended the district authorities to proceed with more deliberation in cases where the arms etc., are held openly, and where the initial presumption of innocence is therefore, much greater.

We have to see whether the actual provisions as enacted give effect to the above intention. I think Parlett, J has shown that the first part of section 20 may be regarded as creating a distinct offence punishable under the section, and that the operation of section 29 may lawfully be restricted to offences punishable not under section 20 but only under section 19 (f). It is true that according to this view sanction would be necessary for a minor offence, while proceedings could be instituted without sanction for a major offence which includes such minor offence, but I do not think that this anomaly need prevent us from adopting the construction proposed by Parlett, J. I therefore concur in answering in the negative the first part of the reference. I also agree with him in thinking that if sanction is necessary under section 29 before the institution of proceedings under section 20 the absence of such sanction would be a fatal defect.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 149 OF 1915.

GUM SONE & others ... ... PLAINTIFFS—APPELLANTS.

vs.

CASSIM DALLA ... ... DEFENDANT—RESPONDENT.

Before Mr. Justice U Kin.

For Appellants—Mr. Wiltshire.
For Respondent—Mr. Dantra.

24th February, 1916.

Transfer of Property Act (IV of 1882) Section 6 (c) and Section 54 Easements—Distinction between creation of an easement and a transfer of an easement—Registration.

The creation of an easement is not a transfer of ownership of land within the meaning of section 54 of the Transfer of Property Act, and need not be in writing.

A right of way can be created by a verbal agreement. There is a difference in this respect between the transfer of a pre existing easement and the creation of a new easement.

Bhagwan Singh vs. Narsingh Sahai 31 *A* 612 followed.

JUDGMENT.

U KIN, J:—The appellants were plaintiffs, the respondent was defendant in the court of first instance.

The facts of the case are as follows:—The plaintiffs sued for an injunction to restrain defendant from interfering with their enjoyment of the right of way over certain land. They are the owners of a rice and saw mill at Kanhla Tagale. Defendant is the owner of the land north of theirs. Plaintiffs' land originally belonged to Ah Lyaung and U Yan and defendant's land was originally owned by Maung Po Thin. Maung Po Thin had a rice mill on his land and had caused a railway siding to be constructed thereon for conveying goods to and from his mill. An arrangement was made between Ah Lyaung and U Yan on the one part and Maung Po Thin on the other part that in consideration of a sum of Rs. 1,500 paid by the former to the latter, the former would have free use in perpetuity of the portion of the railway-line passing through the latter's land and a permanent right of way over the same. Plaintiffs assert that the agreement is binding on defendant who is a purchaser of Maung Po Thin's land. It is alleged that defendant has endangered the running of the railway and has interfered with the proper use of the line by cutting away earth from the railway embankment passing through his land by planting wooden posts and by putting up a notice board prohibiting all persons passing over his land. Defendant admits having put up a notice as alleged by plaintiffs, but states that he did nothing beyond his rights. He

contests plaintiffs' right of way. The court of first instance found for the plaintiffs, and passed a decree as prayed for. The district court held that the right of way in dispute in the case was in the nature of immoveable property and therefore the sale of it could not be made without a registered instrument in accordance with the provisions of section 54 of the Trausfer of Property Act, and that plaintiffs had therefore no right of way as claimed.

According to the Allahabad High Court in Bhagwan Singh vs. Narsingh Sahai (1) the view of the district court is wrong. In that case there was an unregistered document creating a right to discharge water on to a neighbour's premises. It was contended that section 54 of the Transfer of Property Act did not apply and that the document was binding. Tudball, J. observed " The argument is that the document now in question evidences, not the transfer of an easement but tne creation of that right: that prior to the passing of Acts IV and V of 1882 the law did not require the express imposition of an easement to be evidenced by writing at all : *vide* Krishna vs. Rayappa Shanbhaga (2); that Act V of 1882 made no change in the law in this respect, that section 54 of Act IV of 1882 related to the transfer of an easement, not to the creation thereof. Attention is called to section 6 clause (*c*) of that act, which shows that an easement cannot be transferred apart from the dominant heritage and that the act contemplates the transfer of a pre-existing easement, and not the creation of a new one. In my opinion these arguments are well founded."

The learned judge further observed: " It seems clear to me that the creation of a right of easement by grant is not such a transfer of ownership as is contemplated by section 54 of the act. Where under that section an easement is transferred it ought to be transferred along with the dominant heritage. There is no other way of transfering it, and this arises by reason of the nature of the right. It exists only for the benefit of the heritage and to supply its wants. There is nothing in law which necessstates the creation of an easement being evidenced by writing."

Banerji, J. who took part in the decision remarked with reference to section 54 of the Transfer of Property Act as follows: " that section contemplates the existence of a subsisting right of ownership in immoveable property and provides for the transfer of such right. It cannot apply to the creation of a right. By the document referred to above, no existing right of easement was imposed on the property of the grantor. Section 54 has therefore no application."

I would therefore hold that a right of way can be created by a verbal agreement. I would allow the appeal, and set aside the judgment and decree of the district court, and restore the judgment and decree of the court of first instance. The respondent will bear costs throughout.

---

(1) 31 A. 612. (2) 4 M. H C. R. 98.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 34 OF 1915.

EBRAHIM AHMED MEHTER ... DEFENDANT—APPELLANT.

vs.

SAMUEL BALTHAZAR ... ... PLAINTIFF—RESPONDENT.

Before Sir Charles Fox Kt. C. J. and Mr. Justice Twomey.

For Appellant—Mr. Das.

For Respondent—Mr. Doctor.

15th February, 1916.

Indian Contract Act (IX of 1872) Section 160. Bailment—Return of bailed goods—Liability for refusal to return on expiry of period—Conversion—Measure of damages.

The bailee, or his legal representative after this death is bound to return the goods bailed on expiry of the term of the bailment, and would be liable for conversion of the goods from the time when he refuses to return them on a proper demand by the bailor. An executor so refusing to return would be personally liable for conversion.

In actions for damages for conversion of goods the measure of damages is the value of the goods at the time of conversion, and the bailor is not entitled to anything more by way of damages for wrongful use from the date of conversion to the date of institution of the suit.

JUDGMENT.

Fox, C. J:—The partnership of which the plaintiff was appointed receiver let two silk rolling machines to Ahmed Hashim Ariff for two years from the 30th July 1906 for Rs. 100 per mensem. Ahmed Hashim Ariff let the defendant, his son, use the machines. After Ahmed Hashim Ariff's death on the 2nd June 1907 the defendant continued to use them and had possession of them until they were practically destroyed by fire in 1910. The defendant obtained probate of his father's will in 1907. On the 1st March 1909 a letter was written to him as executor of his father's estate demanding payment of the agreed hire for the machines from the 1st August 1906 to the end of February 1909, calling upon him to deliver up the machines by the end of the current month and warning him that if he did not do so he personally would be charged hire at the rate of Rs. 200 per mensem. The defendant did not reply to the letter and kept the machines, which he had removed to a mill of his own.

The plaintiff sued him on the 31st January 1911 for Rs. 7,000 the original cost of the machines, and for Rs. 4,200, hire of them at the rate of Rs. 200 for 21 months from the 1st April 1909 to the 31st December 1910. A decree has been passed against him for

Rs. 5,000 as being the value of the machines when they were destroyed and for Rs. 1,480 as damages for his wrongful use of them from the 31st March 1909 to the 23rd June 1910, the date on which they were destroyed.

The defendant appeals on the ground that he was not personally liable in respect of the non-return and loss of the machines and that he was not liable to pay damages for wrongful use of them. If Ahmed Hashim Ariff had been alive in July 1908 he would have been bound, under section 160 of the Contract Act, to return the machines to the partnership on the expiry of the time for which they had been bailed. He having died, the duty of doing this devolved on the defendant as his executor.

The letter of the 1st March 1909 rightly treats the executor as responsible for hire accrued up to that date, but it gave him notice that if he did not return the machines before the end of the month he would be held personally liable for hire at an enhanced rate. Unless he agreed to pay the enhanced rate he could not be held liable for it, but as he neither returned the machines nor agreed to pay the hire demanded, he was guilty of conversion of the machines to his own use as from the time when he should have returned in response to the demand made for them, and for this conversion he must be held personally liable—see Addison on Torts, 8th Edition, page 575.

In actions for the conversion of chattels the full value of the chattels at the time of the conversion is the measure of damages—ibid at page 597. The original cost of the machines was Rs. 7,000. The plaintiff's advocate did not press for that amount to be awarded, and the learned judge deducted Rs. 2,000 practically for depreciation. If more should have been allowed for depreciation the defendant should have called evidence to prove this: the machines were in his possession, and he himself or his employees could have spoken to the state in which they were in 1909. Not having done so, there is no ground for reducing the amount allowed by the learned judge as the value of the machines.

It was not a case, however, in which the plaintiff should have been awarded damages for wrongful use as well as the full value of the machines. A suit might have been brought in April 1909, and the partners must have been awarded the machines or their value. The partnership estate is not entitled to benefit by the delay of the partners in bringing a suit. If the defendant had chosen to pay the value instead of returning the machines, there would have been no ground for a claim for the use of the machines against him.

I would alter the decree to one for Rs. 5,000 only and the costs of the suit. I would allow the defendant his costs of this appeal on Rs. 1,480 only.

TWOMEY, J:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

*CIVIL EXECUTION No. 106 OF 1916.

