LOWER BURMA RULINGS,

BEING THE

PRINTED JUDGMENTS

OF THE

CHIEF COURT OF LOWER BURMA.

VOLUME I.

1900—1902.

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LOWER BURMA RULINGS

VOL. I.—1900—1902

JUDGES OF THE CHIEF COURT

DURING

1900, 1901 AND 1902.

CHIEF JUDGE.

THE HON'BLE FREDERICK SELWYN COPLESTON, I.C.S., (to 10th April 1902).

THE HON'BLE SIR HERBERT THIRKELL WHITE, K.C.I.E., I.C.S. (from 11th April 1902).

PUISNE JUDGES.

THE HON'BLE MR. C. E. FOX, *Barrister-at-Law.*

THE HON'BLE MR. W. E. BIGGE, M.A., *Barrister-at-Law.*

THE HON'BLE MR. A. R. BIRKS, B.A., I.C.S., *Barrister-at-Law* (on leave from 2nd April 1902 to 8th February 1903).

THE HON'BLE MR. A. M. B. IRWIN, C.S.I., I.C.S. (Officiating Judge, from 2nd April 1902 to 8th February 1903.)

TABLE OF CASES.

A

C

LOWER BURMA RULINGS,

BEING THE

PRINTED JUDGMENTS

OF THE

CHIEF COURT OF LOWER BURMA.

Before Mr. F. S. Copleston, Chief Judge, and Mr. Justice Birks.

Civil Second Appeal No. 241 of 1899.

May 18th.

SEVARAMAN CHETTY, APPELLANT (PLAINTIFF). } *v.* { MAUNG PO YIN, RESPONDENT (DEFENDANT).

Valuation of suit under s. 283, Civil Procedure Code – Declaratory title without consequential relief – Suits Valuation Act, s. 11 – Court Fees Act, Schedule II, Article 17.

The valuation of a suit under section 283, Civil Procedure Code, for the declaration of a right to attach certain property, the attachment on which had been removed, is for purposes of jurisdiction the value of the *decree* which it is desired to execute, if that be less than the value of the *property*, or the value of the property if that be less than the amount of the decree.

Modhusudun Koer v. *Rakhal*, I. L. R., 15 Cal. 104, followed.

Article 17 of Schedule II, Court Fees Act, applies to a suit brought under section 283, Civil Procedure Code, and the stamp required for the plaint is Rs. 10 only.

Dhondo Sakharam Kulkarni v. *Govind Babaji Kulkarni*, 9 Bom., 20.

Vithal Krishna v. *Balkrishna Janardan*, 10 Bom., 610, followed.

Gulzari Mal v. *Jadoun Rai*, 2 All., 63.

Dildar Fatima v. *Narain Das*, 11 All., 365 cited.

Ahmed Mirza Saheb v. *A. Thomas*, 13 Cal., 162 dissented from.

It is not necessary for a plaintiff bringing a suit under section 283, Civil Procedure Code, to ask for any further relief than a declaration of his right to attach the property in dispute. On such declaration being made, the order removing attachment would fall and the attachment should be restored. *Vithal Krishna* v. *Balkrishna Janardan*, 10 Bom., 610, followed.

PLAINTIFF-APPELLANT sued under section 283 of the Code of Civil Procedure to get his right declared to attach certain property belonging, as plaintiff alleged, to his judgment-debtor. The defendant alleged that the property, consisting of houses, a bazaar, the land they stand on, and a boat, belonged to him by virtue of a mortgage executed in his favour in February 1896 by the then owner Maung Hmaw, followed about a year later by a transfer of the property. The plaintiff asserted that the mortgage and the transfer of possession were fictitious. The Judge of the Court of First Instance found that there had been a transfer of possession; but after carefully considering the evidence the Judge also came to the conclusion that the transfer was fraudulent and fictitious, and gave plaintiff a decree.

The lower Appellate Judge in a short judgment states that the decision of the Subdivisional Court is altogether wrong; that although the transaction is open to suspicion, Maung Hmaw and Ma E handed over the property to the defendant Maung Po Yu in satisfaction of an unpaid debt of Rs. 5,000; and that, as plaintiff failed to prove that the transaction was fraudulent and void judgment should have been given against him. The Appellate Judge omitted to deal with several points set out in appeal, holding that it was unnecessary to do so.

Civil Second Appeal No. 241 of 1899.

May 18th.

We have heard arguments of the learned advocates for the plaintiff-appellant and defendant-respondent, Mr. Giles and Mr. Burn, on the facts of the case; but, before dealing with the facts, it is necessary to take up the legal points raised by Mr. Burn.

It was urged as one of the grounds in first appeal that the Subdivisional Court had no jurisdiction, because the subject-matter of the suit was admittedly in excess of the Court's jurisdiction. The Court has jurisdiction we believe up to Rs. 3,000, but whether the limit was Rs. 5,000 or Rs. 3,000 it is in either case clear that the value of the property in respect to which it is sought to have a declaratory decree made is in excess of the jurisdiction. Mr. Burn has quoted XIV S. W. R. 229 in support of his contention; but it is, we think, clear that the valuation of a suit of this nature for purposes of jurisdiction is the value of the decree which it is desired to execute, if that be less than the value of the property, or the value of the property if that be less than the amount of the decree. The case of *Modhusudun* v. *Rakhal* (I. L. R., 15 Cal., 104) may be quoted. The ruling in that case followed others of the Madras, Bombay, and Allahabad High Courts. We hold therefore that the Subdivisional Court had jurisdiction to try the suit, the value of the decree to be executed amounting only to Rs. 2,268 and costs. We think too that had it been shown that the Court of First Instance had no jurisdiction to try this case, we should still, acting under section 11 of the Suits Valuation Act, have felt bound to dispose of the appeal as if there had been no such defect of jurisdiction. It has not been suggested that the alleged defect did prejudicially affect the disposal of the suits on its merits.

Another question has been raised, but not argued at length, as to whether the plaint is properly stamped with a Rs. 10 stamp under the Court Fees Act. We see no reason to doubt that the plaint and memorandum of appeal are properly stamped with a stamp of Rs. 10. The following cases in the Bombay High Court may be cited: *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni*, IX Bom. 20, 1884; *Vithal Krishna* v. *Balkrishna Janardan*, X Bom. 610, 1886. In the former case it was held that, even though a plaintiff suing under section 283, Civil Procedure Code, prayed for possession, still Article 17 of Schedule II, Court Fees Act, 1870, applied, and the stamp required for the plaint was Rs. 10 only. In the second case a similar decision was given.

In the Allahabad High Court *Gulzari Mal* v. *Jadaun Rai*, 2 All. 63 (1878) and *Dildar Fatima* v. *Narain Das and another*, 11 All. 365 (1889), both suits under section 283, Civil Procedure Code, it was decided that where a declaration of plaintiff's right to the attached property and the cancelment of the order disallowing plaintiff's claim were sought the plaint required a Rs. 20 stamp, or Rs. 10 for each relief. So far as we are now concerned, the Allahabad decisions are to the same effect as those of the Bombay Court. It is true the Calcutta High Court [*Ahmed Mirza Saheb and another* v. *A. Thomas and others*, 13 Cal., 162, (1886)], following its own previous decisions, held that a plaintiff who was there suing under section 283, Civil Procedure

Civil Second Appeal No. 241 o 1899.

May 18th.

Code, to free his land from attachment and to protect it from being sold, must sue on an *ad valorem* stamp; but we consider the Bombay and Allahabad decisions are of greater weight and more in accordance with the wording of section 283, Code of Civil Procedure, itself and with the general method of applying the provisions of the Court Fees Act.

It was in our opinion not necessary for plaintiff in this present suit to ask for any further relief than a declaration of his right. On this being made, the order removing attachment would fall and the attachment should be restored (*see Vithal Krishna* v. *Balkrishna Janardan* already cited).

We come now to the question of fact; and we have no hesitation in agreeing with the Court of First Instance that the transfer of the property by Maung Hmaw to Maung Po Yu, if made, as the Subdivisional Court thinks it was, was no real transfer. No mortgage was proved, and the whole evidence is quite insufficient to show that any *bonâ fide* transfer of possession was made or that Maung Po Yu has any title to the property in dispute. We do not understand why a copy of the alleged deed of mortgage, which was not registered, is filed on the record, apparently as admitted evidence of the alleged mortgage. The Court of First Appeal gave very inadequate reasons for reversing the decision of the Subdivisional Judge, and should have dealt with other points raised in appeal. The Subdivisional Judge has imported into his judgment his view of the value of the property in dispute, formed from his own observation. This was not evidence; but we do not find that the defendant-respondent was prejudicially affected by the introduction of these remarks.

This appeal is allowed, the decree of the lower Appellate Court being reversed and that of the Subdivisional Court restored, with costs.

Before Mr. F. S. Copleston, Chief Judge.

Criminal Revision No. 125 of 1900.

May 19th.

QUEEN-EMPRESS (COMPLAINANT) *v.* TAGARAJAN (ACCUSED).

Order of confiscation added to sentence—Sentence not otherwise appealable—Sentence, part of—Excise Act, s. 51—Criminal Procedure Code, s. 414.

The addition of an order of confiscation to a sentence passed under section 51, Excise Act, does not render appealable a sentence otherwise not appealable. The order of confiscation is not part of the sentence. The Magistrate's order for confiscation of valuable property in addition to a heavy fine, was considered excessive and was set aside.

THE Additional Sessions Judge of Tenasserim Division referred this case to the Chief Court of Lower Burma with the following remarks:—

"(1) It seems desirable to have a ruling whether an order for confiscation under section 51, Excise Act, added to a fine, makes the 'sentence' open to appeal within the meaning of section 414, Criminal Procedure Code.

"This turns on whether the order of confiscation is part of the 'sentence.'

'Sentence' is not defined in the Criminal Procedure Code, but it is described in sections 31, 32, 33, 34, etc., Criminal Procedure Code, in such a way that I think it must in section 414, be limited to imprisonment, fine, or whipping.

"Another argument is that section 415, Criminal Procedure Code, *explains* section 414. It seems to me to show clearly that 'a fine not exceeding Rs. 200 only' in section 414 means a fine of not more than Rs. 200, without either imprisonment or whipping, and not a fine of not more than Rs. 200 and *no* other punishment.

Criminal Revision No. 125 of 1900.

May 19th.

"Another argument is that in section 106 of the Code the order of a Magistrate requiring a bond with or without securities, though it is a substantial addition to the punishment and may entail an additional year's imprisonment, is *distinguished* from the *sentence*, and not spoken of as part of the sentence. Similarly compare section 562.

"(2) The next reason for referring this case on revision is that the sentence *and* the heavy order for confiscation seem utterly unreasonable even supposing the offence proved. Moreover, there does not seem to be what can be held to be sufficient evidence of any guilty knowledge on the part of the man convicted, who tells a story not at all unlikely to be true.

"Considering that he could *not* read the incriminating letter and that it might easily have been put in his gharry without his knowledge, it certainly is as evidence worth a great deal less than the Magistrate supposes. I would advise that the conviction be quashed."

The judgment of this Court is as follows:—

The Sessions Judge has sent this case up on revision on various grounds, which I will deal with in the order in which they occur in the reference. The addition of an order of confiscation to a sentence passed under section 51, Excise Act, does not render appealable a sentence otherwise not appealable. The order of confiscation is not part of the sentence. The Sessions Judge was therefore right in holding that no appeal lay. The Sessions Judge considers the punishment inflicted on the accused, namely, of a fine of Rs. 100 and of the confiscation of the gharry and pony to be unreasonably heavy. He further, on the ground of want of evidence, recommends that the conviction be set aside. I do not think, except on the clearest grounds, this Court ought to set aside a conviction in an unappealable case, and I am not able to say there was no evidence to support the conviction. The conviction will therefore stand, but I agree with the Sessions Judge that the punishment is too heavy. For a gharry driver a fine of Rs. 100 must be a heavy punishment, and, if he owns the gharry and pony, the effect of confiscation may be to ruin him. The Magistrate seems not to have carefully considered what punishment he was inflicting.

The Court has power under sections 439 and 423, Criminal Procedure Code, to deal on revision with this order of confiscation, and I accordingly set aside the order so far as it relates to the gharry, pony, harness, and lamps.

Criminal Revision No. 136 of 1900.

June 1st.

Before Mr. F. S. Copleston, Chief Judge.

QUEEN-EMPRESS *v.* SHAIK HOOSAR AND TWO OTHERS.

Defamation—Social ostracism—Want of malice—Privilege—Criminal Proceedings—Indian Penal Code, s. 499, Exceptions 3 and 9.

While the Civil Courts have power to go into the question of the validity of a sentence of excommunication and to require proof that such sentence was passed on justifiable grounds and after a fair and proper inquiry, in a criminal prosecution for defamation if the members of a society had authority to exclude complainant from their society and used that authority in good faith, although they may have erred in law, such members are not liable to a conviction for defamation:—

THE Additional Sessions Judge of Tenasserim Division referred this case to the Chief Court of Lower Burma, with the following remarks:—

"That one Peru Mahomed pronounced the 'Talak' or formula of repudiation or divorce to his wife *three times* in succession, or within

Criminal Revision No, 136 of 1900.

June 1st.

one 'Tahr' or period of purity and shortly afterwards revoked the terms and again took the woman to wife. These facts came to the knowledge of Peru's co-religionists in the locality and they assembled to consider his conduct and decided that he had concluded an *irrevocable* divorce and had sinned by revoking it, and that they would not associate with him.

"Peru being aggrieved complained to the local Magistrate, and several members of the assembly referred to were placed on their trial for defamation, and the arch-members convicted and punished. Briefly, the Magistrate has found that the action of the accused was illegal, was actuated by malice, and that they exceeded any privileges provided by the exceptions to section 499 of the Indian Penal Code. He further holds that the complainant has been *excommunicated* or *excluded* (from the faith) by not receiving invitations to feasts and other functions, and has been held up to public ridicule and contempt and has thus been defamed. The Magistrate adds that the complainant was justified in his conduct for he acted in good faith and did not commit a wicked act as the *repudiation* imposed was revocable because it was *not* recited at the fixed periods laid down by the Mahomedan law according to the interpretation of Syed Ameer Ali.

"The case has been argued by Mr. Moyle, Barrister-at-Law, who urges that the meeting of the accused and others was legal, as it was confined to members of the Mahomedan persuasion only, that they only exercised rights which members of other communities, societies, or clubs were entitled to exercise.

"That *express* malice has not been proved.

"That excommunication has not taken place as only a person in high office such as a Mullah could pass such an order, and it has been shown that complainant has not been denied entrance to the local mosque. Mr. Moyle also refers to the chapter on divorce on the works on Mahomedan law by Sircar and Baillie. These authorities explain that the reciting of the 'Talak' three times whether in immediate succession or at the *recognized* fixed intervals, creates an irrevocable divorce, and hence the complainant having admitted that he repeated the form of repudiation three times and that he subsequently re-took the woman to wife has, on his own showing, committed an irregularity which the tenets of the Mahomedan religion condemn.

"This Court cannot find that express malice has been proved against any of the accused, and is of opinion that because some of the co-religionists of the complainant have socially ostracised him for having offended the laws of the 'Koran' they have not committed the crime with which they are charged and submits the proceedings to the Chief Court with the recommendation that the conviction and sentence of the Lower Court be set aside."

The judgment of this Court is as follows:—

This case has been submitted by the Sessions Judge, Tenasserim, who appears to have heard counsel in support of an application for revision made in his Court. The three persons who were convicted were, with four other Mahomedans, who were acquitted by the Magis-

Criminal Revision No. 136 of 1900.

June 1st.

trate, charged by the complainant with defamation. The complainant divorced his wife and very shortly afterwards took her back again as his wife. Some little time later, apparently at the motion of the three persons who were convicted, a meeting of members of the mosque was held, and in the complainant's absence it was decided that he had committed a grave sin and that others of the community should not associate with him. Accordingly the former friends of complainant ceased to go to his house and he was no longer invited to weddings and feasts. He was allowed still to worship at the mosque. It does not seem to have been denied that these facts might amount to defamation. The Magistrate in a lengthy judgment held that the meeting, having acted behind complainant's back and under the influence of the three accused who were, he found, actuated by malice, was not a *bonâ fide* meeting. The Magistrate went into the question of the legality of the complainant's action and held, on a preponderance of authorities, that the divorce was not irreversible and that complainant had the right according to Mahomedan law of taking his wife back. The action of the community was therefore not free from malice and was not privileged. It was further decided that only three members of the meeting were actuated by malice, the rest having silently acquiesced in condemning the complainant. These three were sentenced to a fine which was not an appealable sentence; and the other accused persons were given the benefit of the doubt. In his judgment the Magistrate refers to the case of *Appaya and another* v. *Padappa* (XXIII, Bombay, 122). This was a civil case and is therefore not exactly in point. It was there held that the Civil Courts had power to go into the question of the validity of a sentence of excommunication, and that it lay on the plaintiffs who sought to enforce the sentence and by virtue of it to deprive the defendants of their civil rights to prove that it was passed on justifiable grounds and after a fair and proper inquiry. In the present case the complainant is the person against whom an order of social ostracism has been passed, and he seeks to have the members of the meeting that passed the order punished criminally. Complainant does not appear to deny the power of the members of the meeting to punish him as they did, provided he had committed a sin; but he denies that he has acted unlawfully, and complains, moreover, that he was wrongfully dealt with in his absence. These questions are material as helping to show whether the meeting acted in good faith or not. A wilful disregard of the law would no doubt render the Mahomedan elders liable to prosecution because nothing is said to be done or believed in good faith which is done or believed without due care and attention. In this case there is nothing to show that it was unlawful to take action in the absence of the complainant, and he was subsequently informed that, if he could show that his marriage was lawful his social position in the community would be restored. Nor does it appear that the meeting came to its decision without due care and attention. If the members erred, provided they erred in good faith, they would be protected by the third and ninth exceptions of section 499; and it was unnecessary for the Magistrate to decide whether complainant's marriage was

Criminal Revision No. 136 of 1900.

June 1st.

according to a preponderance of Mahomedan authorities, lawful or not. The three convicted persons appear to have acted together, and two of them said that if complainant could produce one authority to show he was right they could produce fifteen to the contrary effect. They impressed their view on the meeting which decided accordingly. To feel strongly and to endeavour to impress your view on others who have to join in a decision is no proof of bad faith or malice. I agree with the Sessions Judge that no malice was proved. The Magistrate gave four of the accused the benefit of the doubt, that is, he held that malice was not proved and the zeal of the other three does not prove malice on their part. In a civil suit it might be necessary to ascertain whether the action of the meeting was actually legally justifiable or not; but in a criminal prosecution of this nature for defamation, if the community or meeting had authority to exclude complainant from the society which is a fact not denied, and used that authority in good faith, then, although they may possibly have erred in law they will not be liable to criminal prosecution and conviction.

The convictions and sentences passed on Shaik Hoosar, Guffur, and Hamed under section 500, Indian Penal Code, are set aside.

Before Mr. Justice Birks.

MAUNG THA CHI *v.* MA E MYA.

Civil Second Appeal No. 289 of 1899.

June 6th.

Buddhist law—Suit for divorce—Claim to partition of property—Causes of action distinct.

A suit for divorce and for partition of property do not constitute a single cause of action. Partition of property is not an essential feature of a divorce. The termination of the marriage status in itself is a sufficient cause of action, and till that cause is settled the grounds for partition do not arise and may vary according as the decree for divorce is based on findings of fact as to which party is in fault. A suit for divorce need not therefore contain a prayer for division of the property.

Ma Gyan v. *Maung Su Wa*, U. B. R., 97, p. 1, dissented from.

THIS appeal is really on a question of law as to whether a Burman Buddhist can bring a suit for divorce without at the same time claiming a partition of the property. In *Ma Gyan* v. *Maung Su Wa*, Civil Appeal No. 21 of 1897, U. B. R., page 1 of second quarter of 1897, it was held that section 42 of the Civil Procedure Code would bar a suit brought for divorce alone, and Mr. Burgess evidently considered a suit for divorce and for division of property as constituting a single cause of action. I have not been able to ascertain whether this ruling has been followed in Lower Burma, but, if it has, I must express my dissent from it. There is an implied ruling in the case of *Nga Lôn* v. *Ma Myaing*, 206, S. J., that partition of property is not an essential feature of a divorce. In that case the question at issue was whether there had been a previous divorce as Ma Myaing sued as the heir to her sister alleging a divorce between Ma Kaing and Nga Lôn by mutual consent before Ma Kaing committed suicide. Mr. Jardine held that the fact that there was a divorce document, under which the parties had agreed to effect partition, was evidence that the status of husband and wife had ceased without evidence of actual partition of the property. In his fourth note on Buddhist law the same learned Judge has given an appendix in

Civil Second Appeal No. 289 of 1899.

June 6th.

which a number of actual divorce cases are reported. In the first three of these cases a prayer for divorce is coupled with a prayer for recovery of property but in the remaining eleven cases the prayer is for divorce alone. There seems nothing in Mr. Jardine's notes which indicates that a suit for divorce must necessarily contain a prayer for division of the property. The termination of the marriage status in itself appears a sufficient cause of action, and till this question is settled the grounds for partition of the property do not arise and may vary as pointed out by the District Judge according as the decree for divorce is based on findings of fact as to which party is in fault. It is quite possible that the plaintiff was in possession of the *lettetpwa* property at the time she brought her suit, and indeed this seems to have been alleged by the defendant as her reason for bringing the suit. I think the ruling in *Narayan Babaji Dabholkar* v. *Pandurang Ramchandra Dabholkar*, 12, Bombay High Court, 148, goes to show that the plaintiff might bring a separate suit for partition of the property if that was necessary. This is the only ground of appeal argued for which leave to appeal has been obtained. Something has been said about the appellant's witnesses not being examined. The record should show clearly why they were not examined, which does not appear to be the case. On the point argued before me I think the lower Appellate Court was right and I dismiss this appeal with costs.

Before Mr. F. S. Copleston, Chief Judge.

Criminal Revision No. 37 of 1900.

June 12th.

QUEEN-EMPRESS (COMPLAINANT). *v.* NGA PO THET AND NGA PO THAUNG (ACCUSED).

Examination of accused—Purpose of—Admission by accused of previous conviction—Use of, to affect the punishment—Criminal Procedure Code, ss.342, clause (1), 511.

The accused should not be asked in his examination concerning a previous conviction of which there is no evidence. Without proof of the authorized kind of a previous conviction the mere admission of an accused person does not justify the use of the conviction to affect the punishment to be inflicted.

THE accused in this case was convicted under section 379, Indian Penal Code, and, as he admitted a previous conviction for theft, he was sentenced to a year's imprisonment and 30 stripes.

In his examination the accused was asked if he had ever been convicted and he replied that he had suffered a year's imprisonment for theft. There was no evidence of this fact, and the question should not have been asked in the examination under section 342, Criminal Procedure Code, the purpose of which is stated in clause (*1*) of that section to be to enable the accused to explain any circumstance appearing in evidence against him.

Apparently the Magistrate obtained his information from an extract from a police register (village crime register), which is filed in the process record.

The Magistrate entered the charge of previous conviction in a charge in Criminal Form 169, in which reference is made to the "same offence or of an offence included in the same group of offences" and to "section 3 of Act VI of 1864." Section 221, clause (7), Criminal Procedure Code, directs such entry in the charge when it is "in-

" tended to prove such previous conviction for the purpose of affecting " the punishment." The intention to prove the previous conviction may have existed in the Magistrate's mind and is to be assumed, but the conviction was not proved, accused merely being asked to plead to the charge, which he did admitting the conviction. Such an admission without such proof as is described in section 511, Criminal Procedure Code, is of little weight, because an accused person cannot ordinarily be acquainted with the rather elaborate provisions of the Whipping Act, and the Magistrate, without proper evidence, cannot be certain of the exact section of the previous conviction.

Criminal Revision No. 37 of 1900.

June 12th.

There could have been no difficulty in this case in obtaining proper evidence of the previous conviction; because sufficient details were given in the extract which the Magistrate had before him as a part, one may say, of the police report.

Two points are to be noted therefore: the accused should not be asked in his examination concerning a previous conviction of which there is no evidence, nor, without proof of the authorized kind of previous conviction, does the mere admission of an accused person justify the use of the conviction to affect the punishment to be inflicted.

Before Mr. F. S. Copleston, Chief Judge.

Criminal Revision No. 175 of 1900.

June 21st.

QUEEN-EMPRESS (COMPLAINANT) *v.* NGA PO LUN (ACCUSED).

Summary trial—Application of section 258, Criminal Procedure Code—Improper entry of order of discharge to be treated as one of acquittal—Proceduce in case of improper discharge—" Further inquiry "—Criminal Procedure Code, s. 437.

The fact that a formal charge is not framed in a summary trial does not affect the application of section 258, Criminal Procedure Code, so far as it is possible to apply it. Having charged the accused and recorded his plea, the Magistrate must enter an order either of acquittal or conviction. The use by the Magistrate of the word *discharge* instead of *acquit* does not affect the legal nature of his order and any order of discharge in such a case must be treated as one of acquittal.

An order by a District Magistrate, purporting to be under section 437, Criminal Procedure Code, directing a regular trial is not a correct order. " Further inquiry " is what can be directed, and a further inquiry does not include *trial*. In the case of an improper discharge, the evidence already taken being sufficient in itself to justify the accused being put on his trial, the proper course is to refer the case to the High Court. *Hari Dass Sanyal* v. *Saritulla*, 15, Cal., 608, followed.

THE Sessions Judge of Tenasserim Division referred this case, with remarks, for the orders of the Chief Court.

The judgment of this Court is as follows:—

The accused was put on his trial, which was a summary one, for a theft. No charge was drawn up, but the accused was called on to plead and pleaded not guilty. The Magistrate gave the accused the benefit of a doubt and *discharged* him. The District Magistrate, to whose notice the case came, ordered a regular trial to be instituted and the statements of witnesses to be recorded. Meanwhile, the District Magistrate who passed this order was transferred and the new District Magistrate, on application by accused's pleader, submitted the case to

Criminal Revision No. 175 of 1900.

June 21st.

the Sessions Judge for orders whether the accused should be re-tried as directed in the former District Magistrate's Criminal Revision Case, or whether the case should be referred to the High Court. The District Magistrate quoted rulings, especially the Full Bench ruling in *Hari Dass Sanyal* v. *Saritulla* (15 Cal., 608), which go to show that where no further evidence is required in a case that is being dealt with under section 437, Criminal Procedure Code, the matter should ordinarily be referred to the High Court which can pass a suitable order.

The Sessions Judge in submitting the proceedings states his opinion that the discharge of accused in this present case should be held equivalent to an acquittal, and the Judge finally asks for orders on the following points:—

(1) Whether the Magistrate's order of discharge is correct or should be treated as one of acquittal.

(2) If it can be treated as an order of discharge, is the District Magistrate's order directing a regular trial legal?

The first question seems to present little difficulty. The accused had been charged and called upon to plead. Section 262 of the Code directs that at summary trials the procedure prescribed for warrant cases be followed in warrant cases, except as thereafter mentioned. Section 263 states that in non-appealable cases a formal charge need not be framed, but the fact that a formal charge is not framed does not affect the application of section 258 so far as it is possible to apply it; and it is clear that, after the Magistrate has charged accused, as he must have done in this case before he took his plea, he must either record an order of acquittal or conviction. It can never have been intended that a person tried summarily should be put in a much worse position than a person tried regularly, as would be the case, if, after being called on to plead to a charge, an accused could be discharged and not acquitted. The fact that the Magistrate uses the word *discharge* instead of *acquit* does not affect the legal nature of his order.

The answer to the first question is therefore that the Magistrate's order must be treated as an acquittal.

The District Magistrate's order in Criminal Revision No. 25 of 1900, dated 2nd April 1900, directing that a regular trial be instituted and the statements of the witnesses be recorded by the Magistrate was illegal and is set aside.

Although an answer to the second question is not necessary for the purposes of this case, it may be well to remark that the order directing a regular trial, made, it appears, under section 437, Criminal Procedure Code, would not in any case have been a correct order. "Further inquiry" is what can be directed, and following the Full Bench ruling of the Calcutta High Court already referred to a further inquiry does not include *trial*. Under the circumstances which the District Magistrate thought he had before him, namely, an improper discharge, the evidence already taken being sufficient in itself to justify the accused being put on his trial, the proper course would have been to refer the case to the High Court.

Before Mr. F. S. Copleston, Chief Judge, and Mr. Justice Fox.

Civil Second Appeal No. 158 of 1899.

June 22nd.

MAUNG TWE AND THREE OTHERS, APPELLANTS (PLAINTIFFS), *v.* RAMEN CHETTY, RESPONDENT (DEFENDANT).

Buddhist law—Husband and wife—Act done by husband in pursuance of common business binding on wife—Sale of immoveable property by husband without knowledge of wife—Apparent acquiescence subsequent to sale, by wife, no proof of consent—Presumption.

For many purposes Burmese husbands and wives may be regarded as partners and where the husband manages a business on behalf of himself and his wife, acts done in pursuance of the common business would no doubt bind the wife. But this principle cannot be applied to such a transaction as the sale of immoveable property belonging to both. In such a case further evidence is required besides the fact that the transaction was in some way connected with a business in which it might be presumed that the wife was concerned, and besides the fact that the wife made no open protest against such sale.

Because a wife consents to, or acquiesces in a *mortgage*, the presumption does not arise that she also assents to a *sale* of the property. Nor should apparent acquiescence subsequent to the sale be regarded as proof of consent by the wife to such sale.

Maung Tun Myat v. *Raman Chetty*, P. J. L. B., 37.
Soobramonian Chetty v. *Ma Ye*, P. J. L. B., 568.
Ma Thu v. *Ma Bu*, S. J., 578, referred to.

THE first and third appellant-plaintiffs, Maung Twe and Maung Lu Te, who are the respective husbands of the second and fourth appellant plaintiffs, without the knowledge of their wives, mortgaged two pieces of land in which the wives had an interest to first respondent-defendant, A. R. M. Ramen Chetty, and it was agreed in the registered deed that if the debt due was not paid by a certain date the mortgagee might take over the land absolutely and sell it. Subsequently, not being able to pay the amount due, the two husbands, who had with their wives till then remained in possession of the lands, made them over outright to the chetty and he again sold them to the second and third defendant-respondents.

Both the lower Courts found that the husbands had made this out-and-out transfer of the land, and, further, they held that the wives also were bound by the transfer and sale, and that the claim in this suit of the four plaintiffs to redeem the land for Rs. 1,905 must be dismissed.

We do not propose to question the concurrent findings of fact that the transfer was absolute and that there was no reservation of the right to redeem. The question of law remains whether the wives are bound by the action of their husbands. The wives admit that after the property was mortgaged they became aware of the transaction. There is, however, no evidence that they were aware of the intention to sell or to transfer the property outright, or that they gave any consent to the second transaction.

The Judge of the Court of First Instance held that, as the plaintiffs, the husbands, made over the land secretly, the second and fourth plaintiffs were not to be believed in their statement that their husbands made over the land without their knowledge and consent. The lower Appellate Judge quotes the case of *Maung Tun Myat and one* v. *Raman Chetty* (P. J., p. 37, 1893). "It is settled law that a Burman Buddhist

Civil Second Appeal No. 158 of 1899.

June 22nd.

with the express or implied consent of his wife may dispose of their joint property. It is common practice for the husbands alone to execute deeds of transfer of joint property," and the Judge goes on to say that in the present case the implied consent of the wives may be assumed from their action. They knew of the mortgage, but for years made no attempt to cancel it on the ground of their consent to the alienation of joint property not having been obtained by their husbands. This implied consent is not now denied. The plaintiffs seek to redeem and not to cancel the mortgage or recover possession without payment of the debt. But the Judge did not go into the question of whether the wives were bound by the subsequent *sale* or outright transfer of the land ; and this is the really important point.

As already stated, there is no evidence that the wives knew of the intention to sell or of the sale. Of course they must have known subsequently of the transfer of possession, but such transfer might occur, and be accepted, in lieu of payment of interest, and does not at any rate show consent to a sale. It is going too far to hold, as the lower Appellate Court apparently does, that abstinence from protest against the *mortgage* or joint use with their husbands of the money borrowed can be taken to show or imply consent to *sale* of the land. Many mortgages end in sales, but again many do not, but are simple mortgages. It cannot be said that the wives should have assumed that the mortgagee had acquired a right to take over the land absolutely, or that they were negligent in not inquiring into the terms of the deed to see if absolute transfer was provided for. We are also not prepared to say, because a wife consents to or acquiesces in a *mortgage* that a presumption arises that she also assents to a *sale* of the property. Nor should apparent acquiescence subsequent to the sale be regarded as proof of consent by the wife to such sale.

On the other hand, the mortgagee must be taken to have known that it was most probable that the husbands had no absolute right to dispose of the property. He appears to have made no inquiry even though at the time mutation of names was made he should have been aware that the property stood in the revenue registers in the names of both husband and wife. Obviously a prudent man would have taken the precaution to obtain at any rate the consent of the wives to the out-and-out conveyance to himself of the mortgaged land, even if he did not insist on obtaining their signatures to a deed.

The case of *R. M. M. S. Soobramonian Chetty* v. *Ma Ye* (P. J., L. B., p. 568) has been cited. In that case the learned Judicial Commissioner, Mr. Birks, said : " The presumption is therefore that the wife consents to the acts of her husband as long as the marriage continues, but the presumption may be rebutted." We are unable to go so far as this remark might lead us. In *Ma Thu* v. *Ma Bu* (S. J., p. 578), in a very carefully considered judgment, Mr. Fulton, Judicial Commissioner, came to the conclusion that a husband cannot sell the joint property without his wife's assent, except in circumstances in which it can be said that he is acting as her agent. For many purposes Burmese husbands and wives may be regarded as partners, and, where the husband manages a business on behalf of himself and his

wife, acts done in pursuance of the common business would no doubt bind the wife; but this principle cannot, we think, be applied to such a transaction as the sale of immoveable property belonging to both. In such a case further evidence is required, besides the fact that the transaction was in some way connected with a business, in this case paddy trading, in which it might perhaps be presumed that the wife was concerned, and besides the fact that the wife made no open protest against the sale, of which it is not even shown that she was aware, soon after it occurred.

Civil Second Appeal No. 158 of 1899.

June 22nd.

On the ground then that the defendants have not proved by direct evidence, or by inferences properly to be drawn from proved facts, that the wives consented to the sale of the land in dispute, we allow this appeal and reverse the decisions of the Lower Courts.

There will be a decree that, upon the plaintiffs paying into the Subdivisional Court the sum of Rs. 1,905 on or before the 1st April 1901 to the credit of this suit, the defendants do immediately after such date deliver up possession of the land which is the subject-matter of the suit to the plaintiffs, discharged from any incumbrance, but, in default of the plaintiffs paying such amount as aforesaid, the suit will stand dismissed with costs.

Before Mr. Justice Birks.

ÔKTAMA *v.* MA BWA.*

Civil Second Appeal No. 342 of 1899.

June 26th.

Suit for mesne profits alone—Civil Procedure Code, s. 43.

A suit for mesne profits alone is not barred under section 43, Civil Procedure Code, because claims for recovery of possession of immoveable property and for mesne profits are distinct claims and separate suits will lie in respect of each claim. Section 44, Civil Procedure Code, merely permits the joinder of the two claims.

Lalessor Babui v. *Janki Bibi*, 19 Cal., 615, followed.

THE plaintiff-respondent in this case sued to recover 1,600 baskets of paddy or their value, Rs. 1,600, as rent for paddy land measuring 26·27 acres. The plaint alleges that she let out her land to the defendants in *Tagu* 1258, *i.e.*, April 1897, at a rental of 200 baskets of paddy for one year till *Tabaung*, when defendants refused to pay the rent or give up the land. The plaintiff's husband having died, she sued the defendant and recovered in all the Courts. The last decision was in Civil Second Appeal 42 of 1898, and review of that judgment was sought in Civil Miscellaneous Application No. 66 of *U Ôktama* v. *Ma Bwa*, page 575, P. J. This case was decided in June 1899, but the present suit was brought on 2nd March 1899. The Court of First Instance held that the claim for rent and mesne profits was barred under section 43, Civil Procedure Code. The lower Appellate Court considered the claim for rent barred, but decreed Rs. 1,200 damages as mesne profits. The Court of First Instance went into a good deal of irrelevant matter, but did not record a definite finding as to whether defendants had remained in possession after the plaintiff had obtained a decree. It is true the defendants alleged in their written statement that they had not worked the land since the date of the decree, but their son says they have been working all along for the past five years. I concur with the

* Over-ruled in part by *Ma Nyein* v. *Ma Kon*, 3 L. B. R., 56.

Civil Second Appeal No. 342 of 1899.

June 26th.

lower Appellate Court in holding that the defendants have been in possession and are liable to pay mesne profits. The Court of First Instance was also wrong in holding that a suit for mesne profits alone was barred under section 43, Civil Procedure Code. In *Lalessor Babui* v. *Janki Bibi*, 19 Cal., 615, it was held that claims for recovery of possession of immoveable property and mesne profits are distinct claims, and separate suits will lie in respect of each claim. Section 44, Civil Procedure Code, merely "permits" the joinder of the two claims. There is no cross appeal with regard to the claim for rent prior to the decree, so it is not necessary to discuss the question whether the claim would be barred. The appeal is dismissed with costs.

Criminal Revision No. 180 of 1900.

June 26th.

Before Mr. F. S. Copleston, Chief Judge.

QUEEN-EMPRESS *v.* NGA KYÔN.

Imprisonment in default of security—Postponement of order for—Sentence of imprisonment—Criminal Procedure Code, ss. 110, 118, 120 cls. (1) (2), 123, 397.

Nga Kyôn was on the 7th April 1900 ordered to execute a bond for his good behaviour, and in default to be rigorously imprisoned for one year. He failed to give security and was consequently imprisoned. On the 3rd May 1900 Nga Kyôn was sentenced to undergo rigorous imprisonment for one year for an offence under section 451, Indian Penal Code, committed on the 27th December 1899. The Magistrate ordered that "the unexpired portion of the award under section 110, Criminal Procedure Code, will, under section 120 (1), Criminal Procedure Code, be resumed on the expiry of the present sentence."

Held,—that section 120 (*1*), Criminal Procedure Code, did not apply, and that the order directing that the unexpired portion of imprisonment ordered under section 110, Criminal Procedure Code, should take effect after the substantive sentence of imprisonment was illegal, because the person in respect of whom an order was made under section 110, Criminal Procedure Code, was not, when the order was made, sentenced to or undergoing a sentence of imprisonment. and clause (*2*) of the same section does not enable the Magistrate who tried the offence under section 451 to alter the date fixed by the Magistrate who made the order under section 123, Criminal Procedure Code, for commencement of the term of imprisonment.

READ report of the District Magistrate, Hanthawaddy, submitting proceedings in his Criminal Revision Case No. 85 of 1900.

The facts are fully set out in his order, which was as follows :—

"The Additional Sessions Judge has not interfered with the order of the Subdivisional Magistrate in this case, so that I deal with it with some hesitation. Nga Kyôn was on the 7th April ordered by the Eastern Subdivisional Magistrate, Rangoon, to execute a bond for his good behaviour, and in default to be rigorously imprisoned for one year.

"He has been imprisoned accordingly and, assuming that he continued to fail to give security, his term of imprisonment would naturally terminate on the 6th April 1901. On the 3rd May 1900 Nga Kyôn was sentenced by the Subdivisional Magistrate, Kyauktan, to undergo rigorous imprisonment for one year for an offence under section 451, Indian Penal Code, committed on the 27th December 1899. The Magistrate ordered that "the unexpired portion of the award under 110, Criminal Procedure Code, will, under section 120 (*1*), Criminal Procedure Code, be resumed on the expiry of the present sentence."

Criminal Revision No. 180 of 1900.

June 26th.

"I am of the opinion that section 120 (*1*), Criminal Procedure Code, does not apply, and that that portion of the order of the Subdivisional Magistrate was illegal.

"I think that the period during which Nga Kyôn was bound to furnish security, or to be imprisoned in default, will still terminate on the 6th April 1901, and cannot be affected by the substantive sentence subsequently inflicted for an offence under section 451, Indian Penal Code. If I am right, the order should be cancelled, or it might result in the unlawful detention of Nga Kyôn for a period of eleven months and three days from the 3rd May 1901.

"The case of *Queen-Empress* v. *Nga Shwe Byo*, reported on page 364 of Selected Judgments, is somewhat similar in principle to the present case.

"For the above reasons I forward the proceedings to the High Court for orders."

The order of the Subdivisional Magistrate, Kyauktan, so far as it directed that the sentence of imprisonment passed under section 451, Indian Penal Code, should take effect at once, was legal and proper, but the direction that the unexpired portion of the imprisonment ordered under section 110, Criminal Procedure Code, should take effect after the substantive sentence of imprisonment appears to be illegal. Section 120, Criminal Procedure Code, does not apply, because the person in respect of whom an order was made under section 118, Criminal Procedure Code, was not, when the order was made, sentenced to or undergoing a sentence of imprisonment, and clause (2) of the same section 120 does not enable the Subdivisional Magistrate who tried the offence under section 451 to alter the date fixed by the Magistrate who made the order under section 123, Criminal Procedure Code, for commencement of the term of imprisonment.

Section 397, Criminal Procedure Code, was not relied on by the Magistrate, but it may be remarked that this section would not warrant the postponement of the sentence under section 451, Indian Penal Code, to the close of the term of imprisonment suffered under section 123, Criminal Procedure Code, because the latter is not a *sentence* of imprisonment within the meaning of section 397, Criminal Procedure Code. The term to be suffered under section 123, Criminal Procedure Code, cannot be interrupted, and the sentence under section 451, Indian Penal Code, commencing as it does from the date of sentence will run concurrently with the former. The Subdivisional Magistrate, Kyauktan, must recall his warrant and amend it in accordance with this order in revision. The case of *Queen-Empress* v. *Nga Shwe Byo*, p. 364, *Selected Judgments*, has been referred to by the District Magistrate, but it deals with a different point.

Civil reference No. 1 of 1900.

July 2nd, 1900.

Before the Chief Judge and Mr. Justice Fox.

MAUNG YAT AND MA SHAN *v.* MAUNG TAROK, MAUNG SHWE ZIN, AND MAUNG HLAING.

Messrs. *Vansomeren* and *Fagan*—for appellants. | Mr. *Hla Baw*—for respondents.

Jurisdiction of Civil Court—Burma Land and Revenue Act, s. 56—Dispute as to right to occupy or possess land not covered by a grant or lease or in respect of which no declaration has been made. Burma Land and Revenue Act, ss. 18, 15—Land occupied under rules regulating its temporary occupation. Burma Land and Revenue Act, ss. 19, 55 clause (b)—Civil Procedure Code, s. 54.