ARISING OUT OF CIVIL REGULAR No. 118 OF 1914.

K. HILL ... ... APPLICANT.

vs.

M. M. GREENBERG ... ... RESPONDENT.

Before Mr. Justice Young.

For Applicant—Mr. Patel.
For Respondent—Mr. Barnabas.

11th July, 1916.

Reference to judge on Deputy Registrar's order—Civil Procedure Code (Act V of 1908) O LII r 2.—Limitation act (IX of 1908).—Decree against executor-legatee in his personal capacity-attachment of money due to judgment debtor as executor. Civil Procedure Code O II r. 5.

The Limitation act does not apply to references to a judge on an order by a deputy registrar of the Chief Court of Lower Burma, such reference not being an appeal, nor one of the applications set out in the third division of the schedule to the Limitation Act.

Money in the hands of an executor, administrator or heir as such cannot be attached in execution of a decree against such executor administrator or heir personally, and it makes no difference that the executor is also a legatee and the money in his hands as executor is due to him personally as legatee. It would be opposed to the principle of Order II r. 5, to allow the attachment but the right title and interest of the legatee can be attached, and the executor can be restrained from receiving in his personal capacity any portion of the money in his hands as executor.

JUDGMENT.

YOUNG J.:—This is a reference from an order of the second deputy registrar declining to attach certain money in the custody of the court. The order was dated 31st May 1916, and the reference was filed on 10th June. Under rule 2 of Order LII of the Code of Civil Procedure being an order added to the schedule by the Chief Court under the powers granted to it by part X of the code it is provided that any party desiring to have any question which had been decided by a deputy registrar, whether disputed or not, referred to a judge may apply therefore to the court within eight days from the issuing of the order complained of or within such further time as the judge might allow. The respondent raised the plea of limitation and urged that the words 'from the issue of the order" meant from delivery of the order. The applicant on the other hand claimed exemption on account of time required for obtaining copies of the order and relied on section 12 of the Limitation Act. It is clear that they applied for copies on the 1st June and obtained them on the 2nd. The respondent urged in answer that no copies were requisite, and that they were therefore

*This judgment was upheld in appeal Cf. Civil Misc. App. No. 121 of 1916.

out of time. In my opinion the words "issue of the order" mean delivery of the order, and no copies are required in the first place because there is so far as I can see, no provision requiring a deputy registrar's orders to be in writing at all, and secondly because the rule does not provide for an appeal from a deputy registrar but merely that any question decided by him may, if the parties desired, be decided by the court instead. There is no appeal. The parties start afresh. They are entitled to a decision by a judge, if they so desire. The delegation to these officials of judicial powers in certain cases usually, but by no means always, simple has for its object the speeding up of litigation, but it does not make them judges, or their decisions of any force unless the litigants choose to make them so. If they do not so choose all that they have to do is within eight days from the issue by the registrar of his order to state that they desire the question to be decided by the judge. It is no appeal, the judge need not even see or be referred to the registrar's order. He has to decide not whether this officer is right or wrong, but the original question. No copies are therefore necessary. Moreover the limitation act has no application. Its preamble provides that it applies only to certain applications. These applications are set out in the schedule to the act, and an application of this nature is not one of them. In as much however as it seems the order was delivered without notice to, or, in the absence of the parties, I consent to hear the application under the powers granted by the rule. It remains to see what the question is. The question is whether the applicant who is a judgment-creditor of the respondent in his personal capacity under a mortgage decree, and who anticipates that the mortgaged property, when sold, will not realise the amount of the decree should be allowed to detain a sum of Rs. 12,472 deposited to the credit of the respondent in Civil Regular No. 373 of 1914. This sum is in the custody of the court to his credit as executor. The applicant is a judgment creditor of the respondent in his personal capacity. It would be a strange thing if an executor can be restrained from dealing with and administering his testator's estate at the instance of a creditor to whom he owes money in his private and personal capacity. The executor however is also a legatee, and the applicant seeing that his prayer is probably inadmissible argues that he has also asked for such other order as the court might think fit. He asks that the executor's interest in the sum as legatee might be detained. I do not see that that can be done either. As executor he must be allowed to carry on his executorship, and to interfere with his doing so would be contrary to the principle of Order II Rule 5. I cannot therefore restrain him from withdrawing his money. But when once it is in his hands as an executor it is I think quite possible to attach his right, title and interest as legatee, and as it seems the properties have been sold, and the price fetched has failed to reach the decretal amount, I think I should do so. The respondent must therefore be restrained from receiving in his personal capacity as legatee any portion of the said sum, and from dealing with it otherwise than in his representative capacity in due course of administration.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS No. 103 OF 1916.

MG. SAN YA AND ONE ... ... APPLICANTS.

vs.

THE INDIAN TELEGRAPH ASSOCIATION CLUB AND TWO OTHERS. ... ... RESPONDENTS.

Before Mr. Justice Young.

For Applicants—Mr. Chari.

For Respondents—Mr. McDonnell and Mr. May Oung.

28th July, 1916.

Civil Procedure Code 6 XXXIII r. 5(d)—application for leave to sue as pauper.—Indian Contract Act (IX of 1872) s. 30. agreements by way of wager.—Suit to recover anything alleged to be won a wager-Lottery—Lotteries Act (V of 1844).

An application for leave to sue as pauper ought to be dismissed without enquiry into the poverty of the applicant unless it discloses a cause of action.

Lottery is a game of chance in which the loss or gain of the prize is wholly dependent on the drawing of lots.

Kamakshi vs. Appavu 1 M. H. C. Rep. 448 followed.

A lottery is really a bet between each subscriber and the promoter, the subscriber betting the price of his ticket that he will win, the promoter betting the total subscription that he will not.

There is no difference between "gaming and wagering" as used in the English Gaming Act and in the Indian Gaming Act 21 of 1848 and the expression "by way of wager" in the Indian Contract Act, and participating in a lottery is gaming or gambling.

Kong Yee Lone & Co. *vs.* Lowjee Nanjee 29 C. 461 (P.C.) followed.

If the money won in a lottery is paid to a third person as agent for the winner, the taint of the money would be purged by its passing into the hands of a person who was bound to account and the winner could bring a suit for recovery of the money as from an agent.

Secus if the person has taken away the money alleging himself to be the winner.

Bridger vs. Savage 15. Q. B. D. 363 and Beeston vs. Beeston 1 Ex. Div. 13 followed.

ORDER.

YOUNG, J.—This is an application for leave to sue as paupers to recover (a) from the Indian Telegraph Association Club (b) from one Mg. Tha Yin and (c) from one Mg. Aung Ban the sum of Rs. 98,307 being the amount with interest of a prize drawn by the applicants in a lottery conducted by the first defendant. The second defendant is sued as having actually received the money from the first defendant, such payment being according to the plaintiff the result of negligence, while the third defendent is sued

as having identified and guaranteed the second defendant as the rightful winner. Whether the suit would lie as against him need not be discussed as it is withdrawn.

Order XXXIII rule 5 provides that an application such as the present should be rejected unless the proposed suit discloses a cause of action.

In 1863 in Kamakshi vs. Appavu (1) the Madras High Court described or defined a lottery as being in the ordinary acceptation of the term a game of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the person concerned was made wholly dependent upon the drawing of lots, and the necessary effect of which was to beget a spirit of speculation and gaming that was often productive of serious evils. In Wharton's Law Lexicon it was similarly described as a game of chance, a distribution of prizes by chance. In Lord Halsbury's Laws of England volume 15 para 579 a lottery is described as a game which is made illegal by statute In 1901 Fox J. held that a lottery was forbidden by section 294 A. of the Indian Penal Code. Maung Pe vs. Nga Maung (2). In 1904 in Gulliver vs. Winter(3) Chitty J. disagreed with that view, but stated that a lottery would fall within the meaning of section 30 of the Contract Act. In 1914 in Mg. Baw Gine vs. Indian Telegraph Association (4) I rejected an application similar to the one under consideration, holding that a suit to recover a prize in a similar lottery or a sweep was forbidden by section 30 of the Contract Act. It is only fair to the Indian Telegraph Association to state that in both that case and the present the association was not seeking to retain the prize for itself, but to avoid paying it twice over since they had already paid it to the other claimants as being the rightful winners. Mr. Chari now argues that my decision in Mg. Baw Gine vs. Indian Telegraph Association (4) was incorrect, contending that section 30 of the Contract Act which declares that agreements by way of wager are void and that no suit shall be brought for recovering anything alleged to be won on a wager does not apply to lotteries or to prizes won therein. He admits that if Act 5 of 1844 which declared all lottteries not authorized by government to be common and public nuisances and against the law was still in force he would have no case; but he argues as is the fact that that act was repealed by Act 27 of 1870 which enacted in its stead section 294 A of the Indian Penal Code. That section so far as is material runs as follows: "whoever keeps any office or place for the purpose of drawing any lottery not authorised by Government shall be punished with imprisonment of either description for a term which may extend to six months or with fine or with both." The section also penalises advertisements of such lotteries. Mr. Chari therefore argues that since 1870, only publication of advertisements of such lotteries and the keping of offices or places for drawing them are prohibited, but that the lotteries themselves and agreements to pay prizes won in

(1) 1 M. H. C. Rep. 448.
(2) 7 Agabeg's Rep. 57.
(3) 11 Agabeg's Rep. 23.
(4) Civil Misc 186 of 1913.