The jurisdiction of a Civil Court is not necessarily barred by section 56, Burma Land and Revenue Act, in a dispute between persons as to the right to possess or occupy a part of a registered holding not covered by a grant or lease under section 18 and in respect of which no declaration under section 15 has been made, because there is no law requiring a landholder to obtain a declaration of his status under section 15. But section 56 bars the jurisdiction of a Civil Court when the claimant admits, or when it otherwise appears, that he claims to occupy merely under section 19, *i.e.*, under rules regulating the temporary occupation of land over which no person has a right of either of the classes *(a)* and *(c)* of section 6.

The provision of section 56 of the Burma Land and Revenue Act that *inter alia* no Civil Court shall exercise jurisdiction in "claims to occupy or resort to lands "under sections 19, 20, and 21, and disputes as to use or enjoyment of such lands be- "tween persons permitted to occupy or resort to the same" is a positive rule of law which affords ground for the rejection of a plaint under section 54 of the Code of Civil Procedure. If during the course of a suit a Judge is satisfied on the evidence produced by the parties that the claim or dispute or part thereof is one covered by clause *(b)* of section 55, Burma Land and Revenue Act, it would be his duty to dismiss the suit or such part thereof on the ground that the Court over which he presided had no jurisdiction to determine such claim or dispute.

THE following questions have been referred by Mr. Justice Birks under section 11 of the Lower Burma Courts Act for the decision of a Bench:

I. Whether section 56 of the Land and Revenue Act debars a Civil Court from exercising jurisdiction in a dispute between persons as to the right to possess or occupy a part of a registered holding not covered by a grant or lease under rules made under section 18 of the Act and in respect of which no declaration under section 15 of the Act has been made?

II. Is a Civil Court bound, of its own motion, to refer to the proper Revenue Authority to ascertain whether it can exercise its jurisdiction in any suit in which the plaintiff claims possession of land and does not produce a grant or lease from Government or a declaration of his status as land-holder when the parties do not raise any question as to the Court's jurisdiction?

The decision of the Bench upon the questions referred is as follows:—

To the first question taken exactly as it stands the answer must be that the jurisdiction of a Civil Court is not necessarily barred, because there is no law requiring a land-holder to obtain a declaration of his status under section 15 of the Land and Revenue Act. But in order to answer what is probably the main intention of the question,

Civil reference No. 1 of 1900.

July 2nd.

we would say that section 56 of the Land and Revenue Act bars the jurisdiction of a Civil Court when the claimant admits, or when it otherwise appears, that he claims to occupy merely under section 19, that is, under rules regulating the temporary occupation of land over which no person has a right of either of the classes (*a*) and (*c*) of section 6. In such a case mere entry of the land in the revenue registers in the name of the claimant would not effect the question of jurisdiction, as such entry does not necessarily show that the claimant has or had more than the temporary right to the land set out in Rule 52 of the rules under the Land and Revenue Act for the year his name is or was entered.

The answer to the second question taken exactly as it stands must also be in the negative, because there may be many kinds of suits in which the plaintiff, though claiming possession, is not bound to produce any grant, lease or declaration made under section 15 of the Land and Revenue Act; and because the only cases in which a reference to a Revenue Officer is provided for, are those described in section 17 of the Act, where reference is imperative.

A Civil Court, however, is bound of its own motion to consider whether it has jurisdiction, and should not proceed with a suit before it is satisfied that it has jurisdiction.

Want of objection by an opposing party or even consent by such party cannot give jurisdiction, or cure any defect of jurisdiction.

The question of jurisdiction must be decided in the first instance upon the statements in the plaint. Before admitting a plaint, the Judge of a Civil Court is bound to examine it with a view to considering whether it should be:—

(1) returned either under section 53 or section 57 of the Code of Civil Procedure;
(2) rejected under section 53 or section 54; or
(3) admitted under section 58.

Amongst the grounds for rejection of a plaint set out in section 54 is "(*c*) if the suit appears from the statement in the plaint to be barred by any positive rule of law." The provision of section 56 of the Burma Land and Revenue Act, 1876, that *inter alia*, no Civil Court shall exercise jurisdiction in "claims to occupy or resort to lands "under sections 19, 20 and 21, and disputes as to use or enjoyment of "such lands between persons permitted to occupy or resort to the same" is a positive rule of law, which affords ground for the rejection of a plaint. If a plaint does not contain particulars sufficient to make it appear on the face thereof that the Court has jurisdiction, this would be sufficient ground for returning such plaint for amendment under section 53 of the Code.

Further, if during the course of a suit a Judge is satisfied on the evidence produced by the parties that the claim or dispute or part thereof is one covered by clause (*b*) of section 55 of the Land and Revenue Act, it would be his duty to dismiss the suit or such part thereof on the ground that the Court over which he presided had no jurisdiction to determine such claim or dispute.

Criminal Revision No. 178 of 1900.

July 12th.

Before the Chief Judge.

QUEEN-EMPRESS *v.* NGA SHWE LIN AND 25 OTHERS *

Written report from Police Officer in a non-cognizable case Police Report—Information—Complaint—Criminal Procedure Code, ss. 191, (1) (b), 4 (1) (h)—Police Act, s. 24—Burma Gambling Act, s. 10.

Where a first class Magistrate received a written report from a first class constable of Police that gambling punishable under section 10, Burma Gambling Act, had taken place, and the Magistrate professing to act under section 190 (1) (a), Criminal Procedure Code, issued summonses on the persons named in the report.

Held,—That the written report from a Police officer such as the first class Magistrate acted on is neither a "police report" within the meaning of section 191 (1) (b) nor the report of a police officer within the meaning of section 4 (1) (h), Criminal Procedure Code The expressions "police report" and "report of a police officer" as used in these sections refer to reports by police officers under Chapter XIV, Criminal Procedure Code, and more especially under section 173. Where, without reference from a Magistrate, and otherwise than in a report under section 173, a police officer makes a report on a non-cognizable case, such report may be regarded as an *information* laid in pursuance of the provisions of section 24, Police Act, or it may in certain cases be treated as a *complaint*.

The District Magistrate of Hanthawaddy referrred this case to the Chief Court for orders.

The judgment of this Court is as follows:—

The first class Magistrate of Taikkyi township, on the 8th February, received a written report from a first class constable to the effect that gambling, punishable under section 10 of the Burma Gambling Act, had taken place on the 31st January 1900, and the Magistrate accordingly issued summonses on the persons named in the report as having escaped when the said constable and others on the 31st January made a raid on the gambling party. The constable was not previously examined under section 200, Criminal Procedure Code. The accused were tried, convicted, and fined under section 10, Gambling Act. The District Magistrate on revision called on the Magistrate to explain under what clause of section 190, Criminal Procedure Code, he took cognizance of the case, and the Magistrate quoted 190 (1) (a). In that case of course he should have examined the constable as a complainant. The District Magistrate has referred the case to this Court mainly on the ground that the convictions are illegal, because section 14 (a), Gambling Act, was a bar to the prosecution; and for this reason the conviction must be set aside. The District Magistrate further observes that the Magistrate's procedure was irregular. If as the Magistrate reports, he took cognizance under section 190 (1) (a), he should have examined the complainant before issuing process. If, however, he took cognizance under section 190 (1) (c), then the accused should have been informed as required by section 19: of the Code, and this was not done. The District Magistrate points out that "it has been "ruled that a written report from a police officer such as the 1st class "Magistrate acted on in this case is not a *police report* within the "meaning of section 190 (1) (b), nor the *report of a police officer* within "the meaning of section 4 (1) (h)." In this view the District Magistrate is correct. Several cases of this kind have recently been before this Court on revision, and it is important that Magistrate should have clear ideas on the point how to deal with the reports received from police officers regarding non-cognizable cases.

* Over-ruled by *King-Emperor v. Po Thin*, 2 L.B.R., 146.

Criminal Revision No. 178 of 1900.

July 12th.

The expressions *police report* and *report of a police officer* as used in section 4 (*r*) *(h)* and section 190 (*1*) (*b*) of the Code refer to reports by police officers under Chapter XIV and more especially under section 173. Where, without reference from a Magistrate, and otherwise than in a report under section 173, a police officer makes, as in the present case, a report on a non-cognizable case, such report may be regarded as an information laid in pursuance of the provision of section 24 of the Police Act, or it may in certain cases be a complaint. In case the police officer has personal knowledge of the facts and can be examined as a complainant, his report may be treated as a complaint; but such information may be furnished by a police officer who has not personal knowledge, or it may be impracticable to examine the police officer; and in these cases the Magistrate, if he takes cognizance of the offence reported, must do so under some other provisions than section 190 (*1*) (*a*). As already pointed out, clause (*b*) does not apply. Nor can the Magistrate act under the first portion of clause (*c*), because information received from a police officer is not information on which he may take cognizance of an offence under that clause. There remain the Magistrate's "own knowledge or suspicion." *His own knowledge,* here spoken of, means actual personal knowledge or knowledge based on evidence legally before him. Suspicion opens a very wide field, but a Magistrate would not be exercising a judicial discretion if he issued process on mere suspicion of a trifling offence having been committed. He would take means to ascertain if there were good ground for his suspicion before having an accused arrested or summoned. The exercise of the discretion allowed under section 190 (*1*) (*c*) and which must be exercised in judicial manner, is further guarded by the provisions of section 190 (*3*), and section 191 of the Code. There can be no doubt that the Magistrate was wrong in this case in issuing process as he did on the mere information of the police constable, even if he acted under section 190 (*1*) (*c*). Care must be taken that persons are not harassed by being summoned to Court without good substantial grounds.

As in this case the complaint, or report, or information (section 14(*a*), Gambling Act) was not made or given to the Magistrate within seven days of the date of the alleged commission of the offence under section 10, the Magistrate has no jurisdiction to take cognizance of the offence and his proceedings are void. The convictions and sentences are set aside and the fines must be refunded.

Before the Chief Judge.

Criminal Revision No. 291 of 1900.

July 17th.

QUEEN-EMPRESS AND MA TE *v.* MAUNG ON BWIN.

Maintenance—Divorce—Change in circumstances—Cause for refusing to enforce an order of maintenance—Criminal Procedure Code, ss. 489, 488 (5), 490.

Although divorce is not "a change in circumstances" such as is referred to in section 489, it is ground for inquiry under section 488 (5) whether the parties are living separately by mutual consent, and also cause for refusing to enforce an order of maintenance under section 490, Criminal Procedure Code.

THE Sessions Judge of Tenasserim referred this case to the Chief Court for orders.

Criminal Revision No. 291 of 1900.

July 17th.

This reference has been made by the Sessions Judge, Tenasserim, under section 438, Criminal Procedure Code. The Assistant Magistrate on the 2nd April made an order against Nga On Bwin for the maintenance of his wife. Subsequently, on the 26th April, Nga On Bwin applied to the Magistrate to cancel his order of maintenance on the ground that he and his wife, Ma Tè, had been divorced on the 28th March. It is not apparent from the proceedings how the order came to be made after the parties had been divorced, or whether Nga On Bwin, the defendant, before the order was made, had alleged the divorce. After evidence had been taken on the 21st March the case was adjourned in order to give the parties an opportunity to arrange matters between themselves. On the day the case came on for final hearing and decision, and when the order was made the applicant, Ma Tè, was not present.

On the 8th May the Magistrate dismissed Nga On Bwin's application to have the maintenance order cancelled, on the ground that no "change in the circumstances" (section 489, Criminal Procedure Code) had taken place *since the order was made*. The Magistrate does not appear to have doubted the genuineness of the deed of divorce which was then produced.

The Sessions Judge in his order on revision says:—"Under section 488 (5), Criminal Procedure Code, on proof that the parties are living separately by mutual consent, the Magistrate shall cancel the order.

"It is immaterial whether there has been a change of circumstances or not.

"The plea should have been raised and disposed of in the original case and, if the dates are correct, it is difficult to understand why this was not done; but on the second application it was, I think, the Magistrate's duty to enquire and come to a distinct finding whether the parties were or were not living separately by mutual consent, and if he finds that they were he should cancel his order."

I concur with the Sessions Judge that the Magistrate should have ascertained whether the parties were living separately by mutual consent, and that, if he found this to be the case he should, under section 488 (5), have cancelled his order as requested by Nga On Bwin. What took place at the hearing of the application for cancelment does not clearly appear. The Magistrate simply notes in the diary on the 8th May: "Both parties present and heard. Application dismissed," recording at the same time the formal order of dismissal already referred to.

The applicant, Nga On Bwin, quoted no section of the Code and was not tied down to section 489, Criminal Procedure Code, as the Assistant Magistrate seems to have thought. The Magistrate was right in holding that the "change in circumstances" referred to in section 489 was not a change in status such as that following from a divorce; but, on proof that the parties were divorced, he should have *refused* to enforce his order of maintenance under section 490.

The case of *Shah Abu Ilyas* v. *Ulfat Bibi*, 19, Allahabad, 50, is sufficient authority for this view.

Whether any order for enforcement has been made is not shown, but in an application for revision of the Assistant Magistrate's orders

made by Nga On Bwin to the Additional Sessions Judge, Tenasserim, on the 12th of June, Nga On Bwin states that the Magistrate had directed him on the 6th June to deposit two months' allowance in Court on the 12th June.

Criminal Revision No. 291 of 1900.

July 17th.

It is a little difficult to decide what order should, in the circumstances, be passed by this Court; but I think it will be best to set aside the order made by the Assistant Magistrate in his Criminal Miscellaneous Case No. 61 of 1900 on the 8th May dismissing Nga On Bwin's application for cancelment of the order of the 2nd April, and this is hereby done. This step will enable the Magistrate to enquire into the facts and to follow the procedure above indicated as legal.

Before Mr. Justice Birks.

Civil Revision No. 9 of 1900.

July 24th.

B. DEY *v.* L. J. JOHN *alias* J. J. LYNCH.

Messrs. *Chan Toon and Das* for the applicant. | Mr. *Ghaswalla* for the respondent.

Breach of contract—Damages—Principle of assessment.—Indian Contract Act, s. 73.

There is nothing in the Indian Contract Act which requires a person who cancels an agreement for service to accept those services as originally agreed to.

The principle on which damages for breach of contract are assessed is laid down in section 73 of the Indian Contract Act, and the explanation to that section shows that the means which existed for remedying the inconvenience caused should be taken into consideration.

THE plaintiff in this case sued to recover Rs. 200, being the amount claimed by him for printing an advertisement in the *Burma Sheet Advertising Almanac*. The agreement was made by the defendant's agent, Mullich, and is dated the 29th June 1899. The learned Judge has found that the defendant had tacitly allowed his agent to enter into such contract on his behalf though his power-of-attorney did not justify his action. It is clear that the defendant repudiated the contract and countermanded the order given by his agent on the 1st July or two days later. The plaintiff declined to accept this repudiation of the contract and inserted the advertisement in question in his Almanac which was not published till March 1900, and he admits in the evidence that he had ample time to stop the printing of the defendant's order. If this were an appeal I should feel doubtful whether the defendant was bound by the acts of his agent under the circumstances of this case, but this is a question of fact with which I should not interfere on revision. The only question that remains to consider is the question of damages. The learned Judge has awarded the plaintiff the full amount as stated in his contract on the ground that he has fulfilled his part of the contract. Now it is clear that the breach of the contract was committed on the 1st July. The contract then became voidable at the plaintiff's option under section 53 of the Contract Act, and he was no longer bound to put in the advertisement. From the illustration to that section it would appear that the damages to be awarded are any loss that accrues to the plaintiff from non-performance. Mr. Ghaswalla, for the respondent, urges that the contract was completely entered into by the agent and cannot be revoked by one party only under section 5 of the Act. This is no doubt true and the plaintiff's right to recover some damage is unquestioned; but I can find nothing in the Act which requires a person who cancels an agreement

Civil Revision No. 9 of 1900.

July 24th.

for service to accept those services as originally agreed to. In Leake on Contracts, page 66, the following passage occurs: "Upon the same "principle in the ordinary case of a person employing another to do any "work or service, the employment in general cannot be revoked with- "out compensation for the work and expense incurred or for the ser- "vices rendered under the employment * * * In the case of an "artist employed to paint a picture, if the employer revoke the "order before the completion of the picture, the artist would be entitled "to compensation for the labour and skill bestowed and the money "spent." The principle on which damages for breach of contract are assessed is laid down in section 73, and the explanation to that section shows that the means which existed for remedying the inconvenience caused should be taken into consideration. In this case there is no reason to suppose that the plaintiff could not have got other advertisements to fill the space taken up by the defendant's and he inserted this advertisement at his risk knowing it was not wanted. In awarding the damages the facts of the case can be taken into consideration. In this case it is clear that though the principal may be bound by the acts of his agent, yet it is clear that he had no wish to insert so expensive an advertisement. The plaintiff is only entitled to little more than nominal damages in my opinion. I assess these at Rs. 10. I will make no order as to costs, as the defendant may have derived some benefit from the advertisement inserted against his wishes.

Civil 2nd Appeal No. 65 of 1900.

July 31st.

Before Mr. Justice Birks.

MAUNG AUNG BAN *v.* MAUNG SHWE PÈ.

Maung Loo Nee for appellant (first plaintiff.) | Mr. *Villa*—for respondent (second defendant.)

Sale in execution of decree—Rights of auction-purchaser—Distinction between decree holding purchaser and other purchasers.

Where no fraud is alleged, a sale in execution cannot be set aside as regards an auction-purchaser whether the order of Court under which it took place was legal or not. Even if the decree in execution of which the sale took place was a collusive one, the rights of the auction-purchaser would not be affected if he was no party to the fraud and there would be no ground for setting aside the sale. *Mahomed Kuzulbash Khan* v. *Mahomed Shah and others*, 12, W. R., 48, followed.

Distinction drawn between decree-holding purchasers and other purchasers. *Jan Ali* v. *Jan Ali Chowdhry*, 10 W. R., p. 154, *Murari Singh* v. *Priyag Singh*, 11 Cal. 362 and *Zain-ul-Abdin Khan* v. *Muhammad Ashger Ali Khan*, 10 All., 166 cited.

THE plaintiff-appellant Maung Aung Ban was originally defendant in a suit brought by the first defendant Maung Tha Nu for Rs. 90. The number of that suit is not given, but it was decreed *ex-parte* in 1897. The appellant applied to have it restored to the file under section 108, Civil Procedure Code, on the ground that the summons was not duly served. He failed before the Civil Judge of Wakèma, and two pieces of paddy-land were attached under the *ex-parte* decree. The appellant then applied to the District Judge under section 588, clause (9) and in this appeal he was successful, the lower Appellate Court ordering the case to be re-opened. In the meanwhile the property attached was sold and purchased by Maung Shwe Pè the present respondent for Rs. 115. It is alleged that the decree-holder of the *ex-parte* decree has se-money out of Court. When the original case was

Civil 2nd Appeal No. 65 of 1900.

July 31st.

re-heard, the plaintiff, Maung Tha Nu, only obtained a decree for Rs. 54 and the defendant Maung Aung Ban paid that into Court He has now sued Maung Tha Nu and Maung Shwe Pè the judgment-creditor and auction-purchaser to have the *ex-parte* decree set aside and also the sale of the property held under that decree. It would have been better had the Courts below given more details as to the dates of the various orders passed. I understand it is admitted that the respondent, Maung Shwe Pè, purchased the property attached and that the sale was confirmed before the orders re-opening the suit was received. In the present suit the appellant was successful in the Court of First Instance which held that the sale became void because the decree under which the sale proceedings were initiated was no longer in effect. The lower Appellate Court held that as the sale took place before the case was re-opened it was valid, that the appellant might easily have stopped the sale by depositing the amount decreed and that the respondent was a *bonâ-fide* purchaser for value whose claim should have precedence. The present appeal is that this decision is contrary to law. Maung Loo Nee for the appellant has only cited one case, *Sri Maharani Beni Persad Koeri v. Lokhi Rai and one*, 3 Calcutta Weekly Notes, page 6. In that case the decree-holder was himself the auction-purchaser and it was held that the validity of the sale was a matter for determination under section 244, Civil Procedure Code. The present case is widely different. Maung Shwe Pè was not a party to the first suit brought by the judgment-creditor against Maung Aung Ban, nor is any collusion on his part alleged. The respondent's advocate has cited three cases. In *Mahomed Kuzulbash Khan* v. *Mahomed Shah and others*, 12, W. R., 48, it was held "that where no fraud "was alleged a sale in execution cannot be set aside as regards an auc-"tion purchaser whether the order of Court under which it took place "was legal or not; even if the decree in execution of which the sale took "place was a collusive one, the rights of the auction-purchaser would "not be affected if he was no party to the fraud, and there would be "no ground for setting aside the sale." In 11 Calcutta, 364, next cited, reference is made to the judgment of Sir Barnes Peacock in *Jan Ali* v. *Jan Ali Chowdhry* 10, W. R., page 154, where the distinction between a sale to a party and a stranger is fully discussed with reference to the English decisions under the writ of *elegit* and *fieri facias*."—The same principle seems to have been affirmed by the Privy Council in *Zain-ul-Abdin Khan* v. *Muhammad Asgher Ali Khan and others*, 10 All., 166, where a distinction was made between a decree-hodling purchaser and other purchasers. The appellant's proper remedy appears to be to sue Maung Tha Nu for the excess which he has drawn out of the Court. The appeal is dismissed with costs.

Before the Chief Judge and Mr. Justice Fox.

MAUNG SEIK KAUNG *v.* MAUNG PO NYEIN.

Civil Second Appeal No. 7 of 1900.

August 1st.

Mr. *Chan Toon*—for appellant (defendant). | Mr. *Maung Kyaw*—for respondent (plaintiff).

Buddhist Law—Inheritance—Eldest daughter, claim of to a share of the general joint estate on the death of the mother—Rights of eldest child—Claim of eldest son to one-fourth share of the general joint estate on the death of the mother, when the father marries again.

11 B. 40

Civil Second Appeal No. 7 of 1900.

August 1st.

The hasty abuse by a son of a father on a single occassion—conduct which was also forgiven and not made a ground for any public declaration by the father—is not such conduct as to deprive the son of any right to inheritance which he has.

The principle that an eldest daughter gets a one-fourth share of the general joint estate of the parents on the death of her mother, and an eldest son on the death of his father, simply because the daughter and son perform the family duties of the mother and father respectively, is not to be found clearly enunciated in the Dhammathats, although there are indications of such a principle. The eldest son gets the father's official and personal belongings when the father dies; the eldest daughter in a corresponding way takes her mother's official and personal belongings; but in regard to the one-fourth share, while some Dhammathats are indefinite, others appear to give rights to the eldest *child*. Occasional passages, however, put the daughter in an inferior position to a son.

It may not be very clear from the Dhammathats now available that a son can claim a one-fourth share from his father when he lives separately and when the father does not marry again, but it is not open to reasonable doubt that when the father does marry again the eldest son, especially if he be the eldest child, can claim a one-fourth share of the general joint estate of the parents.

THE plaintiff (now respondent), Maung Po Nyein, is the eldest child and eldest son of the defendant (now appellant), Maung Seik Kaung, and he sued his father for a one-fourth share of the joint estate of his father and mother, the latter having died in the month of *Nayôn*, 1259 B.E., about four years ago. The extent and value of the property is not in dispute in this appeal. The Court of First Instance appears to have doubted if the plaintiff, on the death of his mother, was entitled to claim a one-fourth share from his father, considering that the eldest *daughter* was in such case entitled, but the Judge felt bound by the decisions of the Judicial Commissioner, Lower Burma, in *Ma On and two others* v. *Ko Shwe O and three others* (Selected Judgments page 378) and in *Ma Me* v. *Ma Myit* (Printed Judgments, page 48) to decide that plaintiff had this right. The Judge, however, held further that the plaintiff had by his undutiful conduct as a son forfeited his right to inheritance. The District Judge in appeal cited the following Dhammathats as being against plaintiff's claim and in favour of the eldest *daughter* having claim to a share on the death of the mother, namely, *Manu Wunnana*, *Wagaru* and *Mahavicchedani*. He considered the *Dhammavilasa* unsatisfactory and indecisive, and the *Manukye* as rather in plaintiff's favour. The learned Judge finally came to the conclusion that there was not sufficient reason for disallowing plaintiff's claim to get a one-fourth share of the estate. The Judge further held that the undutiful conduct of the plaintiff took place after the right had accrued and could not operate to defeat this claim, and the Court therefore granted him a decree.

The appeal in this Court by the father, defendant Maung Seik Kaung, is, on the two grounds of law, first, that plaintiff, though the eldest lson, could not claim a quarter share against his father, and, secondy, that by his undutiful conduct he had forfeited his right to inherit. The second point may be dealt with first, since, if the right has been forfeited even if it existed, there would be no need to decide the other more difficult point of law. The misconduct reduces itself, as the District Judge has shown, to abuse by the plaintiff of his father on one occasion, when the latter demanded payment of a debt which the former unjustly denied, drawing on himself the father's abuse, and

Civil Second Appeal No. 7 of 1900.

August 1st.

replying to it in strong and improper terms. It does not appear that the father and son were on bad terms before this occasion; and the hasty abuse of a father on a single occasion—conduct which was also forgiven and was not made a ground for any public declaration by the father—is not such conduct as to deprive the plaintiff of any rights he had. There was moreover an attempted division of property by the father after this occurrence; and the bad conduct seems to have been openly raised as an objection to plaintiff's claim only after this suit was filed. Further, no law has been cited to show that misconduct after a right has accrued will defeat that right. If plaintiff has a right, he obtained it after the death of his mother, or on his father's remarriage a year later.

It becomes necessary therefore to decide if plaintiff, the eldest son, can after the death of his mother by Burmese Buddhist law, claim a one-fourth share of property jointly owned by his father and mother. The father married again a year after his wife's death (*Nayôn*, 1260 B.E.) Before this in *Nayôn* 1259, B.E. (*see* defendant's evidence)—and it must have been very soon after his mother's death—plaintiff demanded of defendant his share of inheritance, and in the month of *Waso*, 1261, a method of division was proposed by elders and agreed to by the plaintiff and others. The abusive conduct took place in the month of *Tawthalin*, 1260 B.E. So far as can be gathered from the evidence, the division of property arranged by the elders in *Waso*, 1261 B.E., which appears to have fallen through because plaintiff would not wait till after the harvest to take his share of cattle, was intended to give half the property to the father and half to the children. That is to say practically, the father having married again, his wife's half-share was to go to the children. The alleged undutiful conduct took place after the remarriage of the defendant, and the father was still willing to divide the property several months later. The rights of children, or of the eldest child, differ somewhat when the father marries again and when he does not, and, as the alleged misconduct is not sufficient in any case to be a bar to plaintiff's claim, the point of law still to be decided may be narrowed down to the question what share can the eldest son claim in the joint property of the parents, when the mother is dead and the father marries again and when there are, as in this case, daughters as well as sons. It is not quite clear that in the decision cited from *page 378, Selected Judgments*, the learned Judicial Commissioner intended to lay down that on the death of either the father or the mother the eldest son may claim a share of the inheritance; or that on the death of one of the parents either a son or a daughter, as the case may be, may claim a share. The expressions used are; "By Burmese law the eldest son is pe-"culiarly favoured, but it is only on the death of one of the parents "that the eldest son can claim a share in the property of his parents. "Thus Chapter 2 of Book X of *Manukyé* deals with the mode "of partition between father and son on the death of the mother. "Chapter 5 deals with partition between mother and son on the death "of the father. And again, on the death of one of the parents, the "eldest son or daughter may claim his or her share, and the remainder "of the property rests, etc."

Civil Second Appeal No. 7 of 1900.

August 1st.

The *Manukyè* is a Dhammathat of authority. Section 2, Book X, lays down that on the death of the mother, the father, not remarrying, the son shall get certain specified property, bullocks, buffaloes, &c., or their value at a fixed rate—not a specified share or fractional part: but, *if the father remarries*, the son is to get a one-fourth share, after deducting the father's personal belongings, the house, &c. Section 3 gives the daughter on the death of the mother a one-fourth share whether the father marries again or not. And conversely, when the father dies (section 4), the daughter gets specified property, buffaloes, bullocks, &c., or a one-fourth share if her mother remarries; and between the mother and sons, the eldest son gets a one-fourth share on the death of the mother. It would seem that on the father's death the daughter shares when there are no sons: but this is not distinctly laid down. Mr. Hosking's decision printed at page 48, P.J., contains the following passsage:—

"There are authorities for holding that the eldest son or the eldest daughter may claim one-fourth of the property during the lifetime of one surviving parent, but this rule, in my opinion, means the eldest son, or the eldest daughter when there are no sons. On the death of the father I think it would only be his eldest son who could claim a one-fourth share. Had there been no son competent to assume the parental duty when the eldest daughter might claim a share in the lifetime of the mother."

The *Manu Wunnana*, as the District Judge points out, supports the principle of the daughters succeeding the mother on her death, and the sons their father: but even here it is by no means clear that the passages in this Dhammathat refer to cases in which there are both daughters and sons.

In case of *Ma Mya Thee* v. *Maung Po Thein*, printed at page 585, P.J., the Judicial Commissioner held that where there are both sons and daughters the eldest competent son is preferred to any daughter, and this opinion has to be allowed due weight. The *Dhamma Vilasa* (Jardine) sections 2, 3, 4 and 5, appears to regard the eldest *child* as having a right to a definite share (section 5). Section 2 deals with sons' rights to one-fourth on the death of his father, if the first child be a son. Section 3 gives the first daughter one-fourth on the death of the mother. Then section 4 gives the first eldest daughter a one-fourth share on the death of the father, and the first eldest son a similar share on the death of the mother. These passages are ambiguous. They emphasize an eldest *child's* right, and they put first (sections 2 and 3) the complementary rights of the respective sexes before notice is taken of the rights of the daughter and son when the parent of the same sex still survives.

The *Wagaru*, paragraphs 2 and 3 (Jardine's notes), distinctly recognises the *orasa son's* greater claim to a one-fourth share on the death of the father, and the eldest daughter's greater right on the death of the mother, and these passages provide for the case where there are both sons and daughters. They do not, however, give an exclusive right to the eldest son or daughter to the one-fourth share. All the children share the one-fourth. The *Mahavicchedani*, the District Judge thinks, supports the defendant's contention and is against plaintiff's claim. Apparently when there are sons only, the eldest son gets a portion of the property, and, when only daughters, the eldest daughter gets a

Civil Second Appeal No. 7 of 1900.

August 1st.

portion (sections 4 and 5, Jardine); but section 7, though not very clearly, considering the preceding section 6, seems to place the eldest daughter after the eldest son in any case.

The *Attasankhepa Wunnana* Dhammathat is a compilation by the *Kinwun Mingyi* and, though not an original authority, is still important as giving the results arrived at by one who may fairly be called an expert.

According to section 155, when the father is dead, in addition to the father's official and personal belongings, the eldest son takes one-fourth of the remainder; and similarly, by section 156, when her mother is dead, the eldest daughter takes corresponding property and share of remainder.

By section 157, on the death of the *mother*, the son gets merely what he previously possessed and the father takes the rest; but if the estate is of considerable value, the father should give the son a fair share of bullocks, paddy, &c.

By section 159, if the mother wishes to marry again, the son would get his share as above, and only if there were no *orasa* son would the *orasa* (eldest) daughter be able to claim. Conversely, the father marrying again, the daughter first, and failing a daughter, the son would get a portion.

These rules seem to proceed on the principle of the son getting a portion if his father dies, and the daughter if her mother dies: but the case of both daughters and sons is not distinctly provided for.

The *Digest of the Dhammathats* compiled by the *Kinwun Mingyi* will now be referred to:—

Section 30, Chapter VI, deals with the share of the son on the death of the father, and the effect of the Codes may be fairly summed up thus:

If the son has done his duty as a son he succeeds to the father's responsibilities and office, and therefore gets all the official and personal belongings of his father. Of the rest he obtains one-fourth, because he continues the family and assumes the responsibility of the father. The mother gets three-fourths, because she it is who saves and accumulates property, which the father can only acquire, and because she loves the children more than the father can, and cannot bear to see them suffer hardships. Section 31 of the Digest deals with the case of the mother's and daughter's shares on the father's death, and the general effect is that the daughter gets her own ornaments, &c., given her by both parents, and certain specified property—one pair of bullocks, buffaloes, some goats, grain, &c.,—and the mother the rest.

The *Vilasa*, as already stated, emphasizes the position of the *eldest child*, and would give the daughter one-fourth, because the eldest child is obtained by the prayers of the parents at an early period of their wedded life and they acquire property with his or her assistance. The *Rasi* and *Kyetyo* are to the same effect. The *Wunnadhamma* gives a reason why the daughter should *not* get one-fourth, because she is entirely controlled by the mother. The *Manuvannana* says that if the daughter lives with the mother she is not entitled to

Civil Second Appeal No. 7 of 1900.

August 1st.

get the bullocks, buffaloes, &c., which she would otherwise get. It is not clear that in the case put in this section there are also sons, so we get little help in deciding the question whether, if there are sons, the daughters, as representative of the mother, would get a share before a son.

Then we have in section 32 the rights of the father and son on the death of the mother, and in these circumstances the preponderance is clearly in favour of the son getting such ornaments and property as has been already given him by both parents and from the rest of the property, one pair each (sometimes two pairs) of bullocks and buffaloes, also goats, sheep, and 1 *pè* of land.

The *Vilasa* apparently gives the son one-fourth of the property if he is the *eldest child*. The *Dhammathat Kyaw* also put the son's right to a portion on the same ground.

Section 33 shows the methods when the mother dies and the father and daughter divide the joint property.

The daughter gets her mother's personal ornaments and belongings.

A good many of the Dhammathats give the daughter a one-fourth share; others give bullocks and buffaloes, &c.

The *Dhammathat Kyaw* lays stress on the daughter being the eldest daughter and the *Kyetyo* makes her getting a one-fourth share dependent on her being the eldest child.

Other sections which follow do not help much towards a distinct view.

In nearly all cases it is uncertain, when a daughter takes a share, whether there are supposed to be both sons and daughters.

The principle that a daughter gets a share on the death of her mother and the son on the death of his father simply because the daughter and son perform the *family* duties of the mother and father respectively, is not to be found clearly enunciated, although, as noted above, there are indications of such a principle. The son gets the father's official and personal belongings when the father dies, and in a corresponding way the daughter takes her mother's official and personal belongings; but as regards the rest, while some Dhammathats are indefinite, others, notably the *Vilasa*, *Kyetyo*, *Rasi* and *Dhammathat Kyaw* appear to give rights to the eldest *child*, because he or she is obtained by the prayers of the parents in early married life and helps the parents before other children can. Occasional passages, however, put the daughter in an inferior position to a son.

In the present case the eldest son is the eldest child; and, having regard to the points just noted, that it is not shown that a daughter must get the share because the deceased parent is the mother and that there is a tendency to prefer the eldest child, we are brought to the following conclusion that the son should not fail in this suit on the ground that it is a daughter who can claim and not a son.

It may not be very clear from the Dhammathats now available that a son can claim a one-fourth share from his father when he lives separately and when the father does not marry again, though this has been held: but we do not think it open to reasonable doubt that when the

father does marry again, the eldest son, especially if he be the eldest child, can claim a one-fourth share of the general joint estate of the parents. This is in accordance with paragraph 2 of section 2, Book X, *Manukyè*, and as shown above, it is not contradicated by the other Dhammathats.

Civil Second Appeal No. 7 of 1900.

August 1st.

No questions have been raised in this Court as to the value or description of the property which has to be dealt with and divided into four parts of which plaintiff gets one, therefore such points need not be discussed.

The decree of the District Judge is confirmed and this appeal is dismissed with costs.

Before Mr. Justice Fox.

NGA PO THET *v.* THE QUEEN-EMPRESS.

Criminal Revision No. 278 of 1900.

August 7th.

Mr. *G. B. Dawson*—appearing on behalf of the applicant.

Evidence of accomplices—Presumption of law—Evidence of one accomplice not sufficient corroboration of that of another—Indian Evidence Act, s. 114, illustration (b).

A person who accompanies another in order to witness the payment of a bribe must be treated as an accomplice. *Rajoni Kant Bose* v. *Asan Mullick*, 2, Cal., W. N. R., 672, followed. Further, the evidence of a person who was witness to the payment of a bribe in April or May, and yet did not give information about it till the 21st June following, must be treated in the same way as that of an accomplice, *Ishan Chandra Chandra* v. *Queen-Empress*, I. L. R., 21. Cal., 328, followed.

The rule regarding the evidence of accomplices is that it must be carefully scrutinized before it is accepted. In dealing with such evidence a Judge or jury must start with the rule stated in illustration (*b*) to section 114 of the Evidence Act, and presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. There may be circumstances in particular cases which are sufficient to overcome such presumption, and in such case a conviction is not illegal. Such cases are provided for by section 133 of the Evidence Act, but in the case of a Judge who has to give reasons for his decision, the reasons which have led him to believe the uncorroborated evidence of an accomplice should be clearly and fully set out. It is not sufficient to set out formally that the witness is an accomplice, but that he is believed, although uncorroborated. *Queen-Empress* v. *Chagan Dayaram*, I. L. R., 14, Bom., 331, followed.

The evidence of one accomplice is ordinarily not sufficient corroboration of that of another, *Queen-Empress* v. *Ram Saran*, I. L. R., 8, All., 305, followed.

THIS is an application to revise and set aside the decision of the District Magistrate of Thatôn convicting the accused of an offence punishable under section 161 of the Indian Penal Code, and the decision of the Sessions Court dismissing the accused's appeal. The main ground upon which the application is based is that there was no evidence to support the conviction except that of the uncorroborated statements of accomplices. The accused was the second clerk of the Subdivisional Officer at Thatôn, and his duties were in connection with revenue matters: he had been a clerk in Government service close upon 20 years and had a fair record.

The charge against him was that in April and May 1899 he accepted from one U Ban the sum of Rs. 775 as a motive for doing an official act, namely, that of procuring for the said U Ban certain grants of land.

The total of Rs 775 was alleged to have been made up by three payments on three different occasions, the first payment having been Rs. 300, the second Rs. 200, and third Rs. 275.

Criminal Revision No. 278 of 1900.

August 7th.

The money was alleged to have come from U Ban, but he did not personally pay anything to the accused: each payment was alleged to have been made to the accused by one Hmo Yeik.

The District Magistrate held that there was no proof making it beyond doubt that the Rs. 200 and the Rs. 275 ever went beyond the hands of Hmo Yeik, but he found that it was sufficiently proved that the accused was paid the Rs. 300 as a bribe, and on this he found him guilty of the offence charged. The evidence in support of the charge was that of (1) U Ban, (2) Hmo Yeik, and (3) Maung Yôk. The Sessions Judge refers to the evidence of another man Maung Swe Lôn, and apparently attached weight to it because this witness was 60 years of ago; but Maung Shwe Lôn said nothing about the payment of the Rs. 300—what he spoke to was the payment of Rs. 275, one of the payments the District Magistrate did not consider proved. U Ban's story was that he was a trader residing in Moulmein, and went to Thatôn to obtain land for cultivation. He applied for leases of seven plots of land in the names of seven of his relations, but with no result at first. After a time he made the acquaintance of Hmo Yeik and Maung Yôk, who each assured him of being able to manage any sort of grant business. Hmo Yeik told him that if he paid Rs. 100 for each grant he would get them at once. He went with Hmo Yeik to the accused's house where he paid Hmo Yeik Rs. 300, but he did not know what Hmo Yeik did with the money, as he left to catch a train. On the occasion he said he did not hear any conversation between Hmo Yeik and the accused, nor did he himself have any conversation with the accused, either then or previously, except when he put in his application. On that occasion he does not say that the accused made any demand for money, or any suggestion that money would have to be paid to him, or that payment to him would facilitate matters.

The suggestion to this effect started and ended with Hmo Yeik.

Hmo Yeik's story was that U Ban asked him to assist him in getting the leases, and accordingly he spoke to the accused, who said that Rs. 125 would have to be paid for each of three leases, and Rs. 100 for each of the other four. The witness gave this information to U Ban who agreed to pay, and accordingly the three of them (U Ban, Hmo Yeik, and Maung Yôk) went to the accused's house, where U Ban gave him Rs. 300, which he at once paid to the accused. This witness professed to have taken trouble for the stranger U Ban quite gratuitously, and with no definite promise of remuneration, but merely with a hope of getting something from U Ban. Up to the hearing of the case, however, he does not say that he had been paid anything, or that he had even asked for anything.

The other witness, Maung Yôk, admitted to having been an acquaintance of Hmo Yeik's from the latter's childhood. He represented that U Ban said that he had to go and pay money to get the leases, and so the witness accompanied Hmo Yeik and U Ban to the accused's house, where he says he saw Hmo Yeik pay the accused the Rs. 300, which U Ban made over to Hmo Yeik there.

Criminal Revision No. 278 of 1900.

August 7th.

The witness admitted that he knew the others were going on a bad errand, but still he went with them.

The dates of the various alleged payments are not spoken to, but this payment of Rs. 300 being alleged to have been the first, it may be taken from the charge that it was alleged to have been made sometime either late in April or early in May 1899.

Maung Yôk said that he had applied for a lease himself and had got one, but on the 21st June 1899 he gave information by means of a petition to the Deputy Commissioner which led to an investigation, and ultimately to the inquiry and trial of the accused. This man's reasons for taking this step was that four others who had petitioned for leases as the same time as he did, did not get them. This accused said that Maung Yôk's petition for a lease had been refused, implying that he ascribed Maung Yôk's action to spite against him on this account, and this was borne out by one of the witnesses for the prosecution who said that Maung Yôk had told him that he had applied for a lease and had not got it, and that he was going to prosecute the accused till he got him sent to jail. The accused alleged that both Hmo Yeik and Maung Yôk were what may shortly be called "touts" this is borne out by the account which U Ban gave of his conversations with them, and of his transactions with Hmo Yeik.

It does not appear to have occurred to the District Magistrate that the evidence of any of the witnesses should be dealt with in the way in which the evidence of accomplices must be treated.

The Sessions Judge held that U Ban and Hmo Yeik were accomplices, but he did not consider that Maung Yôk was one. His reasons for thinking that Maung Yôk was not an accomplice are not clear, the only reason stated being that he was in effect the complainant in the case. A more appropriate word would have been the informer.

In my judgment if the evidence for the prosecution was true, Maung Yôk was clearly an accomplice. He was not only an accomplice, he was also a traitor, who, to satisfy some grudge against the accused, gave information about a criminal action to which he had been a willing witness, if not an actual party.

I follow the case of *Rajoni Kant Bose* v. *Asan Mullick*, 2 Cal., W. N. R., 672, in which it was held that persons who accompanied another in order to witness the payment of a bribe must be treated as accomplices.

Further, Maung Yôk, according to his own account, was a witness to the payment of the bribe in April or May, yet he did not give information about it till the 21st June: for that reason also his evidence must be treated in the same way as that of an accomplice. See *Ishan Chandra Chandra* v. *Queen-Empress*, I.L.R., 21, Cal., 328.

The rule regarding the evidence of accomplices is that it must be carefully scrutinized before it is accepted. In dealing with such evidence a Judge or jury must start with the rule stated in illustration (*b*) to section 114 of the Evidence Act, and presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. There may be circumstances in particular cases which are sufficient to overcome such presumption, and in such case a conviction is not

Criminal Revision No. 278 of 1900.

August 7th.

illegal. Such cases are provided for by section 133 of the Evidence Act, but in the case of a Judge who has to give reasons for his decision, the reasons which have led him to believe the uncorroborated evidence of an accomplice should be clearly and fully set out.

It is not sufficient to set out formally that the witness is an accomplice, but that he is to be believed, although uncorroborated. See *Queen-Empress* v. *Chagan Dayaram*, I. L. R. 14, Bom., 331. In this case there is merely the uncorroborated evidence of men who, on their own statements, were accomplices. The evidence of one accomplice is ordinarily not sufficient corroboration of that of another. See *Queen-Empress* v. *Ram Saran*, I. L. R.. 8., All., 306. The District Magistrate gave no consideration to this aspect of the case. The Sessions Judge scarcely deals with it. He notes that the District Magistate had commented on the fact that U Ban was an unwilling witness, and because he appeared to have spoken against the accused with reluctance, the Judge considered that he was the more likely to have spoken the truth.

As a matter of fact all that U Ban said was that he had listened to, and paid Hmo Yeik three sums of money, amounting to Rs 775, in order to get the leases which he had applied for. He did not even say that Hmo Yeik had told him that the money was to be paid to the accused, and he was not a witness to any payment to the accused.

The evidence as to the actual payment of the Rs. 300 to the accused is that of Hmo Yeik and Maung Yôk only, who beyond being accomplices appear to be touts, and altogether unworthy of belief.

Although there were witnesses to the other alleged payments, the District Magistrate did not find that the accused had received those sums. His reason for convicting in connection with the sum of Rs. 300 appears to have been the fact that Maung Yôk was complainant in the case, and had been present at the payment. In my judgment Maung Yôk was the most tainted witness called, and no man's character should have been ruined on such evidence as that of men like Hmo Yeik and Maung Yôk.

I hold that there was no sufficient proof that the Rs. 300 ever went beyond the hands of Hmo Yeik, and consequently no evidence sufficient to support the conviction.

The conviction of, and sentence upon, Nga Po Thet are set aside, and the fine imposed will, if it has been paid, be refunded.

Civil Miscellaneous Appeal No. 24 of 1900.

August 23rd.

Before Mr. Justice Birks.

MAUNG PO MYA *v.* PALANIAPPA CHETTY.

Mr. *Ghaswalla*—for the appellant. | Mr. *Giles*—for the respondent.

Order returning an appeal for presentation to proper Court, Appeal against a Chief Court, Appellate Jurisdiction of—Civil Procedure Code, ss. 57, 582 588 (6).

Sections 57 and 582 of the Civil Procedure Code can be read together and section 588 (6) applies to memoranda of appeal as well as to plaints. The Chief Court therefore has jurisdiction to hear an appeal from an order of a District Judge, returning an appeal for presentation to the proper Court.

IN this case it is admitted by the advocates on both sides that the District Judge was wrong in directing the memorandum of appeal to

Civil Miscellaneous Appeal No. 24 of 1900.

August 23rd.

be returned for presentation in the Divisional Court. The order appealed against is dated 9th April, and the new Act did not come into force till the 16th April. Under section 44 (*c*) of that Act the appeal was rightly presented to the District Judge. The only question now argued is whether this Court has jurisdiction to hear an appeal from this order under section 588 (*6*) read with sections 582 and 57 of the Code, or whether the case should be dealt with in revision. The Allahabad High Court in *Bindeshni Chanbey* v. *Nandu*, 3, All., 456, held that 588 (*6*) only applied to plaints and not to memoranda of appeals. This decision was given in January 1881. Section 582 of the Civil Procedure Code was however amended by Act VII of 1888 as follows:—"The word 'plaintiff' shall be held to include a plaintiff-appellant or defendant-appellant, the word 'defendant' a plaintiff-respondent or defendant-respondent, and the word 'suit' an appeal." The Madras High Court in January 1891, held that sections 57 and 582 could be read together in *Kunhi Kutti* v. *Achotti*, 14, Madras, 462, and I think this later ruling should be followed. Mr Giles for the respondent only argues that his client should not be made to pay costs. I will make no order as to costs at this stage, but with reference to the ruling in 9. All., 11 (*Husaini Begam* v. *Collector of Muzaffarnagar*) direct the District Judge to admit the appeal and to treat the costs of this application as costs in the case to be borne by the party who loses.

Before the Chief Judge and Messrs. Justices Fox, Bigge, and Birks.

QUEEN-EMPRESS *v.* AW WA AND TAN WIN.

Criminal Revision No. 69 of 1900.

August 27th.

Still, illicit working or possession of—Spirit, illicit possession of—Double conviction and sentence—Excise Act, ss. 45, 51; Criminal Procedure Code, ss. 235, 35—Indian Penal Code, s. 71—"Distinct" and "separable" offences.

Where the evidence goes to show that the accused illicitly works a still and is in possession of spirit manufactured in that still.

Held—That while separate *convictions* under sections 45 and 51 of the Excise Act are permissible, separate *sentences* under the same sections are illegal. *Distinct* offences distinguished from *separable* offences.

Criminal Reference No. 1 of 1900.

THE following reference was made by the Chief Judge to the Full Bench:—The accused Aw Wa was convicted by the Subdivisional Magistrate "of being in possession of a still and of a large quantity of "country spirit and has thereby committed an offence punishable under "sections 45 and 51 of the Indian Excise Act." For the former offence the accused was sentenced "to undergo rigorous imprisonment for "three months and a fine of Rs. 100, or to undergo in default one month's "rigorous imprisonment; and in respect of the second offence to pay a "fine of Rs. 200, and in default rigorous imprisonment for 21 days."

It is certainly probable that the spirit had been manufactured on the spot, but there is no evidence that a still was found, or that the component parts of a still were found, or even that the tubs or tubes (Exhibits 6 and 7) had been used for distilling. The Magistrate's remark that "in Aw Wa's (the accused's) house were found buried a "number of articles which are clearly part of a still" is not sufficient to prove the fact that a still was found. No witness was questioned on the point or gave any evidence regarding it.

Criminal Revision No. 69 of 1900.

August 27th.

Criminal Reference No. 1 of 1900.

Assuming, however, that a still was found, the question would arise whether the double conviction for possession of a still and for possession of the spirit reasonably taken to be produced from that still is legal, and I am inclined to think that it is not legal. On the facts which, as far as I can gather, the Magistrate found proved, it appears that the accused must have *worked* a still, and it is difficult to see how a still can be *worked* without spirit being produced. Clause (*2*) of section 45 provides for the confiscation of all spirit made in contravention of section 5 that is produced by working a still. Had it been intended that the possession of such spirit should also be punished under section 51, this provision for confiscation would not have been necessary.

Working a still would seem to involve the possession of fermented liquor, in this case called *kasawye*, of the still and of some though it may be a small quantity of spirit. *Kasawye* is believed to be the same thing practically as *seinye*, and persons are not unfrequently convicted of illicit possession of *kasawye*. Could a person be convicted of separate offences: possession of fermented liquor, *kasawye*, possession of a still, and possession of spirit when each of these separate acts may be said to be parts of the offence of *working* a still, and therefore within the scope of section 71, Indian Penal Code.

The point is not unimportant, because, although the accused in this case might have been sentenced under section 45 to a fine of Rs. 300 (the total fine), he could not legally have been sentenced to one month and 21 days' imprisonment in default of payment of such fine.

I am not inclined to interfere on the facts and to say that the evidence of the possession of a still is insufficient, but still I am of opinion that the Magistrate should have required further proof than is recorded of this possession and that, even if the tubs and tubes (Exhibits 5 and 6) were *parts* of a still, it is yet not clear that these parts composed or could compose a still.

As to the point of law whether two convictions for possession of a still and for possession of spirit presumably made in the still, instead of one conviction for working a still, are legal, I am doutful, and, having regard to the ruling of the Judicial Commissioner, Upper Burma, in *Queen-Empress* v. *Po Tu*, page 93, Upper Burma Rulings, 1892—1896 (Criminal), in which it was held that manufacture and possession of fermented liquor constitute distinct offences, I think it well to refer this case to be heard by a Full Bench of the Court.

I do not lose sight of the fact that it is possible the spirit was not the produce of the still supposed to have been discovered. I do not, however, think that it would be right to hold such a view in the absence of evidence. If the legality of a double conviction depended on such distinct origin, then there should be evidence thereof, and it should not be presumed, especially when all the surrounding circumstances and discoveries by the Excise Officer are such as usually occur when illicit distillation has been going on.

I direct accordingly that this Criminal Revision Case, No. 69 of 1900, *Queen-Empress* v. *Aw Wa and one* be heard and determined by a

Full Bench consisting of the four Judges of the Court at the next sitting of the Bench.

Criminal Revision No. 69 of 1900.

August 27th.

Criminal Reference No. 1 of 1900.

Notice to issue to the Government Advocate who will, no doubt, consult the Excise authorities.

COPLESTON, J.—I have set out in the order directing this matter to be heard by a Full Bench of the Court the principal facts of the case. The question before us is whether separate convictions and separate sentences under sections 45 and 51 of the Excise Act are legal, when the evidence goes to show that a still has been illicitly worked and that the accused person is in possession of spirit manufactured in that still. The Magistrate convicted the accused of being in possession of a still and of being in possession of spirit and passed separate sentences exceeding in all a sentence which might have been passed under the section (45) which deals with the most serious offence. As I have remarked in the order already referred to, I do not think that there was sufficient proof of the possession of a still, because the articles found could not by themselves form a still. I do not, however, rest my opinion on this point, and accept the findings of the Magistrate. There was undoubtedly ample evidence that a still had been *worked*, and the accused could have been convicted of this offence. Had the Magistrate taken this view of the case, he might have hesitated to convict also of possession of spirit (made in the still). The learned Government Advocate has argued that, although section 71, Indian Penal Code, applies to the facts which are proved in this case, yet, having regard to the illustrations to section 235, Criminal Procedure Code, the accused might legally be convicted of the two offences under sections 45 and 51, Excise Act, and be separately sentenced therefor, provided the total of the punishments imposed under the two sections did not exceed what would be legal under section 45, the gravest section. According to this view the total sentence imposed by the Magistrate in default of payment of fine would be illegal. But this view of the matter seems to be incorrect, and the provisions of section 35, Criminal Procedure Code, have perhaps been overlooked. The explanation to that section, and the illustration show that, when an offender is convicted of separable offences within the provisions of section 71, Indian Penal Code, these offences are not distinct offences within the meaning of this section (35, Criminal Procedure Code), and the offender is not liable to the several punishments prescribed therefor; even though the total punishment imposed may not exceed what would be legal for one of the separable offences. It was held in some High Courts under the former Codes that sentences such as those just referred to were legal, but section 35 as it now stands seems to preclude such splitting up of the sentences; and there is no legal difficulty in the way of separate convictions combined with one sentence, because section 35 only permits, and does not make obligatory, separate sentences in one trial.

As to the applicability of section 71, Indian Penal Code, to the facts of the case before us, I can feel no doubt. The possession of the spirit in question was not distinct from the working of the still.

Criminal Revision No. 69 of 1900.

August 27th.

Criminal Reference No. 1 of 1900.

The conviction and sentence under section 51, Excise Act, must accordingly be set aside.

FOX, J.—In the accused's house were found—

(1) a tub and two pipes which the Magistrate found to be parts of a still;

(2) a packet of powder used for causing fermentation;

(3) four tubs containing *kasawye*, fermented liquor or wash;

(4) five tins containing country spirit.

The Magistrate convicted the accused, (1) of an offence punishable under section 45 of the Excise Act, 1896, for having been in possession of a still without a license, and (2), of an offence punishable under section 51 of that Act for having been in possession of country spirit in contravention of section 30 of the Act.

For the offence under section 45 of the Act he sentenced the accused to rigorous imprisonment for three months, and to a fine of Rs. 100, and in default of payment of that fine to one month's further rigorous imprisonment; for the offence punishable under section 51 of the Act, he sentenced the accused to pay a fine of Rs. 200, and in default of payment of that fine to rigorous imprisonment for 21 days.

In my judgment the facts proved were sufficient to lead to the conclusion that the accused had worked a still without a license, and that the country spirit found in his house was the result of such working. The conviction should more properly have been for having worked the still rather than for having been in mere possession of it.

The questions then arise (1), whether the accused was liable to be convicted also for having been in possession of the country spirit, which was the outcome of his working of the still, and (2), whether he was liable to be sentenced in respect of such offence in addition to the sentence for the offence punishable under section 45 of the Act.

The question of the legality of the double convictions appears to me to depend upon the provisions of section 235 of the Code of Criminal Procedure; that of the legality of the two sentences upon the provisions of section 35 of that Code, and those of section 71 of the Indian Penal Code. The explanation and illustration added to section 35 of the Procedure Code of 1898 clear up what was doubtful in the previous Code, and now, although under section 235 an accused may be charged with, tried, and convicted at one trial for any number of offences which he is alleged to have committed in one series of acts so connected together as to form the same transaction, yet if the offences are not distinct offences within the meaning of section 35 of the Code of Criminal Procedure, he may not be sentenced for more than one of the offences of which he has been found guilty.

In the present case, as the facts proved leave no reasonable doubt that the country spirit found in the accused's possession was the produce of the still which was also in his possession, there was, in my judgment, no distinct offence of possession of country spirit within the meaning of section 35 of the Code of Criminal Procedure, and consequently the sentence for the offence under section 51 of the Excise Act was not legal and should be set aside.

BIGGE, J.—I think it clear that the sentence under section 51, Excise Act, was wrong and should be set aside. It is true that under section

Criminal Revision No. 69 of 1900.

August 27th.

Criminal Reference No. 1 of 1900.

235 of the Criminal Procedure Code an accused person may be charged with, and tried, at one trial for the fractional parts of a series of acts so connected together as to form the same transaction. But it is expressly provided that nothing in the section shall affect the Indian Penal Code, section 71, which provides that unless it be so expressly provided when anything which is an offence is made up of parts, any of which parts is in itself an offence, the offender shall not be punished with the punishment of more than one of his offences. The explanation and illustration to section 35, Criminal Procedure Code, elucidate the matter still further.

The accused had in his possession country spirit; but I think the possession was only incidental to working or possession of a still, and that it was a separable offence coming under section 71, Indian Penal Code, and not a distinct offence within the meaning of section 35, Criminal Procedure Code.

BIRKS, J.—The answer to this reference depends upon the construction to be placed on section 71 of the Penal Code and sections 35 and 235 of the Criminal Procedure Code. The learned Government Advocate has relied on the illustration to section 235, Criminal Procedure Code. It is rather difficult to reconcile illustration (*b*) to that section with the illustration to section 35, where it is specially laid down that if A breaks into a house with intent to commit theft and steals property he has not committed "distinct" offences, while illustration (*b*) says that if A breaks into a house with intent to commit adultery he may be charged with and convicted of offences under sections 545 and 497. I can see very little distinction between breaking into a house with intent to commit adultery and committing that offence, and breaking into a house with intent to commit theft and carrying out that intention. The two illustrations may be reconciled by the fact that, while the last half of section 457 provides a special punishment for house-breaking in order to commit theft, there is no section which provides a special punishment for house-breaking in order to commit adultery. The former would apparently be a "separable" offence as defined in the explanation to section 35, Criminal Procedure Code, and the latter a "distinct offence." Both sections 35 and 235, Criminal Procedure Code, refer to section 71 and section 235 says that nothing contained in it shall affect section 71, Indian Penal Code. That section, however, deals with punishments and not conviction. It would seem therefore that where an offence is made up of parts as defined in the first clause of that section only one punishment can be passed, while if it falls under the amending clauses introduced by Act VIII of 1882, section 4, and which appears to be referred to in section 235, Criminal Procedure Code, he may be charged with, and convicted on, several counts, but shall not receive a more severe punishment than he could receive for any one of the offences charged. In practice I think it is better in cases where several charges are framed under section 235 to pass the sentence on one count alone than to split up the sentences under the several charges. In the present case I concur with my learned colleagues in thinking the sentence passed under section 51 illegal in any case, and would set it aside.

Civil Second Appeal No. 71 of 1900.

August 28th.

Before Mr. Justice Birks.

MAUNG AUNG MYA *v.* MA GYI.

Mr. *Jordan*—for appellant (plaintiff).

Procedure of Appellate Court—Party discovered to be a minor.

The proper course for an Appellate Court to take, if either of the parties appears to be a minor and this point has not been taken in the Court below is to remand the case, and if the question is determined in the affirmative, to set aside all the proceedings which are the subject of the appeal as void *ab initio*, but to make no order as to costs.

THE plaintiff-appellant in this case had obtained a decree against Maung Tun Nyein, the father of the defendant Ma Gyi, and in execution of this decree he attached a house and compound. The defendant, Ma Gyi, who has appeared in person, tells me she is only 17, but, she appears to have been allowed to file an application for removal of the attachment on the ground that the house had been given to her by her father. This gift is evidenced by a registered deed, dated the 10th January 1896, which was executed when he took a second wife. No objection appears to have been taken throughout these proceedings that the girl was a minor and could not institute proceedings except by a next friend, or defend the present suit except by a guardian *ad litem*. The attachment was removed in the Miscellaneous case, and the present plaintiff-appellant then brought a suit against Ma Gyi under section 283, to establish his title. He was successful in the Court of First Instance, the Court holding that as the compound still stood in his name and he paid the taxes and had also jointly, with his daughter, mortgaged the house to Saya Maung Galè, he was the real owner, and that the registered deed of gift was made in order to defeat creditors or his second wife. The Lower Appellate Court held the registered deed of gift was valid and dismissed the suit. It is now sought to contest this decision, not on the ground of respondent's minority, but on the ground that the transaction was obviously a *benami* one as the girl was personally dependent on her father. Mr. Jordan has also argued that the allegation in paragraph 2 of the plaint is correct, and that the document is not valid as not coming within the 12 kinds of gifts referred to in the *Dhammathats*. The first point to determine is unquestionably to consider what is the proper course for an Appellate Court to pursue when a defendant is discovered to be a minor, the parties themselves having waived any objection on this score. In the case of *Guru Pershad Singh and other minors represented by their mother* v. *Gossain Munraji Puri and another*, XI, Calcutta, 733, Prinsep and Grant, Judges, held that a mother was not qualified to sue as representative for her minor sons as section 457 debarred a married woman from being appointed a guardian for the suit. That section, however, refers to guardians *ad litem* and not to next friends, and this judgment was expressly overruled on this point by the Full Bench in *Asirum Bibi* v. *Sharip Mondul*, XVII, Calcutta, 488. In the former case the Court held that the proceedings were void *ab initio*, and this opinion is clearly correct in the present case if the respondent is, as she herself alleges, under 18 years of age. I have considered whether it is necessary to remand the case to have the fact ascertained whether the respondent really is

Civil Second Appeal No. 71 of 1900.

August 28th.

a minor as she alleges. If she is a minor now, she must have been so when she applied for a removal of the warrant of attachment. The proceedings in that case are not before me and an order passed on appeal should be confined to the appeal itself. Mr. Jordan has asked that I should declare the order passed in the Miscellaneous case also null and void. I do not see that I can do that in this case. I have referred to the following cases: 7, All: 490; 13, Cal., 189; 13, Bom., 7 and 234; 14, Cal., 204 and 704. I gather from these decisions that the proper course for an Appellate Court to take is to remand the case if either of the parties appears to be a minor, and if this question is determined in the affirmative, to set aside all the proceedings which are the subject of the appeal as void *ab initio* but to make no order as to costs. The case must, therefore, be remanded to the Lower Appellate Court to return a finding on the following issues:—

(1) What was the exact age of Ma Gyi on the 17th June 1900 when the plaint was admitted?

(2) If she was a minor when the suit was brought, was this brought to the notice of the Courts?

The findings on these issues to be returned in two months' time and to be considered when the Courts re-open.

Before Mr. Justice Fox.

Criminal Appeals Nos. 101 and 102 of 1900.

September 5th.

NGA KYWET *v.* QUEEN-EMPRESS.

Recent possession of stolen property—Theft—Receiving stolen property—Presumption of law—Indian Evidence Act, s. 114, illustration (a)—Separate convictions in respect of property stolen on different occasions.

The mere fact of recent possession of stolen property is in general evidence of theft, not of receipt of stolen property with guilty knowledge; but in view of the plain terms of illustration (*a*) to section 114 of the Indian Evidence Act, it is not necessary to follow English authorities and to hold that to constitute the offence of receiving there must be some proof that some person other than the prisoner had possession of the stolen goods before the prisoner got possession of them. Where the possessions of stolen property sufficiently soon after the thefts permits of one of the presumptions set out in illustration (*a*) to section 114 of the Evidence Act, the question as to which of the two presumptions indicated in that illustration is to be drawn must depend upon the facts of each particular case independently of any rule of English law. *Ishan Muchi* v. *Queen-Empress*, I. L. R., 15 Cal., 511, dissented from.

Held—Under the circumstances set forth in the two cases that the more reasonable presumption to draw was that the accused received the buffaloes which were the subjects of the cases, knowing them to be stolen.

Held also—That in the absence of proof that the accused received the animals on different occasions, it was not permissible to charge, try and convict the accused in respect of each buffalo—*Ishan Muchi* v. *Queen-Empress*, I. L. R., 15 Cal., 511, followed.

THE appellant was convicted in Sessions Trial No. 80 of 1900 in the Pegu Sessions Court of having committed the offence of having stolen a buffalo from the cattle pen of Maung Tha Dun of Kyetmaya village on the night of the 31st March and 1st April last. The conviction is based solely upon one of the presumptions permitted

Criminal Appeals Nos. 101 and 102 of 1900.

September 5th.

by section 114 when a person is in possession of stolen goods soon after the theft and cannot account for such possession satisfactorily. Such possession by the accused was shown by proof that on the 14th of April the appellant sold to one Maung Po Maung the buffalo which was the subject of the charge in this case, and a buffalo stolen from another owner which is the subject of the charge in another case. The accused alleged that he had bought these buffaloes in the Prome cattle market, but this was disbelieved by the Judge and assessors. The possession of the stolen property was sufficiently soon after the thefts to permit of one of the presumptions set out in illustration (*a*) to section 114 of the Indian Evidence Act being drawn. The mere fact of recent possession of stolen property is, in general, evidence of thefts, not of receipts of stolen property with guilty knowledge, but the question arises in this case which of the presumptions was the more reasonable one to draw under the special circumstances of the case. The accused was a man of over 60 years of age: there was no evidence that at any time before or after the thefts he had been seen near the villages from which the buffaloes had been stolen, or anywhere between or along any route between such villages and his own village, which according to the maps appears to be between 25 and 30 miles from them: further, there was no evidence that he was absent from his own village during the time in question.

Under the circumstances it appears to me that the more reasonable presumption to draw is that he received the buffaloes knowing them to be stolen.

In *Ishan Muchi* v. *Queen-Empress*, I. L.R., 15 Cal., 511, it was held (following an English authority) that to constitute the offence of receiving there must be some proof that some person other than the prisoner had possession of the stolen goods before the prisoner got possession of them: in view of the plain terms of illustration (*a*) to section 114 of the Indian Evidence Act, by which Courts in this country must be guided, the decision on this point in the above quoted case appears to me open to question, and I think that the question of which of the two presumptions indicated in that illustration should be drawn must depend upon the facts in each particular case irrespective of any rule of English law.

I alter the conviction of the Sessions Court and find that between the 31st March and the 14th April 1900 the accused Nga Kywet dishonestly received a buffalo which had been stolen from Maung Tha Dun of Kyetmaya village knowing or having reason to believe that such buffalo had been stolen, and that he thereby committed an offence punishable under section 411 of the Indian Penal Code, and that he committed such offence after having previously been convicted of two offences punishable under Chapter XVII of that Code with imprisonment for a term of three years and upwards, and that in consequence he was subject to enhanced punishment under section 75 of the Code, and I uphold the sentence of five years' rigorous imprisonment imposed by the Sessions Court.

The appellant was in Sessions Trial No. 81 of 1900 in the Pegu Sessions Court convicted of the theft on the 4th April 1900 of a buffalo,

Criminal Appeals Nos. 101 and 102 of 1900.

September 5th.

the property of Ma Hnin U of Thaminze village. In Criminal Sessions Trial No. 80 of 1900 in the same Court he was convicted of the offence of theft of another buffalo on the night of the 31st March and 1st April from the pen of Maung Tha Dun of Kyetmaya village which from the maps filed in the cases appears to be near Thaminze village.

In both cases the convictions are based upon one of the presumptions permissible under illustration (*a*) to section 114 of the Evidence Act, when a person is in possession of stolen goods soon after the theft of them, and cannot account for such possession satisfactorily. In appeal No. 101 by this prisoner, I have held that the proper presumption to have drawn was that the prisoner received the buffaloes which were the subjects of the two cases knowing them to be stolen.

The only evidence in the cases to connect the accused with either of the buffaloes is that he sold both to Maung Po Maung on the 14th April at his (the accused's) house in Payanga-su village.

There was no evidence that the accused received the two buffaloes on different occasions, and the probabilities are that the buffaloes were stolen by the same man or men, and were received by the accused on one occasion.

Under the circumstances I do not think it was permissible to charge, try and convict the accused for an offence in respect of each buffalo, *Ishan Muchi* v. *Queen-Empress*, I. L. R., 15 Cal., 511, and *Queen-Empress* v. *Makhan*, I. L. R., 15 All., 317. I set aside the conviction and sentence in this case.

Before the Chief Judge.

Criminal Revision No. 485 of 1900.

September 5th.

QUEEN-EMPRESS v. NGA PO HMAN. *

Criminal Procedure Code, s. 562—Points to be noted in applying its provisions.

Section 562, Criminal Procedure Code, is carefully limited in its application, and the Courts should not go beyond the plain meaning of its provisions.

In cases falling within its scope, it is not open to a Court on proofs of youth of the offender to omit regard to the character, antecedents or to the trivial nature of the offence, or to consider the trivial nature of the offence alone and disregard the age of the offender.

THE offender was not a youth at the time he committed the offence. He is now 32 years of age. There is no evidence as to his character or antecedents. The offence was not a trivial one, nor were there extenuating circumstances. The Court has to give regard to all these points, and it appears that the offender must be young, and the offence must be one of a trivial nature, if the Court is to apply the provisions of the section and order the release of the offender. It is not laid down that the offender's character must have been previously *good* or his antecedents *respectable*, but regard must be had to the character and antecedents; and in addition the other conditions already referred to, concerning youth and triviality of offence, must exist. It is not open to a Court on proofs of youth to omit regard to the character, antecedents or to the trivial nature of the offence, or to consider the trivial nature of the offence alone and disregard the age of the offender.

The only reasons recorded by the Magistrate were that the prosecutors were unwilling to proceed with the case and that the accused

* Overruled by *King-Emperor* v. *Ba Han*, 2 L. B. R. 65.

Criminal Revision No. 485 of 1900.

September 5th.

"promises to repay the value of the articles misappropriated and the "parties are satisfied." Neither of these reasons form any part of the conditions expressed in section 562, Criminal Procedure Code. The section is carefully limited in its application and the Courts should not go beyond the plain meaning of its provisions.

There appears, however, to be no necessity at this period, especially as it appears that the Government Prosecutor concurred in the order of the Magistrate, to set it aside and direct him to pass sentence according to law. The letters which are filed on pages 7 and 8 of the record, immediately following the charges, should not be on the trial record.

Criminal Revision No. 527 of 1900.

September 20th.

Before the Chief Judge.

MAHOMED KASIM *v.* QUEEN-EMPRESS.

Order of committal to prison under sections 118, 123, Criminal Procedure Code—Sentence of imprisonment—Commutation of order to one of detention in a Reformatory—Power of High Court to reverse illegal order—Reformatory Schools Act, sections 8, 16.

An order under sections 118 and 123, Criminal Procedure Code, committing a person to prison until security should be furnished, is not a sentence of imprisonment, and a Magistrate has no power to commute this order to one of detention in a Reformatory.

"Imprisonment" in section 16 of the Reformatory Schools Act means legal sentence of imprisonment, and where there has been no sentence of imprisonment at all, the High Court is not barred by that section from giving effect to its finding on that point by declaring the order for substitution void.

THE present applicant, Mahomed Kasim, who gave his age as 15, a fact accepted by the Magistrate, was ordered, under section 109, Criminal Procedure Code, by the Subdivisional Magistrate, to give security for good behaviour, or in default thereof, to undergo one year's rigorous imprisonment.

The Magistrate then submitted his proceedings to the District Magistrate with a recommendation that the imprisonment awarded be "commuted to detention in a Reformatory," noting that "the accused "is only 15 and might pick up a useful trade in a Reformatory."

The District Magistrate held that the accused person's age was 14 years and six months, and under section 9 (2) of the Reformatory Schools Act, 1897, ordered the detention of the accused "in Insein "Reformatory for three years instead of undergoing one year's rigorous "imprisonment, under section 123, Criminal Procedure Code."

This order was illegal. Section 8 of the Reformatory Schools Act provides for detention in a Reformatory School when any youthful offender is "sentenced to transportation or imprisonment."

The Subdivisional Magistrate's order under sections 118 and 123, Criminal Procedure Code, was not a sentence of imprisonment, but was an order or was meant for an order for detaining the accused person in prison or for committing him to prison for one year or until security should be furnished in accordance with the order under section 109, Criminal Procedure Code.

The District Magistrate had no power to commute this order to detention in the Reformatory.

Criminal Revision No. 527 of 1900.

September 20th.

Section 16 of the Act bars the interference of this Court to alter or reverse on revision "any order passed with respect to the age of a "youthful offender or the substitution of an order for detention in a "Reformatory School for transportation or imprisonment." But this cannot be taken to mean that, when there has been no sentence of imprisonment, the Court may not set aside an order for detention in a Reformatory School. "Imprisonment" in section 16 means legal sentence of imprisonment. If a sentence of imprisonment were set aside in appeal or revision or were altered to one of fine, then, no doubt, the order for substitution of detention in a Reformatory would fail and cease to have effect: and it cannot be doubted that, when there has been no sentence of imprisonment at all, this Court may give effect to its finding on that point by declaring the order for substitution void. The order for detention in the Reformatory is accordingly set aside.

The District Magistrate can act if he so desires under section 124 (*1*) or (*2*).

It may be noted that, when the Subdivisional Magistrate found that Mahomed Kasim was 15 years of age, he should have been aware that the accused was not a youthful offender, and that the District Magistrate could not order detention in a Reformatory School. The District Magistrate was, of course, aware of this; and, accordingly, it was only after he had by means of questions and inspection arrived at a fresh decision as to the accused's age, namely, that the latter was 14½ instead of 15¼ years old, that the District Magistrate was able, as he thought, to pass the order for detention in the Reformatory and give effect to the Subdivisional Magistrate's recommendation.

Before the Chief Judge.

QUEEN-EMPRESS *v.* TUN E.

Criminal Revision No. 214 of 1900.

October 30th.

Possession of spirit—Quantity within that allowed by law—Offence—Obligation of person to account for his possession—Extorting admission of accused—Absence of evidence—New charge by Magistrate.

Possession of half a quart of spirit is no offence, and a man is not bound to account for such mere possession.

Where an accused was arrested and sent up for trial by the police on a charge of illegal possession of country spirit, the quantity being only half a quart, and the Magistrate, after calling upon accused to account for such possession, proceeded to get him to plead to a charge of abetment of the illicit sale of liquor under sections 49—59 of the Excise Act.

Held—that in the absence of any charge brought against the accused by the police of illegal abetment of sale and of which there was no evidence before him, the Magistrate should not have proceeded to make a new charge against the accused.

THE accused was arrested and sent up for trial by the police on a charge of illegal possession of country spirit, the quantity being only half a quart. The arrest was illegal and no offence under section 51, Excise Act, was committed. The accused was not sent up for the sale or abetment of the sale of liquor. The Magistrate should have at once discharged the accused person; but he proceeded to get him to plead to a charge of abetment of sale, sections 49—59, Excise Act, a charge not brought against him by the police and of which there was no evidence before the Magistrate. The accused admitted that he

Criminal Revision No. 214 of 1900.

October 30th.

bought the liquor. Although it might be argued that the Magistrate could charge what offence he pleased, he should have had something to go on before he made a new charge. Section 242, Criminal Procedure Code, says: "the particulars of the offence of *which he is accused* shall be stated to him." Possession of half a bottle of spirit is no offence, and a man is not bound to account for such mere possession. The District Magistrate noted that the accused's admission of purchase should not have been extorted from him, but did not take further steps. The Sessions Judge also had the case in revision, but made no remarks. I consider an important principle is involved, and therefore set aside the conviction and sentence. Fine to be returned.

Before the Chief Judge.

Criminal Revision No. 426 of 1900.

November 3rd.

SHWE ZIN & QUEEN-EMPRESS *v.* MAUNG TUN HLA & THREE OTHERS.

Frivolous accusation—Compensation—Criminal Procedue Code, s. 250.

The provisions of section 250, Criminal Procedure Code, as to compensation can only be applied when the discharge or acquittal is legal.

THE Sessions Judge has referred this case to the Chief Court.

* * *

This was a complaint of offences under sections 447 and 426, Indian Penal Code. The Magistrate issued process for an offence under section 447, Indian Penal Code, and subsequently began the hearing of the case. After examining the complainant and one witness, and without examining the other witnesses offered by the complainant as he was bound to do, if he acted strictly according to section 244, Criminal Procedure Code, the Magistrate discharged the accused person, and ordered the complainant to pay the accused person a total sum of Rs. 110 as compensation under section 250, Criminal Procedure Code.

Section 250, Criminal Procedure Code, can only be applied when the discharge or acquittal is legal; and, in this case, since all the witnesses produced in support of the prosecution were not examined, the application of this section, and the order for compensation for frivolous accusation was premature and illegal. The amount awarded was also grossly excessive.

The order for compensation is set aside.

In his order of the 19th August, the Magistrate says that the complainant has altered his statement of the depth of the encroachment from 1½ to 10 cubits. This remark is not supported by the record.

I have to consider whether a continuation of the trial must be ordered. From what the witness says it seems probable that a criminal prosecution will not hold, and further enquiry will no doubt occasion considerable trouble to all concerned. The best plan will, I think, be that the Magistrate should enquire of the complainant whether he wishes to go on with the case. If he says he does not, the order setting aside that for compensation will stand, and no further steps are necessary. In case, however, complainant wishes to proceed, the accused must be called on to show cause before the District Magistrate or any Magistrate the District Magistrate may think fit, against a re-opening of, and further enquiry into, the case, and the result must be reported to this Court for final orders.

Criminal Revision No. 925 of 1900.

November 3rd.

Before the Chief Judge.

QUEEN-EMPRESS *v.* BA SHIN AND TWO OTHERS.

Stone-throwing at a house—Indian Penal Code, section 336—summary trial—Brief statement of reasons.

To constitute an offence under section 336, Indian Penal Code, the fact that human life or the personal safety of others was endangered, must be proved. It is not merely a question of the words "rashly or negligently."

Where a case is tried summarily, the convicting Magistrate is bound to record a brief statement of the reasons for his conviction, and where the offence is not one which is defined in the way in which, for example, the offence of theft is defined, these reasons must include a statement of facts sufficient *primâ facie* to constitute the offence of which the Magistrate is about to convict.

THE District Magistrate has referred this case, which was a conviction under section 336, Indian Penal Code, for stone and bottle throwing, and he asks that the conviction may be set aside or altered to a conviction under section 504, Indian Penal Code. The convicting Magistrate relies on the ruling in *Queen-Empress* v. *Nga Myat Thin* (page 426, Printed Judgments, 1898), while the District Magistrate considers that the decision printed at page 91, Selected Judgments, *Queen-Empress* v. *Nga Tha Ku*, is correct. As was pointed out in the case first above cited: "In cases of stone-throwing, whether any offence "at all has been committed or what offence has been committed, depends "on the circumstances of each case." In the present case one bottle struck the house, one fell near the house, and a stone was thrown which fell on the roof of the house, which the District Magistrate says was no doubt an iron roof. No one was hurt, nor is there any evidence noted, or referred to, tending to show that there was any likelihood that any person would be hurt. The missiles are said to have been thrown "at the house." There is nothing to show that human life or the personal safety of others was endangered, and these are facts which have to be proved to constitute an offence under section 336. It is not merely a question, as the District Magistrate appears to think, of the meaning of the words "rashly or negligently." If it were, and by virtue of the different rulings above cited, it appeared that different and inconsistent inferences could be drawn from the facts proved, then the latest ruling should be followed. There can be no doubt, I think, that, if a person threw a heavy stone on an iron roof and there happened to be a glass sky-light of which he was ignorant and about which he had not troubled himself to find out, or there happened to be a hole in a thatch roof, then in case the stone fell into the house and caused hurt, the person who threw it could be convicted under section 336, Indian Penal Code. He might not have intended or known it to be likely that he would cause hurt, and in that case section 323 would not apply. It does not appear in the present case that there was any intention by insulting or provoking any person to cause that person to commit a breach of the peace; and, further, as no doubt the stone-throwers intended to remain unseen and unknown, it cannot be said that they knew it to be likely that the provocation would cause the occupant of the house to commit a breach of the peace. For these reasons

Criminal Revision No. 925 of 1900.

November 3rd.

section 504, Indian Penal Code, appears to me to be inapplicable to the circumstances of this case.

The question remains whether, because the evidence on the record does not show that all the facts necessary to constitute an offence under section 336, Indian Penal Code, exist, it is incumbent on this Court to set aside the convictions and sentences. It has to be remembered that the case was tried summarily, but at the same time a convicting Magistrate is bound to record a brief statement of the reasons for his conviction, and, where the offence is not one which is defined in the way in which, for example, the offence of theft is defined, these reasons must include a statement of facts sufficient *primâ facie* to constitute the offence of which the Magistrate is about to convict. The complainant was examined at some length before issue of process, and, reading this statement with the judgment, the only material allegation is that on the occasion of a marriage ceremony, stones and bottles were thrown at the complainant's house. There is no statement that any one could have been hurt or endangered. The Magistrate has failed to observe the direction already cited to consider in each case the circumstances before coming to a conclusion as to whether an offence has been committed, and, if so, of what nature it is. He has simply, as he says, followed the ruling he cites; and, holding that an offence has been committed, decided that the offence fell under section 336, and not under section 504, Indian Penal Code. As the case has been brought to notice by the District Magistrate, it appears to me that I am bound, finding as I do that no offence is disclosed in the statement of the reasons for conviction or in any other part of the record, to set aside the convictions and sentences, and this is accordingly done. It is not to be understood from this order that under no circumstances could stone-throwing at a house be treated as an offence under section 504, Indian Penal Code, nor that the facts which might perhaps have been brought forward in this case, had the Magistrate thoroughly appreciated the ingredients necessary to be proved, could not have consittuted an offence under section 336, Indian Penal Code. A retrial might be ordered in this case, but it has not been asked for by the District Magistrate, nor does it seem necessary or advisable to direct a retrial.

Before the Chief Judge and Mr. Justice Bigge.

QUEEN-EMPRESS. *v.* NGA TUN AND NGA ON.

Criminal Revision No. 919 of 1900.

November 12th.

Murder—Indian Penal Code, s. 302—Claim to benefit of Exception 1 to s. 300.

A received several blows with a stick from B. A then ran into C's house, and meanwhile B went into D's house and there gave up his stick and clasp-knife. A then came out of C's house and being joined by his father E who inquired who had beaten his son, both went into D's house. The father E seized and held B and directed his son A to "do it;" whereupon the latter unclasped a knife and stabbed B in the neck severing the jugular artery and causing almost instant death.

Held—that A cannot claim the benefit of the first exception to section 300 of the Indian Penal Code, and that E must be taken to have aided and instigated the doing of the act done by A which amounted to murder.

Criminal Revision No. 919 of 1900.

November 12th.

THE Additional Sessions Judge has set out the facts of the case in his judgment. The two accused persons, Nga Tun and Nga Ôn, were charged respectively with murder and abetment of murder. The Additional Sessions Judge without detailing any reasons, found that "the facts as already stated clearly amount to culpable homicide not "amounting to murder by accused No. 1, Nga Tun, and to abetment by "accused No. 2, Nga Ôn, of the offence of causing hurt by a dangerous "weapon." The two accused have been called upon to show cause against enhancement, and have submitted a statement which, however, mainly deals with the evidence. Nga Tun had received several blows with a stick from the deceased, Nga Po Hlaing. He then ran into Nga Pwin's house, and meanwhile Nga Po Hlaing went to Nga It's house and there gave up his stick and a clasp knife. Nga Tun came out of Nga Pwin's house and, being joined by his father Nga Ôn who inquired who had beaten his son, both went into Nga It's house. Nga Ôn seized and held Nga Po Hlaing and directed his son, Nga Tun, to "do it"; whereupon the latter unclasped a knife and stabbed Nga Po Hlaing in the neck, severing the jugular artery and causing almost instant death. We do not see how, under the circumstances, Nga Tun can claim the benefit of the first exception to section 300, Indian Penal Code. It cannot be said if a man who escapes from a beating runs into another house, is joined by his father and points out his assailant, and then, at his father's direction, stabs his assailant, after opening a clasp-knife, that he is deprived of the power of self-control by grave and sudden provocation. We cannot doubt that Nga Tun knew also that his act was so imminently dangerous that it must in all probability cause death; and we consider that he should have been convicted of murder, the offence with which he was charged under section 302, Indian Penal Code. As to Nga Ôn, we think he must be taken to have aided and instigated the doing of the act done by Nga Tun, which amounted to murder. There is nothing to show that Nga Tun had any other weapon such as a stick or that Nga Ôn intended his son merely to pommel Nga Po Hlaing with his fists. In the absence of any such evidence he must be held responsible for what Nga Tun actually did,—unfortunately not at all an unusual act—and, being present, he is to be deemed to have committed the offence of murder and liable to the punishment prescribed for that offence.