them are no longer illegal. Having regard to the fact that the repealed act in addition to declaring lotteries illegal expressly provided that any person who agreed to pay any sum or deliver any goods as a price of such lottery should be liable to a fine not exceeding Rs. 1,000, I consider that there is considerable force in his arguments so far as the Penal Code is concerned. As Mr. McDonnell expressly disclaimed any contention that this lottery could be regarded as immoral or opposed to public policy, Mr. Chari proceeded to endeavour to show that lotteries did not fall within section 30 of the Contract Act, or, in other words, that a suit to recover a prize in a lottery was not a suit to recover any thing won on a wager. He contended that Chitty J's judgment in Gulliver v. Winter, (3) that a suit against the Calcutta Turf Club to recover a prize in its sweep would fall within the mischief of that section and would not lie, was a mere expression of opinion since the question did not arise in that suit—a statement which is obviously correct and in regard to my decision in Mg. Baw Gine vs Indian Telegraph Association (4) he argued that the case had not been fully argued which is also correct. He argues that lotteries are not wagers within the meaning of section 30 of the Contract Act. A wager is defined in Hampden vs. Walsh (5) as a contract by A to pay money to B on the happening of a given event, in consideration of B paying money to him on the event not happening—strictly speaking as has been pointed out by Sir. F. Pollock, it would be more correct to say, in consideration of B agreeing to pay money to him. In this particular contract the Indian Telegraph Association admittedly paid to the winner only a portion of the amount subscribed, retaining a percentage and in Maung Baw Gine vs. Indian Telegraph Association (4) I held that there was a wager between the association and each subscriber, each subscriber betting one rupee (the price of his ticket) that he would draw the lucky number, while the association betted the total amount of subscriptions less the percentage retained that he would not do so. The fact that the subscriber pays his stake in advance, instead of merely agreeing to do so does not seem to me to prevent the transaction being a bet or wager within the above definition, any more than the deposit of his stake by a gambler with a bookmaker prevents a bet on a horserace being a wager; nor again does the fact that the winner's gain is uncertain prevent its being a wager any more than the same uncertainty prevents a bet on a totalisator being a bet. I see no reason to recede from that view. But it is really unnecessary to consider the question. The Privy Council has held in Kong Yee Lone & Co., vs. Lowjee Nanjee (6) that there is no difference between the expressions "gaming" and "wagering" as used in the English Gaming Act and in the Indian Act 21 of 1848 and in the expression "by way of wager" used in the Contract Act. The section might therefore run "all agreements by way of wagering or gaming are void." Gaming is defined as playing a

(5) 1 Q. B. D. 192.
(6) 29 C. 461.

game for stakes, (Halsbury's Laws of England volume 15 para 583) and in Wharton's Law Lexicon as playing any game of chance for money or money's worth, and similarly in Stroud's Law Lexicon. If therefore a lottery is a game in the eyes of the law it would also follow that to participate in one for stakes or money is to game or gamble. Mr. Chari argues that to do so is neither to wager nor to gamble. He points out that Act 5 of 1844 (the Lotteries Act) was followed by Act 21 of 1848 the Gaming Act, and shows that the two continued in force side by side till the former was repealed in 1870 by section 294 A of the Penal Code, and argues that if to indulge in lotteries was to wager or game there was no reason for the two acts to continue in force side by side. I do not think that argument is very convincing. The acts were very different. Act 21 of 1848 did not make gaming or wagering illegal. The legislature merely sought as stated in the preamble to discourage it by refusing to help the winner to recover the money, but in Act 5 of 1844 the legislature had gone much further. Its aim was not to discourage but totally to suppress all lotteries which it expressly declared to be common and public nuisances and contrary to law, and not merely declined to lend its aid for the recovery of winnings but actually penalised all agreements to pay such with a fine that might amount to Rs. 1,000. The continued joint existence of the two acts might of course imply a difference between the subject matters with which they respectively dealt, but might equally well be held to signify that the legislature regarded participation in lotteries as participation in gaming of a particularly mischievous kind, and unless the latter view is correct, the views of the legislature must have undergone very great change when they repealed the Lotteries Act altogether in 1870, and left agreements to pay moneys on lotteries neither illegal nor even void unless Act 21 of 1848 applied.

That its views have not undergone this complete change is clear from the fact that it repealed the act by Act 27 of 1870 which substituted for it section 294A of the Indian Penal Code. This act or section aimed at any rate at discouraging lotteries for it made it a penal offence to advertise them or to keep a place or office for the purpose of drawing any lottery unless authorised by government. The legislature therefore certainly still discountenanced lotteries even if it no longer pronounced them to be illegal. But if it now only discourages lotteries and lotteries are a species of gaming or wagering, lotteries would be on the same footing as other forms of wagering or gaming and there would then be no longer any reason for the joint existence of the two acts. It seems practically inconceivable that a legislature which enacted section 294A of the Indian Penal Code would legalise agreements by way of lotteries and put them on the same footing as other contracts, and yet this is what it did, unless Act 21 of 1848 included them.

It remains to be seen whether there is support for the view that lotteries in the eyes of the law are games and that participation in them for gain is gaming. We have seen that Wharton's Law Lexicon and the Madras High Court defined lotteries as games

of chance and that in Lord Halsbury's Laws of England they are described not only as games but as illegal games by statute. As is well known in former days in England games were discouraged as distracting men from the practice of martial exercises useful for the defence of the realm vide 33, Henry VIII Cap. 9. The Act is entitled "A bill for maintaining artillery and the debarring of unlawful games." and cf Jenks vs. Turpin (7) In later times many games were prohibited as leading to gambling and so on. While still later these prohibitions were themselves removed except as regards certain games, such as, ace of hearts, pharaoh, basset, hazard, passage, roulet, all games of dice except backgammon, and all games of card which are not games of mere skill, Jenks vs. Turpin page 524. When we turn to these statutes we find (1) that all these games of chance are called indiscriminately games or lotteries and (2) that lotteries strictly so-called are termed games. Thus in 10 & 11 William III Cap. 17 entitled "an Act for the suppression of lotteries" the preamble states as follows: "Whereas several evil-disposed persons have set up many mischievous and unlawful games called lotteries . . . . and have thereby most unjustly and fraudulently got to themselves great sums of money" etc., etc., and the statute then declares all such lotteries and all other lotteries to be common and public nuisances. In 8 George I Cap. 2 we find lotteries in the restricted sense described and prohibited. In 12 George II Cap. 28 we find a renewed prohibition and a declaration that certain games called ace of hearts, pharaoh, basset, and hazard are games, or lotteries by cards or dice within the meaning of 10 William III Cap. 17 sections 1 and 2, while 13 George II Cap. 19 after reciting 12 George II Cap. 28 proceeds to declare that a certain game called passage and all other dice-games except backgammon are to be deemed games or lotteries within the meaning of the statute and prohibits them. Similarly in 1802. 42 George III Cap. 119 prohibits certain mischievous games or lotteries called "little goes" and in 1846. 9 and 10 Victoria Cap. 48 provided that Art Unions which may be roughly described as associations for distributing works of art by lot amongst the subscribers should not be deemed to fall within the statutes prohibiting lotteries, little-goes and unlawful games. It therefore seems to me that in India and England lotteries were regarded as games of chance, that participation in such as were not authorised, was in India at first absolutely prohibited and penalised, while wagering and gaming were only discouraged: that as time went on lotteries were put on the same footing as other games of chance except that to advertise them or keep an office or place for the purpose of holding them still remained an offence under the general criminal law, and that when this happened, there was no longer any reason for any special act and lotteries fell under the general and milder wagering act and finally under section 30 of the contract act. In my opinion therefore no suit lies against the first defendant to recover the money.

---

(7) 13 Q. B. D. 517.

As regards the second defendant he neither appeared in person or by counsel and so far as I recollect Mr. Chari advanced no argument to show that the suit would lie as against him. This might have been due either to inadvertence or to the fact that he was a convict in the Rangoon jail and apparently not a person from whom it was likely that the money could be recovered. It was clear that he received the money and the cases showed that if he had done so as agent for the plaintiff, the original taint of the money would be considered purged by its having passed into the hands of a person who was bound to account, and a suit would lie as being one for an account between principal and agent: cf. Gulliver v. Winter (3) already cited, and Bridger v. Savage (8) at page 366 in which Brett M. R held that the suit would lie, as the defendant had received money, which he contracted with the plaintiff to hand over to him, and Beeston v. Beeston (9) at page 15 in which Cleasby Baron stated that the action lay because the defendant had received money for which he had agreed to account. But that is not the case here: the second defendant did not receive the money in any sense as the agent of the plaintiff, but in his own right as being in the opinion of the Indian Telegraph Association the rightful winner. The question therefore would be who was the rightful winner, and the law would be asked to lend its aid to the plaintiff to recover what he alleged to be his rightful winnings. As at present advised I very much doubt whether the character of the money was purged of its original taint by its having come under these circumstances into the hands of second defendant. I incline to think that it is still a suit to recover money alleged to be won on a wager and therefore forbidden by section 30 of the Contract Act. As however I am reluctant to decide the point without argument and as plaintiff might think the second defendant despite appearances to be worth powder and shot, I reserve may decision so far as he is concerned. Mr. Chari also asked me if my opinion was against him to refer this matter for consideration by a bench, as my order is not appealable. His request must at present be considered as relating to the first defendant only. It is always difficult to refuse such requests, but after having given Mr. Chari's interesting arguments my best consideration I am constrained to say that I have no doubt that the opinion of Chitty J. in Gulliver v. Winter (3), obiter though it was, is perfectly correct. I also think for the reasons given that it is an understatement and that the suit is not merely within the mischief but within the letter of section 30 of the Contract Act If it is not within the letter, I have no doubt that it is within the spirit of the section. Being of this opinion, to grant a reference would be to evade the law and make an order which was not appealable, appealable. I must therefore, though with regret, decline to refer the matter.