We accordingly set aside the convictions and sentences passed on Nga Tun and Nga Ôn under sections 304 and 324—114, respectively, and find both accused persons guilty of the offence with which they stood charged, namely, of murder, section 302, Indian Penal Code, and we direct that Nga Tun and Nga Ôn be each sentenced to transportation for life.

Before the Chief Judge.

RUD MULL *v.* RAM CHANDRO KHEMKA.

Criminal Revision No. 943 of 1900.

November 13th.

Sanction to prosecute under s. 195, Criminal Procedure Code, in respect of evidence given in Civil Proceedings—Reversal of order granting or refusing sanction.

Where the evidence asserted to be false is given in a Civil Court, application for sanction to prosecute or for reversal of orders granting or refusing such sanction should be dealt with by the Civil Courts alone.

Such applications should be treated as Civil or Criminal Miscellaneous applications, as the case may be, and not as Civil or Criminal Appeals.

Criminal Revision No. 943 of 1900.

November 13th.

THE Extra Assistant Commissioner, Akyab, acting on the Criminal side as a Magistrate, refused sanction under section 195, Criminal Procedure Code, to prosecute under section 193, Indian Penal Code, in respect of evidence given on the *Civil* side of his Court. The Assistant Commissioner to whom appeals in Civil cases lie from the above Court, heard an application against the Extra Assistant Commissioner's order, treating the matter as a *Criminal* appeal, and granted sanction.

The Sessions Judge on further application, treating the matter as a Criminal Miscellaneous case, revoked the sanction, the Sessions Judge being the Court of Appeal both for Civil and Criminal cases from the Assistant Commissioner's Court.

Referring to the first portion of the application now made to this Court, I fail to see that the Sessions Judge has acted illegally. But I may remark that the applications should have been dealt with on the Civil side by all the authorites who have hitherto dealt with the case, because the evidence asserted to be false was given in a Civil Court; and a further application for the reversal of the order made under section 195, Criminal Procedure Code, should be treated as a Civil or Criminal Miscellaneous application, as the case may be, and not as a Civil or Criminal appeal.

The application in this Court is made in Criminal Revision, and, as the order of the Court it is asked to review was a Criminal one, this mode of application may be correct. Into the merits of the case it is needless to go. They have been considered by three Judges or Magistrates already. The application is rejected.

Before the Chief Judge.

Criminal Revision No. 916 of 1900.

November 15th.

MAUD ALLY *v.* QUEEN-EMPRESS.

Mr. *Bagram*—for the applicant.

Obstruction—Indian Penal Code, s. 283—Measure of the fine to be inflicted—Compensation—Criminal Procedure Code, s. 545.

There must be proof of some particular case of obstruction before a prosecution under section 283, Indian Penal Code, can be successful. A mere general allegation that a certain act committed has caused obstruction, but no evidence that some particular person or thing has been obstructed is not sufficient.

A fine should be calculated according to the nature of the offence and the means of the offender, and not according to the expenses which the complainant may reasonably or unreasonably incur on matters in some way connected with the offence.

Compensation awarded under section 545, Criminal Procedure Code, is meant to be applied in defraying expenses *properly incurred* in the prosecution.

THE gist of the offence of which the applicant has been convicted under section 283, Indian Penal Code, is that obstruction must be caused to some person in a public way. There is in evidence merely a general allegation that the accused has, by erecting two posts, made it impossible for carts to pass along the alleged road, but there is no evidence that any particular cart or person has been obstructed; and this is a point which must be proved. It is unnecessary to go into the further question whether the way in question was proved to

Criminal Revision No. 916 of 1900. November 15th.

be, as is alleged, a Public cart-way. The learned counsel has cited in support of his application for revision the following rulings of other Courts: Calcutta L. R., 462, I. L. R. Madras, 235, L. L. R. XXV Calcutta, 275, and they clearly lay down the necessity for proving a particular case of obstruction before a prosecution under section 183 for causing obstruction can be successful. The conviction and sentence passed on Nga Waing are set aside and the fine must be refunded. I am not aware of any authority for taking "as the measure "of the fine to be inflicted," the expenses the *ywathugyi* and other villagers have incurred "in one way and another in getting the "obstruction removed." The Magistrate accepted the statement of the *ywathugyi*, not in evidence, that they had "in one way or another" spent Rs. 45, and therefore fined the accused Rs. 50. The fine should be calculated according to the nature of the offence and the means of the offender, and not according to the expenses the complainant may reasonably or unreasonably incur on matters in some way connected with the offence. The Magistrate awarded the whole fine of Rs. 50 to the complainant. Section 545, Criminal Procedure Code, permits the Magistrate to order the whole or part of the fine recovered to be applied (*a*) in defraying expenses properly incurred in the prosecution: but in this case the Magistrate made no effort to ascertain what expenses actually were incurred in this prosecution, or whether they were *properly* incurred.

Before the Chief Judge.

Criminal Revision No. 369 of 1900. November 23rd.

QUEEN EMPRESS *v* NGA LU GYI AND SEVEN OTHERS.

Burma Gambling Act—Care required of Magistrates to follow proper procedure.

There is great danger that the gambling law as it stands may be made a means by unscrupulous persons of harassing and oppressing persons on charges of gambling. Magistrates should be careful to see that precautions are used to avoid unnecessary hardship and to follow strictly the procedure laid down by law.

THE Magistrate's order shows that he issued warrants for the arrest of persons accused on complaint of gambling, sections 11 and 12 Burma Gambling Act. The Magistrate recorded no reasons for issuing a warrant instead of a summons (section 90 Criminal Procedure Code). He did not examine the complainant as he should have done (section 200, Criminal Procedure Code). When the case came on trial, the Magistrate found that "there is not a particle of evidence to show "that Nga Lu Gyi kept a common gaming house on the alleged nights. "I must therefore acquit the accused."

Had the Magistrate examined the informer, who was a sergeant of police and named himself as a witness, it appears that the Magistrate would have found that the informer, at any rate, could not give evidence in support of the charge and he would then have dismissed the complaints, or have ordered, or made further inquiry, before harassing the accused persons by having them arrested and made to attend Court, some of them twice. Even if the Magistrate erroneously thought that an information by a police officer in a gambling case was a police report within the meaning of section 190 (*1*) (*b*), he should have been more

Criminal Revision No. 369 of 1900. November 23rd.

careful than he was in issuing any process, as it was clear that there had been no investigation of the case by the police since they had no power to investigate a non-cognizable offence. There is great danger that the gambling law as it stands may be made a means by unscrupulous persons of harassing and oppressing persons on charges of gambling, and Magistrates should be careful to see that precautions are used to avoid unnecessary hardship, and to follow strictly the procedure laid down by law.

Special Civil 2nd Appeal No 99 of 1900. November 26th.

Before the Chief Judge and Mr. Justice Birks.

MAUNG HMU *v.* MAUNG PO THIN.

Mr. *E. A. Villa*—for the appellant. 1 *Colonel Parrot*—for the respondent.

Buddhist Law—Title of eldest son who has obtained his one-fourth share to share thereafter in the remainder of the estate.

There is no authority for thinking that an eldest son, after having taken his one-fourth share of the estate of his deceased father, retains any right to a further future partition of, or any right in, the remainder of the estate except the right of pre-emption in case of sale by the remaining co-heirs. In such a claim for pre-emption the co-heirs would have to be made defendants or joined as plaintiffs.

Ma On and others v. *Ko Shwe O and others*, S. J. 378; *Ma Ngwe* v. *Lu Bu and another*, S. J. 76; *Maung Shwe Nyun and others* v. *Ma So and another*, and U. B. R., p. 97 of 1900; cited.

The plaintiff-respondent Maung Po Thin is the eldest son of Maung Kaing and Ma Seik Gaung, both now deceased. On the death of his father which occurred in 1256 B.E., Maung Po Thin sued his mother for a fourth share of the estate and obtained it. This is not denied. The mother and one son subsequently mortgaged the land now in dispute; and ultimately, after the mother's death, it was sold by the second son, apparently with the consent of the two youngest children, to one Maung Hmu. The defendant-appellant Maung Po Thin now sues Maung Hmu to redeem the land alleged to have been purchased outright by the latter on payment to Maung Hmu of the original sum for which the land was mortgaged by Ma Seik Gaung and Maung Tun Win her younger son.

The Court of First Instance in the judgment states that plaintiff sued to enforce a right of pre-emption, but this is not quite correct. In the plaint plaintiff made no mention of a sale of the land, and, as already stated, he sued to be allowed to redeem. The Judge, however, decided that plaintiff Maung Po Thin had already obtained his share in the estate of Maung Kaing on the death of the latter, and that the remainder of the property vested in the surviving parent Ma Seik Gaung for herself and the younger children.

The Judge further held that the disposal of the land, which was part of the ancestral property, first by Ma Seik Gaung with the apparent consent of her remaining children during her lifetime, and subsequently by Maung Tun Win with the consent of the other two younger children, was valid and could not be disturbed by Maung Thin, who has admittedly got his share on his father's death. The Judge relied on Special Court ruling *Ma On and others* v. *Ko Shwe O and others* (S. J. 378).

Special Civil 2nd Appeal No 99 of 1900. November 26th.

The Lower Appellate Court held that the Court of First Instance was wrong in thinking that plaintiff had lost his right to share in undivided ancestral property merely because he had obtained a one-fourth share as the eldest son. Undivided ancestral property, the Judge remarked, is to be kept in the family as much as possible, the chief principle being that alienation to strangers is always to be avoided as long as the heirs and co-heirs have the power to keep the property amongst themselves. Even when ancestral property has passed into the hands of strangers the heirs of the original stock still retain the right of pre-emption "(*see Mi Tè* v. *Po Maung*, S. J. p. 41, *Nga Myaing* v. *Mi Baw*, S. J. p. 39, *Ma Ngwe* v. *Lu Bu*, S. J., p. 76)."

The Judge also held the sale to be invalid because made by Maung Tun Win alone. Even had all three younger children joined in the sale, the land would, the Judge said, have to be offered for sale to appellant first before it could be sold to a stranger. Redemption was allowed.

The appeal in this Court is based on the following grounds:—

(*a*) that plaintiff having got his quarter share in the estate is no longer a co-heir and is not entitled to pre-emption;

(*b*) that as the property was made over to the appellant (defendant) for the maintenance of the remaining heirs, the respondent (plaintiff) had no right of pre-emption;

(*c*) that the remaining heirs were not bound to offer the property to the plaintiff-respondent before making it over to appellant;

(*d*) that the validity of the sale was irrelevant to the question in issue.

The main question is whether plaintiff having taken his one-fourth share is still a co-heir to the remainder of the estate of Maung Kaing, and on this point we agree with the Judge of the Court of First Instance. Plaintiff claimed a partition on the death of his father, as he, the eldest son, was entitled to do, and he obtained it. From the ruling already cited (S. J. p. 378) and from the authorities quoted in Chapter VI, section 30 of the Digest of Buddhist Law, it appears that this is a real partition of the estate, and there is no authority for thinking that the eldest son, after taking his one-fourth share, retains any right to a further future partition or any right in the remainder of the estate, except the right of pre-emption in case of sale by the remaining co-heirs, that is, in this case, by the mother and younger children (*see Ma Ngwe* v. *Lu Bu*, p. 76 S. J., *Maung Shwe Nyun and others* v. *Ma So and another*, U. B. R., p. 97 of 1900). In such a claim for pre-emption the co-heirs would have to be made defendants or joined as plaintiffs. Again, to set aside the mortgage or the sale as made without consent of all the three younger children these younger children should be made parties to the suit The suit was not for pre-emption nor to set aside the sale, and, as the co-heirs were not made parties in any way to this suit, claims to pre-emption or annulment of the sale cannot now be dealt with. No suggestion has been made by the learned Advo-

Special Civil 2nd. Appeal No 99 of 1900. November 26th.

cates engaged in the appeal that the suit should be remanded for parties to be added and for these matters to be dealt with and decided. The suit is one to redeem mortgaged land, and, treating the land for purposes of this suit as mortgaged land, it appears that the mother and children had a right to mortgage land, without plaintiff's consent, he having ceased, when the partition he claimed was effected, to be a co-heir in the remaining property, and that he has no right to redeem.

It is very possible that before selling the land after the death of the mother, the co-heirs should have given plaintiff as one previously interested in the ancestral property the option of redemption or purchase (*see Ma Ngwe* v. *Lu Bu and another*, S. J. p. 76), and it is possible, if this sale was secret, or was invalid for want of consent of all the co-heirs, and if plaintiff could be said to have promptly asserted his claim to pre-emption, that he could still enforce the right against his brothers and sisters and the defendant, but, as already stated, this matter cannot in the suit as constituted now be determined. In case a suit for pre-emption in respect of the sale to Maung Hmu, the defendant, failed, it is still possible that in case Maung Hmu wished to sell, the plaintiff could claim pre-emption. But plaintiff's rights in the property in dispute are at present only those which survive to him as a member of the family formerly interested in the ancestral property of which this is part. He cannot, after the partition he obtained, claim the status of a co-heir of the land in question.

The suit must be dismissed with costs.

Criminal Revision Na. 56 of 1900. December 2nd.

Before the Chief Judge.

QUEEN-EMPRESS *v.* NGA PO MYA.

Exposing person to insult a woman—Obscene act done in a public place—Double conviction—Indian Penal Code, ss. 294—509, s. 71.

Where the accused exposed his person with intent to insult a woman, and that obscene act done in a public place caused annoyance to others,

Held,—that although the act falls under sections 509 and 294 of the Indian Penal Code, only one conviction and sentence should be passed.

IN this case all that the evidence proved against accused was that while under the influence of liquor he exposed his person with intent to insult a woman, and that that obscene act done in a public place caused annoyance to others. The question is whether the Magistrate was right in convicting the accused and separately sentencing him under section 294 and section 509 Indian Penal Code. The evidence does not show that the accused committed any additional or separate offence under section 294 when subsequently lying in the road. There was, therefore, only one act. It is true this act falls within both sections, but there was only one act and the first proviso of section 71 Indian Penal Code, applies to the case.

The conviction and sentence under section 509 are set aside. The sentence of one month's rigorous imprisonment under section 294 Indian Penal Code, appears to have been unnecessarily severe.

Before the Chief Judge.

Criminal Revision No. 1017 of 1900. December 4th.

QUEEN-EMPRESS *v.* NGA PO KYE.

Whipping—Postponement of sentence of—Accused under sentence of imprisonment in another case—Criminal Procedure Code, ss. 390, 391 (1).

A Magistrate postponed a sentence of whipping only passed in one trial until the expiry of a sentence of six months' imprisonment passed in another trial.

The direction contained in s. 390 Criminal Procedure Code, that when the accused is sentenced to whipping only, the sentence of whipping shall be executed at such place and time as the Court may direct, is intended for the case where the accused is not already under another sentence of, or is not at the same time sentenced to, imprisonment.

When the accused is under sentence of imprisonment in another case the Magistrate should, when passing the order required by s. 390, follow the analogy of s. 391 (1) as far as may be. To postpone the whipping to the end of a considerable term of imprisonment is illegal.

THE 1st class Magistrate convicted the accused under section 380, Indian Penal Code, and sentenced him to suffer a whipping, which he directed should be inflicted on the expiry of a term of six months' rigorous imprisonment to which this same accused had been sentenced in another case.

No doubt the Magistrate thought he was acting in accordance with the provisions of section 390 Criminal Procedure Code, which states that when the accused is sentenced to whipping only, the sentence shall be executed at such place and time as the Court may direct. This direction is intended for the case when the accused is not already under another sentence, and is not at the same time sentenced to imprisonment. When he is also sentenced to imprisonment, section 391 Criminal Procedure Code is applicable; and, when the accused is under sentence of imprisonment in another case, the Magistrate should, when passing the order required by section 390, follow the analogy of section 391 (1) as far as may be.

To postpone the whipping to the end of a considerable term of imprisonment is illegal. In the present case, the sentence of whipping not being appealable, a proper direction would have been that the whipping should be inflicted as soon as practicable in the jail in which the sentence of imprisonment was being or was to be carried out.

Before Mr. Justice Fox.

Civil Second Appeal No. 12 of 1900. December 10th.

AHMED ALLY *v.* MAUNG SHWE THIN AND MA SHWE MA.

Messrs, *Burjorjee* and *Dantra*—for appellant.

Mr, *G. B. Dawson*—for respondents.

Sale in execution of decree—Title of purchaser—Stranger whose property is sold behind his back without authority—Suit to set sale aside—Indian Limitation Act, Schedule II, Division I, Article 12 (a).

If property put up for sale in execution of a decree is not in fact the property of the judgment-debtor, the sale does not affect the rights of the real owner in any way. The confirmation of a sale under section 312 Civil Procedure Code is only "as regards the parties to the suit and the purchaser."

No title is guaranteed to the purchaser at an execution sale beyond that he shall have the rights and interests in the property which belong to the judgment-debtor, or in other words, that the judgment-debtor shall not recover back the property—*Sowdamini Chowdhrain* v. *Krishna Kishor*, 4 B. L. R. F. B., 11 followed.

Civil Second Appeal No. 12 of 1900. December 10th.

A stranger whose property is sold behind his back without any authority does not need to have the sale set aside at all. Even if he does seek to have it set aside, Article 12 (*a*) of the 1st Division of the 2nd Schedule to the Indian Limitation Act, 1877, does not apply.

Parekh Ranchor v. *Bai Vakhat*, I. L. R., 11 Bom., 119, and *Narasimha Naidu* v. *Ramasami*, I. L. R., 18 Mad., 478, followed.

THE suit out of which this appeal arises was one for possession of land between owners of two adjoining plots and the dispute, in effect, was as to which of the plots the disputed land rightly formed part of The plaintiff had bought his plot from one Nga Lan Ba: the defendant had bought his plot from a person referred to as Moulvie, who had bought it at a sale in execution of a decree against Banya, obtained by one Maud Ally.

The original Court found that the disputed piece fell within the plot owned at one time by Nga Lan Ba, and accordingly gave the plaintiff a decree for possession. The Lower Appellate Court held that the only point to be decided was whether the disputed piece was included in the land sold by the Court in execution of the decree against Banya, and that Nga Lan Ba not having made any application to set aside the sale, and no suit having been brought within a year from the confirmation of the sale, the present suit was barred by Article 12 (*a*) of the 1st Division of the 2nd Schedule to the Indian Limitation Act, 1877.

In my judgment this decision was erroneous. Nga Lan Ba was not a party to the suit in execution of the decree in which the property was sold, or purported to have been sold: if he had been aware that a portion of his property was included in the property attached as being Banya's property, he might, no doubt, have preferred a claim or objection under section 278 of the Code, and after the sale he might have applied to have the sale set aside under section 311 of the Code, but he was not bound to take either step, and it certainly would not have been wise for him to have applied under section 311 in view of the limited grounds to which an application under that section is confined which grounds would have been inapplicable to the case.

If any portion of the property put up for sale was not in fact the property of the judgment-debtor, the sale did not affect the rights of the real owner of that portion in any way. The confirmation of a sale under section 312 is only "as regards the parties to the suit and the "purchaser."

No title is guaranteed to the purchaser at an execution sale beyond that he shall have the rights and interests in the property which belong to the judgment-debtor, or in other words that the judgment-debtor shall not recover back the land,—*Sowdamini Chowdhrain* v. *Krishna Kishor*, 4 B. L. R., F. B., 11. Although in the case of *Saryanna* v. *Durgi*, I. L. R., 7 Mad., 258, it was held that a suit by the rightful owner of property to recover property which had been improperly sold at a Court sale was barred by limitation, because it was not brought within a year from the date of confirmation of the sale, this decision was doubted in a subsequent case (*Narasimha Naidu* v. *Ramasami*, I.L.R., 478) in the same High Court, and I agree with the learned Judges in this latter case that a stranger, whose property is

Civil Second Appeal No. 12 of 1900. December 10th.

sold behind his back without any authority, does not need to have the sale set aside at all; and further that even if he does seek to have it set aside, the reasoning in the case of *Parekh Ranchor* v. *Bai Vakhat*, I. L. R. 11 Bom., 119, leading to the conclusion that the article of the 2nd Schedule to the Limitation Act above referred to does not apply is correct.

In that case the learned Judges say at page 123: "The Subordinate "Judge has, in our opinion, wrongly applied Article 12, clause (*a*) of "Schedule II of Act XV of 1877 to the case; for though the plaintiff "seeks to set aside a sale in execution of a decree, he does so, not as one "who would have been bound by the sale, if the suit had not been "brought—but in order to obtain a declaration that he is not bound by "it. The rule in Article 12, clause (*a*) of Schedule II of the Act is the "same as in clause (*3*) of section 1 of Act XIV of 1859, upon which a "strict construction was put by Sir R. Couch in *Lalchaund* v. *Sakaram* "5 Bom. H. C. Rep., A. C. J., 139. It was there held that the con- "cluding words of clause (*3*), namely 'the period of one year from the "date at such sale was confirmed or would otherwise have become final "and conclusive, if no such suit had been brought' are inapplicable to "a suit where a dispossession is the cause of action, which may not have "taken place till some time after the confirmation of sale. 'They "seem,' Sir R. Couch said, 'to refer to a suit by a party to the suit "in which the execution issued or by the purchaser, who are bound by "the confirmation of the sale, and *not to a suit by a person not bound "by it.*' And a similar construction must, we think, be put on the pre- "sent Act. The policy of the Legislature requires that a person who "has once commenced to litigate should carry his litigation to an end "within a reasonable time. If this be the reason for the one-year rule, "it applies as well to one who connects himself with litigation either by "intervention to prevent the sale of property under an attachment, or "by becoming a purchaser of property sold in execution, as to a party "to the litigation. It has no necessary application to a person who has "not been connected in any such way with litigation."

Nga Lan Ba was not connected in any way with the litigation between Maud Ally and Banya, and therefore if he really owned the property now in dispute, his right to it was not in any way affected by anything done in the course of that litigation. I set aside the decree of the Lower Appellate Court, and remand the case to the Distric Court for decision upon the issue whether the land was the property of Nga Lan Ba through whom the plaintiff claims title. The defendant must pay the plaintiff's costs of this appeal.

Before the Chief Judge.

QUEEN-EMPRESS *v.* HAMZA.

Criminal Revision No. 507 of 1900. December 15th.

Theft—Robbery—'Same' offence—Whipping Act, s. 5.

Robbery, although it sometimes includes theft, must be considered a distinct offence from theft, for purposes of the Whipping Act.

THE accused, who had previously been convicted of theft, section 379, and of house-breaking, section 457, I.P.C., was at this trial con-

Criminal Revision No. 507 of 1900. December. 15th.

victed of robbery, section 392, I. P. C., and was sentenced by the Magistrate to whipping in addition to imprisonment. The District Magistrate in revision remarked that "the sentence was suitable." The Additional Sessions Judge, in appeal, reduced the sentence of imprisonment, but maintained the whipping.

The sentence of whipping in addition to imprisonment was illegal. It may be presumed that the Magistrate thought the sentence of whipping was legalised by section 3 of the Whipping Act. This section runs; "Whoever, having been previously convicted of any one of the "offences specified in the last preceding section, shall again be convicted of the same offence, or of any offence included in the same group of "offences, may be punished with whipping in lieu of or in addition to "any other punishment," etc. The present conviction was for robbery section 392, Indian Penal Code, and this offence is not mentioned in section 2 of the Whipping Act: but robbery includes theft or extortion, and, on this ground, probably, the Magistrate, the District Magistrate and the Additional Sessions Judge considered the sentence to be legal. There can, I think, be no doubt that robbery, although it sometimes includes theft, must be considered a distinct offence from theft, and theft from robbery. An *offence* denotes a thing made punishable by law, and as the punishments for theft and robbery are different, they cannot be treated as the same offence. It is quite clear that in Group A of section 2, theft as a clerk or servant which is ordinary theft *plus* certain circumstances is not regarded as the *same offence* as theft. The wording of section 3 is sufficient to show this. I have had occasion to draw attention to several illegal sentences of whipping lately. Magistrates should be careful to interpret the law strictly. The sentence of whipping has no doubt been suffered, and that of imprisonment was considerably reduced by the Additional Sessions Judge. It is not necessary to interfere further.

Before the Chief Judge.

Criminal Revision No. 711 of 1900. December 18th.

QUEEN-EMPRESS *v.* NGA AUNG NYUN & 24 OTHERS.

Rioting—Fight between two opposing parties—Common object—Separate trials—Procedure—Criminal Procedure Code, s. 233.

A fight between two parties cannot be properly described as being the "same transaction."

Queen-Empress v. *Chandra Bhuiya*, I. L. R. 20 Cal. 537, followed.

Where therefore the accused who formed parts of two bands of different villages were tried together and convicted of the offence of rioting armed with a deadly weapon,

Held,—that as the two opposing bands had not the *same* common object distinct offences were committed and separate trials were necessary.

THE accused, who formed parts of two bands of different villages, were tried and convicted together under section 148, Indian Penal Code. The trial appears to have been irregular, because by the definitions in sections 141 and 146, *a common object* is required for the offence of rioting. Here there were two common objects. The two opposing bands cannot be said to have had the same common object. Distinct offences were committed, and under the provisions of section 233, Criminal Procedure Code, separate trials were necessary unless the

exceptions set out in sections 234, 235, 236 and 239 applied to these offences. *Criminal Revision No. 711 of 1900. December 18th.*

Probably the section of the Code which would be cited by the Magistrate in support of his procedure is section 239, Criminal Procedure Code. But a fight between two parties cannot be properly described as being the "same transaction" (*see* I. L. R., XX Cal., 537, *Queen-Empress* v. *Chandra Bhuiya and others*).

The accused could all legally have been tried together for an offence under section 160 ~~Criminal Procedure Code.~~ J.P.C

Before Mr. Justice Birks.

Criminal Appeal No. 272, of 1900. December 24th.

NGA SHWE THAW AND NGA SHWE PAW *v.* QUEEN-EMPRESS.

Concurrent sentences—Aggregate sentence—Criminal Procedure Code, s. 35 (3).

Where an accused was sentenced in one trial to undergo 3 years' rigorous imprisonment under section 380, Indian Penal Code, and 2 years under section 215 of the same Code, both sentences having been ordered to run concurrently.

Held,—that in considering the question whether an appeal from such sentences lies to the Chief Court or to the Court of Session, the real test is the maximum period of imprisonment that can be undergone under a given judgment, and that in this case the maximum period being 3 years, the appeal lay not to the Chief Court but to the Court of Session.

Nga U v. *Queen-Empress*, P. J., 268, referred to.

THE accused in this case has been sentenced in one trial to undergo three years' rigorous imprisonment under section 380, Penal Code, and two years under section 215 of the same Code. The question is whether the appeal lies to the Sessions Judge or to this Court as the sentences have been ordered to run concurrently. I am of opinion that the real test is what is the maximum period of imprisonment that can be undergone under a given judgment. In this case the maximum period is three years. The word "aggregate" in section 35 (*3*), Criminal Procedure Code, can hardly refer to sentences ordered to run concurrently. (*Nga* U v. *Queen-Empress*, *268*, *P. J.*) The ruling relied on by the Sessions Judge was given under the old Code of 1882 when it was not permissible to make sentences run concurrently. The Sessions Judge would not be able, on appeal, to order the sentences to run consecutively as this would be to enhance the sentence. The appeal in my opinion lies to the Sessions Judge and will be returned for disposal accordingly.

Before Mr. Justice Fox.

Criminal Appeal No. 8 of 1901 January 7th.

NGA TUN THA *v.* QUEEN-EMPRESS.

Power to fine under s. 75, Indian Penal Code—"Sentence of imprisonment exceeding four years"—Substantive sentence of imprisonment—Criminal Procedure Code, s. 408, provisio clause (b).

Section 75, Indian Penal Code, contains no power to fine for an offence punishable under Chapter XII or Chapter XVII when such offence is committed after a previous conviction of an offence punishable under one of those chapters.

The words "sentence of imprisonment exceeding four years" in clause (*b*) of the proviso to section 408 Criminal Procedure Code, must be taken to mean the substantive sentence of imprisonment apart from any sentence of fine or imprisonment in default of payment of the fine. *Queen-Empress* v. *Shumsher Khan*, I. L R., 6 Cal. 624, followed.

THE appellant in this case was convicted by the District Magistrate of Hanthawaddy of an offence punishable under section 379 of the

Criminal Appeal No. 8 of 1901. January 7th.

Indian Penal Code, and liable to punishment for the offence under section 75.

In exercise of powers under section 30 of the Code of Criminal Procedure, the Magistrate passed a sentence of four years' rigorous imprisonment and fine of Rs. 50, or in default of payment of such fine a further term of six months' rigorous imprisonment.

As the case is before me, I will deal with it first in the exercise of revisional powers, and I hold that the sentence of fine and imprisonment in default was illegal.

No doubt in the case of conviction of an offence punishable under section 379, the sentence may include both imprisonment and fine, but the Magistrate in this case acted so far as the sentence went under section 75, and this section contains no power to fine for an offence punishable under Chapter XII or Chapter XVIII when such offence is committed after a previous conviction of an offence punishable under one of those chapters.

I accordingly set aside the sentence of fine and imprisonment in default.

The sentence which stands is one of four years' rigorous imprisonment, and an appeal against that lies to the Sessions Court and not to this Court under clause (*b*) of the proviso to section 408 of the Code of Criminal Procedure. Even if the sentence of fine had been legal, I am of opinion that the appeal would have lain to the Sessions Court, because the words "sentence of imprisonment exceeding four years" must, I think, be taken to mean the substantive sentence of imprisonment apart from any sentence of fine or imprisonment in default of payment of the fine. See *Empress* v. *Shumsher Khan*, I. L. R., 6 Cal., 624.

Let a copy of this order be sent to the District Magistrate with his proceedings, and the petition of appeal be returned to the Superintendent of the Jail, with a copy of this order, and a request that he will inform the appellant that the appeal is not admitted by this Court for the reasons given in the order, and that any appeal he wishes to make should be made to the Sessions Court.

Criminal Revision No. 192-6—C of 1901. January 14th.

Before the Chief Judge.

QUEEN-EMPRESS *v.* NGA SHWE E AND FOUR OTHERS.*

Information laid by Police officer—Complaint—Burma Gaming Act, ss. 11, 12, Criminal Procedure Code, ss. 4, 190.

"Police report" means a report made by a police officer under Chapter XIV of the Code of Criminal Procedure in a case which he is authorized to investigate.

An information laid by a police officer of gambling contrary to sections 11 and 12 of the Burma Gaming Act, not being a 'police report' in the sense in which this term is used in section 4 or section 190 of the Criminal Procedure Code, should be treated as a 'complaint.' The complainant should be examined, and if necessary action should be taken under section 202 Criminal Procedure Code, before issue of process.

THIS is one of a type of case now become common under the new Gambling Act. An information was laid by a police officer of gambling contrary to sections 11 and 12 of the Act, and the Magistrate without

* Over-ruled by *King-Emperor* v. *Po Thin*, 2 L. B. R., 146.

examining the police officer as a complainant, or making any inquiry of any kind, issued summons. The charge was not proved and accused were acquitted. The information was not a police report in the sense in which this term is used in section 4 or section 190, Criminal Procedure Code. Police report means a report made by a police officer under Chapter XIV in a case he is authorised to investigate. The information should be treated as a *complaint* and the complainant should be examined, and, if necessary, action should be taken under section 202 Criminal Procedure Code, before issue of process. To act as the Magistrate has done in this and several other similar cases is to put into the hands of unscrupulous persons a power of harassing, annoying, and extorting money from innocent persons. Rewards are given in these cases and the temptation to lodge false information is therefore increased.

Criminal Revision N. 192-6—C of 1901. January 14th.

Before the Chief Judge.

QUEEN-EMPRESS AND MAUNG SHWE LON *v.* MAUNG GALE.

Criminal Revision No. 805-12—C of 1901. January 16th.

Power of Magistrate to refer a case for trial by village headman—Criminal Procedure Code, s. 192.

A Magistrate has no power to refer a case for trial by a headman of a village. His powers of transfer under section 192 Criminal Procedure Code, permit of reference to a subordinate Magistrate. But a village headman is not a Magistrate under the Code.

A WRITTEN complaint was made to the Subdivisional Magistrate of offences under sections 324, 504, 109, Indian Penal Code.

Without examining the complainant the Magistrate, on the 8th December 1900, referred the case to the headman for disposal. It appeared then that the headman was related to the persons concerned; and on the 10th December the Subdivisional Magistrate examined the complainant and ordered summons to issue for an offence under section 323 Indian Penal Code, and proceeded to try the case himself. He simply erased his previous order. He should, supposing he had the power to transfer or withdraw the case, have recorded an order withdrawing the case for trial by himself. The Magistrate had, however, no power to refer the case for trial by a headman. His powers of transfer under section 192 Criminal Procedure Code, permit of reference to a Subordinate Magistrate; and a village headman is not a Magistrate under the Code. Further, the complaint was on the face of it one regarding an offence under section 324 Indian Penal Code, and a headman has, so far as I can ascertain, no authority to try such an offence.

There is no need to do more than point out these errors of law.

Before the Chief Judge.

QUEEN-EMPRESS *v.* NGA SAW AND FIVE OTHERS.*

Criminal Revision No. 210-10—C of 1901. January 16th.

Written information by police officer—Police Report—Criminal Procedure Code s. 190—Being found in common gaming house—House not entered under warrant—Accused persons made witnesses—Burma Gaming Act, s. 8.

A written information given by a police officer not himself a witness, who is not examined as a complainant, is not a "police report" such as is meant in section

* *Pro tanto* over-ruled by *King-Emperor* v. *Po Thin*, 2 L. B. R., 146.

Criminal Revision No. 210-10—C of 1901 January 16th.

190 Criminal Procedure Code. "The police report" is a report made by a police officer in a case which he may investigate under Chapter XIV.

Where a Magistrate at once issued process on a mere written information of this kind, and the evidence offered being insufficient, on the application of the police made two of the persons accused witnesses in the trial of an offence under section 10 of the Burma Gaming Act,

Held,—that the provisions of sections 8 of that Act can be applied only to cases in which a house or place has been entered under a warrant issued by a duly empowered Magistrate or the District Superintendent of Police under section 6.

THIS case of gambling, section 10 of the Burma Gambling Act, was taken up by the 1st class Magistrate on a written information given by a police officer, not himself a witness. He was not examined as a complainant nor was any inquiry made under section 202, Criminal Procedure Code, but the Magistrate at once issued process on this mere information. The Magistrate was not empowered to act under section 190 (1) (*c*), nor did he do so. If he had, then, of course, section 191, Criminal Procedure Code, would have applied. An information of this kind is not a police report such as is meant in section 190 Criminal Procedure Code. The police report is a report made by a police officer in a case which he may investigate under Chapter XIV.

Often these cases are brought out of spite, or falsely in hope of reward, and a Magistrate should be careful before he issues process compelling attendance of the persons accused, or he frequently causes unnecessary harassment to innocent persons, and facilitates oppression and extortion by unscrupulous persons.

In the present case the evidence offered being insufficient, the Magistrate, "on the application of the police," made two of the accused persons witnesses. This was illegal. Section 337 of the Code has no application to a case of this kind: and section 8 of the Gambling Act, under which the Magistrate informs me he acted, applies only to cases in which a house or place has been entered under the provisions of section 6, that is, under a warrant issued by a duly empowered Magistrate or by the District Superintendent of Police.

Setting aside this inadmissible evidence of accomplices, there was not sufficient evidence for a conviction.

The convictions and sentences are set aside and the fines must be refunded.

Criminal Revision No. 99 of 1901 January 17th.

Before Mr. Justice Birks.

QUEEN-EMPRESS *v.* NGA TUN HLA AND 17 OTHERS.

Adjournment of trial—Reasonable cause—Criminal Procedure Code, s. 344.

There is no authority for adjourning the trial of a case till all the absconding accused are found. An accused has the right to have the evidence against him recorded at as early a period as possible. The absence of some of the accused is not a "reasonable cause" for adjourning the enquiry into the guilt of the accused who are present.

THIS case was brought to my notice while inspecting the Courts at Nyaunglèbin. Twenty-three persons were charged by Police Sergeant

Criminal Revision No. 99 of 1901. January 17th.

Maung Po Saw with having gambled at *Anidaung* in the house of Nga Tun Hla on the night of the 21st October 1900. The Sergeant gave a written information to the Magistrate on the 24th, and he was examined on oath on that date. He deposed to the fact of gambling going on, but it is not clear from his original deposition that Maung Tun Hla's house was used as a common gaming house. The Magistrate directed summonses to issue on the 24th, returnable on the 6th November. He was himself away on that date, but returned from the Departmental Examination the following day. With the exception of eight men, the accused had appeared on the 6th: the others could not be found. The Magistrate issued a proclamation under sections 87 and 88 Criminal Procedure Code, for the eight men who could not be found, and warrants of arrest for the others except three who appeared later. The case was adjourned till the 3rd December. On that date it was adjourned again till the 20th December, as four of the accused against whom proclamations were issued were not in attendance, and Po Saw and another witness for the prosecution were absent. It appears from the diary that the witnesses for the prosecution were in attendance on the 7th November, and Tun Hla and two other accused persons appeared in Court. The Magistrate should have proceeded with the case then and examined the witnesses to see if the complaint was well founded. The accused were not actually called upon to plead to the charge till the 20th December. The case was then tried, six witnesses for the prosecution were examined, and all the accused acquitted. The Magistrate found that it was an unauthorised raid effected by show of authority. This fact should have been discovered before process was issued at all, and certainly before proclamations were issued under section 87. The *Ywathugyi* had no authority to order the doors to be opened. It is only when the provisions of section 6 of the Act have been complied with that the presumption arising from the discovery of gaming instruments can be drawn. The Magistrate disbelieved the evidence of the approver Po Ka. Under the circumstances I think the Magistrate was right in acquitting the accused as it would not be safe to convict on such evidence. I am not satisfied on reading the evidence that this is altogether a false case and that unlawful gambling did not go on. There was no authority for adjourning the case till all the absconders were found. The accused who did not answer to the summonses issued could have been tried separately. This charge has been hanging over the accused who first appeared for about two months. Under section 242 Criminal Procedure Code, the Magistrate is required to question the accused as to the particulars of the offence when he appears or is brought before him. Section 344 enables a Magistrate to adjourn a case for a reasonable cause. In *Manikam* v. *Queen-Empress*, I. L. R., 6 Madras 63, it was held that an accused has the right to have the evidence against him recorded at as early a period as possible. The absence of some of the men suspected of gambling was not "a reasonable cause" for abjourning the enquiry into the guilt of the fifteen men who appeared on the 6th November. The papers can be returned with these remarks.

Criminal Revision No. 241 of 1901. January 25th.

Before the Chief Judge.

QUEEN-EMPRESS *v.* NGA PO SIN AND SIX OTHERS.

Gambling—Accused person required by Magistrate to give evidence—House not searched under s. 6—Burma Gambling Act, s. 8—Criminal Procedure Code, s. 337—Evidence of accomplice.

Section 8 of the Burma Gambling Act does not enable a Magistrate to call on an accused person to give evidence in the case of a house which was not entered under the provisions of section 6 of that Act, and section 337 Criminal Procedure Code cannot be applied to an accomplice in cases under the Gambling Act.

THE Magistrate will report why he thought it necessary to issue warrants and not summonses, and why he did not observe the provisions of section 90, Criminal Procedure Code.

Maung Nge, the informer, was discredited by other witnesses, though he may have been speaking the truth. The Magistrate trying the case relied on Nga Tha Han's evidence. This man was one of the accused. Section 337 Criminal Procedure Code does not apply to a case of this kind, and section 8 of the Gambling Act did not enable the Magistrate to call on an accused person to give evidence in this case, because the house was not entered under the provisions of section 6 of the Act. Besides this, as the District Magistrate points out, the evidence of Nga Tha Han, even if admissible, would be that of an accomplice, and would therefore require substantial corroboration. The fines appear to me, though the District Magistrate in referring the case has not expressed such an opinion, to be too heavy for the offence supposed to be proved.

As the District Magistrate recommends, the convictions and sentences are set aside.

Criminal Reference No. 1 of 1901. February 13th.

Before the Chief Judge and Mr. Justice Bigge.

CROWN *v.* EBRAHIM AHMED DAWOODJEE.

Messrs. *Eddis, Connell and Lentaigne*—for accused.
The Government Advocate—for the Crown.

Bail—Discretion of High Court or Court of Session as to granting—Criminal Procedure Code, s. 498.

Section 498 Criminal Procedure Code gives a High Court or Court of Session an unlimited judicial discretion in dealing with an application for admission to bail.

THE following question has been referred under section 11 of the Lower Burma Courts Act, 1900, to a Bench by Mr. Justice Fox sitting singly, namely.—

"Is a High Court or Sessions Court dealing with an application for admission to bail under section 498 of the Code of Criminal Procedure bound to follow the rules stated in section 497 of that Code as to when a person accused of a non-bailable offence may and may not be admitted to bail? Or have such Courts an unlimited judicial discretion when dealing with such an application?"

After reading the order of reference and hearing the arguments of Mr. Eddis, the learned counsel for the accused person immediately concerned, and of Mr. Giles, the learned Assistant Government Advocate, on behalf of the Crown, our decision is that section 498 Criminal Procedure Code gives a High Court or Court of Session an unlimited judicial discretion in dealing with an application for admission to bail.

Before Mr. Justice Birks.

SOOBA REDDY *v.* CROWN.

Criminal Revision No. 246 of 1901. February 16th.

Mr. *Broadbent*—for the applicant.

Section 354 of the Indian Penal Code, which is punishable with two years' rigorous imprisonment, is not specified in either section 260 or 261 of the Criminal Procedure Code as an offence that can be tried summarily by a Bench,

Held,—that where such an offence was tried by a Bench, the consent or waiver of the accused could not give the Magistrate jurisdiction to try the offence summarily.

THIS application for revision was admitted by Mr. Justice Fox who has admitted the accused to bail. The case comes before me for disposal. The accused was convicted under section 354 of the Penal Code by the Rangoon Bench of Magistrates and sentenced to seven days' rigorous imprisonment and a fine of Rs. 25. He appealed to the District Magistrate who summarily dismissed the appeal. In the original information to the Police, section 352 was quoted, and no mention is made of an indecent assault on the complainant's wife. The petitioner was referred to Court and preferred a complaint under section 450 to the Eastern Subdivisional Magistrate, who examined the complainant and ordered summons to issue under sections 352 and 448. The case was subsequently transferred to the Bench, who charged the accused under section 354 and tried him summarily. Now section 354 is punishable with two years' rigorous imprisonment and is not specified in either section 260 or 261 Criminal Procedure Code, as an offence that can be tried summarily by a Bench. Under section 530 (*g*) the proceedings are therefore void. I have examined the proceedings to see if there are any grounds for directing a fresh trial. The accused has been two days in jail before he was released, and though a trespass appears to have been committed, he has been adequately punished. I must express my dissent from the remark of the District Magistrate that the consent of the accused could give the Magistrates jurisdiction to try the offence summarily. In the *Queen* v. *Bholanath Sen*, 2 Cal., 23, it was held "that if proceedings were substantially bad in themselves, the defect will not be cured by any consent or waiver of accused." The conviction is set aside, the bail bond will be cancelled, and the fine, if paid, refunded.