---

(8) 15 Q. B. D. 363. (9) 1 Exch. Div. 13.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL NO. 57 OF 1915.

MA KYUN & OTHERS ... ... APPELLANTS.

vs.

MYAING SHAIN ... ... RESPONDENT.

Before Mr. Justice U Kin.

For Appellants—Mr. Palit.

For Respondent—Mr. Chari.

23rd February, 1916.

Sale of mortgaged property—Redemption of mortgage out of purchase money—Extinguishment of mortgage

A purchaser of mortgaged property who pays off the mortgage at the time of purchase cannot claim the rights of the redeemed mortgagee as against a subsequent purchaser, the mortgage having been extinguished as soon as the mortgagee was paid off by the purchaser.

JUDGMENT.

U KIN, J.—This is a suit for the recovery of a piece of land.

The plaintiff is a Chinaman by name Myaing Shin. His case is that by a registered deed of sale, dated the 12th July 1906, he purchased the land in suit for Rs. 300 from Maung Aung Myat and his wife, Ma Mya. He says that he worked it for one year and in the following year he had to return to China owing to ill-health leaving the land in charge of Ne Win. Ne Win wrote and told him that Aung Myat, husband of Ma Kyun, had forcibly entered upon and worked the land. He directed Ne Win to take legal proceedings but Ne Win replied that, without a power of attorney he could do nothing. He could not get one in China, so did nothing until he returned to Burma. He asks for the land and mesne profits for three years.

Ma Mya, wife of Aung Myat, plaintiff's alleged vendor, has died. So has Aung Myat the husband of Ma Kyun. The defendants, therefore, are Aung Myat, the plaintiffs' alleged vendor, and his daughter Ma Pwa Kin who is added as a representative of her deceased mother, Ma Kyun, the widow of Aung Myat, the alleged wrong doer, and her two children Ba Than and Ma Shin, who are added as representatves of their father. Aung Myat and his daughter have not defended the suit.

Ma Kyun on behalf of herself and her two children contests the suit on allegations (1) that the sale to Myaing Shin was a fraudulent one, (2) that there was a mortgage of the land by Aung Myat, the plaintiff's vendor, for Rs. 250 to a Chetty; and that prior to the date of the sale to plaintiff her husband and she had, by a *pyatpaing*, bought the land by paying Rs. 500, the amount due on the mortgage.

The points for determination are (1) whether the sale set up by the plaintiff was valid (2) whether there was a mortgage of the land to the Chetty for Rs 250; (3) whether the purchase by Ma Kyun and her husband was valid and (4) to what relief is the plaintiff entitled. Both the lower courts have found that the sale set up by the plaintiff was valid and I have no reason to differ from them on the point. Indeed the advocates have argued this appeal on the assumption that it was valid. The court of first instance found that there was no mortgage, whereas the lower appellate court has held that there was a mortgage and that Ma Kyun and her husband bought the land by paying off the amount due on the mortgage but that there was no intention on the part of the purchasers to keep the mortgage alive.

The plaintiff has won in both the courts. Myaing Shin's advocate has not seriously taken exception to the finding of the lower appellate court as to the purchase by Ma Kyun and her husband but the argument is that the purchase was not valid, because it was not made by a registered deed as it should have been as required by section 54 of the Transfer of Property Act, in as much as the purchase was made on the 27th July 1906. Ma Kyun's advocate does not reply to this argument, but argued on the assumption that it was not valid by contending that as Ma Kyun and her husband paid off the mortgage, they stepped into the shoes of the mortgagee and can now claim the mortgage as still alive and that, that being the case, the plaintiff's purchase which was subsequent in date must be subject to Ma Kyun's rights as a substitute of the original mortgagee. There can be no doubt that, for want of a registered deed, Ma Kyun has not obtained a valid title by the purchase.

The argument advanced on her behalf that the plaintiff must take the land subject to her rights under the mortgage she paid off is based upon very slender foundation. All along there has been a good deal of juggling with the transaction. To my mind it was a purchase of the land for Rs. 500 and nothing more nor less than that. There was no intention on the part of the purchasers to keep the mortgage alive. It is the same thing as where you say that Ma Kyun and her husband bought the land from Aung Myat for Rs. 500 which they paid into his hands, and which he Aung Myat handed over to the Chetty, because he owed that amount to him on the mortgage of the property. That was exactly the nature of the transaction. The discharged mortgage-deed is now with Ma Kyun, as it should naturally be. The stamp has been punched in two places. This must have been done because the mortgage was fully discharged. Even if it had not been punched, I would not in the view I take as to the nature of the transaction, consider the fact as evidence of an intention, on the part of Ma Kyun and her husband to keep the mortgage alive. But as it happens the mutilation of the document sets all possible doubt at

rest. See S. R. M. Chellappa Chetty vs. N. A. P. Chellappa Chetty (1) Ma Kyun has no title to the land as nothing has passed to her by the *pyatpaing* and Myaing Shin has rightly succeeded.

The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL NO. 1 OF 1915.

RAM DHON DHOR... ... PLAINTIFF—APPELLANT.

vs.

SHARF-UD-DIN & OTHERS ... DEFENDANTS—RESPONDENT.

Before Sir Charles Fox Kt. Chief Judge and Mr. Justice Twomey.

For Appellant:—Mr. J. E. Lambert.
For Respondents:—Mr. Munshi.

14th February, 1916.

Probate and Administration Act (V of 1881) sections 82 and 90—Administrator's powers of alienation—effect of alienation by administrators and some of the heirs—Mohamedan Law—Indian Succession Act (X of 1865) section 269.

The probate and Administration Act applies to Mahomedan estates and overrules all rules of Mahomedan Law that are inconsistent with the provisions of the Act.

An administrator appointed under the Probate and Administration Act has no power to mortgage or transfer without the previous permission of the court under section 90 (3) of the act, and he is strictly bound by the terms in which the permission is given. Permission to sell does not include permission to mortgage, and a mortgage executed in professed exercise of a power to sell is voidable under section 90 (4) of the act at the instance of any person interested in the property.

The powers of an executor under a will are much wider and are limited only by any restrictions contained in the will appointing him.

After grant of probate or letters of administration no person other than such grantee shall have power to represent the estate of the deceased.

Semble.—Alienations of an estate by an heir not being the executor or administrator will be valid to the extent of the share of the alienor in the property alienated.

JUDGMENT.

TWOMEY, J.—There is no dispute as to the main facts of this case which are briefly as follows: Mahid Ali Chowdhry died in 1907 leaving seven heirs, including the four defendants-respondents. He left certain immoveable property under mortgage. It had been mortgaged first in February 1903 (exhibit C) to a Chetty, secondly to the same Chetty in May 1903 (exhibit D) and thirdly to other persons in June 1905 (exhibit E) to pay off the Chetty's prior mortgages.

---

(1) 2 Bur L. T. 65.

The first defendant obtained letters of administration to Mahid Ali Chowdhry's estate in 1908. Subsequently on 4th July 1909 the first three defendants, that is to say, the administrator and two other heirs, mortgaged the property to the plaintiff (exhibit A) and paid off Abdul Samad to whom the mortgage of 1905 had been assigned. These three defendants subsequently borrowed further sums from the plaintiff and allowed interest on exhibit A to accumulate till 15th June 1913, when the amount due as interest on exhibit A was Rs. 873 9-6 and this sum with further sums borrowed from the plaintiff altogether came to Rs. 2 650 for which sum exhibit B, further mortgage on the property was executed by these three defendants in favour of the plaintiff.

The mortgagee sued the first three defendants on the two mortgages of 1909 and 1913. The fourth defendant who is another of the seven heirs of the deceased, was impleaded at his own request. He defended the suit on the ground that the first defendant as administrator had mortgaged without the previous permission of the court as required by section 90 sub-section 3 of the Probate and Administration Act 1881. He also pleaded that the second and third defendants under section 82 of the same act had no power to bind the estate of the deceased so long as the letters of administration were in force. The first three defendants pleading their own wrong contested the suit on the same grounds as the fourth defendant.

The plaintiff appellant relied on two orders of the court permitting sales of a portion of the estate, and it was argued for the plaintiff that the permission to sell included permission to mortgage. The court rejected this plea, and decided that the two mortgages were effected in contravention of section 90. The court decided however, that notwithstanding the grant of letters of administration to the first defendant, the mortgages by the first, second and third defendants held good to the extent of their shares in the property. A decree was therefore given against the first, second and third defendants, but the suit as against the fourth defendant was dismissed. The first three defendants, have not appealed and the only question in this appeal by the plaintiff is whether the district court was right in holding that the mortgages did not bind the fourth defendant and the other heirs who were not parties to the mortgages.