Before the Chief Judge.

CROWN *v.* VALU.

Criminal Revision No. 313 of 1901. February 20th.

Age of accused—Substituted order of detention in reformatory for imprisonment—Order of duly empowered Magistrate—High Court's powers of interference—Reformatory Schools Act, s. 16.

Where an accused gave his age as 14 years, and a duly empowered Magistrate, though having reasons to suspect this statement as being below the mark, accepted it and sentenced him in lieu of two years' rigorous imprisonment to be detained in a Reformatory School until he attains the age of 18 years,

Held,—that the case was not one of an order illegal on the face of it or made without jurisdiction with which the High Court could interfere, and that section 16 of the Reformatory Schools Act debars the High Court from altering the order passed by the Magistrate with respect to the age of the offender or the substitution for imprisonment of an order for detention in a Reformatory School.

Criminal Revision No. 313 of 1901. February 20th.

A sentence or order by a Magistrate should be as precise and definite as possible, and should not leave the term of detention to be ascertained by the authorities of the Reformatory School.

THIS case of *Queen-Empress* v. *Valu* was called for at the instance of the Superintendent of the Rangoon Central Jail. The Cantonment Magistrate convicted Valu, found he was under the age of 15, and sentenced him, in lieu of two years' rigorous imprisonment under section 457 Indian Penal Code, to be detained in a Reformatory School until he attains the age of 18 years. The Magistrate now says he was mistaken as to the age of the accused, and the District Magistrate also considers the accused is at least 20 years of age. In 1897, when previously convicted, the age of the accused appears to have been recorded as 21; in 1899, when again convicted, the age was recorded as 20. In the recent trial the accused gave his age as 14 and the Magistrate, though apparently having reasons to suspect this statement of being below the mark, accepted it. Evidently he should have been much more careful.

Section 16 of the Reformatory Schools Act clearly debars this Court from altering the order passed by the Cantonment Magistrate with respect to the age of the offender, or the substitution of an order for detention in a Reformatory School for imprisonment. This is not a case of an order illegal on the face of it or made without jurisdiction, with which this Court would probably be able to interfere.

The District Magistrate appears to have pointed out that the matter should be reported to the Local Government for orders under section 13 of the Reformatory Schools Act. The reason this has not been done probably is that the prisoner is still in the Rangoon Central Jail, over which the Committee of Visitors of the Reformatory has no jurisdiction under section 13. It would seem that the prisoner Valu is being detained in jail under section 12 (*a*) of the Act. Until the prisoner reaches the Reformatory the Local Government, although it has powers under the Criminal Procedure Code, cannot, it appears, exercise the powers referred to in section 14 of the Reformatory Schools Act.

The Magistrate, it must be pointed out, should not have ordered the accused to be detained in prison until he attained the age of 18. He should have ascertained the age of the offender and have calculated the term which would elapse before the offender would attain the age of 18 years, and should have directed his detention for that specific term, subject, of course, to the rules in force under section 8 (*3*) (*b*) of the Reformatory Schools Act. A sentence or order by a Magistrate should be as precise and definite as possible, and should not leave the term of detention to be ascertained by the authorities of the Reformatory School. Had the proper procedure been followed, the Magistrate might have avoided the mistake he fell into as to the age of Valu, who may now perhaps, as a result of that mistake, escape punishment he richly deserves.

A copy of this order, with the proceedings of the Cantonment and District Magistrates, will be sent to the Local Government for any action they may see fit to take.

Before the Chief Judge and Mr. Justice Bigge.

Criminal Reference No. 2 of 1901. February 22nd.

CROWN *v.* NGA PO HLAING.

Assistant Government Advocate—for the Crown.

Confession to ywathugyi—Evidence Act, s. 25.

A *ywathugyi*, or village headman, though not a Magistrate under the Criminal Procedure Code, is not termed a police officer, and is intentionally distinguished in the Lower Burma Village Act, 1889, from a rural policeman.

Section 25 of the Evidence Act, 1872, therefore does not forbid the proving in evidence of a confession to a *ywathugyi*.

Maung Wun v. *Queen-Empress*, P. J. 22, dissented from.

THIS is a reference made by Mr. Justice Fox under section 11 of the Lower Burma Courts Act, 1900, and the question to be decided is "Does section 25 of the Indian Evidence Act, 1872, forbid the proving in evidence of a confession made to a *ywathugyi* or village headman under the Lower Burma Village Act, 1889?"

Mr. Giles, the learned Assistant Government Advocate, has appeared on behalf of the Crown in support of the admissibility of such a confession.

In the case of *Maung Wun* v. *Queen-Empress*, P. J., 22, the learned Judicial Commissioner, Mr. Hosking, held a confession made to a *ywathugyi* to be inadmissible. This decision proceeded on the following grounds:—

"The *ywathugyi* is the head of the rural police, and has police duties to perform. He is to all intents and purposes a police officer, though he may not be so designated. The material point is not whether he is called a police officer, but whether he discharges the duties of a police officer. The spirit of the law and not the letter of the law is to be considered." The learned Judicial Commissioner then cited *Reg.* v. *Hurribole Chunder Ghose* (I. L. R., 1 Cal., 207). Mr. Hosking's decision appears to go beyond the Calcutta decision in holding that, although not technically a police officer and not popularly regarded as such, the headman is to be considered to be a police officer because he has police duties to perform. The headman has powers of investigation and of arrest in certain cases, and may no doubt inspire some awe into an accused or other person who may make a confession to him. So also may a Magistrate exercising powers under the Criminal Procedure Code. The headman is a good deal more than one who exercises some powers and duties ordinarily belonging to a police officer. He is a collector of revenue; he tries petty cases of a criminal nature; he may also be empowered to try petty civil cases, and he performs duties of an administrative nature. The *ywathugyi* does not represent the official known as headman under the Burma District Cesses and Rural Police Act of 1880. The latter was a rural policeman. The *ywathugyi* of the Lower Burma Village Act rather replaces the circle thugyi who existed in 1880 and for years subsequent.

This fact is alluded to by Mr. Justice Fox in his order of reference, and is pointed out in Judicial Department Circular 12 of 1899 printed at page 10 of the Lower Burma Village Manual. The Lower Burma Village Act repealed sections 12 to 20, which include the whole of the

Criminal Reference No. 2 of 1901. February 22nd.

part of the District Cesses and Rural Police Act, 1880, relating to *rural police*.

The Lower Burma Village Act was intended (*vide* preamble) "to "*provide a village system* and to amend the law relating to Rural Police "in Lower Burma," and in many sections of the Act—indeed, it may be said, throughout the Act—the *headman* (or *ywathugyi*) is clearly distinguished from the *rural policeman*. Evidently it was the intention of the framers of the Act that the headman should *not* be regarded as a rural policeman. He was to have a higher status. The rural police are by Judicial Department Notification No. 332, dated 7th August 1889, assistants of the headman, and have to perform all the duties imposed on police officers by Act V of 1861 and the Code of Criminal Procedure. The headman is no doubt the head of the rural police where they are appointed. (*See* again General Department Circular 10 of 31st May 1892, page 15 of the Village Act Manual.) He himself may perhaps have no rural policemen under him, and in such case his duties of arrest and investigation would probably assume a more prominent proportion to his other functions. But the fact remains that Government appears intentionally to have avoided calling the *ywathugyi* or village headman appointed under the Act of 1889 a police officer, and it is also believed that he is not popularly regarded as a police officer. His duties as such form in the ordinary course of his business but a small part of his functions.

To turn now to a consideration of those decisions of High Courts of India which seem to bear on the question before this Bench. In the Calcutta case, to which reference has already been made, it was held that the term police officer must not be restricted to its strict technical sense, but is to be understood in "its more compre-"hensive and popular meaning" and is to be construed "in its wides "and most popular signification," and that the Deputy Commissionert of Police in Calcutta, whose essential functions were those of a police officer and head of the Calcutta police, though he was also a magistrate, especially when sitting in his place of office surrounded by police immediately under his control, could not divest himself of his character of a police officer which in common parlance he was understood to be. In this case the officer receiving the confession had a title indicating that he was a police officer, and he was as a matter of fact the head of the regular police, some of whom were near him at the time the confession was taken.

In *Queen* v. *Sama Papi* (I. L. R., 7 Madras 287), the confession had been made to a village munsif, a Civil Judge under Madras Regulation IV of 1816. Heads of villages are under that Regulation by virtue of their office, munsifs within their respective villages: and a head of village has, under Madras Regulation XI of 1816, duties and powers resembling those of a *ywathugyi*. From the report of the case it appears that the District Magistrate designates this munsif a head of the village and also a village magistrate. Probably therefore the munsif was also village headman and had the powers above referred to, which resemble those which our headmen in Burma exercise. If this conjecture be correct, the decision of the Madras High

Criminal Reference No. 2 of 1901. February 22nd

Court which was that the munsif—the headnote says "*village Magistrates*"—was not a police officer and that the confession was not rendered inadmissible by the terms of section 25, Indian Evidence Act, would go to support the view that a headman in Lower Burma is not a police officer within the meaning of section 25.

The case of *Queen-Empress* v. *Bhima* (I. L. R., 17 Bombay, 485), has also been referred to in which it was held that a police *patel* was a police officer and a confession made to him was not admitted in evidence. The Judges in this case declined to follow the Madras ruling which, it was stated, followed the view that in the Presidency of Madras village munsifs are "magistrates and not police officers, "which cannot be said of police *patels* in this province." The Calcutta case was cited and followed. Under the Bombay Village Act of 1867, police *patels* have similar powers, *quasi*-magisterial and other, to our *ywathugyis*. There are also *revenue patels*. It would seem therefore that the term police *patel* gave a distinctly police character to the village official concerned in the Bombay case: and this decision is not of very much use towards a ruling for this province in regard to *ywathugyis* or headmen who, though not magistrates under the Criminal Procedure Code are still not termed police officers, and are intentionally distinguished in the Village Act from rural policemen.

The case of the *ywathugyi* is clearly distinguished from that of the Deputy Commissioner of Police in that the former bears no title indicating that he is a police officer and is not popularly regarded as one, and it is also distinguished in the same way from that of the police *patel*. It more nearly resembles the case of the *munsif* in Madras. The question seems to reduce itself to this, namely, whether a village official, because he controls some rural policemen (persons who are themselves hardly to be regarded as technically police officers except in the wider sense which, following the Calcutta decision, we should probably consider applicable), and because he is empowered to exercise certain powers of investigation of offences and of arrest, must be held to be a police officer, though not called so and not regarded as such. We have carefully considered the reasons given by the learned Judicial Commissioner's decisions above cited: but we do not think we should go so far as to say that the *ywathugyi* must be regarded as a *police officer* within the meaning on the 25th section of the Indian Evidence Act. At the same time the *ywathugyi* is not a magistrate under the Criminal Procedure Code, nor is he a magistrate within the meaning of section 26 of the Evidence Act, and, owing to the position of authority he actually exercises in his village, a confession made to him should no doubt be received in evidence with caution, the circumstances in which the confession was made being important for consideration in each case in estimating the weight to be attached to the confession.

Our decision then on the question referred is that section 25 of the Indian Evidence Act, 1872, does not forbid the proving in evidence of a confession made to a *ywathugyi* or village headman under the Lower Burma Village Act, 1889.

Criminal Revision No. 303 of 1901. February 26th.

Before Mr. Justice Fox.

CROWN *v.* DAWOOD SAIB.

Reformatory—Order of detention improperly passed—High Court, powers of, to interfere—Reformatory Schools Act, s. 16—Term of detention, enhancement of.

A High Court has power to interfere in appeal or revision when an order of detention in a Reformatory is opposed to the rules framed by the Local Government under the Reformatory Schools Act.

If an order for detention in a Reformatory School is not properly passed, that is, if it does not conform to the rules made by the Local Government, the High Court is not debarred by section 16 of the Act from altering or reversing such order.

Queen-Empress v. *Hori*, I. L. R., 21 All., 391, and *Queen-Empress* v. *Makimuddin*, I. L. R., 27 Cal., 133, followed.

Queen-Empress v. *Nga Nyan Wun*, P. J., 441, and *Deputy Legal Remembrancer* v. *Ahmad Ali*, I. L. R., 25 Cal., 333, dissented from.

This case has been brought to the notice of the Court by the Local Government.

The accused was found guilty of theft in a building after having been previously convicted of theft, and was sentenced to rigorous imprisonment for six months, which was commuted to detention in a Reformatory School for a period of three years. The Magistrate made no inquiry into the age of the accused as contemplated by section 11 of the Reformatory Schools Act, but the accused having, in his examination, stated his age as being ten years, the Magistrate in his judgment held that he was of that age. I take this to mean that he was over ten and under eleven years of age. Under the rules under section 8 of the Reformatory Schools Act, made by the Local Government and published in Judicial Department Notification No. 237 dated the 12th June 1897, the period of detention ordered in the case of the accused should not have been less than five years.

I should not have hesitated to interfere with the Magistrate's order but for the following passage in the judgment of Mr. Hosking, Judicial Commissioner, in the case of *Queen-Empress* v. *Nga Nyan Wun*, P. J., 441: "The decision of the Privy Council would, in my opinion, "be an authority for holding that an order passed by a competent "Magistrate relating to a youthful offender, contravening any rules "made by the Local Government, though illegal, would yet be an "order made under the Reformatory Schools Act, and could not be "altered in appeal or revision."

These remarks were made in considering the effect and operation of section 16 of the Reformatory Schools Act, but they did not apply to the case actually before the learned Judge, and were not the foundation of his judgment, and, I think, they may be treated as *obiter dicta*.

The actual decision in the case was in accord with the ruling of the Calcutta High Court in *The Deputy Legal Remembrancer* v. *Ahmad Ali*, I. L. R., 25 Cal., 333, and since those cases there has been a Full Bench Ruling of the Allahabad High Court, *Queen Empress* v. *Hori*, I. L. R., 21 All., 391, in which the question involved in the above-quoted remarks is considered, and it was decided that a High Court has power to interfere in appeal or revision when an

order of detention in a Reformatory is opposed to the rules framed by the Local Government under the Act.

Criminal Revision No. 303 of 1901. February 26th.

In the case of *Queen-Empress* v. *Makimuddin*, I. L. R., 27 Cal., 133, the Calcutta High Court held that if an order for detention in a Reformatory School is not properly passed (*i.e.*, if it does not conform to the rules made by the Local Government), the High Court is not debarred by section 16 of the Act from altering or reversing such order.

I am therefore fortified in my opinion that there is no bar to the interference of this Court in the present case.

The accused not having shown any cause against enhancement of the period of detention, I enhance it to a period of seven years' detention in a Reformatory School from the date of the original order.

The boy was a beggar, and any less period would increase the chances of his reverting to crime whilst still a youth.

Before Mr. Justice Birks.

MAUNG SIT LE *v.* MAUNG SHWE THIN.*

Civil Second Appeal No. 111 of 1900. February 28th, 1901.

Mr. Jordan—for applicant (defendant). | Mr. *Hla Baw*—for respondent (plaintiff).

Rent—"*Small Cause*"—*Civil Procedure Code, s. 586.*

A suit for rent—not only of house-rent—is a suit of a nature cognizable in a Court of Small Causes within the meaning of section 586, Civil Procedure Code.

Sounderam Ayar and another v. *Sennia Naickan and another*, 23, Mad., 547, followed.

THIS is a suit to recover Rs. 157, being the amount paid by the plaintiff on behalf of the defendant. It appears from the plaint that the defendant agreed to rent a piece of paddy land from the plaintiff for three years, paying 200 baskets of paddy for the years 1259, 1260 and 1261, and also agreeing to pay Rs. 157 each year, being the revenue due on the land. It is alleged that the rent of 200 baskets was paid for three years but not the revenue for 1261. The claim was dismissed by the Court of First Instance, but was decreed by the Lower Appellate Court. The appeal was admitted during the vacation by Mr. Justice Bigge on a report from the Assistant Registrar that the suit was an "unclassed one," as the Rs. 157 claimed formed a portion of the rent and was excluded from the cognizance of a Court of Small Causes under paragraph 8 of the Second Schedule of the Provincial Small Causes Courts Act of 1877. Under section 30(*b*) of Act VI of 1900, the value being under Rs. 500, an appeal will not lie unless some question regarding succession, inheritance, marriage or caste or any religious usage or institution arises. Mr. Jordan in arguing the appeal admitted it was purely a question of fact as to whether the defendant entered into this contract himself with the plaintiff or whether it was entered into by third persons, whose payments he merely guaranteed. No question of law therefore arises which justifies a second appeal. Mr. Hla Baw, for the respondent, has also called my attention to a recent ruling of the Full Bench of Madras in *Sounderam Ayar and another* v. *Sennia Naickan and another*, 23 Mad., 547. A majority of four Judges there held that a suit for rent (not only house rent) was

* Over-ruled by *Sein Thaung* v. *Shwe Kun*, 3 L. B. R., 47.

Civil Second Appeal No. 111 of 1900. February 28th, 1901.

a suit of a nature cognizable in Courts of Small Causes within the meaning of section 586 Civil Procedure Code. I concur with the views expressed by Mr. Justice Benson in that case. That learned Judge says: "When the Legislature determines that suits of a certain "character may be made triable in Courts of Small Causes without "further action on the part of the Legislature, I think that those suits "are of a nature cognizable in Courts of Small Causes even though the "Local Government may not establish Small Cause Courts or invest "any Judge with powers to try Small Cause suits in general or rent suits "in particular as Small Cause suits. The nature of the suit is, I think, "determined once for all by the Legislature, but it leaves the Local "Government to decide whether the suits shall in fact be tried as Small "Cause suits or not." It may be added that this view seems to assign to the Legislature a more consistent policy than the alternative view. It would be strange if the Legislature, when enacting the Civil Procedure Code, regarded rent suits as being of such a character as to be suitable for second appeals, and yet, when enacting the Small Cause Courts Act, regarded them as suits which might, by notification of the Local Government, be made triable by a Court of Small Causes, in which case not even a first appeal in regard to them would be allowed. I hold therefore that this suit was of a nature cognizable by a Court of Small Causes and that no second appeal lay. The appeal is dismissed with costs.

Civil Revision No. 63 of 1900. March 5th, 1901.

Before Mr. Justice Fox.

W. S. THANEGA CHELLUM MOODALIAR *v.* K. T. NARAYANAN CHETTY.

Mr. *Israil Khan*—for plaintiff. | Messrs. *Agabeg* and *Maung Kin*—for respondent.

Removal of attachment—Dismissal of application—Civil Procedure Code, s. 102—Courses open to applicant. (O.9—R.8)

(O.9-R.9.) If an application for removal of attachment is dismissed under section 102 of the Code of Civil Procedure, the only courses open to the applicant are either to apply under section 103 for an order to set the dismissal aside, or to file a regular suit under section 283. (O.21 - R.63)

THE respondent applied for removal of attachment obtained by the applicant against certain property.

That application was dismissed owing to the respondents not appearing on the day fixed for hearing: although it is not distinctly so stated, I gather from the terms of the order that somebody appeared for the present applicant.

Subsequently the present respondent filed another application for removal of same attachment which was admitted notwithstanding objection by the present applicant who was referred to a regular suit.

This proceeding was in my judgment irregular.

(O.9.R.8.) If an application for removal of attachment is dismissed under section 102 of the Code of Civil Procedure, it appears to me that the only courses open to the applicant are either to apply under section 103 (O.9-R.9) for an order to set the dismissal aside, or to file a regular suit under section 283. (O.21- R.63.)

The application is allowed and the order of the District Court, dated the 18th September 1900, is set aside.

The respondent must pay the applicant's costs in both Courts, two gold mohurs are allowed as advocate's fees.

Civil Revision No. 63 of 1900. March 5th, 1901.

Before Mr. Justice Fox.

NGA SHWE YWE *v.* THE CROWN.

Criminal Revision No. 307 of 1901. March 5th.

Mr. *Dawson*—for applicant.

All gambling not illegal—Hearsay evidence not evidence of general repute—Burma Gambling Act, s. 17—Criminal Procedure Code, ss. 110 and 112.

The fact that all gambling is not illegal must not be lost sight of in proceedings taken under section 17 of the Burma Gambling Act, the essential point in which is that the person proceeded against earns his livelihood wholly or in part by *unlawful* gaming.

Evidence of reports, rumours, and information received is mere hearsay evidence, and as such wholly inadmissible as evidence of general repute. Evidence of repute is a totally different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of that character. On the other hand, if the state of things is that the *body* of his fellow townsmen who know him, look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character; but to say that, because there are rumours in a particular place among a certain class of people that a man has done particular acts or has characteristics of a certain kind, those rumours are in themselves evidence to say what the law does not justify us in saying.

Rai Isri Pershad v. *Queen-Empress*, I. L. R., 23 Cal., 621, followed.

THIS is an application to revise an order by a Subdivisional Magistrate ordering the applicant to execute a bond with four sureties for his good behaviour for a period of one year under section 17 of the Burma Gambling Act.

That section provides that whenever a District or Subdivisional Magistrate, or a specially empowered Magistrate of the 1st class receives information that any person within the local limits of his jurisdiction earns his livelihood wholly or in part by *unlawful gaming* or by promoting or assisting in the promotion of *unlawful gaming*, he may deal with such person as nearly as may be as if the information received about him were of the description mentioned in section 110 of the Code of Criminal Procedure, and for the purposes of any proceeding under the section the fact that a person earns his livelihood as aforesaid may be proved by evidence of general repute or otherwise.

On the 8th September 1900 the District Magistrate sent certain police papers, and a petition by one Lu Te to the Subdivisional Magistrate "with a view to action being taken against the applicant under "section 110 of the Code of Criminal Procedure and under section 17 "of the Burma Gambling Act."

Under this order, which practically left the Subdivisional Magistrate no discretion in the matter, the Subdivisional Magistrate issued an order to the applicant in the following terms:—

"Inasmuch as I have received credible information to the effect that you, Shwe Ywe, earn your livelihood by gambling, I hereby call

Criminal Revision No. 307 of 1901. March 5th.

upon you, Shwe Ywè, to show cause why you should not enter into a bond in the sum of Rs. 3,000 with four sureties in the like amount for your good behaviour for the term of one year under section 110, Criminal Procedure Code, read with section 17 of the Burma Gambling Act."

I will remark at once that this order was not a compliance with the terms of section 112 of the Code of Criminal Procedure, which requires that the substance of the information received must be set forth in the order, and it also omitted to state the essential, without which the Magistrate had no power to issue any order, namely, that the information was that the applicant earned his livelihood by *unlawful* gambling.

Upon the enquiry under section 117, the following witnesses were examined in support of the information, whatever it was :—

(1) The Township Magistrate exercising jurisdiction at the place where the applicant resided.
(2) An Advocate practising in the Courts of the district.
(3) A Head Constable of police of the district.
(4) Maung Lu Te, the man who had petitioned.
(5) Three men who were present during card-playing and gambling between the applicant and Maung Lu Te.
(6) Six witnesses who were called to prove that the accused had gambled in the house of one Kya Gaing at a place in Wanetchaung which is not where the applicant resides.

The Township Magistrate deposed that in 1899 the District Magistrate had ordered the applicant to execute a bond for good behaviour under the same section of the Gambling Act, and that while this bond was in force the applicant had been convicted by himself of gambling and sentenced to a month's simple imprisonment for gambling, which appears to have been either setting cocks to fight or being present at a cock-fight in a public place and in consequence of the conviction the bond had been exacted and Rs. 900 recovered.

The bond required by the District Magistrate had been one for Rs. 1,000 by the applicant, with two sureties for Rs. 1,000 each to endure for a period of three years, and in default of furnishing such security the applicant was to go to jail: this order, however, had been modified by the Judicial Commissioner to a personal bond for Rs. 300 with sureties for the like amount for a period of one year.

The Township Magistrate then deposed that he had received information of the applicant's having again gambled since his release from jail, and not only was he allowed to make statements about what information he had received and what he had heard as to the accused's having gambled, but information as to the applicant being a man of general bad character, and also as to his relations being persons of bad character, as to the applicant's receiving and encouraging bad characters, as to his being a receiver of stolen property, as to his holding out threats to people, and as to his being feared by people in the place where he lives, was recorded.

He further stated that the applicant was then pending trial before him for having intimidated one of the witnesses in a civil case brought

Criminal Revision No. 307 of 1901. March 5th.

by the applicant against Maung Lu Te: the result of that case was that this Magistrate fined the applicant Rs. 100 and sentenced him in default to six months' rigorous imprisonment, and called on him to execute a bond in the sum of Rs. 300 with two sureties for Rs. 300 each to keep the peace for one year; this punishment was inflicted on the applicant upon the allegation of the witness that the applicant had said to him: "I will slap you and kill you if you give evidence."

The Advocate who gave evidence spoke to his having *heard* that the applicant had gambled on the borders of the district, not where the applicant resided, and that he had heard that the applicant forced people to sign documents for gambling debts, and as to his being feared by people, and as to various other things he had heard about the accused.

The Head Constable likewise was also allowed to make a long statement as to various things he had heard about the accused, not merely connected with gambling, but generally.

Maung Lu Te, the man who had petitioned against the applicant, deposed to his having been induced to play cards and gamble with the applicant, and to his having lost Rs. 200 to him since the applicant's release from jail, but nowhere did he say anything which would show that the gambling on that occasion was unlawful gambling: it took place in the upper storey of a house of which the lower storey was a liquor shop. The gambling was between the two of them, and in his evidence before the Magistrate he made no mention of any one having taken any commission, or having made any charge for the use of the cards or room or otherwise.

He alleged that the applicant had forced him to sign a pro-note for what he lost, and he admitted that he did not petition the District Magistrate until the day the applicant had filed a suit against him for the recovery of the amount of the note. A decree was given against him, so presumably the Civil Judge disbelieved his story as to how he came to sign the note. The three men who were present at the game of cards said nothing to show that the gambling then was unlawful.

The six men called to speak of gambling at Kya Gaing's house denied that they knew anything about it, and denied that they had given the police any information about it, so that part of the case broke down altogether. No attempt was made to prove the gambling on any other of the occasions of which the Township Magistrate and Head Constable said they had received information.

Evidence was given for the defence by persons resident in the place where the applicant resides as well as by others to the effect that they did not know and had not heard of the applicant having gambled since his release from jail, or of his having committed the other iniquities ascribed to him by the Township Magistrate, the Advocate, and the Head Constable, or of his being feared by people.

Two of the witnesses on cross-examination by the Magistrate trying the case said that it was said that all the property in the applicant's possession (and it was admitted to be considerable) was earned by gambling. It was proved that the applicant owned land, stored and

Criminal Revision No. 307 of 1901. March 5th.

dealt in paddy, and lent money, and in fact the District Magistrate upon the appeal starts his judgment by saying that the applicant is a man of considerable wealth for a Burman.

The Subdivisional Magistrate arrived at his conclusion that the applicant earned his livelihood by unlawful gambling by taking as proved facts all that the Township Magistrate, the Advocate, and the Head Constable said they had heard, or received information of. In the words of the Court in *Rai Isri Pershad* v. *Queen-Empress*, I. L. R. XXIII, Calcutta, 621: "There are on the proceedings whole "pages of evidence which is hearsay evidence on the face of it, and "there is line after line of evidence in which witnesses deliberately "state, and are allowed deliberately to state, things which they have "heard from other people, which can be no evidence of repute, and no "evidence of the circumstances."

The District Magistrate upon the appeal considered the evidence of the above persons to be of the best description, meaning, I take it, that it was the best evidence of the general repute of the applicant

In face of the evidence for the defence, he says that the accused is described as a man of dangerous character, feared by the residents of the neighbourhood in which he lives, and that this no doubt explains the fact that no village elders have been found bold enough to give evidence against him.

I must hold that the statements of the Township Magistrate, the Advocate, and the Head Constable as to acts of gambling on the part of the applicant since his release from jail was wholly inadmissible as evidence even of general repute.

It seems necessary to say that evidence of rumours, reports, and information given is mere hearsay evidence.

In the words of the judgment above quoted: "Evidence of repute "is a totally different thing. A man's general reputation is the "reputation which he bears in the place in which he lives amongst all "the townsmen, and if it is proved that a man who lives in a particular "place is looked upon by his fellow-townsmen, whether they happen "to know him or not, as a man of good repute, that is strong evidence "that he is a man of that character. On the other hand, if the state of "things is that the *body* of his fellow townsmen, who know him, look "upon him as a dangerous man, and a man of bad habits, that is "strong evidence that he is a man of bad character; but to say that, "because there are rumours in a particular place among a certain class "of people that a man has done particular acts or has characteristics "of a certain kind, those rumours are in themselves evidence under "this section, is to say what the law does not justify us in saying."

Counsel for the applicant has strongly commented upon the action of the Magistrates against his client: the applicant certainly may have some cause for thinking that the Magistrates appear to be bent upon getting him into jail, and keeping him there, although unable to convict him of any specific grave offence: the action in this case appears to have been the result of overzeal, but taken in the belief that the applicant exercises a pernicious influence in the district through his gambling propensities.

The fact that all gambling is not illegal has been lost sight of throughout the proceedings, and I must say that overzeal in checking what is believed to be a pernicious influence is no excuse for the want of attention to the actual law which has been shown in this case, or for the want of the discretion which has been inculcated alike by the superior Courts and by the highest executive authority before action should be taken to enforce security for good behaviour.

Criminal Revision No. 307 of 1901. March 5th.

The order of the Subdivisional Magistrate requiring the applicant to give security for good behaviour is set aside as being unsupported by any admissible evidence, and the bond executed by the applicant and his sureties will be cancelled.

Before Mr. Justice Fox.

CROWN *v.* NGA KYAUK LÔN.

Criminal Revision No. 971 of 1900. March 5th.

The Government Advocate—for the Crown.

Security proceedings—Discretion and care, exercise of, by Magistrates and Sessions Judges—Criminal Procedure Code, ss. 110, 112, 118, 123.

A Magistrate, at the conclusion of an inquiry into a theft case, recorded the following order: "Maung Naing is a man who has been strongly suspected of stealing for the past four or five years. Maung Kyauk Lôn is a man who was convicted under section 380 Indian Penal Code in 1894. He was subsequently ordered to furnish security under section 110 Code of Criminal Procedure and in 1896 was again convicted under section 215 Indian Penal Code in respect of stolen cattle. I shall prosecute both Maung Naing and Maung Kyauk Lôn under section 110 Code of Criminal Procedure," and, accordingly, he issued orders to both Maung Naing and Maung Kyauk Lôn to show cause why each should not give security for good behaviour, basing his order to Maung Kyauk Lôn on the previous convictions and his conduct in the inquiry above referred to. This order in which the Magistrate said: "I am of opinion that he is an habitual thief and receiver and disposer of stolen property" was on the same day read out and explained to Maung Kyauk Lôn, and the Magistrate recorded that he said that he had no defence and would furnish security. The Magistrate then made an order in the following terms: "Order:—There is no need to record any further evidence in this case. Accused has no defence. Accused is ordered to execute a bond in accordance with the order of this Court for his good behaviour for a period of three years."

Held,—that there was no police report or report by any villager or other person, and in fact no information from any one of Nga Kyauk Lôn being by habit any one of the descriptions of offenders specified in section 110 Criminal Procedure Code, and on that ground the proceedings were without jurisdiction from the commencement. Further, that the Magistrate's order purporting to issue under section 112, in no way complied with that section, but it showed that the Magistrate had pre-judged a matter upon which he was bound to withhold his final judgment until he had inquired into the truth of the information he had received, if he had received any, and until he had heard the respondent. Further, there was absolutely no evidence taken in the case, and even if the evidence taken in the theft case could have been used on the enquiry in the case, that afforded no ground for holding that at that time Kyauk Lôn was by habit an offender of any of the descriptions mentioned in section 110.

The record of the Sessions Judge's proceedings was:—

"READ—

Miscellaneous Case No. 11 of 1900 of District Magistrate.

"READ also—

Case No. 32 of the same Court.

ORDER.

"The District Magistrate has found that Kyauk Lôn is an habitual thief and has ordered him to furnish security for his good behaviour for three years—his

Criminal Revision No. 971 of 1900. March 5th.

own recognizances in Rs. 200 and four respectable houseowners jointly and severally to the same amount. I confirm the order and direct that in default of furnishing the security required Kyauk Lôn be kept in rigorous imprisonment for three years from the date of District Magistrate's order."

Held,—that this method of disposing of the case was not a real compliance with the law under section 123 of the Code. The Judge is bound to examine the proceedings as a Judge, that is to say, whether those proceedings were in due accordance with law and correct procedure, and to form his own judgment, whether upon the evidence in the case and for the reasons given by the Magistrate it was necessary for maintaining good behaviour, that the respondent should execute a bond and, in default, should be imprisoned. The mere fact that the Magistrate had found the respondent to be an habitual thief was not sufficient to justify an order confirming the Magistrate's order and directing imprisonment in default of security being furnished.

THE records of this case were called for upon perusal of the monthly statements of criminal cases disposed of by the Subordinate Courts.

Purporting to act under section 110 of the Criminal Procedure Code, the District Magistrate had called upon the respondent to show cause why he should not execute a bond for Rs. 200 with four sureties (who were to be respectable houseowners) to be bound jointly and severally for the same amount, for his good behaviour for a period of three years, and under section 118 had made an order to the above effect.

The Sessions Judge to whom the proceedings were submitted under section 123 had confirmed the order, and had directed that in default of furnishing the security, the respondent should be kept in rigorous imprisonment for three years from the date of the District Magistrate's order. The respondent was unable to furnish the security, and accordingly a warrant for his imprisonment in accordance with the Sessions Judge's order was ordered to be issued; but I do not find a copy of the warrant on the record.

The respondent had been one of three men sent to the District Magistrate by the police charged with housebreaking and theft: the names of the other two men were Maung Naing and Maung Po Sin.

The Magistrate inquired into the case, took the evidence for the prosecution, and examined Kyauk Lôn and Maung Po Sin. He found that it was only too clear that the thief was Maung Naing, that Maung Po Sin was innocent, and that a police sergeant in collusion with Maung Naing and the latter's uncle, Maung Kyauk Lôn (the respondent) had foisted some of the property on to Maung Po Sin. He added: "Unfortunately there is not sufficent evidence to justify the Court in "charging either Maung Naing or Maung Kyauk Lôn, and so both of "them must be discharged. * * * Maung Naing is a man who "has been strongly suspected of stealing for the past four or five years. "Maung Kyauk Lôn is a man who was convicted under section 380 of "the Indian Penal Code in 1894. He was subsequently ordered to "furnish security under section 110 of the Criminal Procedure Code, and "in 1898 was again convicted under section 215 of the Indian Penal Code "in respect of stolen cattle. I shall prosecute both Maung Naing and "Maung Kyauk Lôn under section 110 of the Criminal Procedure "Code."

Accordingly on the same day he issued orders to both Maung Naing and Nga Kyauk Lôn to show cause why each should not give security for good behaviour, basing his reasons for his order to Maung Kyauk

Criminal Revision No. 971 of 1900. March 5th.

Lôn on the previous convictions and his conduct in the circumstances appearing in the inquiry referred to. This order, in which the Magistrate said: "I am of opinion that he is an habitual thief and receiver "and disposer of stolen property," was on the same day read out and explained to Maung Kyauk Lôn, and the Magistrate recorded that he said he had no defence and would furnish security. The Magistrate then made an order in the following terms: "Order.—There is no "need to record any further evidence in this case. Accused has no "defence. Accused is ordered to execute a bond in accordance with "the order of this Court for his good behaviour for a period of three "years."

Upon perusal of the proceedings it appeared to me that the proceedings of the Magistrate were not only illegal but were unjust. They were originated solely upon the Magistrate's initiative, and on the view taken by him in the case of theft which he inquired into and in consequence of his having had to hold that there was no evidence in that case on which he could charge either of the two accused whom he believed to have been implicated.

Before deciding the case I have given the Sessions Judge and the District Magistrate an opportunity of appearing through the Government Advocate to support their orders. The Government Advocate has appeared, and is unable to contend that the orders were justifiable. The District Magistrate has submitted a report in which he says that the accused was defended by an European Advocate who consented to the original proceedings (by which I presume he means the proceedings in the theft case) being put in evidence against the accused in place of fresh evidence being recorded. If this was so, it displayed great ignorance on the part of the Advocate, but that does not excuse the Magistrate in not complying with the law.

Before the Magistrate could take action under section 110, some one must have informed him that Maung Kyauk Lôn was, at the time, by habit, a robber or house-breaker or thief, or receiver of stolen property, knowing the same to have been stolen, or that he habitually protected or harboured thieves or aided in the concealment or disposal of stolen property, or that he habitually committed some of the other acts enumerated in the section, or that he was of the character mentioned therein.

In his order issued under section 112 he was bound to set forth the substance of the information he had received, and then to require Kyauk Lôn to show cause why he should not execute a bond.

When the time came for hearing the respondent the Magistrate was bound to *inquire into the truth of the information on which he had acted*, and, after hearing the respondent, to consider whether on the evidence before him it was proved or not proved that a bond was necessary for maintaining good be haviour, and if he found such bond necessary, to fix the amount with due regard to the circumstances of the case, and so that it should not be excessive.

In the present case there was no police report, or report by any villager, or other person, and in fact no information from any one of

Criminal Revision No. 971 of 1900. March 5th.

Nga Kyauk Lôn being by habit of any of the descriptions of offenders specified in section 110 of the Criminal Procedure Code, and on that ground the proceedings were without jurisdiction from the commencement.

Again, his order purporting to issue under section 112 in no way complied with that section, but it showed that the Magistrate had pre-judged a matter upon which he was bound to withhold his final judgment until he had inquired into the truth of the information he had received, if he had received any, and until he had heard the respondent. After the Magistrate had said that his opinion was that the respondent was an habitual thief, etc., it is not surprising that the respondent should have said that he had no defence.

Again there was absolutely no evidence taken in the case, and if the evidence taken in the theft case could have been used on the inquiry in this case, that afforded no ground for holding that at that time Kyauk Lôn was by habit an offender of any of the descriptions mentioned in section 110.

The record of the Sessions Judge's proceedings is as follows :—

"READ—

Miscellaneous Case 81 of 1900 of District Magistrate.

"READ also—

Case No. 32 of same Court.

ORDER.

"The District Magistrate has found that Kyauk Lôn is an habitual thief and has ordered him to furnish security for his good behaviour for three years, his own recognizances in Rs. 200 and four respectable houseowners jointly and severally to the same amount.

"I confirm the order and direct that in default of furnishing the security required, Kyauk Lôn be kept in rigorous imprisonment for three years from the date of the District Magistrate's order."

This method of disposing of the case was not a real compliance with the law: under section 123 of the Code the Judge is bound to examine the proceedings as a Judge, that is to say, with a view to seeing whether those proceedings were in due accordance with law and correct procedure, and to form his own judgment whether upon the evidence in the case and for the reasons given by the Magistrate it was necessary for maintaining good behaviour that the respondent should execute a bond, or in default should be imprisoned. The mere fact that the Magistrate had found the respondent to be an habitual thief was not sufficient to justify an order confirming the Magistrate's order and directing imprisonment in default of security being furnished.

I set aside the orders of both Courts and direct that Nga Kyauk Lôn be released from confinement under the warrant in this case.

In conclusion I would direct the attention of both the Sessions Judge and the Magistrate to the rulings of the Special Court and of Judicial Commissioners as to the discretion and care which should be exercised before and during proceedings under section 110 of the Criminal Procedure Code.

Before Mr. Justice Fox.

CROWN *v.* MAUNG NAING.

Criminal Revision No. 30 of 1901. March 5th.

Security proceedings—Procedure—Sureties, Amount for which made liable—Criminal Procedure Code, ss. 110, 117—Schedule V, Form XI.

A Magistrate, after his order discharging the accused in a theft case recorded the following order: "In Criminal Regular No. 127 of 1900 of this Court accused "Maung Naing was sent up under section 457 Indian Penal Code, in which pro- "perty valued at Rs. 300 odd were stolen. There was not sufficient evidence to "charge him with the offence, but there can be little or no doubt from the circum- "stantial evidence that he committed it. The evidence shows that accused Maung "Naing is, and has been, strongly suspected of stealing for the past four or five years. "Under the circumstances I call upon him to show cause why accused Maung Naing "should not execute a bond for Rs. 50 with two sureties each for his good behaviour "for a period of one year under section 110 Criminal Procedure Code." The diary of the Magistrate's proceedings shows that the case was "taken up personally after "disposing of Criminal Regular Trial No. 32 of this Court. Accused present in "Court and arrested." The Magistrate recorded that the respondent said: "I have "no defence. I will furnish security." The Magistrate then proceeded to order him to execute a bond with sureties or in default to suffer one year's rigorous imprisonment.

Held,—that no information had been given to the Magistrate such as is contemplated under section 110 Criminal Procedure Code. Further that under section 117, the Magistrate was bound to take all the evidence which might be produced to show that the respondent came within the terms of section 110 before calling upon him for his answer or defence.

Again, the order as to the security to be furnished by the sureties was wrong. The amount for which the sureties should be made liable on a bond in Form XI of Schedule V of the Code should be the same as that for which the accused is made liable, and only that amount can be recovered from the respondent and his sureties or any of them.

Queen-Empress v. *Nga Hla*, U. B. P. J., 1899, 1st quarter, p. 93, followed.

THIS case originated in the same way as the case of Nga Kyauk Lôn which has been dealt with in Criminal Revision No. 971 of 1900.

After his order discharging the accused in a theft case, the Magistrate recorded the following order:—

"In Criminal Regular No. 127 of 1900 of this Court accused Maung Naing was sent up under section 457 Indian Penal Code, in which property valued at Rs. 300 odd were stolen. There was not sufficient evidence to charge him with the offence, but there can be little or no doubt from the circumstantial evidence that he committed it. The evidence shows that accused Maung Naing is, and has been, strongly suspected of stealing for the past four or five years. Under the circumstances I call upon him to show cause why accused Maung Naing should not execute a bond for Rs. 50 with two sureties each for the like amount for his good behaviour for a period of one year under section 110 Criminal Procedure Code."

The diary shows that the case was "taken up personally after dis- "posing of Criminal Regular Trial No. 32 of this Court. Accused "present in Court and arrested."

The Magistrate recorded that the respondent said: "I have no "defence. I will furnish security." The Magistrate then proceeded to order him to execute a bond with sureties, or in default to suffer one year's rigorous imprisonment. No information had been given to the Magistrate such as is contemplated under section 110 of the Criminal

Criminal Revision No. 30 of 1901. March 5th.

Procedure Code. No doubt the complainant in the theft case had stated that he suspected the respondent of going in for stealing because he was suspected of committing thefts by other people, and he had borne that reputation for four or five years, but assuming that an allegation made whilst giving evidence could be regarded as information given, the Magistrate had not even examined Maung Naing in the theft case, and he made no inquiry into the truth of the complainant's allegation. Under section 117, the Magistrate was bound to conduct the inquiry as nearly as might be practicable in the manner prescribed for conducting trials and recording evidence in warrant-cases, that is to say, he would be bound to take all the evidence which might be produced to show that the respondent came within the terms of section 110, before calling upon him for his answer or defence. Again, the order as to the security to be furnished by the sureties was wrong: the amount for which the sureties should be made liable on a bond in Form XI of Schedule V of the Code should be the same as that for which the accused is made liable and, as was pointed out in *Queen-Empress* v. *Nga Hla*, U. B. P. J., 1st quarter 1899, p. 93, only that amount can be recovered from the respondent and his sureties or any of them.

The proceedings and orders of the District Magistrate are set aside as being wholly irregular, and the bond executed by the respondent will be cancelled, or, if he is now imprisoned, he will be released.

Civil Second Appeal No. 178 of 1900. March 6th, 1901.

Before Mr. Justice Fox.

MAUNG ON *v.* MAUNG SHWE BWIN AND ANOTHER.

Maung Tun Win—for appellant. | *Maung Thin*—for respondent.

Custom—Opinion of witnesses who give evidence—Opinion of Judge who does not take evidence—Evidence Act, s. 48.

A general custom or general right must be proved by evidence. Under section 48 of the Evidence Act, the opinions of persons who would be likely to know of its existence, if it existed, are relevant, but such opinions must be given by witnesses who give evidence. Where therefore there was no evidence given of any custom, and a Lower Appellate Court dismissed an appeal because the Judge thought that the Judge of the original Court ought to know what the custom was and that his opinion might be accepted:

Held,—that it was inadmissible to act as the Appellate Court did upon the opinion of the Judge of the original Court as to the existence of the custom.

THE appeal as against the first respondent was abandoned at the hearing, and is therefore dismissed: the appellant will pay this respondent's costs of the appeal. The suit was one for rent of paddy-land: the second respondent admitted that he had rented the land, but claimed that he was not bound to pay the rent because the land had been flooded, and in consequence had not produced any crop: he set up a custom under which in such circumstances tenants were not bound to pay rent.

Both Courts dismissed the plaintiff's claim: the first Court because there was evidence that rent had not been exacted from other tenants whose lands had been flooded, and the Lower Appellate Court because

Civil Second Appeal No. 178 of 1900. March 6th, 1901.

the Judge thought that the Judge of the original Court ought to know what the custom was, and that his opinion might be accepted.

There was no evidence given of any custom: as the Judge of the Appellate Court says: "The evidence on the record is very meagre, and "does not go much beyond showing that other landlords have, as a "matter of fact, let off their tenants on account of failure of crops."

A general custom or general right must be proved by evidence: under section 48 of the Evidence Act, the opinions of persons who would be likely to know of its existence, if it existed, are relevant, but such opinions must be given by witnesses who give evidence.

It was not admissible to act, as the Appellate Court did, upon the opinion of the Judge of the original Court as to the existence of the custom.

The decrees of both Courts dismissing the claim as against the 2nd respondent are set aside, and there will be a decree that this respondent do deliver to the plaintiff 120 baskets of paddy, or that he do pay to the plaintiff as an alternative Rs. 108 if delivery cannot be had.

Each party will bear his own costs throughout.

Before Mr. Justice Fox.

Civil Revision No. 93 of 1900. March 7th, 1901.

ALANEAPPA CHETTY & TWO OTHERS *v.* MIRAJAM BEE AND ANOTHER.

Mr. *Sivaya*—for applicants.

Lenders and Borrowers—Suit on promissory-note—Equitable mortgage as security for loan—Decree for payment of claim by instalments—Civil Procedure Code, s. 210.

Where the suit was on a promissory-note, but it appeared that as security for the loan the plaintiffs held the title-deeds of a house, or in other words, an equitable mortgage, and the Court ordered payment of the claim by instalments,

Held,—that if the plaintiffs had pursued all their remedies and had sued to have their lien declared, and for a mortgage decree for sale, the defendants would have had time given within which to pay, and that if lenders abandon their proper remedy in order to avoid one of the consequences of the original contract with the borrower, it is not unreasonable or inequitable that the Court should, as far as possible, put the borrowers in the same position as if the lenders had sought for their proper remedy.

I do not think that this case calls for the exercise of this Court's revisional powers.

It is true that the learned Judge did not comply with section 210 of the Code of Civil Procedure in so far that he did not state any reason for ordering payment by instalments, but his record explains that he was under the impression at the time that the plaintiff consented to payment by instalments.

The suit was upon a promissory-note, but it appeared that as security for the loan the plaintiffs held the title-deeds of a house, or, in other words, they had an equitable mortgage.

If the plaintiffs had pursued all their remedies and had sued to have their lien declared and for a mortgage decree for sale, the defendants would have had time given within which to pay.

If lenders abandon the proper remedy in order to avoid one of the consequences of the original contract with the borrowers, it is not unreasonable or inequitable that the Court should, as far as possible, put the borrowers in the same position as if the lenders had sought for their proper remedy.

The application is dismissed.

Civil Revision No. 54 of 1900. March 8th, 1901.

Before Mr. Justice Fox.

MAUNG PO YIN AND ANOTHER *v.* MAMOOJEE MOOSAJI.

Chan Toon and *Dass*—for applicants. | *Cowasjee* and *Cowasjee*—for respondent.

Landlord and Tenant—Rent—Notice to quit containing alternative clause as to enhanced rent.

Where in a suit for house-rent the plaintiff gave notice to the defandant to quit at the end of a month, such notice containing also the following clause:—"Should you however continue to occupy the said premises after the 30th of this month, our client will charge you for the use and occupation thereof at and after the rate of Rs. 240 per month. This must not be taken as a waiver on the part of our client to eject you from the said premises in terms of this letter."

Held,—that a tenant after receiving such an alternative notice and continuing in occupation is not liable to pay the enhanced rent claimed. The reasonableness of the rent claimed must be considered. *Mahamaya Gupta* v. *Nilmadhab Rai*, I. L. R. XI, Cal., 533, and *Ramzan Ali* v. *Shew Bux*, S. J. 439, followed.

Held,—further that if such a notice is a good notice to quit, then the tenancy determines upon the expiry of the month: in the subsequent month the defendant would be a trespasser, and the owner's remedy against him would be only an owner's ordinary remedies, namely, ejectment and mesne profits, or compensation for use and occupation. Such compensation must be determined by evidence as to what the plaintiff lost by being kept out of the benefit of the use of his property or by what was a fair charge for the use of the property whilst the defendant occupied against the will of the owner.

In this suit the plaintiff alleged that the defendants had rented a house from him at Rs. 150 a month rent, and that he had given them, through his advocate, notice to quit at the end of a month, which notice contained the following clause:—

"Should you, however, continue to occupy the said premises after the 30th of this month, our client will charge you for the use and occupation thereof at and after the rate of Rs. 240 per month. This must not be taken as a waiver on the part of our client to eject you from the said premises in terms of this letter."

The suit was for Rs. 390, made up of Rs. 150 the rent for one month and Rs. 240 the amount mentioned in the notice. The learned Judge found that the defendants had agreed to pay rent at Rs. 150 a month, consequently no question arises as to that. As to the other sum the defence was that the demand was unreasonable.

The learned Judge says, "As to the enhanced rent, I should be very sorry indeed to find that the law allowed a person to insist on inhabiting a house in the teeth of the landlord's wishes, on condition that a reasonable compensation was paid. The defendant knew the terms on which he was allowed to stay and his staying was purely optional. He elected to stay, and in doing so, I think there can be no doubt he accepted the terms offered, and impliedly agreed to pay the rent asked."

Certain observations in the judgment of one of the Lords Justices in the case of *Ahearn* v. *Bellman*, L. R. 4, Ex. Div. 201, tend to support this view, but the decision of that case did not turn upon the question directly involved in this case. Some remarks in the decision in *Janoo Mundur* v. *Brijo Singh*, 22 W. R. 548, are also in favour of the view that if a tenant after being served with a notice like the present one chooses to continue in occupation he must be taken to have agreed by

Civil Revision No. 54 of 1900. March 8th, 1901.

implication to hold the property rented at the rate mentioned in the notice. However, in *Mahamaya Gupta* v. *Nilmadhab Kai*, I. L. R., XI Cal., 533, the Chief Justice doubted the correctness of this proposition and said: "I think it may well be doubted whether a tenant, after receiving such an alternative notice, and continuing in occupation of the land, would be liable to pay the enhanced rent claimed."

In all the cases in the Indian Courts bearing upon the question which I can find, including the case of *Janoo Mundur* v. *Brijo Singh* above referred to, the reasonableness of the enhanced rate demanded was considered: in that case Mr. Justice Phear said that the Court should inquire whether the rate of rent mentioned in the notice was such as the defendant ought fairly to be taken to have agreed to by reason of having held over notwithstanding the notice, regard being had to all the circumstances of the case.

In the case of *Ramzan Ali* v. *Shew Bux*, S. J. 439, the Judicial Commissioner held that under circumstances similar to the present there was no agreement on the part of the defendant to pay the enhanced rate, and that the plaintiff could only recover a fair rate for use and occupancy from the date the defendant had notice to quit.

In my judgment this is the correct view: if such a notice as the present one is a good notice to quit, then the tenancy determined upon the expiry of the month: in the subsequent month the defendants were in fact trespassers, and the owner's remedy against them was only an owner's ordinary remedies, namely, ejectment and mesne profits, or compensation for use and occupation. Such compensation must be determined by evidence as to what the plaintiff may have lost by being kept out of the benefit of the use of his property, or by what was a fair charge for the use of the property whilst the defendants occupied against the will of the owner.

If the decision of the learned Small Cause Court Judge were correct, then it would follow that a landlord who gave such a notice would be entitled to recover any rate whatever, however exorbitant, and however out of proportion to the actual value of the property it might be, although the defendant might have a *bonâ fide* but erroneous claim to occupy notwithstanding the notice. Further in the present case, the notice distinctly said that the plaintiff would treat the defendants after the end of the month as trespassers and not as tenants, and consequently there would be no question of either party having impliedly agreed to a new tenancy.

So far as the judgment gave the plaintiff a decree for Rs. 240 it was, in my judgment, contrary to law, and I set it aside. The case will be remanded to the Small Cause Court to take evidence as to what compensation the plaintiff is entitled to for the wrongful use and occupation of his property by defendants, and to decide the claim for the month of May 1900 upon such evidence.

The Judge's decision upon the claim for the month of April will stand. The respondent must pay the applicant's costs in this Court, two gold mohurs being allowed as Advocate's fee.

Civil Second Appeal No. 163 of 1900. March 19th, 1901.

Before Mr. Justice Fox.

MA SHWE KYAW *v.* MA BOK GALE.

Messrs. *Chan Toon* and *Das*—for appellant. | Mr. *Hla Baw*—for respondent.

Award of lugyis—Instrument of partition—Unstamped document—Stamp duty and penalty not tendered in Original Court—Admission of document by Appellate Court—Stamp Act.

Where the stamp duty and penalty on an award by lugyis—which fell under the description of "instrument of partition" as defined in the Indian Stamp Act, 1899—was not tendered in the Original Court,

Held,—that an Appellate Court could not admit the document in evidence even if the stamp and penalty had been tendered to it.

Champabaty v. *Bibi Jibun*, I. L. R., 4 Cal., 213, followed.

The plaintiff sued for her share of inheritance after setting aside an award by *lugyis* as to what she should get. The defendant relied upon the award. There was no award in writing, but both the plaintiff and defendant had signed a document on unstamped paper on which the award of the *lugyis* is set out, and by which the parties agreed to divide the property according to the award. The original Court did not admit the document in evidence, and there is nothing to show that the stamp duty and penalty were tendered in that Court.

In the Appellate Court the duty and penalty seem to have been offered, if not actually tendered; but that Court held that the document, to have any validity and to be admissible in evidence, required registration as well as a stamp.

The document was certainly an "instrument of partition" as defined by the Indian Stamp Act, 1899.

Whether registration was requisite is open to doubt: it is unnecessary to decide this as in my judgment the appeal of the defendant must fail on the ground that the stamp duty and penalty not having been tendered in the original Court, the Appellate Court could not admit the document in evidence, even if the stamp and penalty had been tendered to it, *see Champabaty* v. *Bibi Jibun*, I. L. R., 4 Cal., 213.

The appeal is dismissed with costs.

Criminal Revision No. 498 of 1901. March 26th.

Before the Chief Judge.

CROWN *v.* MA PEIN.

Defamation—Witness for defendant in a claim made before elders—Privileged statement—Judicial proceeding—Good faith—Indian Penal Code, s. 499, cls. 8 and 9.

Ma Cho, a Karen woman, went before elders with a claim for damages against one Kan Baw for breach of promise of marriage. Kan Baw called as a witness one Ma Pein, who stated that she had seen Ma Cho having intercourse with her brother-in-law, Ko Kya E. Ma Cho's claim was accordingly dismissed by the elders. Ma Cho then prosecuted Ma Pein for defamation and the latter was convicted and sentenced to a fine,

Held,—that although the statement made by Ma Pein was not one made in a judicial proceeding it was privileged under clauses 8 and 9 of section 499, Indian Penal Code, as it was apparently made in good faith. The complainant had herself taken her case of breach of promise of marriage before the elders, and in respect of the subject-mater of the accusation the elders had lawful authority over Ma Cho for the purpose of her case; but if this be doubtful, it is quite clear that the defamatory

statement was made for the protection of the interest of Kan Baw, the defendant in the case brought by Ma Cho, and Ma Pein therefore was not liable to a prosecution for defamation.

Criminal Revision No. 498 of 1901. March 26th.

THIS case has been referred by the District Magistrate, Pegu, under section 438 Criminal Procedure Code. One Ma Cho, a Karen, went before elders with a claim for damages against one Kan Baw for breach of promise of marriage. He called as a witness the accused, in this case, Ma Pein, who stated that she had seen Ma Cho having intercourse with her brother-in-law, Ko Kya E; and Ma Cho's claim was accordingly dismissed by the elders.

Ma Cho then prosecuted Ma Pein for defamation, and the latter was convicted and sentenced to a fine.

The Magistrate who tried the case referred to the case of *Govindappa Nayak* v. *Antoni* (I. L. R., 7 Mad., 36), but held that, as the proceedings before the elders were not judicial proceedings and as Ma Pein could not be tried and convicted for perjury, therefore the statement made was not privileged. The Magistrate must have been unaware of the nature of the proceedings before a *panchayet*, or he would have found a closer analogy between the cases.

The District Magistrate on the other hand who refers the case recommending that the conviction and sentence be set aside, cites the cases of *Queen-Empress* v. *Babaji* and *Queen-Empress* v. *Balkrishna Vithal* (I. L. R., 17 Bom., 127 and 573). In each of these cases the accused was giving evidence in a judicial proceeding. The proceeding now in question was before elders, and was not a judicial proceeding; but it seems that the statement made by Ma Pein, which was apparently made in good faith, was privileged under two clauses of section 499, namely, the eighth and the ninth.

The complainant had herself taken her case of breach of promise of marriage before the elders, and in respect of the subject-matter of the accusation it may be said the elders had lawful authority over Ma Cho for the purposes of her case; but if this be doubtful, it is quite clear that the defamatory statement was made for the protection of the interest of Maung Kan Baw, the defendant, in the case brought by Ma Cho, and that Ma Pein was therefore not liable to a criminal prosecution for defamation. Much the same ground was given in the Madras case, to which the Subordinate Magistrate referred, for holding the accused to be innocent. The Magistrate perhaps had not the Law Reports at hand.

The conviction and the sentence passed on Ma Pein under section 500 are set aside, and the fine must be refunded.

Before the Chief Judge and Mr. Justice Fox.

Civil Second Appeal No. 75 of 1900. September 5th, 1900.

1. MAUNG MYAING.
2. MA BÔK SÔN. } *v.* { 1. MAUNG SHWE YÔN. 2. MA MEIK.

Messrs. *Eddis, Connell* and *Lentaigne*—for appellants (defendants). | Mr. *Agabeg*—for respondents (plaintiffs).

Want of jurisdiction in original Court to try a suit—Objection not raised—Value of suit—Jurisdiction—Suits Valuation, Act, s. 11, Civil Procedure Code, s. 578.

Civil Second Appeal No. 75 of 1900. September 5th, 1900.

The value of the subject-matter of the suit was not set out definitely in the plaint and section 11 of the Suits Valuation Act, 1887, did not apply.

It was to be inferred in the case, however, that the value of the subject-matter was in excess of the jurisdiction of the Court which tried the suit.

Where there is inherent incompetency in the Court to try the suit, then, although no objection to the jurisdiction was raised in the original Court, the Appellate Court is bound to decide the question.

The error in exercising jurisdiction where none existed cannot be cured under section 578 of the Code of Civil Procedure.

WE agree in thinking that this appeal must succeed upon the ground of want of jurisdiction in the original Court to try the suit.

The value of the subject-matter was not set out in definite terms in the plaint, and consequently section 11 of the Suits Valuation Act, 1887, does not apply. The plaint, however, contained a statement that the land which was the subject-matter of the suit had been transferred to the plaintiffs outright for Rs. 3,536.

In the absence of anything in the proceedings to show that the land was not worth that amount at the date of suit, we think it must be taken in this suit in which the plaintiffs are seeking to assert rights in respect of it, that it was worth the amount at the time it was transferred to them, and that it continued to be worth at least that amount up to the date of suit.

There was then inherent incompetency in the Court of the Myook invested with powers for the adjudication of suits of value not exceeding Rs. 3,000 to try the suit, and notwithstanding that no objection to the jurisdiction was raised in the original Court, we think this Court is bound to decide the question. The error in exercising jurisdiction where none existed cannot be cured under section 578 of the Code of Civil Procedure.

We think the decrees of the Lower Courts should be set aside, and that the case should be remanded to the Township Court now having jurisdiction where the property is situate in order that that Court may under section 57 of the Code return the plaint to be presented to the proper Court.

We think the appellants are entitled to their costs in the Lower Appellate Court and in this Court, but not in the original Court as they did not raise the plea of want of jurisdiction there.

We do not think it is necessary or expedient to deal with or remark on the other points raised in the appeal.

Criminal Revision No. 752 of 1900. May 15th 1901.

Before Mr. Justice Birks.

THE CROWN *v.* NGA SO NAUNG AND MAUNG BU.

Transfer of case for trial—Trial of accused by officer taking active part in preliminary enquiry—Criminal Procedure Code, s. 192.

When a District Magistrate transfers a particular case to a 1st class Magistrate for trial the latter officer has no power to transfer it again to a Subdivisional Magistrate even though he may be empowered by the District Magistrate to make such transfers under clause 2 of section 192 Criminal Procedure Code. The Subdivisional Magistrate transferred the case again to the Township Magistrate, but both these officers had recommended the prosecution of the accused as Revenue Officer. The trial of accused by officers who have taken an active part in preliminary enquiries condemned.

Regina v. *Bholanath Sen*, I. L. R., 2 Cal., 23, *Regina v. Hira Lal Das*, 8, Bengal L. R., 422, *Sudhama Upadhya and others* v. *Queen-Empress*, I. L. R., 23 Cal., 328, referred to.

Criminal Revision No. 752 of 1900. May 15th, 1901.

THIS case has been reported by the District Magistrate of Akyab. It appears that on the 7th December 1900, Maung Pan Hla, the Township Officer of Akyab, reported the four accused as having committed offences under Rule 69 of the Revenue Rules. The report was submitted to the Subdivisional Officer to sanction the prosecution of the offenders. That officer referred it to the Deputy Commissioner. On the 1st January 1901 the Deputy Commissioner passed the following order: "Prosecution sanctioned. The Town Magistrate should try the four cases." This appears to be a transfer under section 192 Criminal Procedure Code, to the Town Magistrate to try the accused himself in four separate trials. On the 19th January the Town Magistrate referred the case to the Subdivisional Magistrate, who is also Subdivisional Officer for trial. This order was made without jurisdiction. Even assuming that the Town Magistrate has been empowered under clause 2 of section 192 to transfer to other Magistrates cases of which he has taken cognizance, his order is bad, for the case was transferred to him for trial. The order of transfer was also bad on the merits as it was clear from the previous orders in the case that both the Township Officer and the Subdivisional Officer had recommended the prosecution. It did not make matters any better for the Subdivisional Magistrate to transfer the case again to the Township Officer for trial. It would not be necessary to set aside the conviction on the mere ground that the Town Magistrate was not empowered to make the order he did, *vide* section 529 Criminal Procedure Code, but I think the accused have been prejudiced by being tried together and by the Magistrate who recommended the prosecution. The cases under this head are given in the notes to Henderson's Criminal Procedure Code, 5th edition, under section 556. The cases of *Regina* v. *Bholanath Sen*, 2, Calcutta 23; *Regina* v. *Hira Lal Das*, 8 Bengal Law Reports (Full Bench), 422; and *Sudhama Upadhya and others* v. *Queen-Empress*, 23, Calcutta 328, to which I have referred indicate that the Magistrate who recommended the prosecution after preliminary enquiries should not have tried the case. The District Magistrate's order directing the Town Magistrate to try the four cases shows clearly that he considered the Myoôk and the Subdivisional Officers not suitable Courts as having already formed an opinion. Under the Code of 72 the Madras High Court held that where a Magistrate duly empowered referred a complaint to another Magistrate for disposal, that officer could not transfer it again, Madras High Court Reports, Volume 7, Appendix XXXIII. In this case the District Magistrate did not make over the complaint to the Town Magistrate for "disposal" merely, but to try himself. I concur with the District Magistrate in thinking that the conviction of Maung Bu, who merely drove his cattle across the grazing-ground, cannot stand. With regard to the conviction of Nga So Naung, who, though a cultivator of the village for whose requirements the grazing-ground was set apart, acted as agent in grazing the

Criminal Revision No. 752 of 1900. May 15th, 1901.

cattle of outside villagers, I am not prepared to express a final opinion. It is a matter for argument whether Rule 69 is intended to cover such cases. The fact that the Magistrate rather strained the meaning of the section seems to show that he was biassed. It is clear that the villagers can take civil proceedings to stop the grazing of outside cattle, but it does not follow that Nga So Naung has committed a criminal offence. For the reasons above stated the convictions are set aside and the fines imposed will be refunded.

Criminal Revision No. 759 of 1901. May 15th, 1901.

Before Mr. Justice Birks.

THE CROWN *v.* { 1. NGA SAWE YAUK. 2. NGA MAUNG. 3. ME THU DAW.

Commitment, Quashing of, by Magistrate.

A Magistrate having once committed an accused person to Sessions has not power to cancel his order and try the accused himself. A commitment once made can only be quashed on a point of law. The fact that the evidence as recorded would not justify a conviction under section 413, I.P. C., not considered a sufficient ground for quashing a commitment under that section if there was ample evidence that an offence under section 411, I. P.C., had been committed, as the offences were of the same nature.

I CONCUR with the learned Additional Sessions Judge in holding that all the three accused were committed to Sessions by the order of the Magistrate, dated the 22nd March 1901. This order was presumably read out in Court, for I find an order in the diary of same date stating that the accused were committed to Sessions. The word "unfinished" at the foot of the order in the body of the proceedings might mean that this was a draft judgment not delivered, but the orders in the diary show clearly that the accused were all committed. Under section 215 Criminal Procedure Code, a commitment once made by a competent Magistrate can only be quashed by the High Court and on a point of law. The learned Sessions Judge recommends that the commitment in the case of the woman Mi Mè Thu Daw under section 411 should be allowed to stand, but that a fresh trial of the other joint accused should be ordered, as section 413 Indian Penal Code is not applicable to the facts. I doubt the expediency of quashing the commitment of some of the accused on the ground that the section quoted may not be applicable in its entirety to the facts. Section 413 Penal Code is of the same nature as 411, but it is necessary to prove that the accused habitually deal in stolen property. The Additional Judge has cited *Queen-Empress* v. *Baburam Kansari* 19 Cal., 190, as showing that the evidence recorded would not warrant a conviction under section 413. It would be open to the District Magistrate to direct additional evidence to be taken in support of the graver charge as indicated in that judgment before the case actually goes to trial. It would be the duty of the Sessions Judge to add a count under section 411, but I do not think there was such an error in the commitment of Nga Shwe Yauk and Nga Maung as would justify me in quashing it under section 215 Criminal Procedure Code. The orders of the

Magistrate trying the case himself are clearly *ultra vires:* It is discreditable to the Magistrate that he should have overlooked the plain provisions of section 215 and arrogated to himself a power of revising his own orders, a power with two exceptions reserved to the High Court alone under section 369 Criminal Procedure Code. The convictions are set aside, but the commitment order of the 22nd March will remain in force.

Criminal Revision No. 759 of 1901. May 15th, 1901.

Before Mr. Justice Birks.

THE CROWN *v.* S.S "CHUPRA."

Criminal Revision No. 754 of 1901. May 16th, 1901.

Fine inflicted on a ship in a corporate capacity—Absconding offenders, presumption regarding.

There is no authority in the Criminal Procedure Code for fining a ship under section 48 (*e*) of the Excise Act in a corporate capacity, *i.e.*, master, officers, and crew, without specifying the names of the accused. The fine inflicted was apparently intended to be recovered from the wages of three of the crew who had absconded and were suspected of having the gunja seized. There is no authority for fining absconding offenders on a mere presumption in this way.

IN this case the 1st class Magistrate of Akyab has convicted the S. S. "Chupra" of an offence under section 48 (*e*) of the Excise Act for importing 14½ seers of gunja into the port of Akyab. The Magistrate considered that he could fine the ship in a corporate capacity, *i.e.*, the masters, officers and crew. He appears to have arrived at this singular conclusion because of a Home Trade Article which is filed in the case. This article reads as follows:—

"And the said crew jointly and severally agree that in case any contraband goods be found on board and a fine be imposed by the *Customs authorities* in respect of the same, the amount of such fine shall be recoverable from the wages of the owners or owner of the goods, but, if the master be not satisfied as to whom the goods belong, such fine shall, at the discretion of the master, be recoverable rateably according to the rates of their wages, either from that portion of the crew belonging to the department in which contraband goods shall have been discovered or from the whole crew."

This article clearly refers to fines inflicted by the Customs authorities. What the nature of the fines is may be gathered from a reference to section 167 of Act VIII of 1878 (Sea Customs). A reference to section 182 of that Act shows that all the offences specified in the schedule annexed to section 167 are punishable by a Collector of Customs except where the word Magistrate is specified in the 3rd column. Now as the introduction of gunja into Burma is prohibited by Financial Department Notification No. 5533, dated the 12th September 1874, under section 19 of the Sea Customs Act, there is no doubt that that gunja was liable to confiscation under clause 8 of the schedule attached to section 167. The 3rd column goes on to say that any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods or not exceeding Rs. 1,000. It appears from the evidence of Mr. Datta, who is described as a custom house official, that he made his search in that capacity and discovered the gunja below a hatch under a bunker in the crew's quarters.

Criminal Revision No. 754 of 1901. May 16th, 1901.

The mate was treated as an accused to represent the ship's company and he states that three of the crew deserted the morning after the gunja was found. Their wages would amount to Rs. 100 and the Magistrate's order fining the ship Rs. 100 seems to contemplate that these wages should be forfeited. There is no authority in the Criminal Procedure Code for fining a whole ship's company without specifying the names of the accused or of fining absconding accused without a hearing. The gunja was liable to confiscation and has been confiscated. The Magistrate's proper course was to ascertain the names of the absconding members of the crew and issue warrants for their arrest. There is nothing to show that Mr. Lefevre, the mate, was in any way concerned in the offence. The order of confiscation will be treated as having been made under clause 8 of section 167, Sea Customs Act. The conviction of the S.S. "Chupra" is set aside and the fine will be refunded to owners or master on application.

Criminal Revision No. 146 of May 18th, 1901.

Before Mr. Justice Fox.

CROWN *v.* NGA NYEIN.

Security order—Criminal Procedure Code, s. 118—General reputation—Necessity for making of order.

In order to justify an order on the ground that a person has been proved by evidence of repute to be an habitual offender, the *general reputation* that he is so must be proved. A man's general reputation is the reputation which he bears in the place in which he lives amongst the inhabitants of that place.

Rai Isri Pershad v. Empress, I. L. R., 23 Cal., 621, followed.

Before a Magistrate can make an order for security for good behaviour under section 118 Criminal Procedure Code, he must, besides being satisfied by the evidence that the respondent falls within one of the classes from whom security can be demanded, be also satisfied and find it proved that it is *necessary* for maintaining good behaviour that such an order should be made, and, in his judgment, he should give his reasons for coming to the conclusion that such necessity has been proved.

NGA NYEIN is undergoing one year's rigorous imprisonment in default of finding sureties in Rs. 100 for his good behaviour for one year.

On the 30th September 1900 a Police Sergeant informed the Subdivisional Magistrate that Nga Nyein was a bad character and had no ostensible means of livelihood, and that he received and associated with bad characters and thieves, and acted as *daing* in gambling. Upon this information apparently no action was taken by the Magistrate.

On the 1st November another sergeant of Police informed the Magistrate that Nga Nyein had no ostensible means of livelihood, and that it was rumoured that he was in the habit of associating with bad characters and thieves and of stealing.

Upon this information the Magistrate issued an order to Nga Nyein under section 112 of the Code of Criminal Procedure, in which the substance of the information was stated to be that he, Nga Nyein, had no ostensible means of livelihood, and that he was in the habit of associating with bad characters and of stealing.

The evidence of four witnesses for the prosecution was taken. Two of these called themselves ten-house *gaungs*, but that they were so was disputed by one of the witnesses for the defence.

Criminal Revision No. 146 of 1901. May 18th, 1901.

The first witness stated boldly that Nga Nyein was in the habit of stealing, and that he associated with thieves and used to dispose of stolen articles and had gambling in his house and took commission; but the Magistrate did not ask the witness any questions to ascertain how he knew that Nga Nyein did these things. The witness further stated that Nga Nyein had been suspected by every one of having been concerned in a certain theft which had happened. He, however, stated that Nga Nyein did work as a goldsmith.

From the questions put by Nga Nyein to this witness it would appear that Nga Nyein alleged that the witness had a grudge against him on account of some quarrel between him and the witness' sister.

The second witness also called himself a ten-house *gaung* and was a brother-in-law of Nga Nyein's and a relation of the first witness also. He said he did not see Nga Nyein doing any work, and that he kept a gambling den and took commission, and that he made friends with thieves and received them in his house, and that he himself used to steal in houses, and that every one suspected him of the particular theft referred to by the first witness. Again in the case of this witness the Magistrate made no inquiry from the witness how he knew of the matters he spoke to. The same remark applies to the evidence of the third and fourth witnesses. These witnesses were young men of between 25 and 27 years of age. The first witness for the defence, a man of 40, said he had not heard that Nga Nyein committed thefts, or that he received bad characters, but he had heard that he had a gambling den. The second witness, a man of 58, said he knew that Nga Nyein worked and that he had heard nothing about him in the quarter. The Magistrate held there was ample proof that Nga Nyein was a reputed thief and gambling *daing*.

From this I gather that he regarded the evidence of the witnesses in support of the truth of the information as evidence of repute only, and not as direct evidence of witnesses speaking from their own personal knowledge of the facts to which they deposed.

If this was not so, then the Magistrate made no proper inquiry into the truth of the information on which he had acted. If, however, he regarded their evidence as establishing Nga Nyein's general repute and so justifying the order for security for good behaviour, it fell far short of so doing.

In order to justify an order on the ground that a person has been proved by evidence of repute to be an habitual offender, the *general* reputation that he is so must be proved.

A man's *general* reputation is the reputation which he bears in the place in which he lives amongst the body of the inhabitants of tha place. (*Rai Isri Pershad* v. *Empress*, I. L. R., 23 Cal., 621.)

The evidence of the four witnesses for the prosecution cannot properly be said to prove that Nga Nyein's *general* reputation was that of an habitual thief and gambling *daing*, and the evidence for the defence negatives the conclusion that his *general* reputation was such. For this reason I reverse the order requiring security.

Criminal Revision No. 146 of 1901. May 18th, 1901.

On another ground the Magistrate's order is faulty and cannot stand. His order runs: "As there is no ground for accused being "without sureties, therefore the Court of the Subdivisional Magistrate "directs accused Nga Nyein to execute the bond as required by the "Court; etc."

The reason given for requiring security was not a sufficient reason. Before a Magistrate can make an order for security for good behaviour under section 118 he must, besides being satisfied by the evidence that the respondent falls within one of the classes from whom such security can be demanded, be also satisfied and find it proved that it is *necessary* for maintaining good behaviour that such an order should be made, and in his judgment he should give his reasons for coming to the conclusion that such necessity has been proved.

Further the evidence should have been confined to the matters set out in the information.

No charge is necessary in proceedings for security, but the basis of the provision requiring the substance of the information on which action has been taken to be set forth in orders under sections 107, 108, 109, and 110 of the Code is identical with that of the provisions requiring a charge to be framed in trials, namely, to give the person proceeded against full notice of what he has to meet.

On the information on which the Magistrate acted in this case, there was nothing said about Nga Nyein earning his livelihood by unlawful gaming, and the Magistrate erred in apparently himself bringing into the inquiry new matter of which no notice had been given under his order under section 110.

I direct that the Magistrate's order requiring security from Nga Nyein be set aside and that Nga Nyein, if still imprisoned, be set at liberty.

Criminal Revision Nos. 546 and 547 of 1901. May 21st, 1901.

Before Mr. Justice Birks.

NGA HINAN *v.* THE CROWN.

(1) AUNG LAYA, (2) NGA SIT KWIN *v.* THE CROWN.

General repute—Burma Gambling Act, s. 12.

Evidence of general repute is not admissible in prosecutions under section 12 of the Burma Gambling Act. The Magistrate should satisfy himself by evidence that a particular house is used as a common gaming house before he issues process under section 12. Irregularities of procedure pointed out. Opinion expressed that offences under section 12 should be tried regularly.

THE petitioners in these two cases were both tried summarily by the 1st class Magistrate, Letpadan, for offences under section 12 of Burma Act, I of 1899, and were each sentenced to one month's rigorous imprisonment.

In case No. 88 the Municipal Secretary was the informer. His information is not dated nor did it show when the gambling had last taken place. It would seem that neither of the two informers were examined on oath till after process had issued. It is not clear how accused Sit Kwin came to be summoned, for there is no complaint about him. When examined on oath Maung Lu Gale said that the gambling

Criminal Revision Nos. 546 and 547 of 1901. May 21st, 1901.

had last taken place on the 6th April 1901. In case 89 the head constable Po Aung said that the last gambling was on the 8th September 1901. This was apparently a clerical error for 8th April 1901. Both these witnesses were examined on the 10th April and the accused in the two cases were tried and convicted on the same day. In one case the Magistrate held that the last gambling was on the 6th and in the other on the 8th. The Magistrate does not appear to have recorded the grounds of his belief that Aung Laya's house was used as a common gaming house under section 6 before process was issued. The ordinary procedure contemplated in the Act is that detailed in section 6, but in nearly every case that has come to my notice the accused are brought before the Court by summons and in many cases there is reason to fear that unauthorized entries and searches are made to obtain evidence. In neither of these cases are there any copies of these summonses on the record, and it seems probable that the accused were just sent for by the Magistrate. No time was given to them to prepare their defence or to engage advocates. The cases being tried summarily there are no notes of the evidence, but it would appear from the Magistrate's finding that he admitted a good deal of evidence that might be relevant in an enquiry under section 17 of the Act, but was irrelevant under section 12. It is also clear that the Magistrate did not know the precise date when the gaming took place, and he has convicted the accused because he believes them to be habitual gamblers.

It is not alleged that the accused have ever been convicted before, and as evidence of general repute is not admissible in a trial under section 12, the sentence passed is unduly severe. The sentence has, however, been undergone. I do not think the record shows that the accused in either case committed any specific offence.

The convictions in both cases are set aside. I think it right here to express an opinion that offences under section 12 of the Burma Gambling Act should be tried regularly and not by way of summary trial.

Before Mr. Justice Birks.

Civil Second Appeal No. 54 of 1901. May 21st, 1901.

MA PU AND TWO OTHERS *v.* MA LE.

Mr. *Maung Thin*—for appellants. | Mr. *R. N. Banerji*—for respondent-plaintiff.

Buddhist Law—Inheritance—Attetpa property—Lettetpwa property—Out-of-time grandchild, Share of—Estate of grandparents.

The plaintiff sued for three-fourths of the "attetpa" property of her grandparents and one-eighth of the "lettetpwa" property.

Held,—that as she was an "out-of-time grandchild," *i.e.*, her parents had predeceased the grandfather, she was only entitled to one-fourth of the above shares.

THIS is an appeal on a question of law. The plaintiff-respondent is the granddaughter of U Po by Ma Si his first wife. Ma Si had two daughters, Ma Hme and Ma Ke: the elder Ma Hme, died without issue and both the daughters predeceased U Po. The defendants are the children of U Po's third wife, Ma Shwe The, who also died before her husband. The plaintiff sued for 11·28 acres, being three-fourths of

Civil Second Appeal No. 54 of 1901. May 21st.

the "attetpa" land left by her grandmother Ma Si. The main plea raised in defence was that the plaintiff was not within reach of the inheritance, and also that U Po had already given Ma Le her share in the inheritance. The Courts below have found that the "payin" of U Po consisted of the Teinbin field of 8·16 acres and the "lettetpwa" property of 8·78 acres and that plaintiff was entitled to three-fourths of the first and one-eighth of the second. This division is alleged to be in accordance with paragraph 21 of the 10th book of the *Manu Kyè*. It is an essential under that section that the grandchild should live with the surviving grandparent, but the Court of First Instance held that this condition had been fulfilled, as the plaintiff was an infant in arms when her mother died and was put out to nurse by the grandfather. For the appellant it is contended that paragraph 15 of book 10 of the *Manu Kyè* is the law applicable. It is admitted in the plaint that Ma Ke the plaintiff's mother was the younger daughter, and that she died six years before her elder sister, and that therefore her daughter is only entitled to one-fourth of the share that would have come to her mother. No authorities have been cited beyond these two sections of the *Manu Kyè*. The meaning of these words "within reach of the inheritance" was discussed in *Maung Hmaw* v. *Ma On Bwin and others* (Civil Reference 4 of 1900). It was there held that "it is a "principle of Buddhist law that only those closely related should in- "herit and that relations of the same degree should inherit to the ex- "clusion of those of a more remote degree, that, for instance, children "should exclude grandchildren." The paragraph now quoted by Maung Thin is referred to as one of the exceptions to this general rule and reasons for it are assigned. In section 213 of the Attasankhepa Vannana Dhammathat "out-of-time grandchildren" are defined as grandchildren whose right of inheritance has been discounted through the death of their parents in the grandparents' lifetime. Their share is laid down as one-fourth of what would have come to their parents. Ma Hme having died without issue Ma Ke would have been the sole surviving daughter of Ma Se and U Po, but unfortunately she died before her sister. Maung Thin contends that paragraph 66 of the *Manu Kyè* applies and that the children of Ma Se and the children of the late wives would take in the proportion of two to one. As there were two daughters by the first wife and one by the third wife they would each get one-third. Section 66 applies the same principle to the property acquired during the latter marriages. Section 226 of the Attasankhepa seems to give the shares to the grandchildren of the first marriage the shares as divided by the Court below, but this section must be read in connection with sections 213 and 224 which refer to the shares of "out-of-time grandchildren." I am of opinion therefore that the decrees should be modified. No doubt the authorities differ widely as to what the shares of the grandchildren should be and this was pointed out in an Upper Burma Ruling, *Maung Kya Nu and others* v. *Ma Bwin*, page 345 of Chan Toon's Leading Cases. I think the Courts were right in holding that Ma Le's shares would be one-eighth of the "lettetpwa" property and three-fourths of the "attetpa" property of U Po had she not been an "out-of-time grandchild." The

decrees of the Courts below will be varied by a direction that the plaintiff is entitled to one-fourth of what was decreed, *i.e.*, 1·53 acres of the "payin" and ·27 of the "lettetpwa." The order as to funeral expenses not having been the subject of appeal will stand. The costs of the proceedings will be calculated in proportion throughout.

Civil Second Appeal No. 54 of 1901. May 21st.

Before Mr. Justice Fox.

VADIVALOO SWAMY (Applicant) v. CROWN (Respondent).

Criminal Revision No. 981 of 1901 May 30th.

For Applicant—Messrs. *Summers, Okeden* and *Buckland.*

Summary trial—Reasons for conviction, Record of—Criminal trespass, what constitutes—Indian Penal Code, ss. 441, 447—Procedure when accused does not admit the offence—Criminal Procedure Code, s. 244.

A Magistrate in recording his reasons for the conviction in a summary trial should state them so that the High Court on revision may judge whether there were sufficient materials before him to support the conviction. *In re Punjab Singh*, I. L. R., 6 Cal., 579, and *Queen-Empress* v. *Shidgauda*, I. L. R., 18 Bom., 97, followed.

Every trespass upon the property of another is not a criminal trespass. There must be circumstances in the case which afford ground for a reasonable deduction that the accused had at least one of the intents specified in section 441 of the Indian Penal Code. *Chunder Narain* v. *Farquharson*, I. L. R., 4 Cal., 837, followed.

The latter part of section 243 Criminal Procedure Code cannot be read as distinct and separable from the first part of the section. If an accused does not admit the offence of which he is accused, the Magistrate cannot convict except upon evidence that the accused did commit the offence.

THE applicant was convicted by the District Magistrate, Rangoon, of an offence punishable under section 447 of the Indian Penal Code and was sentenced to rigorous imprisonment for one month.