It is argued in the first place that the lower court was wrong in its decision under section 90. The judge considered that the Allahabad High Court ruling in Seale v. Brown (1) furnished an authority for the view that an administrator who has permission to sell may, if he pleases mortgage the property instead. That was a case in which executors under a will mortgaged the estate as security for money borrowed by them to discharge the debts and they gave a power of sale to the mortgagee. The will expressly charged the testator's debts on his estate. The majority of the bench decided that the action of the executors was valid. But

(1) 1 A. 710.

that case was governed by the Indian Succession Act of 1865 and section 269 of the act gives unrestricted powers of disposal to executors and administrators. Under the Probate and Administration Act of 1881, an administrator must comply strictly with the provisions of section 90 of the act. The executor's powers depend largely on the terms of the will appointing him. He has power to sell or mortgage unless the will forbids it. An administrator has no power to alienate at all without first obtaining the express permission of the court and he is strictly bound by the terms in which the permission is given. In the present case moreover as the judge points out, the first defendant, when applying to the court for permission to sell, entirely concealed his mortgage transactions with the plaintiff and the judge gives reasons for thinking that the court would have refused permission to effect these further mortgages on the property if the whole facts had been disclosed. Moreover there is no proof that any part of the sums borrowed on exhibit B was really devoted to paying off interest which had accrued on exhibit A. I think the decision that the two mortgages were voidable is correct.

But it is further contended that under Mahomedan Law the three defendants had power to bind the other heirs in respect of alienations made for paying off the debts of the deceased. The district court has found that exhibit A was executed to pay off debts of the deceased, and Abdul Samad the assignee of the 1905 mortgage, (exhibit E) admits that it was paid off on 4th July 1909 when Exhibit A was executed. Exhibit B was executed ostensibly to pay off debts contracted by the mortgagors including Rs. 73 9-6 due for interest on exhibit A. There is a conflict of authority among the Indian High Courts as to the effect of a decree against one of several Mahomedan heirs relative to debts contracted by the deceased owner of the estate. The Allahabad High Court has held that such a decree does not bind the other heirs who are not parties to it, Jafri Begum v. Amir Mahomed Khan (2), and presumably the same principle would apply to voluntary alienations by one of several heirs. According to the decisions in Calcutta on the other hand, a creditor may sue any one of the heirs who is in possession of the whole or any part of the property without joining the other heirs as defendants, and the decree will bind not only the actual defendant's proportionate share but all assets of the deceased in his hands Amir Dulhin v. Baij Nath Singh (3) and Muttijan v. Ahmed Ally (4). But it appears to me that these divergent rulings have no bearing on the present case, which is distinguished from them by the fact that letters of administration to the estate of the deceased had been issued before the mortgages in suit were executed. The statutory provisions of the Probate and Administration Act apply to Muhammadan estates overriding any rules of Muhammadan Law that are inconsistent with them. It follows from section 82 of the act that the first

---

(2) 7 A. 822
(3) 21 C. 311. (4) 8 C. 370.

defendant who is administrator, was the only person clothed with authority to act as representative of the estate, could bind the shares of the other heirs, and that the first defendant could not do so effectually unless he complied with the provisions of section 90.

The district court has held that notwithstanding the provisions of section 82 the mortgages hold good so far as the proportionate share of first three defendants, that is to say the actual mortgagors, are concerned. That decision has not been questioned in appeal and it is not necessary to consider whether it is correct or not. But in my opinion the appellant's claim as against the heirs who were not parties to the mortgages was rightly disallowed, and I would therefore, dismiss this appeal with costs.

FOX, C. J.:—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL NO. 175 OF 1913.

MALAYANDI CHETTY and others ... APPELLANTS.

vs.

NARAYANEN CHETTY and others ... RESPONDENTS

Before Mr. Justice Ormond and Mr. Justice Twomey.

For Appellants—Mr. Ormiston.
For Respondents—Mr. Chari.

15th June, 1915.

Novation—Partnership—Power of a partner when the partnership is being wound up—mortgage and acknowledgment of debt by one partner.

A novation of a debt whereby one debtor is substituted for another is not binding on the creditor unless he has consented to the novation.

When a partnership is being wound up no single partner has any authority to borrow money, or to mortgage partnership property except perhaps in case of necessity, or to give an acknowledgment for a subsisting debt so as to bind his co-partners.

JUDGMENT.

ORMOND, J.:—The plaintiff firm C. T. V. M. are mortgagees of certain paddy lands under a registered mortgage deed dated 18th November 1909 executed by the first defendant Narayanen on behalf of the N. L. C. T. K. R. M. firm which carried on business as money lenders at Tawa hereinafter called the Tawa firm. Narayanan's partners were Kanappa the second defendant and Raman the third defendant a minor brother of Kanappa. Kanappa and Raman had a firm of the same name viz., N. L. C. T. K. R. M. which carried on business at Pegu hereinafter called the Pegu firm. Narayanen was not a partner of that firm. Narayanen had 7—16th share in the Tawa firm and had a separate money lending business of his own at Tawatake which he was still carrying on at the time of this mortgage. In 1907 the Tawa firm ceased to carry on a money lending business at the time they owed the plaintiff's firm

Rs. 4,900 and transferred their books to the charge of the Pegu firm for the outstandings to be collected. Malayandi the managing partner of the plaintiff firm is a relation of the first defendant Narayanen. The Tawa firm purports to have transferred these lands to the Pegu firm by a book entry in August 1909 in partial satisfaction of a debt of Rs. 41,600 and on the 25th June 1910 the Pegu firm purported to transfer these lands by a registered mortgage to a firm in Rangoon N. K. K. R. M. which firm is owned by Kanappa and Raman and one Kumarappa. It is clear however that the Pegu firm had acquired no legal interest in the lands by the book entry of August 1909, and therefore could not transfer any interest to the Rangoon firm. The second and third defendants allege that the mortgage in suit was collusive and fraudulent; that it was antedated and was really executed subsequent to a settlement which they allege was made on the 24th November 1909 whereby Narayanen took over the firm's liability to the plaintiff and the firm was released from the debt. The evidence does not show that the plaintiff was cognisant of any such settlement and the novation in respect of that debt is not made out. There are many suspicious circumstances attending the mortgage. It is not entered in the Tawa firm's books. Narayanen says that he told the clerk Rungasawmy Naidu to enter it in the accounts and Rungasawmy says he did not enter it because Kanappa who was then in his country had before leaving told him not to make entries at Narayanan's bidding. The mortgage was executed at Pegu in the shop of A. R. A. R. in a room separated from the room occupied by the Pegu firm by two other rooms. It was not registered until the 10th March 1910. A Rs. 30 stamp would have been sufficient for the mortgage but the stamp actually used was one of Rs. 40 which had been sold on the 25th May 1909 to Perina Pillay a clerk in Narayanan's firm at Tawatake. The district judge dismissed the plaintiff's suit on the ground that Narayanan was not the managing partner of the firm and that in a winding up only the managing partner has authority to execute a mortgage on behalf of the firm. The business no doubt was in a state of being wound up and Malayandi the managing partner of the plaintiff firm must have known that fact because when he came to Pegu he would put up at the place of business of the Pegu firm. Both Kanappa and Narayanan took an active part in the winding up of the Tawa firm and we must take it that Narayanan had the full powers of an ordinary active partner. The business was an ordinary Chetty money-lending business and as long as such business is a going concern each of the partners would have authority to borrow money on behalf of the firm for the purposes of the business, and to mortgage the firm's assets for that parpose. But when a moneylending firm is being wound up, in my opinion one partner has no authority to mortgage the firm's assets because he no longer has authority to borrow money, except perhaps in case of necessity, and he cannot give an acknowledgment for a subsisting debt so as to bind the firm. Both the power to mortgage the firm's assets and the power to give an acknowledgment for an antecedent debt on behalf

of the firm must rest on the power to borrow on behalf of the firm. Mr. Ormiston for the plaintiff appellant has cited the following cases Butchart v. Dresser (1), In re Clough (2) and In re Bourne (3), Butchart v. Dresser shows that one of several partners after dissolution can sell the assets and receive payment of debts and can complete a transaction which was commenced before the dissolution. In that case the firm had agreed to buy certain shares and dissolved partnership before payment. One partner A handed the shares to a bank as security for a loan to pay for the shares and authorized the bank to sell the shares which it did. It was held that the partner A had authority to pay for the shares and therefore had authority to pledge the shares for that purpose; the contract for the purchase of the shares having been made before the dissolution. That case does not amount to an authority that one partner can mortgage the assets of the firm as security for an anticedent debt. In both the other cases cited the security for an antecedent debt was given by a sole surviving partner after the death of his co-partner, but upon the death of a partner the surviving partners represent the whole firm, and if all the partners join in mortgaging the assets of the firm after dissolution during a winding up, the mortgage of course is good. Narayanan who gave evidence for the plaintiff states that he would not have executed the mortgage if Kanappa had not consented. He says that plaintiff made demands, that Kanappa told him to ask four months time and if the plaintiff refused, to execute the mortgage. The fact that the mortgage was not entered in the firms' books tends to show that the mortgage was executed without Kanappa's knowledge and behind his back, and there is no evidence of their being any necessity for the mortgage, and therefore it is not a mortgage binding on the firm.

Mr. Ormiston was allowed to add a new ground of appeal, viz., that if the mortgage was not binding on the firm the plaintiff has a mortgage to the extent of Narayanan's interest in the land. Narayanan's share in the firm is 7—16ths and that would be his share in this asset subject to there being anything left after accounts have been taken and that partnership debts liquidated. The plaintiff I think is entitled to a mortgage decree against Narayanan in respect of his interest in this partnership asset. I would therefore confirm the decree dismissing the suit as against all defendants except Narayanan and would make a decree in favour of the plaintiff as against Narayanan as stated above. The second, third and fourth defendants are entitled to the costs of this appeal.

TWOMEY J:—I concur.

---

(1) 4 D. G. M. & G 542; 43 Eng. Rep. 619. (2) 1885, 31 Chan Div. 324.
(3) (1906) 2 Chan 427.

IN THE CHIEF COURT OF LOWER BURMA

SPECIAL CIVIL SECOND APPEAL No. 107 OF 1915.

AUNG HLA ... ... APPELLANT.

vs.

TON GYI & ANOTHER ... ... RESPONDENTS.

Before Mr. Justice Twomey.

For Appellant.—Mr. Ginwalla.

1st July 1915

Limitation act (IX of 1908) schedule I arts 142 & 144.—Suit for possession based in title—Burden of proving adverse possession.—

Article 142 of the Limitation act applies only to suits based on an allegation of plaintiff's possession lost by dispossession or discontinuance, not to suits for possesion based on title which are governed by article 144

In a suit to which article 144 applies the plaintiff must first prove his title, and the defendant cannot be required to prove adverse possession until the plaintiff has proved his title.

The fact that a piece of land is shown as falling within plaintiff's holding is not sufficent to establish his title.

JUDGMENT.

Mr. Justice TWOMEY:—The plaintiff sued for possession of a strip of garden land measuring ·27 of an acre and appearing in the revenue maps and registers as part of a holding which he bought in 1911 from a Karen woman named Ma Nabu. The strip is in the possession of the defendants who own the adjoining land, and the defendants' case is that the disputed strip forms part of their land which they bought in 1906 from one Maung Po Gale.

The township court found that the plaintiff had established his title and that his suit was in time, and accordingly gave the plaintiff a decree. On appeal the district court held that the plaintiff's suit must fail as he had not shown possession by himself or his predecessor in title within a period of twelve years before the date of institution of the suit.

The plaintiff has now appealed to this court and it is contended that the district judge erred in applying article 142 of the sehedule to the Limitation act, that article 144 applies and therefore that on the plaintiff proving his title it was incumbent on the defendants to show that they had a possession inconsistent with the plaintiff's title for upwards of twelve years before the suit. This contention is correct. The plaintiff does not allege dispossession. What he says is that in 1914 *i e.* about three years after he had bought the land from Ma Nabu a land record subordinate brought to his notice that part of the area shown on the Kwin maps as Ma Nabu's garden plot was occupied by the defendants. He therefore brought the suit. The case falls under article 144. and not under article 142.

It is further contended that the defendants have failed to prove adverse possession for twelve years. But before the defendants can be required to prove adverse possession it is necessary to see whether the plaintiff has proved title. The township court's finding on this point is based on the extracts from the Revenue Maps and on the evidence of the witness Bo Yi. The district judge gives good reasons for disregarding Bo Yi's evidence altogether. This witness says that when the defendants bought their land he helped them to put up a fence on the boundary over against Ma Nabu's land. He does not explain why he helped them to grab part of Ma Nabu's land. His evidence as to what Maung Po Gale pointed out as the boundaries of his land is confused. On the other hand there is no evidence that Ma Nabu was ever in possession of the strip now in dispute. She is still living and was even cited as a witness by the plaintiff, but was not examined. This tells strongly against the plaintiff. According to plaintiff's third witness Maung Sin, Ma Nabu's son objected to the defendants' fence saying that he thought the defendants were encroaching. This witness is admittedly on bad terms with the defendants. His evidence if true would only show that Ma Nabu was aware of the fact that defendants in 1906 enclosed a strip of land shown on the map as hers and that she took no active measure to assert her claim to the land, but allowed defendants to remain in occupation year after year. The plaintiff admits that his vendor Ma Nabu never told him that the defendants had encroached on her garden plot Even the plaintiff's own witness Maung Sin says that before the defendants put up the fence the fruit growing on the land was enjoyed by the public. There is nothing to show that Ma Nabu exercised rights of ownership over it.

If the plaintiff had proved that Ma Nabu was ever in possession it would no doubt be necessary for the defendants to prove twelve years' adverse possession. But the plaintiff having failed to prove possession by his vendor at any time the mere fact that the disputed land is shown as part of his holding in the Revenue maps is not sufficient to establish his title. It may well be that the map is incorrect.

The appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL No. 150 OF 1914.

T. P. C. P. ROWTHER ... DEFENDANT APPELLANT.

vs.

MAMAKKANTAKATH & OTHERS... PLAINTIFFS RESPONDENTS.

Before Sir. Charles Fox Kt. C. J. & Mr. Justice Twomey.

For Appellant—Mr. A. C. Dhar.
For Respondents—Mr. Bannerji.

25th January, 1916.

Transfer of property Act (IV of 1882) ss. 58 (a) & 66—English mortgage—The law applicable to English mortgages in India—Lease for a term by a mortgagor under an English mortgage

The rights and liabilities of the parties to an English Mortgage excuted in India are determined by the provisions of the Transfer of Property Act, and English common law does not apply to the case.

Under the transfer of property act an English Mortgage does not transfer the property absolutely to the mortgage. The mortgagor remains owner subject to the mortgage. The fictions of English common law with regard to legal and equitable estates do not apply to India.

Prima facie a mortgagor in possession can exercise all the ordinary rights of an owner in possession. The only restriction of his rights is that imposed by section 66 of the Transfer of Property Act which provides that he must not commit any act which is destructive or permanently injurious to the property if the security is insufficient or will be rendered insufficient by such act.

The mortgagor by an English Mortgage can grant a valid lease for a term of years and recover rent for the term in advance unless the security is thereby rendered insufficient.

JUDGMENT.

Fox, C. J.—The relief claimed in the suit was (1) a declaration that a lease for three years of two separate plots of land made by one A S. Mahomed Abu Backer to the defendant on the 27th September 1911 was void and of no effect, (2) an order for the delivery up by the defendant of the lease (3) possession of the lands, and (4) costs. Backer was adjudged insolvent on the 14th June 1912. Previous to granting the above lease, he as mortgagee, obtained an order for sale of the lands by the official assignee. At sales by the latter the first plaintiff bought one lot and the second plaintiff the other lot.

The grounds on which the plaintiffs claimed that the lease should be declared void, were because it was a colourable and fradulent transaction in which no consideration passed, and because Backer who was at the time be executed the lease mortgagor of the lands could not validly give a lease of them. The mortgage was undoubtedly an "English Mortgage" within the description of that kind of mortgage in section 58 of the Transfer of Property Act, and Backer remained in possession of the lands after making it, and was in possession when he granted the lease. For the plaintiff it was contended that one who mortgages his property by an English mortgage has no power to make a lease of it because by the mortgage he transfers the property to the mortgagee absolutely, and consequently he has no interest to transfer until the land is re-transferred to him by the mortgagee in fulfilment of the condition or provison that this shall be done upon payment of the mortgage-money.

No doubt this contention would be correct if the English common law were applicable to the case, but what has to be applied is the Transfer of Property Act of 1882. Under that act a mortgage is a transfer of an interest in specific immoveable property for the purpose of securing (1) the payment of money advanced or to be advanced by way of loan, (2) an existing or future debt, or (3) the performance of an engagement which may give rise to a pecuniary

liability. In whatever terms the document may be expressed nothing more than what is stated in section 58 (a) is effected, consequently although in the case of an English Mortgage the mortgagor transfers the property absolutely to the mortgager, the Indian law does not recognise that he that he does so in fact, and the mortgagor remains in Indian law owner of the property subject of course to the mortgage. The fictions of English law in regard to the legal and equitable estate have not been continued in India.

A mortgagor in possession can prima facie exercise the ordinary rights of an owner in possession. The only restriction imposed on him is that contained in section 66 of the Transfer of Property Act, that is to say, he must not commit any act which is destructive or permanently injurious to the property, if the security is insufficient or will be rendered insufficient by such act. In the present case the mortgagor is said by the document to have been paid the full three years' rent in advance, but there is nothing to show that even if this was the case the security was thereby rendered insufficient within the meaning assigned to that term.

It was not proved that the lease was colourable, benami, or fraudulent, and there was no ground for decreeing any part of the plaiutiffs' claims. It is unneccessary to decide whether there was misjoinder of parties.

I would allow the appeal, set aside the district court's decree and dismiss the suit with costs ordering the plaintiffs to pay also the first defendant's costs of this appeal, the representatives of the first plaintiff being made liable to the extent of the assets which have come to their hands.

Twomey, J :—I concur.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL FIRST APPEAL NO. 149 OF 1910.

BADIER RAHMAN CHOUDHRY ... JUDGMENT—DEBTOR.

vs.

M. A. R. R. M. R. M. Chetty Firm ... DECREE—HOLDER.

Before Sir Charles Fox, Kt. Chief Judge.

For Applicant—Mr. J. R. Das.
For Respondent—Mr. Connel.

Civil Proceedure Code (Act of 1908) O XXXIV r 6.—Equitable mortgage—Rights of parties—Personal decree against mortgagor—Expart decree.

Deposit of title—deeds amounts to an agreement to execute a lega mortgage, and carries with it all the remedies incident to such mortgage.

Carter *vs.* Wake. 1877 L. R. 4 Ch. D. 605 followed.

The proper remedy of a mortgagor by deposit of title-deed is a decree for sale.

Oo Noung *vs.* Moung Htoon Oo. 13 C. 322. and Raja Sree Nath Roy *vs.* Gadadhar Das 1. C. W. N. 225. refered to.