The trial was a summary one. In the space left in the prescribed form for the finding and, in the case of a conviction, a brief statement of the reasons therefor, the following is recorded:

"He has been warned twice to clear off the land by Magistrates and is most obstinate. He refuses to go in spite of warnings by Magistrates and police. I must therefore sentence him to gaol. Any further warnings are useless."

This, in my judgment, was not a compliance with the law.

In the case of *In re Punjab Singh*, I. L. R., 6 Cal., 579, and in *Queen-Empress* v. *Shidgauda*, I. L. R., 18 Bom., 97, two High Courts have held that a Magistrate in recording his reasons for the conviction in a summary trial should state them so that the High Court on revision may judge whether there were sufficient materials before him to support the conviction.

Every trespass upon the property of another is not a criminal trespass. To constitute criminal trespass the person trespassing must have either entered on the property, or remained there with one or more of the following intents, namely:—(1) to commit an offence, (2) to intimidate any person in possession of the property, (3) to insult such person, or (4) to annoy such person; and before convicting any one of the offence of criminal trespass the judge must find that the person accused entered or remained with one or more of such intents. Intent is to be gathered from the circumstances, but there must be circumstances in the case which afford ground for a reasonable deduc-

Criminal Revision No. 981 of 1901, May 30th, 1901.

tion that the accused had at least one of such intents. Previous warning to the person not to enter the property does not necessarily lead to a conclusion that a subsequent entry was made with one of such intents. See *Chunder Narain* v. *Farquharson*, I. L. R., 4 Cal., 837.

The absence from this record of anything to show that the Magistrate had sufficient materials before him to justify a conviction would, on the authority of the cases first cited, be sufficient ground for setting aside the conviction.

The conviction, however, must be set aside on another ground. This Court called for a report as to whether any witnesses were examined in the case. The Magistrate reports that "the accused was "called on to show cause why he should not be convicted of the follow-"ing charge, in substance that he committed criminal trespass on Port "Trust ground to the annoyance of Mr. Tilly. The only reason shown "against conviction was that he did not know the land belonged to the "Port Trust Commissioners. This I considered clearly false, having "reference to proceedings before Mr. Moultrie which were submitted "with my record. He was warned last year by Mr. Godber.

"As no cause was shown against conviction I sentenced him."

The procedure of the Magistrate was clearly erroneous.

Section 243 of the Code of Criminal Procedure enacts that, if the accused admits that he has committed the offence, *and* if he shows no sufficient cause why he should not be convicted, the Magistrate shall convict him accordingly, but by section 244 if the accused does *not* make such admission, the Magistrate is bound to hear the complainant (if any) and to take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

These provisions clearly show that, if an accused does not admit that he committed the offence of which he is accused, the Magistrate cannot convict except upon evidence that the accused did commit the offence. The Magistrate appears to have read the latter part of section 243 as distinct and separable from the first part of the section: this is not the case. On this further ground also the conviction must be set aside.

I acquit the accused Vadivaloo Swamy, son of Permiasur, of the offence of criminal trespass charged against him in Criminal Summary Bailable Case No. 41 of 1901 of the Court of the District Magistrate, Rangoon, and I direct that he be set at liberty.

Before Mr. Justice Fox.

Special Civil Second Appeal No. 83 of 1901, May 31st.

MAUNG KYAW DUN *v.* (1) MAUNG KYAW, (2) U MYAT SAN.

Messrs. *VanSomeren* and *Fagan*—for appellant (plaintiff).

Messrs. *Lowis*, *Giles* and *Thornton* for respondents (defendants),

Redemption suit—Stamp duty—Value of suit—Jurisdiction—Lower Burma Courts Act, 1900, s. 25.

The amount on which stamp duty is payable does not determine the jurisdiction of a Court, but the amount or value of the subject-matter of a suit.

Special Civil Second Appeal No. 83 of 1901. May 31st, 1901.

In a redemption suit the subject-matter of the suit is the land sought to be redeemed. Therefore the actual present value of that land at the time the suit is filed must determine any question as to the Court which is competent to try the suit.

THE plaintiff sued to redeem some garden land for Rs. 200, alleging that he had mortgaged it, and had not sold it outright as the defendants contended he had done.

The plaint was filed "in the Court of the Civil Judge of the Insein Township," and was written on a Court-fee sheet for Rs. 15: this was the proper amount for such a suit according to sub-section (IX) of section 7 and the First Schedule of the Court Fees Act.

The actual present value of the land was not set out in the plaint, and in the written statements neither of the defendants raised in a distinct form the question whether the Township Court had jurisdiction to hear and determine the suit.

Upon appeal, however, to the District Court the defendants contended that the Township Court had no jurisdiction.

The Additional Judge decided against such contention. He held that in suits for redemption the stamp duty is paid on the amount for which redemption is sought, and that amount also determines the jurisdiction of the Court. He added "the land in dispute though measuring only 2·78 acres is said to be worth anything from Rs. 3,000 to Rs. 10,000," but he gave no definite finding upon what the value was. The Judge's decision upon how plaints in redemption suits must be stamped is not in strict accordance with the sub-section of section 7 of the Court Fees Act which I have referred to above: when the mortgage is in writing the plaint in such a suit must be stamped according to the principal money expressed to be secured by the instrument of mortgage, whether any part of the principal money has been paid off or not.

His decision that the amount on which stamp duty is payable determines the jurisdiction of the Court is also erroneous. Under section 25 of the Lower Burma Courts Act, 1900, Township Courts and Subdivisional Courts have jurisdiction to hear and determine suits and original proceedings of a value not exceeding Rs. 500 in the case of a Township Court and not exceeding Rs. 3,000 in the case of a Subdivisional Court.

The word "value" is defined in the Act as follows: "Value used "with reference to a suit or appeal means the amount or value of "the subject-matter of the suit or appeal."

In a redemption suit the subject-matter of the suit is the land sought to be redeemed: therefore the actual present value of that land at the time the suit is filed must determine any question as to the Court which is competent to try the suit.

The plaintiff's advocate does not admit that the value of the land in question in this suit was over Rs. 500.

I therefore frame the following issue, namely: "What was the "value of the land, the subject-matter of the suit, at the time the suit "was filed?"; and under sections 566 and 587 of the Code of Civil

Special Civil Second Appeal No. 83 of 1901. May 31st, 1901.

Procedure I refer such issue for trial to the Township Court and direct such Court to take such additional evidence as may be tendered by the parties on such issue.

The Township Court will record its finding on such issue and return it through the District Court to this Court together with the evidence taken.

Special Civil Second Appeal No. 23 of 1901. June 7th, 1901.

Before Mr. Justice Birks.

MA TU *v.* MAUNG PU.

Maung Thin—for appellant.

Power of attorney—General and special power—Civil Procedure Code, s. 37.

A plaint was presented by A who held a power of attorney from the plaintiff B. The power in question is stamped with a one-rupee stamp, and, after setting out that the principal B was 80 years of age and unable to come to Court, it appoints A, the brother-in-law of B, to speak on her behalf and to conduct the case as her representative. It was argued that the power was not a general power. The Lower Appellate Court reversed the decision of the Court of First Instance on a preliminary point, holding that the plaint was not presented by B, or by her duly recognized agent as described in section 37 Civil Procedure Code.

Held,—that the power is sufficiently general in its terms to cover the requirements of section 37 Civil Procedure Code, and that the question whether the power is general or special cannot be decided solely by the question of stamp duty.

Held,—further that the plaint having been admitted and no objection taken to the representation of plaintiff B by her agent A the suit should not have been dismissed on this technical ground.

Munoo Dossee v. *Ishan Chunder Banerjee*, 15 W. R., 245; *Bisandas* v. *Lakhmichand Kisanchand*, 6 Bom. H. C., 159, followed.

THE Lower Appellate Court has reversed the decision of the Court of First Instance on a preliminary point, holding "that the plaint was not presented by Ma Tu or by her duly recognized agent as described in section 37 Civil Procedure Code." The plaint was apparently presented by Maung Thaing, who holds a power of attorney from the plaintiff Ma Tu. It was stated he had engaged a pleader, but I do not find any pleader's power in this record. The power in question is stamped with a one-rupee stamp, and, after setting out that the principal Ma Tu was over 80 years of age and unable to come to Court, it appoints her brother-in-law to speak on her behalf and to conduct the case as her representative. It is argued that this is not a general power. Now the distinction between a general power and special power is laid down in Stoke's Precedents of Powers of Attorney as follows: "We shall see that generally every person *sui juris* may delegate authority to perform all lawful acts. He may authorize another to transact all matters connected with a particular employment, or he may confine the power to the doing of a single specified act. In the former case the power is called a general, in the latter a special or particular power of attorney." The special powers given as illustration to these remarks are those where a Solicitor is given a special power to receive money out of Court. On referring to the Stamp Act of 1899 it will be seen that seven different kinds of powers are provided

Special Civil Second Appeal No. 28 of 1901. June 7th, 1901.

for in Schedule I under Article 48. The first clause (*a*) clearly refers to a special power. The second (*b*) provides that when a power of attorney is required in suits or proceedings under the Presidency Small Cause Courts Act, XV of 1882, a fee of eight annas only is necessary. On turning to that Act, the second schedule shows that Chapter III of the Civil Procedure Code is applicable as to procedure except section 37, clause (*b*), and the last paragraph. Now clause (*b*) deals with muktars holding special powers, so that it would seem that a power given under clause (*b*) to conduct a Presidency Small Cause Courts suit under that Act was a general power though only bearing an eight-anna stamp. In the present case the power filed appears to be duly stamped under clause (*c*) of Article 48, but it seems to convey a general power to Maung Thaing to act for Ma Tu in that particular case. Maung Hla Baw now argues that, as Ma Tu is residing in the jurisdiction, even if this were a general power the plaint was not duly presented. It is, however, signed by the plaintiff, and there is no question but that she intended her agent to act for her. It is clear that a bed-ridden old woman must appoint some agent, if unable to come to Court. No question was raised in the Court of First Instance as to the validity of this power. It was held in *Munoo Dossee* v. *Ishan Chunder Banerjee*, 15 W. R., 245, "that a suit should not be dismissed by the First Appellate Court "on the ground that the plaint has not been filed by a duly recognized "agent, as such an error does not effect the merits of the case." In that case a very similar question was raised, for the plaintiff was residing within the jurisdiction, and the party who put in the plaint on her behalf was not a person holding a general power of attorney from her. The Court held that the point had been wrongly decided by the Munsif in the plaintiff's favour, but as it had been considered it should not have been questioned on appeal. A similar view was held by the Bombay High Court in *Bisandas* v. *Lakhmichand Kisanchand*, 6 Bom. H. C., 159. A case of mine as Judicial Commissioner has also been referred to, *Mohan Panday* v. *Chunhal Panday*, Civil Second Appeal No. 9 of 1899, where it was held that the defendant had waived an objection of this nature. I think also that the general provision of section 528 Civil Procedure Code, shows that the Lower Appellate Court was wrong in dismissing the suit on the purely technical ground. I would hold therefore—

(1) that the power in question is sufficiently general in its terms to cover the requirements of section 37 Civil Procedure Code, and that the question as to whether the power is general or special cannot be decided solely by the question of stamp duty;

(2) that the plaint having been admitted and no objection taken to the representation of plaintiff by her agent the suit should not have been dismissed on this technical ground.

The appeal is allowed and the case will be remanded back to the Lower Appellate Court for a decision on the merits. The costs of this appeal will be in favour of the plaintiff and will be included in the costs of the decree of the lower Appellate Court on the merits.

Criminal Revision No. 466 of 1901. June 11th, 1901.

Before the Chief Judge.

THE CROWN *v.* NGA PO KA.*

Improper discharge of accused—Further inquiry—Reference to High Court—Criminal Procedure Code, s. 437—Notice to accused.

In the case of an accused being improperly discharged by a Magistrate, when there is really no further inquiry that can be properly directed, the proper course is to refer to the High Court. In cases in which further inquiry of any kind can be ordered, a reference to the High Court generally would be unnecessary.

Queen-Empress v. *Ng'a Lun*, 1 L. B. R., 9, commented on.

It is a general principle of law that an order to the prejudice of an accused person shall not be made without his having an opportunity of contesting it.

ON the 4th of February 1901 the District Magistrate, without recording any special reasons, directed the re-arrest and re-trial of one Nga Po Ka, who had on the 21st November 1900, been discharged in respect of offences under sections 420 and 429 of the Indian Penal Code by a Subordinate 1st class Magistrate. The successor in office of the District Magistrate above referred to submitted the case to this Court, recommending that his predecessor's order should be set aside as "the order passed by this Court on 4th February 1901 ordering a "retrial under section 437 Code of Criminal Procedure, by another "Magistrate is illegal under the ruling given in *Queen-Empress* v. *Nga "Po Lun*, 1 L. B. R., 9 (Criminal Revision No. 175 of 1900)"; and the District Magistrate asked that the case should be remanded for trial to the 1st class Magistrate, who originally inquired into the case and discharged the prisoner.

I accordingly set aside the order of the 4th February and requested the District Magistrate to submit reasons for asking for an order for re-trial.

These are now before me and are sufficient to show that on the evidence recorded a charge should have been framed. Some of the facts stated by the District Magistrate are, further, such as would indicate that a re-trial *de novo* may be desirable. The Magistrate who first inquired into the case is also now absent from the district.

I direct accordingly that Nga Po Ka be called on to show cause against a fresh inquiry being held in the case against him, and on receipt of the District Magistrate's report final orders will be passed.

With regard to the order in *Queen-Empress* v. *Nga Po Lun* which was passed by me I may make the following observation :—

The accused had in that case been acquitted, and, as noted, an answer to the second question asked by the Sessions Judge was not necessary for the purposes of that case; but it was thought well to make certain remarks. Part of the remarks as recorded in the last paragraph of the ruling go further than was intended, and should be understood to be limited to the last sentence, which runs "under the "circumstances which the District Magistrate had before him, namely, "an improper discharge, the evidence already taken being sufficient in "itself to justify the accused being put on his trial, the proper course "would have been to refer the case to the High Court." The text of

* Over-ruled by *King-Emperor* v. *Po Yin*, 3, L. B. R., 97.

Criminal Revision. No. 466 of 1901 June 11th, 1901.

the Full Bench decision which I was following (*Hari Dass Sanyal and others* v. *Saritulla*, 15 Cal., 608) runs as follows: "In the same "way, in a case not triable only by the Court of Session, if the Ses- "sions Judge or the District Magistrate is satisfied that on the evidence "taken there is a clear case for charging and trying the accused, and "there is no reason for desiring further magisterial examination, I think "it is ordinarily his duty to refer the case to this Court, which can "make a suitable order, and not to direct a further inquiry by a Magis- "trate." That was the state of things in the case then before me as to the need for further inquiry, supposing the accused had been discharged and not acquitted. In the present case *Queen-Empress* v. *Nga Po Ka*, the evidence recorded is in the opinion of the District Magistrate also sufficient to warrant the framing of a charge, but the District Magistrate has now submitted reasons for also considering that a *further inquiry* in the ordinary sense of the words is called for, the record having apparently been tampered with, and again as the Magistrate who tried the case is not available, a fresh or *new* inquiry is obviously desirable.

I take then this opportunity of pointing out that the order in *Queen-Empress* v. *Nga Po Lun* should be understood as not intended to do more than lay down that, when there is really no *further inquiry* that can be properly directed, the proper course is to refer the matter to the High Court. In cases in which *further inquiry* of any kind can be ordered a reference to the High Court may be, and in my opinion generally would be, unnecessary.

It appears that before making the order under section 437 of the Criminal Procedure Code, which has already been set aside, the District Magistrate did not give the accused person an opportunity of showing cause why an order for further inquiry should not be made. The service of a notice to show cause is not absolutely necessary in point of law, but it is a general principle that an order to the prejudice of an accused person shall not be made without his having an opportunity of contesting it, and a Magistrate who neglects to give such notice or opportunity does not exercise a proper discretion.

Before the Chief Judge.

Criminal Revision No. 993 of 1901. June 12th, 1901.

CROWN *v.* MI ZAN.

Improper discharge of accused—Further inquiry—Reference to High Court—Criminal Procedure Code, section 437—False statement made to Police Officer—Statement taken down in writing by Police Officer—Criminal Procedure Code, section 161—False evidence—False information—Contradictory Statements to Police and to Magistrate—Conviction in the alternative—Indian Penal Code, sections 193, 182—Police Sergeant not subordinate of Township Magistrate—Criminal Procedure Code, section 195 (i) (a)—Alternative charges—Criminal Procedure Code, s. 236.

It is not necessary in every case in which further inquiry is considered desirable under section 437, or in which the framing of a charge against the accused who has been discharged and his trial are required that reference should be made to the High Court. Even if the words '*further enquiry*' do not include *trial*, the trial would follow as in the case of a newly instituted prosecution if the further enquiry established a *primâ facie* charge, without reference to the High Court. *Queen-Empress* v. *Nga Po Lun*, 1 L. B. R., p. 9, referred to.

Criminal Revision No. 993 of 1901. June 12th, 1901.

False statements made under section 161 Criminal Procedure Code, are not now punishable under section 193 Indian Penal Code.

The written statement made under sections 161 and 162 Criminal Procedure Code, is not admissible in evidence.

A Police Sergeant is not *subordinate* to a Township Magistrate within the meaning of section 195 (1) (*a*), Criminal Procedure Code.

A conviction in the alternative under section 193 or section 182, Indian Penal Code, is not sustainable on the ground that, where one statement has been made to the police and a contradictory statement has been made on oath, the accused must either have given false evidence or false information.

Section 236 Criminal Procedure Code, does not apply to a state of facts in which it is doubtful what are the acts or series of acts that are proved, but to a state of facts in which it is doubtful which of several sections is applicable. The doubt is not as to the facts but as to a matter of law.

Wapadar Khan v. *Queen-Empress* I. L. R., 21 Cal., 955; *Queen-Empress* v. *Croft*, I. L. R., 23 Cal., 174, *Khan Mahomed* v. *Queen-Empress* and *Shershah* v. *Queen-Empress*, Punjab Rec., 1887, Criminal Judgments Nos. 11 and 43, *Queen-Empress* v. *Ramji Sajabarao*, I. L. R. 10 Bom., 124, cited.

THE District Magistrate has referred the proceedings of the Subdivisional Magistrate, Myaungmya, in Criminal Trial No. 136 of 1900, Crown *v.* Mi Zan, section 193 Indian Penal Code, with a recommendation that the order of discharge passed therein be set aside and that Mi Zan be put on her trial. It appears that it was intended to prosecute her for offences under section 193 and section 182, Indian Penal Code.

The District Magistrate's order of reference is as follows :—

"One Tun Nyan was prosecuted for kidnapping a girl Mi Kin. During the investigation by the police the latter's mother stated to the police that she had not consented to her daughter's eloping with Tun Nyan. When giving evidence in the case Mi Zan stated that she had given consent and added that she had made a false statement to the police because she was angry.

"The Township Magistrate accordingly sanctioned her prosecution under section 182 Indian Penal Code.

"The Subdivisional Magistrate who tried the case discharged Mi Zan on the ground that as she had been a witness in Court she could not be prosecuted under section 182 Indian Penal Code, and also on the ground that the Township Magistrate had no power to sanction prosecution for false statement made to the police.

"I am unable to follow the Subdivisional Magistrate's argument as to the first ground. It is clear that owing to the false information which Mi Zan gave to the police, Tun Nyan was harassed by being arrested and tried, and I see no reason why Mi Zan should not be tried under section 182 Indian Penal Code.

"As for the second ground, Mi Zan gave the false evidence to a Sergeant of police of a guard within the jurisdiction of the Township Magistrate. Surely the Sergeant was subordinate to the Township Magistrate for the purpose of section 195 Criminal Procedure Code. If so the Township Magistrate had power to grant the sanction.

"The proceedings are accordingly submitted to the Chief Court, with the recommendation that the order of discharge be set aside and Mi Zan be put on her trial."

There was in the first place no necessity for a reference to this Court. It seems clear from the record that the whole of the evidence

Criminal Revision No. 993 of 1901. June 12th, 1901.

had not been taken. No witness had been examined, but two copies of statements made by Mi Zan, one a copy of police record of her statement made on examination by the police and the other a copy of her deposition in Court, were filed; and on perusing these documents and the order of sanction for Mi Zan's prosecution which was passed by the Township Magistrate, the Subdivisional Magistrate discharged the accused. If there was evidence obtainable to prove a charge under section 193 or section 182, Indian Penal Code, the District Magistrate had the power under section 437 to order further inquiry which would in the natural course be followed by charge and trial in case an offence were found to be *primâ facie* established. It is not necessary to refer every case in which further inquiry is necessary to this Court; nor was the decision published at page 9 of the Printed Judgments of the Chief Court, *Queen-Empress* v. *Nga Po Lun* (cited in a similar reference by the same District Magistrate) intended to lay this down. Further, the general statement that 'further inquiry' does not include *trial*, is liable to be misunderstood. The words 'further inquiry' may not include in their actual meaning *charge* and *trial*; but, if it appears on the further inquiry that a charge should be drawn up and the accused should be tried, then this trial will properly follow just as if the case had been newly instituted.

In the case of *Queen-Empress* v. *Po Lun* there was no scope for further inquiry, even supposing that the accused in that case had been *discharged* and not acquitted, and, therefore, following the Full Bench ruling cited in the order, it was noted that the proper course would have been to refer the matter to the High Court. The point was not actually involved in the case, as it appeared on consideration to stand, and the remarks made on the subject of further inquiry, taken as applying generally, are no doubt liable to be misunderstood in their bearing.

There are several points in the case now referred to this Court which call for remark, because the District Magistrate seems to be under misapprehensions, and similar errors have come before me lately in other cases. In the first place the Subdivisional Magistrate is right in pointing out that "false statements made before the police are not punishable under section 193 Indian Penal Code." A person though bound to answer all questions (with certain exceptions) relating to the case under investigation which may be put by a police officer is not, by the law, as it at present stands in section 161 Indian Penal Code, bound to answer those questions truly. He does not thereby commit the offence of giving false evidence even if he makes false statements.

Secondly, by the provisions of section 162 of the Code, no statement taken down in writing in the course of an investigation by a police officer shall be used as evidence. The recorded statement found on page 2 of the file of *Crown* v. *Mi Zan* was therefore inadmissible.

Thirdly, the Township Magistrate had no power under section 195 Criminal Procedure Code, to sanction the prosecution of Mi Zan for an offence under section 182 Indian Penal Code. The Police

Criminal Revision No. 993 of 1901. June 12th, 1901.

Sergeant was not subordinate to the Magistrate in the sense intended by section 195 (*1*) (*a*), Criminal Procedure Code. In the case of *Ramasory Lall* v. *Queen-Empress* (I. L. R. 27 Cal., 452), it was held that although police officers in a district are generally subordinate to the District Magistrate, yet the subordination, contemplated by section 195 Criminal Procedure Code, is not such subordination, but is the subordination to some superior officer of police; and from this opinion I see no reason to differ.

Fourthly, the District Magistrate appears to have had in mind a case very similar to this which he has also referred to this Court and to have thought that Mi Zan must be either guilty under section 195 Indian Penal Code, of giving false evidence in Court, or under section 182 Indian Penal Code, of giving false information. There is no suggestion in the case immediately under consideration that it can be proved which statement is false; but the District Magistrate in the other similar case just referred to thought that a conviction in the alternative under section 193 and section 182, Indian Penal Code, was a *dilemma* from which the accused could not escape, and it appears that he has acted in this reference on the same view. Such a conviction in the alternative could not be sustainable. Section 236 Criminal Procedure Code, does not apply to a state of facts in which it is doubtful what are the acts or series of acts that are proved, but to a state of facts in which it is doubtful which of several sections is applicable. The doubt is not as to facts but as to a matter of law.

Illustration (*b*) to section 236 is perhaps an apparent exception, but, so far as rulings form a guide, the case of contradictory statements on oath forms the only apparent exception to the law as stated above. The following rulings are clear on the subject of alternative charges.

Wafadar Khan and others v. *Queen-Empress* (Indian Law Reports, 21 Cal., 955), *Queen-Empress* v. *Croft* (Indian Law Reports, 23 Cal., 174), *Khan Muhammed* v. *Queen-Empress*, and *Shershah* v. *Queen-Empress* (Pun. Rec., 1887, Criminal Judgments Nos. 11 and 43). And again this very point of alternative charges under sections 193 and 182, Indian Penal Code, was dealt with in the case of *Queen-Empress* v. *Ramji Sajabarao* (Indian Law Reports, 10 Bom., 124).

For the above reasons I must decline to interfere with the order of the Subdivisional Magistrate discharging the accused Mi Zan. It is not suggested that it can be proved that the evidence given on oath in Court was false and can be proved to be so.

The proceedings may be returned.

Civil Reference No. 4 of 1900. January 4th, 1901.

Before the Chief Judge and Mr. Justice Fox.

MAUNG HMAW *v.* MA ON BWIN AND THREE OTHERS.

Buddhist Law—Succession—Brothers and sisters already divided—Estate of divided deceased sister—Equal rights of elder brothers or sisters on failure of younger brothers or sisters—Exclusion of children of brother predeceasing his divided deceased sister.

In the case of brothers and sisters already divided, the elder brothers or sister inherit only on failure of younger brothers or sisters; but the second of such elder

Civil Reference No. 4 of 1900. January 4th, 1901.

brothers or sisters would not exclude one older than himself or herself. The principle that property does not ascend does not operate in such a case, the eldest is not barred from equal rights with the second.

It is a principle of Buddhist Law that only those closely related should inherit, and that relations of the same degree should inherit to the exclusion of those of a more remote degree, *e.g.*, that children should exclude grand-children. There are certain exceptions to this rule (*e.g.*, in cases where there has been no division). In such cases, elder brothers within reach of the inheritance would share equally, and one brother so within reach dying before distribution, his children would take *per stirpes* and not *per capita*. In cases where there has been division, however, if the eldest brother predeceases his sister, his children cannot succeed to her estate where there is a surviving second brother: the surviving second brother is the sole heir.

The following questions have been referred by Mr. Justice Birks to a Divisional Bench of this Court:—

(1) In the case of the youngest of three children dying after the death of the parents and after the estate has been divided does the next eldest brother exclude the children of the eldest of the three from any share in the inheritance on the authority of sections 211, *Attasankepa Vannana, and 18, Book X, of Manukye?*

(2) If he does not exclude them, do the elder brothers share equally, and in the case of death of one do the descendants take *per stirpes* or *per capita?*

The decision of the Bench upon the questions referred is as follows:—

It may be noted at once that there is no question before us affected by the nature of the property, ancestral or other. The question, as is admitted by both parties, is merely as to the inheritance of the deceased youngest sister's estate, she having left no issue. Further in reference to question (2) it is to be noted that the brother who predeceased the sister leaving children was the eldest of the three. The questions referred have been argued before us by the learned advocates for the parties.

It is admitted and agreed by the advocates—

(*a*) That if the eldest and the elder brother had been equally within reach of their deceased sister's estate, they would take equal shares. We see no reason to doubt that this is a correct statement of the Buddhist Law on the subject. There is nothing that has been cited, or that we have found on search of authorities to lead us to suppose that when on failure of younger brothers or sisters the elder brothers or sisters inherit, the second of such elder brothers or sisters would exclude one older than himself or herself, nor is such exclusion indicated by any analogous rule in the case of children or other relations. The principle that property shall not ascend does not operate, nor do the authorities cited by the learned Judge in question (1) of the reference bar the eldest brother from equal rights with the second.

(*b*) That if the *children* of the eldest brother have a right to inherit at all they will take *per stirpes*, that is, the share of their father between them, and not *per capita*, that is, each an equal share with the second brother. This also we

Civil Reference No. 4 of 1900. January 4th, 1901.

believe to be in principle good law. This view was adopted in the case of *Mau-g Kyaw and three others* v. *Ma Tu and another*, U. B. R. (Civil), page 189, 1895, and we have found nothing in the authorities to contradict this method of division.

But it is argued by Mr. VanSomeren that, since the eldest brother predeceased the sister whose estate is in question, he was not within reach of the inheritance and that therefore his children should get nothing. This argument is based on the analogy of what takes place when a person dies leaving children and also grand-children, whose parent (the child of the intestate) predeceased the intestate. It is a principle of Buddhist Law that only those closely related should inherit (see *Dhammathatkyaw*, section 378, Digest) and that relations of the same degree should inherit to the exclusion of those of a more remote degree, that, for instance, children should exclude grand-children. But there are exceptions to this last rule. If a child dies after his parents but before partition of their property and leaves children, his children inherit his share because he died after he was *within reach of the inheritance* (section 105, page 43, Digest). But if the child died before his parents, that is, without being within reach of the inheritance, then, in case the deceased's child was the eldest son, his children take among them a share equal to that of the younger brother (section 162, page 378, Digest). And, in case the deceased's child was not the eldest son, the grand-children will take among them a fourth of the share that would have come to their parents (section 162, page 378, Digest, section 164, page 383, Digest). There seem to be reasons both for giving a share and for ordinarily giving a reduced share to the grand-children. They are probably young and require support; but they will also probably obtain that support in ordinary course in some measure from their uncles and aunts. The grant of a share to children of a son who has predeceased his father appears to be somewhat of a favour done in spite of the fact that they stand in a remoter degree than their uncles and aunts. In the case before us we have to consider whether there is any analogy which would justify us in saying that the children of the eldest brother of the deceased's sister, this brother having predeceased the sister, should take between them the share their father would have got had he survived his sister. We do not think the cases are analogous. The deceased's brother presumably got his share of his parents' estate and, so far as it still exists, his children have it for their support. The natural claim to share in an aunt's property is weaker than the claim to share in an ancestor's undistributed property, whether Buddhist legal principles or natural rights be considered.

We think that, since the eldest brother was not within reach of his sister's estate when he died, his children should not inherit, and that the second brother who survives is the sole heir.

We therefore answer the first question in the negative, and in reply to the second are of opinion that elder brothers within reach of the inheritance would share equally, and in the case of one brother so within reach dying before distribution, his children would take his share *per*

stirpes and not *per capita*, but we are informed that in the case in question the eldest brother predeceased his sister whose estate is in question, and we are of opinion, for reasons given above, that the children of the deceased's brother have no claim to share in the sister's estate.

Civil Reference No. 4 of 1900. January 4th, 1901.

Privy Council.

KONG YEE LONE & Co., APPELLANTS, *v.* LOWJEE NANJEE, RESPONDENT.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.*

Wagering contract—Gambling transaction—Consideration for promissory notes sued upon—Indian Contract Act, s. 30.

Two parties may enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay and receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction but a wager on the rise or fall of the market.

Where therefore the dealings which formed the consideration for certain promissory notes sued on were not for genuine purchases of rice, but only for payment of money by one party or the other according to the changes and chances of the market, *Held*—that such dealings were wagering contracts within the meaning of the Indian Contract Act, and the consideration for which the promissory notes were given was a gambling transaction.

The respondent in this appeal, who is plaintiff in the original suit, sued the defendants now appellants in the Court of the Recorder of Rangoon for the recovery of money secured by two promissory notes. The plaintiff is a rice trader carrying on business under the firm of Robert Sutherland & Co. in Rangoon. The defendants carry on business with other persons under the firm of Kong Yee Lone as rice millers, general merchants and commission agents.

The notes sued on are in the form following:—

"Rangoon, 11th September 1899.

"Rs. 1,27,820.

"On demand we the undersigned Kong Yee Lone and Company promise to pay to Messrs. Robert Sutherland and Company or order the sum of rupees one lac twenty-seven thousand and eight hundred and twenty only for value received in difference on rice.

"Signed in Chinese character.

"(Sd.) KONG YEE LONE & Co. (in English).

"*Note.*—The translation of the above Chinese character is—

"'KWONG SHIP LOANG.'"

"Rangoon, 11th September 1899.

"Rs. 5,198-1-0.

"On demand we the undersigned Kong Yee Lone and Company promise to "pay to Messrs. Robert Sutherland and Company or order the sum of rupees five

* Present: Lord Hobhouse, Lord Macnaghten, Lord Robertson, Sir Richard Couch, and Sir Ford North.

"thousand one hundred and ninety-eight and anna one only for value received in "brokerage.

"Signed in Chinese character.

"(Sd.) KONG YEE LONE & Co. (in English).

"*Note*.—The translation of the above Chinese character is—

"'KWONG SHIP LOANG.'"

The defendants pleaded that the character signed to the notes indicates not their firm but somebody or something else; and further that the dealings on which the notes are founded were effected between the plaintiff and one Kaim Chiew, who, though a partner, was not the manager of the firm and had no authority to bind it. A large part of the controversy in the Court below and at this Bar related to these two defences. Their Lordships will not discuss them further now. One turns on the niceties of Chinese handwriting; and the other on a variety of circumstances adduced to show the position of Kaim Chiew in the defendants' firm. Both have been ruled by the learned Recorder in favour of the plaintiff and at the close of the argument their Lordships were clear that the evidence fully justified his rulings.

A more serious objection to the plaintiff's suit is that the consideration for which the promissory notes were given was a gambling transaction. The law applicable to the case is the Indian Contract Act, which enacts as follows:—

> "30. Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made."

This is substantially a transfusion of English law into the Indian statute book. Mr. Danckwerts urged that there is a difference between the expression "gaming and wagering" used in the English statute and in the earlier Indian Act XXI of 1848 and the expression "by way of wager" used in the present Indian Act. Their Lordships are unable to perceive the distinction. Two parties may enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time. But if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market. The question is, of which nature were the dealings which formed the consideration for the notes sued on. Were they for genuine purchases of rice or only for payment of money by one or the other according to the changes and chances of the market?

The contracts by which the plaintiff purports to buy rice from the defendants are broadly divisible into two classes. They are distinguishable on their face by what is called the option clause. In one class of contracts, shown in Exhibits D. 12 to D. 20, the seller has an

option to deliver rice from a number of specified mills, among which that of the defendants' is not included. In the other class, shown in Exhibits D. to D. 11, the only mill specified is that of the defendants'. In fact this second class leaves no option to the seller, though the expression used in and appropriate to the first class is retained in the class where only the defendants' mill is specified.

The defendants' mill is a small one, capable, as the plaintiff states, of putting out 30,000 bags in a month. Their partnership capital, too, is small, being fixed by their deed at a trifle more than a lac of rupees.

In the year 1899, by 14 contracts ranging in time from January to the end of August, the plaintiff bought from the defendants 22,250 bags of rice. All these contracts, which are set out in the record and are conveniently tabulated in the case lodged for this appeal, are contracts of the second class, namely, for rice from the defendants' mill. All were duly fulfilled by delivery and payment.

Contracts of the first class are very different both in their character and in the treatment of them by the parties. The plaintiff's clerk Sitaram produced an account (Exhibit I, Rec. p. 106) showing the dealings which took place between the parties from January 1898 to August 1899. They are very large, considerably exceeding half a million of bags. The witness was asked to mark the items for which the rice had been delivered. The items so marked (*see* Exhibit I, 1) consist of the 22,250 bags which fell under the contracts mentioned as of the second class, and 5,000 more which are the subject of other contracts made subsequently to the date of the promissory notes. It does not appear by the record whether those 5,000 bags were bought under the first or the second class of contract.

There is some difficulty in applying Sitaram's oral evidence to Exhibit I, because the exhibit relates to a wider range of dealings than those under discussion. The oral evidence is to the following effect:—

"Out of 193,250 bags sold to plaintiff 27,250 were delivered.

"Of the amount in Exhibit I put down as bought by defendants from plaintiff, *i.e.*, 258,000 bags, none at all were delivered. Those were re-sales for differences. On the 28th June whoever acted for defendants began a very heavy speculation. On that day defendants sold to the plaintiff 30,000 bags, on the 5th July 30,000, on the 10th July 10,000, on 16th 30,000, on 18th 15,000, 24th 30,000 for delivery August to October.

"On 5th August defendants bought 62,000 and 94,000 bags. On 7th August 20,000. On 21st August plaintiff purchased 20,000 bags.

"Exhibit A was given for differences on these sales."

Whether the differences were for the sales in August alone or for those in June and July also is not clear, and there is a slight discrepancy in the figures. But that does not substantially affect the result of the witness's accounts and statements, which is clear enough. Out of the half million or more bags represented in Exhibit I there were delivered prior to the date of the promissory notes 22,250 bags, every one of which was sold under the second class of contract. As to the other 5,000 delivered it is not shown that they were under the first class. For all that appears there has not been delivery of a single bag

under the first class. During seven weeks in June, July and August 1899 were made the contracts on which the notes in suit are founded. They are the last seven items in Exhibit I. They appear to be for 199,000 bags at various prices aggregating upwards of 5 crores of rupees. The latest delivery was to be on the 7th October.

Now the output of the firm itself would not be much over 60,000 bags during the currency of the contracts; and they had dealings with other persons besides the plaintiff. The capital of the firm as stated was a trifle more than a lac of rupees. The cost of the goods would be that amount multiplied five hundred fold. It is possible for traders to contemplate transactions so far beyond their basis of trade, but it is very unlikely. In point of fact they never completed nor were they called on to complete any one of the ostensible transactions. The rational inference is that neither party ever intended completion. When the two classes of contracts are compared; the one class suitable to traders such as the defendants and fulfilled by them, the other extravagantly large and left without any attempt at fulfilment; the rational inference is strengthened into a moral certainty. Their Lordships think that from these data it is unreasonable to draw any other conclusion than that the description which the larger promissory note gives of the consideration for it is the correct one. It is for "difference on rice;" not, as now contended, for the price of rice resold by the plaintiff to the defendants.

The judgment of the learned Recorder does not dwell on the above considerations. He quotes the judgment of Mr. Justice Cave in the case of *The Universal Stock Exchange* v. *Strachan*, L.R., 1896, Cas. 166, which, as their Lordships agree, lays down the law very clearly. He then asks whether there was in this case a common intention to wager; and he adds, "I do not see how I can so hold, having regard to the "fact that the rice was in certain instances delivered and paid for." But he does not observe that the instances all belong to the class of contracts as to which it is reasonable to infer that they were genuine contracts for the sale and delivery of goods.

Their Lordships hold that the consideration of the notes sued on was a number of wagering contracts within the meaning of the Indian Contract Act. They will humbly advise His Majesty so to declare, and reversing the decree below to dismiss the suit with costs. The plaintiff must also pay the costs of this appeal.

Criminal Revision No. 473 of 1901.

Criminal Reference No. 5 of 1901. June 28th, 1901.

Before the Chief Judge, Mr. Justice Fox, Mr. Justice Bigge, and Mr. Justice Birks.

CROWN *v.* NGA THA DUN AND ONE.

Pwè—Definition—Lower Burma Village Act, s. 13A—Lower Burma Towns Act, s. 7A.

The word *pwè* that occurs in sections 13A of the Lower Burma Village Act and 7A of the Lower Burma Towns Act merely refers to entertainments of a theatrical nature, namely, *zat-pwès* and *yókthe-pwès*, and does not include a cart or pony race.

REFERENCE by Mr. Justice Birks under section 11 of the Lower Burma Courts Act, arising out of an order of the 1st class Magistrate of

Pegu convicting Nga Tha Dun and Nga Po Nyan under section 13A of the Lower Burma Village Act for holding a bullock race without permission.

Criminal Revision No. 473 of 1901.

Criminal Reference No. 5 of 1901.

June 28th, 1901.

The order of reference ran as follows :—

The accused Nga Tha Dun and Nga Po Nyan have each been sentenced under section 13A of the Lower Burma Village Act for holding a bullock race without permission and ordered to pay fines of Rs. 10. The papers were called on revision by the Chief Judge and have come before me for disposal. Whether the conviction is legal or not depends upon the construction to be placed upon the word *pwè* that occurs in section 13A. In Criminal Revision No. 150 of 1900 the Chief Judge held that the word *pwè* would cover a cart race. The decision given by me as Judicial Commissioner in Criminal Revision No. 84 of 1900 has therefore been overruled. This decision was, however, based on the interpretation placed by the Local Government on the meaning of the word *pwè* (*vide* Secretary's No. 393—2C.-2, to the Commissioner of the Tenasserim Division, dated the 15th January 1900). I think there can be no doubt what the intentions of the Legislature were from a perusal of the statement of the objects and reasons published in the *Burma Gazette* of the 8th September 1895, Part III, page 190. Paragraph 3 of these reasons is to the following effect:—

"In the course of the discussion on the amendment of Act V of 1861 (an Act for the regulation of Police) the necessity for giving district officers in Burma power to control and regulate the public entertainments which are locally known as *pwès* was represented to the Government of India, but it was thought that matters peculiar to that province could not appropriately be dealt with in a general Act. The opportunity has now been taken of introducing, by sections 2 and 5 of the Bill, in the Lower Burma Village Act, 1889, and also in the Lower Burma Towns Act, 1892, a provision prohibiting the holding of these entertainments without a license granted by the Deputy Commissioner or an officer appointed by the Deputy Commissioner in this behalf. It is unnecessary to amend the corresponding enactments in force in Upper Burma as the matter is sufficiently provided for there by the Dramatic Performances Act (XIX of 1876), as amended by section 7 (*1*) (*e*) of the Upper Burma Laws Act (XX of 1886)."

I think it is clear from the reference to the Dramatic Performances Act, XIX of 1876, in this paragraph that the word *pwè* was used as denoting entertainments of that nature. In the case of the *Administrator-General v. Prem Lai Mullick*, 22 Cal., 788, the Privy Council seems to have disapproved of a reference to these statements. It is, however, a question whether the word *pwè* as used in an Act of the Legislature has not acquired a technical meaning and the first and most important rule of construction given in Maxwell on the interpretation of statutes is "that words and phrases are used in their technical "meaning if they have acquired one and in their popular meaning if they "have not." I am of opinion that the word *pwè* in this section has acquired a technical meaning and does not cover an entertainment such

Criminal Revision No. 473 of 1901.

Criminal Reference No. 5 of 1901. June 28th. 1901.

as a cart race. As the Chief Judge has taken a different view I will refer the following question to a Bench :- -

Does the word *pwè* in sections 13A of the Lower Burma Village Act and 7A of the Lower Burma Towns Act include such entertainments as cart races or pony races or does it merely refer to entertainments of a theatrical nature?