Under O. XXXIV. r. 6. of the Code of Civil proceedure a court can pass a final personal decree only when the balance due after sale of the mortgaged property is legally recoverable from the defendant otherwise than out of the mortgaged property.

Before passing a final personal decree the court ought to issue notice to the judgment debtor to show cause against it.

An application to set aside a decree ought to be made to the court which passed the decree, not to the appellate court.

JUDGMENT.

Fox, C. J.:—This application presented on the 20th January 1916, is to amend the appellate court's decree which is dated the 8th July 1912 so as to bring it into accordance with the judgment.

The part of the decree objected to is that which orders that if the net proceeds of sale of the mortgaged property should be insufficient to pay the amount due on the mortgage and subsequent interest and costs the plaintiff should be at liberty to apply for a personal decree for the amount of the balance.

It is argued that the judgment did not authorize or contemplate this clause because they held the defendant not liable on the promissory note sued on, and only held him liable on the equitable mortgage.

The judgment gave the plaintiff a mortgage decree for Rs. 10,000 with interest calculated according to the practice of the court. The plaintiff had asked for sale of the mortgaged property in default of payment of the amount due. The decree was drawn up in a form which complies with Rule 4 of Order XXXIV. and the part objected to merely indicates what Rule 6 states would be open to the decree-holder in case the sale proceeds should turn out to be insufficient to meet the amounts decreed.

Although the defendant was not liable on the promissory note, he was liable for the money borrowed by his agent on the mortgage.

As stated by Jessel M. R. in Carter *vs.* Wake (1) where there is a deposit of title deeds the court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. The appropriate remedy in this province is a decree for sale—see Oo Noung *vs.* Maung Htoon Oo. (2) as it is in Bengal. See Rajah Sree Nath Roy *vs.* Gadadhar Das (3) There is in my opinion no error in the decree, and consequently nothing in it to amend or rectify.

I accordingly dismiss the application with costs—2 gold moher being allowed as advocate's fees.

The applicant's advocate stated that the applicant only became aware that a final decree ordering payment by him personally had been passed when about four weeks before the application the respondent filed an application to execute that decree. The record shows that the plaintiffs filed an application for it on the 6th or 7th October 1913. No notice of the application was issued to the

---

(1) 1877. L. R. 4 ch. D. 605 (2) 13 Cal. 322.
(3) 1 Cal. W. N. 225.

judgment debtor before the application was granted on the 19th November 1913. In view of Rule 6 of Order XXXIV permitting a court to pass a final personal decree only when the balance due after sale of the mortgaged property is legally recoverable from the defendant otherwise than out of the property sold, it would appear right to issue notice to the judgment-debtor to show cause before making a decree under the rule, except possibly in cases in which the judgment and preliminary decree have expressly made him liable personally.

If the applicant in this case is aggrieved at the final decree having been made against him exparte, the original court which made it is the court for him to apply to if he wishes it set aside.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL NO. 197 OF 1915.

MA GYI AND OTHERS ... ... APPELLANT.

vs.

PAT LON ... ... RESPONDENT.

Before Mr. Justice U Kin.

For Appellant—Mr. Villa.
For Respondent—Mr. Ah Yain.

18th January, 1916.

Civil Procedure Code (Act of 1908) Order I rule 8 and Order XXIX rule 1—Suits by or against corporations—unincorporated societies or clubs.

Order XXIX rule 1 of the code of civil procedure applies only to corporations strictly so-called i. e., to bodies authorized by law to act as a person in law, and not to uncorporated bodies or associations of men.

An officer of an unincorporated association can file a suit on behalf of the association only with special permission of the court under order I rule 8.

JUDGMENT.

U KIN, J.:—The plaintiff sued in the township court of Einme for a decree declaring his title as the representative of the short-coat Chinese community of Einme to a half of the house in suit. In his plaint he states that he is a lugyi of the short-coat chinese community; that about twenty years ago the long-coat and the short-coat Chinese community of Einme jointly bought the house in suit for the purpose of using it as their club-house, each community contributing Rs. 700 towards the purchase money which was Rs. 1,400; that U Sit Taik was elected as the head of the two communities about 14 years ago; that U Sit Taik having died two years before the suit, the defendants who are his widow and children have been claiming the house as their own and are about to sell it. Both the lower courts have granted the plaintiff a decree as prayed for.

In this appeal the defendants contend that the township court had no jurisdiction. This point was taken in that court. But I do not think that on the evidence it is possible to hold that the house is worth more than Rs. 1,000. As the suit is in regard to one half of it, the township court had jurisdiction. The next contention of the defendants is that the district court erred in holding that the plaintiff could maintain the suit in his own name on behalf of his community under order 29 rule 1 of the code of civil procedure, and that it should have been held that the proper procedure was as laid down in order 1 rule 8 of the civil procedure code.

Order XXIX rule 1 provides that in suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case. This rule applies only to corporations properly so called and not to every body of persons. A corporation is a body authorized by law to act as one individual and it is constituted either by prescription, by letters patent, or by an act of the legislature. The rule does not apply to unregistered or unincorporated societies. The society in question is not one within the meaning of the rule. Even if it is, the plaintiff who claims as a lugyi (elder) cannot be said to be claiming as the secretary or director or principal officer of the society. Order I rule 8 is the provision by which the procedure must be guided. As no permission was obtained by the plaintiff for the institution of the suit by him on behalf of the short-coat community the suit must be dismissed.

The appeal is dismissed and the suit will be dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL NO. 179 OF 1914.

FOESAN OR FAKIR CHAN & ONE ... APPELLANT.

vs.

ADI CHANDRO BORWA ... ... RESPONDENTS.

Before Sir Charles Fox, Kt., Chief Judge.

For Applicants—Mr. Champagne.
For Respondent—Mr. Lambert.

3rd September, 1915.

Customary Law—Applicability of Burmese Buddhist Law to Rajbansis.—

The rule of Indian courts has been to apply the customary law prevailing amongst them to the various communities living in the Indian Empire without regard to the law of the part of the country in which they are settled or domiciled.

Fone Lan v. Ma Gyce, 2 L. B. R. 95 approved.

Burmese Buddhist Law is not applicable to Rajbansis settled in Burma even if they are Buddhists. The law applicable to them is the customary law prevailing amongst them in their habitat in Chittagong.

Ma Tin v. Doop Raj Borwa 1 Chan Toon 370; U. B. R. (1892-96) II 608 dissented from

Fone Lan vs. Ma Gyee 2 L. B. R. 95 followed.

JUDGMENT.

Fox, C. J.:—The case was between Rajbansis or Mugs. The question for determination was whether the wife of a Rajbansi had an interest in property which had been sold by her husband. The district judge on the strength of the decision in Ma Tin v. Doop Raj Borwa (1) was of opinion that that she had. The part of the judgment quoted by the district judge viz., "*prima facie*, as a Buddhist, deceased would come under the Buddhist Law of the country at large, and the burden of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance" appears to me to be entirely opposed to the course of decisions in the Indian Courts, some of which are referred to in Fone Lan v. Ma Gyee (2). The various races are accorded the customary law prevailing amongst them and such customary law is applied to them in whatever part of the Indian Empire they may settle or be. I cannot accede to the proposition that Burmese Buddhist Law is applicable to Rajbansis, even if they are Buddhists. The law to be applied to them is the customary law prevailing amongst them in their habitat which is Chittagong.

Burmese Buddhist Law not being applicable to the case there is no foundation for the claim that the wife in this case owned half the property sold to the deceased whom the plaintiff represented. It was for the contesting defendants to show that under the customary law applicable to Rajbansis a wife had an interest in property bought by her husband. There was no evidence that this was the case. The defence should have been held untenable on this ground.

The appeal is dismissed with costs—3 gold mohurs allowed as advocate's fees.

---

(1) 1 Chan Toon 370; U. B. R. (1892-96) II 608.
(2) L. B. R. 95.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL NO. 132 OF 1915.

MA HLA DUN ... ... PLAINTIFF—APPELLANT.

vs.

MOUNG SHWE YA ... DEFENDENT—RESPONDENT.

Before Mr. Justice U Kin.

For Appellant.—Mr. Halkar.
For Respondent—Mr. Dhar.

10th January, 1916.

Civil Procedur Code (Act V of 1908) O XX r 1. Notice of delivery of judgment Limitation Act (IX of 1908) s 5 Sufficient cause—Discretion of court
Evidence Act (I of 1872) s 91 Meaning of "Terms of a contract

Under Order XX rule 1 when the court does not pronounce judgment at once after the case has been heard, it ought to give notice to the parties of the day on which judgment is to be delivered.

When the failure of the court to give notice of the date of delivery of judgment has led to a delay in filing the appeal that ought to be considered sufficient cause for extending time under section 5 of the Limitation Act.

Whether time for an appeal should be extended under section 5 of the Limitation act is a matter of discretion for the court before whichthe appeal is filed, and its discretion should not be interfered with in appeal unless it has been exercised arbitrarily or illegally.

Quacre whether the words "terms of a contract" in section 91 of the Evidence Act include the date of a contract

JUDGMENT.

U KIN J:—The plaintiff appellant says that in 1267 she sold the land in suit to the defendant's deceased husband for Rs. 150. The sale was verbal. Delivery of possession was made to the purchaser who took possession and worked the land. The plaintiff now wishes to get back the land without offering to return the purchase—money, on the ground that no title has passed to the purchaser under the oral sale, as it should have been by a registered deed as required by section 54 of the Transfer of Property act.

The defence was that the sale was in 1264 prior to the time when the Transfer of Property Act came into force in Burma. The only question to determine on the merits of the case is whether the sale took place before or after that Act came into operation.

The divisional court on appeal has held that the plaintiff being debarred from proving the sale for want of a registered deed was also debarred from proving the date of the sale by oral evidence in view of section 91, of the Evidence act. It also held that the evidence to prove that the transaction took place in 1267 was slender. It is not necessary for me to decide whether the oral evidence

The burden was entirely on the plaintiff. She has failed to discharge it, even supposing that the evidence is admissible.

This is another point which requires my decision and that is whether the divisional judge was right in admitting the appeal after the expiration of the period limited for it. The main ground upon which the appeal was admited under section 5 of the Limitation Act was that the original court merely reserved judgment but did not fix a date for the delivery of judgment which omission led to delay. Order 20 rule 1 of the code of civil procedure requires that if judgment is to be passed on a future day after the case has been heard, due notice shall be given to the parties or their pleaders. In my judgment, the divisional court has properly exercised its discretion. The question whether an appeal should admitted after time is a discretionary matter and I have no power to disturb a finding of the lower appellate court in a matter of this sort unless I am of opinion that that court has exercised its discretion arbitrarily or illegally or in a manifestly unjust manner.

The appeal is dismissed with costs in all courts.

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL SECOND APPEAL No. 39 OF 1916.

ALI ASHGAR ... ... APPELLANT

vs.

MI KRA HLA U ... ... RESPONDENT.

Before Mr. Justice Ormond.

For Appellant—Mr. Lambert.
For Respondent—Mr. Maung Gyi.

21st June, 1916.

Mahomedan Law—Restitution of conjugal rights. Effect of apostary of wife.

A Mahomedan husband cannot get a decree for restitution of conjugal rights against wife who has apostatised from Mahomedanism.

Hoosain Anwar *vs.* Fatima Bee (1885) S. J. L. B. 368 followed.

JUDGMENT.

ORMOND, J :—The plaintiff a Mahomedan sued for restitution of conjugal rights. The township court gave him a decree but on appeal the district judge found that there was no marriage and that the plaintiff had bought the girl for a temporary purpose. The defendant is a Burmese Buddhist.

Plaintiff's case is that at the time of the marriage she was converted to the Mahomedan religion and was married to defendant according to Mahomedan rites.

It is not clear what the defence really is. The written statement states that there was no marriage ceremony and no marriage. But it is clear that the defendant after living with the plaintiff for 7 days left him on the ground that she refused to become a Mahomedan. It is not contended by the plaintiff's advocate that a

marriage between a Mahomedan and a Burmese Buddhist is valid. According to the decision in Husain Anwar vs. Fatima Bee, (1) a Mahomedan cannot get a decree for restitution of sonjugal rights against his wife who has apostatised from Mahomedanism. I am refered to the case of Kumal Sheriff vs. Mi Shwe, (2) decided in 1875. In that case a Burmese woman professing the Buddhist faith but who at the time of her marriage simulated conversion to Islam, and married with Mahomedan ceremonies was estopped from saying that she was still not a Mahomedan; and she was not allowed a divorce there being no fault established on her husband's side. That case was not cited in Husain Anwar's case which was decided 10 years later, and I doubt if a Burmese woman, who is converted to Mahomedanism for the purpose of a marriage with a Mahomedan, can by estoppel be placed in a worse position than if she had been a real Mahomedan at the time of the marriage. In Husain Anwar's case it was admitted that an apostate Mahomedan wife by the apostasy cancels the marriage.

If the plaintiff's case is true that the defendant was married according to Mahomedan ceremonies and became a Mahomedan, she has apostatized and the marriage is thereby cancelled. If the defendant's case is true that she never became a Mahomedan and was not married according to Mahomedan ceremonies, the plaintiff's advocate admits that there would be no marriage. In either case therefore the plaintiff is not entitled to restitution of conjugal rights.

This appeal is dismissed with costs.

IN THE CHIEF COURT OF LOWER BURMA.

INSOLVENCY CASE NO. 32 OF 1912.

In the matter of KO SHWE GYA—INSOLVENT.

Before Mr. Justice Young.

For Insolvent—Mr. N. N. Sen.

For Decree-holder—Mr. Broadbent.

12th June, 1916.

Presidency Towns Insolvency (Act. III of 1909) Section 17.—Pendency of insolvency proceedings.—Leave of Court for application to arrest insolvent.—Effect of refusal of discharge on protection order.

The refusal of a discharge is a final disposal of a petition of insolvency and proceedings are no longer pending.

The protection order is ipso facto vacated by a refusal of discharge, and hence no leave under section 17 of the Insolvency Act is necessary for an application to arrest the insolvent under a decree.

Quaere.—Whether leave is necessary for an application to execute the decree by attachment of the insolvent's property.

---

(1) S. J. L. B. 368 (1885) (2) S. J. L. B. 49 (1875)

JUDGMENT.

YOUNG, J.:—This is an application in Insolvency arising out of an application on the original side to arrest under a decree the respondent who is an insolvent whose discharge has been refused, but whose protection orger has not been cancelled, the applicant not having obtained the leave of the Insolvency Court under Section 17 of the Insolvency Act. The main question is whether the insolvency proceedings can still be considered to be pending: if not no leave is required under section 17, and the protection order which only enures till the final disposal of the matter of his insolvency (Form 66) is avoided by the mere refusal of his discharge, questions which sitting on the Original Side I had no jurisdiction to determine. In my opinion the refusal of a discharge is a final disposal of the matter of an insolvency and proceedings are no longer pending. An insolvent whose discharge has been refused has under section 42 no right to apply again for a discharge: all that he can do is after a certain lapse of time to apply to the court for permission to make such application and in my opinion the proceedings are closed unless and until he obtains such permission. The refusal of a discharge is I consider as final a disposal of the matter of an insolvency as is a decree in a suit. The protection order therefore is ipso facto vacated by such refusal and as proceedings are no longer pending no leave is requisite under section 17, and the proceedings on the original side can continue.

IN THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.

CIVIL REVISION No. 232 OF 1913.

NGA THA ZAN & OTHERS ... ... APPLICANTS.

vs.

NGA KYAW KAING ... ... RESPONDENT.

Before H. E. McColl, Esq., I.C.S., Additional Judicial Commr.

For Appellants.—Mr. J. N. Basu.
For Respondent.—Mr. San Wa.

2nd October, 1916.

Reference to arbitration Execution by some of the parties.

A reference to arbitration to bind any of the parties ought

To be binding on any of the parties a reference to arbitration should be executed by all the parties to the reference. If not so executed it is void even as to those who have executed it.

The authority of the arbitrators does not begin till all the parties have signed the reference to arbitration.

JUDGMENT.

The plaintiffs appellants alleged that they and defendant respondent and his wife, the second defendant, had entered into a written agreement, (exhibit C) to refer a dispute to arbitration, that one of the terms of the agreement was that if any party refused to abide by the award he should forfeit Rs. 150 to those parties that wished to abide by it, and that an award had been given which the defendant—respondent had repudiated.

They sued for this sum of Rs. 150. The first defendant—respondent admitted having signed a reference but denies that exhibit C was the one, and denied that exhibit C contained the terms agreed to. He also pleaded that the second defendant and the plaintiff—appellant, U Wayama, had not signed the reference and it was therefore a void. The second defendant, who is the wife of the first defendant respondent denied that she had ever referred the matter to arbitration at all, and denied that she had authorized her husband to do so for her.

The reference exhibit C does not contain the second defendant's signature and the courts below therefore found that the document was void and that the suit must fail.

The plaintiffs-applicants have applied for revision on the ground that the courts acted contrary to law in holding that the agreement was void, even though it had not been signed by the second defendant.

This point was considered and therefore I do not think the ground relied on is a good one. Moreover, it was the plaintiffs applicant's case that all the parties had referred the matter to arbitration, and seeing that the dispute concerned property left by the second defendant's parents, it is obvious that that must have been the intention and that a reference to arbitration in which she did not join, could but be infructuous.

If the first defendant respondent said that he agreed to the award it would not benefit the plaintiffs-applicants one jot, because the dispute was with his wife and not with him and therefore the plaintiffs-applicants have suffered no damage by his refusing to abide by it and they are therefore not entitled to any compensation. Further, if as plaintiffs-applicants assert it was intended that all the parties should join in the reference the written reference was of no effect until all the parties executed it.

The learned counsel for the defendant-respondent relies on the following passage in Russell on Arbitration 9th edition p. 48. "Where the accession of all parties to the reference is the consideration to each to execute the submission it is not valid as to some who have executed it until all have done so, even although it purposes to refer all matters in difference between them or any two of them" and again p. 110 "But when there are several parties to a

deed of submission and the consideration to each to execute it is the accession of all the parties to the reference the authority of the arbitrator does not commence until all executed it: and even though the submission be several as well as joint he has no power to decide on a separate mater in difference between two of those who have signed it; when there are others who have not executed it."

In the present case it is obvious that the intention of each of the parties who signed the reference was to get the matter in dispute settled and that they could not do by means of arbitration without the second defendant's consent. As she did not sign the reference, therefore it was void even as between those who signed it and compensation cannot be granted for a so called breach of a void agreement.

The application is dismissed with costs.