The judgment of the Full Bench was as follows :—

Birks, J.—The question before us for decision is the meaning of the word *pwè* that occurs in sections 13A of the Lower Burma Village Act and 7A of the Lower Burma Towns Act. The question specially referred is the one that arose in Criminal Revision No. 473 of 1901 as to whether the word *pwè* would cover a cart race. It is admitted that the word *pwè* is often affixed to other Burmese words and in this way denotes public entertainments of very various characters. For instance *mengala pwè* is a marriage feast, *shinbyu pwè* an entertainment given on a boy entering the priest-hood, *hle-pyaing pwè* a boat race, *myinpyaing pwè* a race meeting, *sa-me pwè* a school examination. The original signification of the word as given in Stevenson's Dictionary is "food prepared for eating," *Sabwe* is "a place of eating" or "a table"; hence the word means also "a feast or public entertainment." *Pwe-kya* is to meet with approval (as actors) of the audience of a dramatic performance; *pwè-ngat* is to have a craving for a dramatic performance; *pwe-nyaung* to be *ennuyi* with having frequently seen dramatic performances; *pwè-hnga* is to engage a dramatic troupe, and *pwè-sayan* the advance given to a dramatic troupe for their services.

There is no expert evidence before us as to the meaning of the word *pwè* taken by itself, but Mr. Stevenson's Dictionary is recognized as the work of an officer who has a very intimate knowledge of Burmese. It seems pretty clear from these illustrations that when the root word *pwè* is used with verbal affixes it refers to dramatic entertainments generally, when by itself a qualifying affix to other nouns it denotes a public entertainment varying with the nature of the word to which it is affixed. Now the intentions of the Legislature can be inferred from the course of legislation in Burma. When I came to Burma in 1874 it was always the practice for the people to apply for permission to hold *pwès*. There were standing orders in nearly all districts that such permission should not be granted except on moonlight nights, *i.e.*, between the 8th waxing and the 8th waning of the moon. As far as I remember, these old orders did not specify the class of *pwès* referred to, but they were intended to control theatrical performances at night. Breaches of these standing orders were formerly punished under section 188 Penal Code. It was pointed out by the Judicial Commissioners of those days that this section was not intended for the breach of executive orders addressed generally to the public, and I believe it was then the practice to treat the unlicensed holding of *pwès* as public nuisances. In 1876 the Dramatic Performances Act came into force in Lower Burma and no further legislation was deemed necessary. In 1886 when Upper Burma was annexed it was thought convenient to

Criminal Revision No. 473 of 1901.

Criminal Reference No. 5 of 1901. June 28th, 1901.

legalize the old practice of granting written permits by an amendment of Act XIX of 1876 as regards Upper Burma which was effected by amending section 10 as follows:—

"No dramatic performance shall take place except under a license granted by the District Magistrate or such officer as the District Magistrate may appoint in this behalf.

"Any person who promotes or takes part in any dramatic performance in contravention of the foregoing portion of this section shall be punishable, on conviction before a Magistrate, with imprisonment for a term which may extend to three months, or with fine which may extend to Rs. 500 or with both.

"The Local Government may also order that no dramatic performance shall take place in any place of public entertainment unless a copy of the piece, if and so far as it is written, or some sufficient account of its purport, if and so far as it is in pantomime, has been furnished, not less than three days before the performance, to the Local Government or to such officer as it may appoint in this behalf.

A copy of any order under this section may be served on any keeper of a place of public entertainment, and if thereafter he does, or willingly permits, any act in disobedience to such order, he shall be punishable, on conviction before a Magistrate, with imprisonment for a term which may extend to three months or with fine, or with both."

This Act was superseded by Act XIII of 1898, which is applicable to both Upper and Lower Burma, and the Dramatic Performances Act has therefore been extended as originally enacted, with the exception of section 12, to the whole province.

It may be noted that while Schedule I of this Act maintains the Dramatic Performances Act as applicable in Upper Burma except section 12 without the amendments effected by Act XX of 1886, Part II of the third Schedule re-enacts the amendment as part of the Village Act. In Lower Burma these amendments in the Village and Town Acts had been already effected by Act 18 of 1895. It would seem therefore that the Legislature considered that the control of *pwès* could be met in Upper Burma by the amendment of the Dramatic Performances Act and that afterwards it considered these provisions more suitable in the Village and Town Acts and re-enacted them in nearly the same language in 1895 for Lower Burma and in 1898 for Upper Burma.

This view is also supported by the similarity of the penalties for breach of the rules, which are much severer than the other penalties mentioned in these Acts, section 8.

The only variation between section 10 of Act XIX of 1876 as amended by Act XX of 1886 and the clauses now under discussion is that the words "Deputy Commissioner" is substituted for "District Magistrate." I am inclined to think from the course that legislation has taken in Burma that it was not the intention of the Local Government to make all forms of entertainments which are colloquially spoken of as *pwès* punishable unless held under a license. I think also that the vernacular word *pwè* being used in an English Act must be interpreted in the sense ordinarily known to Europeans and that would, I am convinced, be held to mean some form of theatrical entertainment.

Criminal Revision No. 473 of 1901.

Criminal Reference No. 5 of 1901.

June 28th, 1901.

The sections in which the words occur being penal enactments should be construed strictly. It may no doubt be argued that the Legislature by substituting the word *pwè* for "dramatic performance" intended to enlarge the scope of the offences punishable under sections 13A and 7A, but I think if this were the intention, the different kinds of *pwès* would have been specified. I have already stated some of the reasons I have for holding the word *pwè* should be read in a restricted sense in my order of reference. I would answer the question as follows:—

The word *pwè* that occurs in sections 13A of the Lower Burma Village Act and 7A of the Lower Burma Towns Act merely refers to entertainments of a theatrical nature such as *zat-pwès* and *yok-the-pwès* given in the Burmese language and does not include a cart or pony race.

Bigge, J.—I would answer the question referred in this case as follows:—

The term *pwè* used in section 13A of the Lower Burma Village Act, 1889, and section 7A of the Lower Burma Towns Act, 1892, does not include such entertainments or gatherings as cart races or pony races. It no doubt requires to be defined legislatively, but I do not think we should meanwhile define it judicially so as, in my opinion, to extend its meaning far beyond that which is usually accorded to it.

It seems to me to construe this somewhat vague word so as to include most meetings of a public character (I believe a school examination is a species of *pwè*) would be to lose sight of the principles on which penal statutes should be interpreted, and to interfere with the gatherings, festivals and amusements of the people of the country in a way which can only be warranted when the legislature has declared expressly and beyond all doubt that such is its deliberate intention.

That the word *pwè* does require definition is clear from this reference and from the fact that executive orders have been issued by Government in connection with its signification, and it is of importance that a clear interpretation should be assigned to it so that nothing may be left to the feelings, caprice or prejudice of those who have to administer the law.

I do not think it is necessary to go to dictionaries to decide the question before us, and philological enquiries, while usually interesting, not infrequently darken counsel when the meaning of an every-day expression has to be settled for practical purposes. I simply put to myself this question, "What is the meaning attached to the word *pwè* in ordinary parlance, and by persons of reasonable and ordinary understanding?" Speaking for myself, if I was asked to a *pwè* I do not think I should consider it necessary to ask what kind of *pwè* it was, and I should be much surprised if on arriving on the scene, I found anything going on but what I may term "the conventional *pwè*" and that I believe would be the case with the majority of Englishmen, and it must be borne in mind that the Acts we have to construe are English Acts prepared by Englishmen and to a very great extent to be administered by them. In my opinion, the word *pwè* in the Acts in question is not used in any unusual or extended sense but in its usual and what I have already termed its conventional sense, that is to say, a gathering

of Burmese to witness a dramatic performance acted by living Burmese actors and actresses or by puppets manipulated and controlled by Burmese.

Criminal Revision No. 473 of 1901.

Fox, J.—I would answer the question referred in this case as follows:—

Criminal Reference No. 5 of 1901. June 28th, 1901.

The word *pwè* in section 13A of the Lower Burma Village Act, 1889, and in section 7A of the Lower Burma Towns Act, 1892, does not include such entertainments or gatherings as cart races or pony races.

It includes only the entertainments or gatherings to which English-speaking people ordinarily and commonly refer when they use the word *pwè* without prefix or affix in the course of speaking English; and the word is ordinarily applied by such people under such circumstances only to gatherings of Burmese to witnesss a dramatic performance in which the language used is Burmese or Pâli or both, and the action is either by Burmese "actors and actresses, or by the manipulation of puppets."

My reason for this answer is that the word *pwè* occurring, as it does, in two Acts of the Legislature couched, with the exception of that word, in the English language, must be taken to have been intended to be used in the particular sense in which it is ordinarily used by English-speaking persons in the course of conversing in that language, if as a fact such persons in such circumstances do use the word in a particular sense. In my opinion the word is so used by such persons in a particular sense, and I have indicated in my answer the only description of gathering to which it is applied by such persons when used by itself.

Copleston, C. J.—The reference before us is made in the following words:—

"Does the word *pwè* in sections 13A of the Lower Burma Village Act and 7A of the Lower Burma Towns Act include such entertainments as cart races or pony races or does it merely refer to entertainments of a theatrical nature?"

The actual facts of the particular case out of which this reference arose (Criminal Revision No. 473 of 1901) before Mr. Justice Birks are not stated in his order and are not now before us. The learned Judge notes that in Criminal Revision No. 150 of 1900 I held that the word *pwè* would cover a cart race. My remarks in that case were: "I am of opinion that the term *pwè* includes such public entertainments as a cart race and cannot be restricted to a theatrical performance. The conviction therefore does not seem to me to call for interference." I may say at once that I do not hold that a cart race, or a pony race, is *per se* a *pwè* or a *public entertainment*. There is often no public assembly. And in some cases where convictions were had under the section 13A, cited above, I set them aside because there was no proof nor admission that a *pwè* had been held. In the case Criminal Revision No. 857 of 1900 I remarked: "I will not undertake to define a *pwè* nor to say that, if people are assembled for a *shinpyu pwè*, that *pwè* is

Criminal Revision No. 473 of 1901.

Criminal Reference No. 5 of 1901. June 28th, 1901.

not within the meaning of the section but the want of sufficient proof by valid admission or otherwise, in this case is sufficient to justify the District Magistrate's recommendation."

I was, it will be seen, inclined to treat the question whether the entertainment was a *pwè* or not as a matter of evidence in each case.

A cart race may of course be held without anything that could be called a public assembly, public entertainment or *pwè*, just as horses may be raced without there being anything that could be called a race *meeting;* but *yein-pwès*, "cartrace-*pwès*" (*hlè-pwès*), "boat-*pwès*" (*hle-pwès*), "boxing-*pwès*" are undoubtedly often largely attended as public entertainments, and, in my view, as an European acquainted with the language and habits of the Burmese, may be properly included in the term *pwè* according to circumstances.

I may note that the Deputy Commissioner, Thatôn, in his letter No. 176-11—1, dated the 10th January 1901, regarding the conflict of decisions on this point (my decision being unpublished), says he had "advised the police not to prosecute and the Magistrates not to convict in cases in which cart races are held without permission," but he has heard, he adds, "that this action is an isolated one, and that in other districts (Pegu for instance) these cases are invariably convicted."

The decisions that I have had to deal with on revision were convictions by mofussil Magistrates.

As Mr. Justice Birks has noted, it was *dramatic performances* that were formerly prohibited without license obtained. Act XIX of 1876 deals with *dramatic performances* in *any place of public entertainment.* I am not aware that this Act has ceased to extend to Lower Burma, and it is with Lower Burma that we are dealing. Presumably, then, finding that this Act did not go far enough, section 13A was inserted in the Lower Burma Village Act by Act XVIII of 1895. In this section the holding of a *pwè* in any village without a license is made a punishable offence. Had the Local Government intended to restrict this term *pwè* to dramatic performances only it would have been easy to say so or to define the term. The Government left the term unqualified, and I do not consider that a Burmese word should be restricted in its meaning to what a person unacquainted, or imperfectly acquainted, with the Burmese language may think is its ordinary meaning, namely, a dramatic performance. Even if the then intentions of Government were ascertainable they are not the only guide to interpretation of the words of an Act. Legislators not unfrequently fail to give effect to their intentions or go far beyond them.

A letter from the Government to the Commissioner of Tenasserim, dated January 1900, although not, for judicial purposes, an authoritative declaration, shows at any rate that in the opinion of Government marionette shows are not dramatic performances, but are nevertheless to be included in the term *pwè* as used in the Act, while other entertainments also called *pwès* with defining words prefixed, are not. Now a marionette *pwè* is a *yôk-the-pwè*, and requires the prefixed word in order to define the kind of show, and so also *yein-pwè*, *hle-pwè* are *pwès*, but require the defining prefix to give meaning to the word *pwè*.

Criminal Revision No. 473 of 1901.

Criminal Reference No. 5 of 1901. June 28th, 1901.

A Burman, and, I believe, often an Englishman, if invited to a *pwè* would ask "What kind of *pwè*?" He might probably assume that the entertainment was to be either a *zat-pwè* (dramatic performance) or a *yók-the-pwè* (puppet show), or else, if he had been longer in the country, a *yein-pwè* (dance): but he would not know which of the two, or three, were intended. In case a European or Burmese were invited to a *pwè* at Danubyu or Bassein he might expect to see a boat-race meeting; if at Kyaikto a cart-race meeting, and so on, according to his acquaintance with the country and customs of the people. In the statement of reasons cited by Mr. Justice Birks in his order of reference the necessity for regulating the *public entertainments* which are *locally* known as *pwès* is referred to. These expressions are wide. *Pwè* I understand to mean an assembly or entertainment of a practically public nature; and as Government decided to use this generic term in the way in which it is *locally* understood, I do not see how it can properly be restricted by the means and in the manner now proposed. I am fully alive to the evils and inconveniences that may arise from a wide and rather vague interpretation of the term; and it was because I was so that I caused a letter on this subject to be addressed to Government in November last. The close of the letter ran as follows:—"In case some of the gatherings to which local "Burmese officers apply the term *pwè*, perhaps quite correctly, were "not intended to come within the scope of the terms *holding a pwè*, then "possibly the term *pwè*, as used in the Lower Burma Village Act might "be defined by legislation, or, possibly the result desired might be "effected by executive instructions."

The matter seems to me to be one of evidence in each case: at the same time I have been for a considerable period of opinion that it is of importance that the term *pwè* as used in the Acts cited should be defined by legislation in order to avoid unintended and unnecessary interference with the habits and amusements of the Burmese and also to obviate possible black-mailing and oppression by unscrupulous persons.

I gather from the learned Assistant Government Advocate's arguments that Government will welcome the restriction now proposed to be placed on the legal meaning of the word *pwè*. If this is the case, while I cannot agree that this is the right method to apply, I shall welcome the fact that the meaning of the term is now to be clearly defined in a way that will be binding on Magistrates.

I have now had the advantage of seeing the final opinions of all my learned colleagues. I agree that the decision come to by the learned Judges, which will be the decision of the Court, may be, so far as it is a reply to the question asked, expedient and that it will obviate the possible interference and oppression to which I have referred to above, but with all due respect for their opinions the decision does not appear to me to proceed on strictly legal grounds. It may be true that many Englishmen ordinarily understand the word *pwè* to mean either a *zat-pwè* or a *yók-the-pwè*, although, as Mr. Justice Birks was, I believe, inclined to do, many would include also a *yein-pwè* and some similar *pwès* in their understanding of the term. It is also no doubt true that

Criminal Revision No. 473 of 1901.

Criminal Reference No. 5 of 1901. June 28th, 1901.

many English-speaking persons who have happened to see one kind only of these shows and this description would probably apply to a majority of English-speaking persons in the country, would in their mind restrict the term *pwè* to that one kind, a puppet show. If a majority is the guide to what English-speaking persons ordinarily understand, then, accordingly *pwè* should be restricted, on this principle, to a *yôk-the-pwè* or puppet show. But when the legislature deliberately refrains from using the words *dramatic performance*, or the easy terms 'Burmese dramatic performance or puppet show,' and makes use of the term *pwè* with the vaguely expressed intention of regulating the "*public entertainments*" which are *locally* known as *pwès*, the ordinary opinion of an English-speaking person acquainted for the most part with the language and habits of the people of the country, varying also, as such opinion may, with his knowledge of the language and customs of the country, does not appear to me to be contemplated; nor can it have been expected that Burmese Magistrates, who try nearly all these cases, would have any means of knowing the ordinary Englishman's views. We ourselves even have not any evidence before us as to what is the ordinary opinion of an ordinary Englishman regarding the meaning of the word *pwè*. Fortunately the legislature has not left the meaning of *thug* or *dacoity* in any doubt. Definitions are supplied.

In his judgment in a criminal case which has just been before me in appeal, an Additional Sessions Judge, a Burmese scholar and of large experience in the country, uses the expression, "The accused raced the bullock before the Court in a *pwè* at Kwinbyagalè," and again, "As regards the *pwè* at Kwinbyagalè," etc. The evidence in that case went to show there were perhaps 200 persons assembled at that *pwè* or cart-race assembly.

I mention this as an illustration of a public entertainment or assembly which would be *locally* known as a *pwè*, which is so termed by an English Judge, and which may in my opinion have been legally a *pwè* within the meaning of the Act. The point, of course, was in no way under consideration in the case mentioned.

I may add that I think Mr. Justice Birks' proposed reply is rather better adapted to give effect to the decision of this Court than that proposed by Mr. Justice Fox. The former reply answers briefly the questions asked us. The latter seems to me to contain expressions which might raise a doubt in a Magistrate's mind whether the presence of Europeans or Indians in the assembly; the use of English, Indian or Shan phrases in a drama; the fact that one or more of the performers may be other than Burmese, will take the assembly or entertainment out of the category of *pwès*. I would myself even reduce Mr. Justice Birks' proposed answer still further by the omission of the words "given in the Burmese language" and would substitute the word, "namely," for "such as." It seems to me that the answer so amended will give a clear and simple answer to the question asked and will express the intention of the learned Judges.

Before the Chief Judge.

CROWN *v.* ABDUL GUFFUR.

Criminal Reference No. 6 of 1901. July 3rd, 1901.

Additional Sessions Judge, Revisional powers of—Power to call for proceedings of Magistrates—Power to refer to High Court—Criminal Procedure Code, ss. 435, 438 (1).

An Additional Sessions Judge as such has not the powers of a Sessions Judge to call for the proceedings of Magistrates under section 435 or to refer proceedings to the High Court under s. 438 (1), Criminal Procedure Code.

Kefatullah v. *Feruzuddin Miah*, 5 Calcutta Weekly Notes, 71, referred to, and *Musa Asmal and others*, I. L. R., 9 Bom., 164, cited.

THIS is a reference in revision made by the Additional Sessions Judge, Tenasserim, and the question asked is whether an Additional Sessions Judge has power (1) to call for proceedings under section 435 of the Criminal Procedure Code, and (2), without a transfer from the Sessions Judge, to report a case for the orders of the High Court under section 438 of the Criminal Procedure Code.

The Additional Sessions Judge's Registrar called for certain proceedings without reference to the Judge, and the Judge has examined a proceeding containing an order passed by a Subdivisional Magistrate.

There seems therefore to be some justification for this reference and for the action of this Court under section 439 Criminal Procedure Code. The Additional Sessions Judge moreover regards the matter as of great practical importance.

The Advocate for the applicant to the Additional Sessions Judge cited the case of *Kefatullah* v. *Feruzuddin Miah and others*, reported at page 71, 5 Calcutta Weekly Notes (1900-1901), as an authority for the exercise of revisional powers by the Additional Sessions Judge; but it appears from the judgment of the High Court in that case that the question whether the Additional Sessions Judge could exercise the revisional powers expressly conferred on the Sessions Judge was not definitely considered; and, as the Additional Sessions Judge, who makes the present reference, points out, the judgment cannot be regarded as deciding the point now under consideration.

In the case of *Musa Asmal and others* (I. L. R., 9 Bom., 164) the High Court of Bombay held that a Joint Sessions Judge could not exercise the powers of a Sessions Judge under Chapter XXXII of the Criminal Procedure Code (X of 1882).

In can see no reason for holding that the Code as it stands now gives power to an Additional Sessions Judge to call for proceedings under section 435 or to refer to the High Court under section 438 (1).

In section 435 the expression is not Sessions "Court" but Sessions "Judge," and so in section 438, clause (2) of the latter section, a recent addition to the Code, expressly provides for the exercise by the Additional Sessions Judge of powers under Chapter XXXII after transfer of any case to him by the Sessions Judge.

Clause (3) of section 9 cannot be said to confer on Additional Sessions Judges or Assistant Sessions Judges all the powers of a Sessions Judge. It gives them jurisdiction, limited by other provisions of the Act, in one or more Sessions Courts.

Criminal Reference No. 6 of 1901. July 3rd, 1901.

The provisions of section 17 (4), a new clause, show also that an Additional Sessions Judge has not, as such, jurisdiction in all matters equal to that of the Sessions Judge. Section 193 (2) applies to the *trial* of offences and does not assist in a determination of the present reference.

It seems to me clear that an Additional Sessions Judge as such has not the powers of a Sessions Judge under section 435 or under section 438 (1), and that in the present case the Additional Sessions Judge should return the application for revision, which has been presented to him, in order that it may be presented to the Sessions Judge or to the District Magistrate, who may have authority to proceed under section 435 of the Criminal Procedure Code.

Criminal Revision No. 1185 of 1901. July 17th, 1901.

Before Mr. Justice Fox.

CROWN *v.* MAJUN AND 12 OTHERS.

Gambling—House irregularly entered—Burma Gambling Act—Presumption under s. 7—Search-warrant issued without compliance with provisions of s. 6.

The provisions of sub-section 1 of section 6 of the Burma Gambling Act are all important, and unless those provisions are strictly carried out, a house or place cannot be said to have been entered under the provisions of that section, and consequently the presumption specified in section 7 cannot be made.

A Magistrate or District Superintendent of Police before he can issue a search-warrant is required (1) to himself record in writing the substance of the information he has received, and (2) to record the grounds of his belief that the information is credible.

THE Sessions Judge of Tenasserim has referred this case with an expression of his opinion that the evidence was not sufficient to justify a conviction. The evidence was that at the time of the Chinese New Year police officers under the authority of a warrant from the Sub-divisional Magistrate made a raid upon the house of a Chinese trader, found gambling going on when they entered, and seized playing cards and money found on the premises.

The defence was that the trader had invited a number of people to dinner, and they were having friendly games of cards afterwards.

There is no reason for holding that the Magistrate's finding that gambling or playing for money was going on was otherwise than correct.

Applying the presumption which section 7 of the Burma Gambling Act, 1899, enacts shall be made when instruments of gaming are found in a house entered under section 9 of the Act, he held that the house was a common gaming house, and he convicted the accused of offences punishable under either section 11 or section 12 of the Act.

In adopting this presumption, however, he overlooked the fact that in issuing the warrant for the search of the house he himself had not complied with the provisions of section 6 of the Act.

The provisions of sub-section 1 of section 6 are all important, and unless those provisions are strictly carried out, a house or place cannot be said to have been entered under the provisions of the section, and consequently the presumption specified in section 7 cannot be made.

Criminal Revision No. 1185 of 1901. July 17th, 1901.

A Magistrate or District Superintendent of Police, before he can issue a search-warrant, is required (1) to himself record in writing the substance of the information he has received, and (2) to record the grounds of his belief that the information is credible.

The object of these provisions is that the Magistrate or Police officer shall not act on mere hearsay statements of his subordinates or others, but that he shall satisfy himself by reasonable means, such as by questioning persons who have or profess to have direct knowledge of the house or place being used as a common gaming house, before he issues a warrant for its search, or searches it himself. In the present case the Subdivisional Magistrate did not comply with either of the requirements of the section before issuing the search-warrant.

A report or complaint was made to him by the Assistant Superintendent of Police, and on this he merely issued a warrant on a printed form used before the Burma Gambling Act, 1899, came into force, which form appears to me to be now apt to mislead officers into non-observance of the provisions of section 6 of the Act.

The house in this case not having been entered under the provisions of that section, the foundation of the Magistrate's judgment fails. There was no other evidence that the house was a common gaming house, consequently the gambling or playing on the occasion was not an offence punishable by law.

The convictions and sentences are set aside, and the fines and moneys confiscated will be refunded or returned to the persons from whom they were taken.

Civil Second Appeal No. 39 of 1901. August 6th, 1901.

Before Mr. Justice Fox.

SIT SAING *v.* MAUNG PO KAING.

Messrs. *Agabeg* and *Maung Kin*—for appellant (plaintiff).

Messrs. *Chan Toon* and *Das*—for respondent (defendant).

Execution of decree—Rateable share of sale-proceeds—Application to be made to Court holding the assets prior to their realization—Application to be made to Court which passed the decree or to Court to which the decree has been sent for execution—Civil Procedure Code, ss. 295, 230.

The plaintiff had obtained a decree in the Subdivisional Court against Nga Cho and another. The defendants had obtained two decrees in the Township Court against the same persons. On 1st May 1900 the plaintiff applied for the attachment of moveable and immoveable property belonging to the judgment-debtors and the property was attached. The moveable property was sold by the Subdivisional Court on the 5th June and the proceeds were realised on the same day. The immoveable property was sold on the 21st June and the proceeds were realized on the 28th of the same month. On the 2nd June the defendants applied to the Township Court for execution of their decrees by attachment and sale of the same property, but in their applications they stated that the property had already been attached by the Subdivisional Court in execution of the plaintiff's decree and they asked that their applications might be forwarded to the Subdivisional Court so that they might obtain a rateable share of the proceeds of the sale. In consequence, no second attachment of the property was made, and the Township Court submitted the applications to the Subdivisional Court. The Judge of the latter Court thereupon stopped payment of the proceeds of the moveable property to the plaintiff. On the 19th June the defendants put in an application to the

Civil Second Appeal No. 39 of 1901. August 6th, 1901.

Subdivisional Court asking for a rateable share in the proceeds of sale of all the property and the Judge on the 29th June ordered such distribution.

Held.—that s. 295 Civil Procedure Code requires that the persons seeking a rateable share shall, prior to the realization of the assets, have applied to the Court which holds the assets for execution of their decrees and under s. 230 an application for execution of a decree can only be made to the Court which has passed the decree or to a Court to which the decree has been sent for execution under ss. 223 and 224. The decrees of the Township Court had not been sent to the Subdivisional Court; consequently the latter Court had no jurisdiction to entertain the defendants' application of the 19th June and the order for rateable distribution was illegal.

THE suit was one authorized by the penultimate clause of section 295 of the Code of Civil Procedure. The plaintiff had obtained a decree in the Court corresponding to the Subdivisional Court against Nga Cho and another.

The defendants had obtained two decrees against the same persons in the Court corresponding to the Township Court.

On the 1st May 1900 the plaintiff applied for the attachment of moveable and immoveable property belonging to the judgment-debtors, and the property was attached. The moveable property was sold by the Subdivisional Court on the 5th June, and the proceeds were realised on the same day. The immoveable property was sold on the 21st June, and the proceeds were realised on the 28th of the same month.

On the 2nd June the defendants applied to the Township Court for execution of their decrees by attachment and sale of the same property, but in their applications they stated that the property had already been attached by the Subdivisional Court, in execution of the plaintiff's decree and they asked that their applications might be forwarded to the Subdivisional Court so that they might obtain a rateable share of the proceeds of sale.

In consequence, no second attachment of the property was made and the Township Court submitted the applications to the Subdivisional Court.

The Judge of the latter Court thereupon stopped payment of the proceeds of the moveable property to the plaintiff.

On the 19th June the defendants put in an application in the Subdivisional Court asking for a rateable share in the proceeds of sale of all the property, and the Judge on the 29th June ordered such distribution.

The plaintiff alleges that the portion of the assets realised which were paid to the defendants were paid to persons not entitled to receive the same.

The rateable distribution could only be authorised by either section 285 or section 295 of the Code.

Section 285 did not apply because the property had not actually been attached under the defendants' decrees; consequently the decision in *Clark* v. *Alexander*, I. L. R., 21 Cal., 200, even if followed, would not assist the defendants. The defendants were not entitled to a rateable share in the proceeds of the moveable property because they did not apply to the Subdivisional Court before that property was realised. In fact until the 19th June they did not apply to such

Court at all: their previous applications were to the Township Court, and there is no procedure which authorised the transmission of those applications to the Subdivisional Court and regarding them as applications to that Court.

Civil Second Appeal No. 39 of 1901. August 6th, 1901.

Section 295 requires that the persons seeking a rateable share shall, prior to the realisation of the assets, have applied to the Court which holds the assets for execution of their decrees. Under section 230 of the Code an application for execution of a decree can only be made to the Court which has passed the decree, or to a Court to which the decree has been sent for execution under sections 223 and 224.

The decrees of the Township Court had not been sent to the Subdivisional Court, consequently the latter Court had no jurisdiction to entertain the defendants' application of the 19th June, and the order for rateable distribution was illegal.

I allow the appeal and reverse the decrees of both the Lower Courts. There will be a decree for the plaintiff for the amount claimed in the plaint with costs.

The respondents must also pay the plaintiff's costs in the Lower Appellate Court and in this Court.

Before Mr. Justice Fox.

Criminal Appeals Nos. 227, 228 and 229 of 1901. August 15th, 1901.

SHWE LE AND TWO OTHERS *v.* CROWN.

Theft—Dishonest misappropriation—Possession of owner—Indian Penal Code, ss. 379, 403.

Where a herd of bullocks stampeded from a village grazing-ground frightened by the appearance of an elephant and were not found when searched for by or on behalf of their owners and were subsequently discovered in the possession of the accused, who had dishonestly taken them—

Held,—that the offence committed by the accused was not theft but dishonest misappropriation.

IN my judgment the convictions of the appellants of the offence of theft cannot be sustained. The evidence was that a herd of 19 bullocks stampeded from a village grazing-ground, frightened by the appearance of an elephant. Search was made for the missing animals, but they were not found.

Subsequently they were seen in the possession of the accused.

Not having been found when searched for by or on behalf of the owners, the cattle must, in my opinion, be held to have ceased to be in the possession of the owners. There was, before the accused obtained possession of them, a cessation of that mastery over property which lies at the bottom of the legal sense of the word possession, and therefore whoever took the cattle could not take them out of the possession of the owner within the meaning of section 379 of the Indian Penal Code.

I see no reason to doubt the evidence that the appellants were seen in possession of the cattle: they must have dishonestly taken them but their offence amounted to criminal misappropriation and not theft.

Criminal Appeals Nos. 227, 228 and 229 of 1901. August 15th, 1901.

I alter the finding of the District Magistrate and, setting his findings and sentences aside, I find each of the appellants guilty of an offence punishable under section 403 of the Indian Penal Code.

For this offence the appellant Shwe Le was not liable to enhanced punishment under section 75 of the Indian Penal Code.

I sentence each of the appellants to rigorous imprisonment for two years.

Before Mr. Justice Fox.

Civil Second Appeal No. 115 of 1901. August 22nd, 1901.

MAUNG BA AND ONE *v.* MAUNG MO AND ONE.

Mr. *Wilkins*—for appellants. | Messrs. *Chan Toon* and *Das*—for respondents.

Suit for mutation of names in the revenue registers—Jurisdiction of Civil Court.

There is no right of suit for the mutation of names in the revenue registers, and a Civil Court has no jurisdiction to make a decree ordering mutation of names in such registers. This is a matter which is to be regulated entirely by the Revenue authorities.

THE plaintiffs in this case asked for a decree transferring the land in dispute from the names of the first and second defendants in the revenue registers into their own names.

The Judge of the Lower Appellate Court refers to the suit as one for mutation of names.

In my judgment no right of suit for such relief exists, and a Civil Court has no jurisdiction to make a decree ordering mutation of names. This is a matter which is to be regulated entirely by the Revenue authorities.

I am asked to treat the suit as one for a declaratory decree, declaring that the plaintiffs are the absolute owners in possession, but this I cannot do.

A question of limitation arises, and it is impossible to decide that question upon the suit as framed, that is to say, in a suit in which no right of suit exists.

The decrees of the Lower Courts are reversed and the suit is dismissed with costs.

Before Mr. Justice Birks.

Criminal Revision No. 55 of 1901. August. 26th, 1901.

QUEEN-EMPRESS *v.* NGA KHAN AND TWO OTHERS.

Reference to District Magistrate—Order—Criminal Procedure Code, s. 349.

A 3rd class Magistrate found the accused, a boy 12 years of age, guilty of the offence of theft and reported the case under section 349 Criminal Procedure Code, to the District Magistrate, recording that the accused should receive a punishment different in kind from what he, the 3rd class Magistrate, could inflict. The District Magistrate returned the case to the 3rd class Magistrate for disposal and the latter passed a short sentence of 10 days' rigorous imprisonment antedating it by ten days.

Held,—that the District Magistrate was bound to pass final orders on the reference made by the 3rd class Magistrate, the word "order" in section 349 meaning a final order disposing of the case and that it was not legal to antedate a sentence.

Regina v. *Abdulla*, I.L.R. 4 Bom., 240, and *Queen-Empress* v. *Havia Tellapa*, I.L.R. 10 Bom., 196, followed.

Criminal Revision No. 55 of 1901. August 26th, 1901.

IN this case three accused persons, Nga Khan, Mi Ba Wun and Nga Khaing, were charged before the 3rd class Magistrate of Myebôn with the theft of a waist-cloth from the house of Nga Han under section 380 Indian Penal Code. The first and second accused were discharged, the third, being a boy of 12 years of age, was found guilty and the case reported under section 349 Criminal Procedure Code, the Magistrate recording that he should receive a punishment different in kind from what he could inflict. The District Magistrate was bound to pass final orders on his reference. The word "order" that occurs in section 349 means a "final order" disposing of the case; *vide R.* v. *Abdulla*, 4 Bom., 240; *Queen-Empress* v. *Havia Tellapa*, 10 Bom., 196. In the present case the 3rd class Magistrate should have indicated whether he wished the District Magistrate to pass a sentence of whipping or an order under section 562 Criminal Procedure Code; but the District Magistrate should have known that one or other of these punishments was intended, and his action in returning the case for a sentence of imprisonment to be passed was injudicious in the case of so young an offender besides being illegal. The 3rd class Magistrate, when the case was returned, passed a sentence of ten days' rigorous imprisonment but made it run from the 29th September so that the sentence had expired before it was imposed. It is not legal to antedate sentences in this way. The order was also for the reasons above stated made without jurisdiction. As the accused was in custody from 22nd September till the 8th October when the final order was passed no further action need be taken against him now.

Before Mr. Justice Birks.

Criminal Revision No. 1365 of 1901. August 26th, 1901.

CROWN *v.* NGA YAUNG AND TWO OTHERS.

Complaint—Reference to Police for investigation—Dismissal of complaint without examination of complainant—Criminal Procedure Code, s. 203.

A District Magistrate on receiving a complaint did not examine the complainant but referred the complaint direct to the Police for enquiry and on receipt of the report of the Police investigation dismissed the complaint.

Held,—that the Magistrate had no power to dismiss the complaint without having examined the complainant.

THE proceedings in this case are irregular. The complainant Mi Kraing Bu filed a complaint under section 336 Indian Penal Code before the District Magistrate, who, without examining the complainant, referred the complaint direct to the police for enquiry on the 3rd June and apparently dismissed the complaint, the order being endorsed on the police report on the 14th June. Section 203 is not quoted, but the facing sheet shows that it was dismissed under that section. If the District Magistrate did not examine the complainant himself on oath he should have transferred the complaint to another Magistrate to examine the complainant. He had no power to dismiss the complaint without examining the complainant, for section 203 says, "if, "*after examining the complainant*, and considering the result of the "investigation (if any) made under section 202, there is, in his judgment,

Criminal Revision No. 1365 of 1901. August 26th, 1901.

"no sufficient ground for proceeding, the Magistrate before whom the "complaint is made or to whom it is transferred may dismiss the com- "plaint."

The order of dismissal in this case was illegal and the complaint will be returned to the District Magistrate to deal with according to law.

Before Mr. Justice Fox.

MA GYI *v.* MAUNG PE.

Mr. *Broadbent*—for applicant. | Mr. *F. C. Jordan*—for respondent.

Criminal Revision No. 1356 of 1901. August 28th, 1901.

Maintenance—Father's liability to maintain child—Agreement between father and mother—Criminal Procedure Code, s. 488.

The obligation to maintain a child unable to maintain itself is a statutory obligation, and parties cannot contract themselves out of it.

APPLICATION was made by the mother to the Magistrate for an order under section 488 of the Code of Criminal Procedure ordering her divorced husband to make a monthly allowance for the maintenance of their daughter, a child of ten years of age. The father resisted the order on the ground that at the time of the divorce he had paid off certain debts, and the mother had agreed not to make any claim upon him for maintenance of the child.

From the fact that the mother had made no claim for the child's maintenance for nine years, the Magistrate inferred that an agreement had been come to under which the father was relieved from liability to maintain the child, and he refused the order asked for. In my opinion the ground of the Magistrate's decision was erroneous. The obligation to maintain a child unable to maintain itself is a statutory obligation, and parties cannot contract themselves out of it. If such an arrangement had been proved it would not have been valid in law. I set aside the Magistrate's order and remit the case to him to fix the amount of maintenance that should be ordered.

Before the Chief Judge.

CROWN *v.* PO SEIN.

Criminal Revision No. 1481 of 1901. September 3rd, 1901.

Youthful offender—Finding as to age of accused to be recorded before order of detention—Reformatory Schools Act, s. 11.

A youthful offender under the Reformatory Schools Act is one who is *under* the age of 15 years.

To merely ask the accused his age and record his reply is not a compliance with the provisions of section 11 of the Reformatory Schools Act unless it happens that no futher inquiry is possible.

An inquiry and finding recorded under the provisions of section 11 must be made and recorded by the Magistrate before directing the offender to be sent to a reformatory school or to be sent up to the District Magistrate for his orders. An inquiry held after the order for detention is made is made after the Magistrate ceases to have jurisdiction in the matter.

The District Magistrate has sent up this case with the following remarks:—

"The accused, on examination by the 1st class Magistrate, who forwarded the case to me for final disposal, stated that his age was

15 years, and accordingly, under section 368; Rule I (*d*) (iii), of Criminal Circulars, an order of three years' detention in a reformatory was passed. But on further enquiry I found that his age was 12 years and 10 months at the time of committal. The boy's sentence should have been therefore five years' detention in the Reformatory under the abovementioned Circular. I would therefore suggest that the case be dealt with in revision. The boy was born on the 18th February 1888."

Criminal Revision No. 1481 of 1901.

September 3rd.

There are various points about this case which it may be useful to note. The accused gave his age as 15 years and the 1st class Magistrate who tried the case notes in his judgment that the offender is aged 15 years. This would ordinarily mean that the boy had completed fifteen years, and in that case as a youthful offender means a boy *under* the age of 15 years, this offender would not be within the scope of the Act. By section 11 (*1*) the Court, before directing any youthful offender to be sent to a reformatory school, must inquire into his age and record a finding, and by section 11 (2), a similar inquiry and finding must be made and recorded before the offender is sent by the trying Magistrate to the District Magistrate for his orders.

No such inquiry was made either by the trying Magistrate or by the District Magistrate who passed the order of detention. Merely asking the accused his age and recording his reply is not a compliance with the provisions of section 11 unless it happens that no further inquiry is possible. As the record stands, however, it seems on the face of it that no order for detention in a reformatory should have been made.

The District Magistrate now reports that he has on further inquiry found the boy's age to be 12 years and 10 months: but this inquiry was made after the District Magistrate had ceased to have any jurisdiction in the matter and is of no use from a judicial point of view. The inquiry must be held before the order of detention is made.

The order of the Magistrate who tried the case and recorded the age of the accused, was impliedly adopted by the District Magistrate, who in his order does not even mention the age at all, and it must be taken that the District Magistrate decided that the offender was fifteen years of age. Section 16 of this Act prevents this Court from altering in revision any order passed in respect to the boy's age, and this Court therefore cannot interfere in the manner desired by the District Magistrate.

If I were prepared to say that the District Magistrate has passed an order to the effect that the accused's age was fifteen completed years or over at the time of conviction, I should then have to hold that the order for detention in the reformatory was illegal; and this Court would have jurisdiction in spite of the provisions of section 16 of the Act, to set aside the order for detention in a reformatory school instead of imprisonment. (*See Queen-Empress* v. *Nga Nyan Wun*, L. B. R., 441; and *Puttu* v. *Queen-Empress*, P. J., L. B., 493.)

It does not, under the circumstances, appear to be necessary to interfere with the order on the ground that the Magistrates have deter-

Criminal Revision No. 1481 of 1901. September 3rd.

mined the accused's age to be over fifteen. As it now appears that he is considerably younger than that, being under 13 years of age, I may assume that the Magistrate meant by fifteen years of age that the boy was in his fifteenth year, although I do not think this is the natural or correct interpretation either of the English or the Burmese expression.

Before the Chief Judge and Mr. Justice Birks.

Civil Regular Appeal No. 20 of 1901. September 5th.

M. A. OOTHAMAN *v.* KONG YEE LONE & CO.

Messrs. *Eddis, Connell* and *Lentaigne*—for appellant.

Messrs. *Lowis, Giles* and *Thornton*—for respondents.

Brokerage on wagering contract—Collateral agreement devoid of the element of wagering—Indian Contract Act, s. 30.

A contract by way of wager is not an illegal contract, although, or because, it cannot be enforced in a Court of law. Although a contract to pay differences only on contracts for the purchase and sale of rice is void as being of the nature of a wager, collateral agreements which are themselves devoid of the element of wagering, though they may be entered into with knowledge of the nature of the principal contract, are not avoided by section 30 of the Indian Contract Act, or by any other provision of law.

Copleston, C. J.—Plaintiff sued as a broker to recover from the buyer the brokerage due to him in respect of rice contracts arranged by him, which contracts are now admitted, in accordance with the Privy Council ruling in *Kong Yee Lone* v. *Lowjee Nanjee*,* to be agreements by way of wager and therefore void under section 30 of the Contract Act, which provides that no suit shall be brought for recovering anything alleged to be won by way of wager. The learned Judge on the Original Side found that the plaintiff was employed by the defendants as their broker under a valid and binding contract (issue 2 and judgment); but held that, as the contracts in respect of which the plaintiff is suing are gambling contracts to his knowledge, he is precluded from recovering the brokerage claimed in the suit. It has been suggested that there was no agreement to pay brokerage; but the bought and sold notes prepared by the broker and signed by the parties to the principal contract are perfectly clear as to this, and the Judge's finding on this point is unquestionably correct. There is no reason to doubt that Oothaman, the plaintiff, had knowledge of the real nature of the contracts for the sale and purchase of rice, that is, as has been decided, that they were wagering contracts. The only point, therefore, which has now to be decided is, whether, knowing, as the plaintiff did, the nature of the contracts between the defendants and the other parties to the ostensible sales, the plaintiff is, as the learned Judge held, precluded from recovering the brokerage otherwise due to him. It is clear that the transactions between the plaintiff and the defendants were not in themselves wagering contracts, nor do I see how it can be said that they were

* *Vide supra*, page 107.

Civil Regular Appeal No. 20 of 1901. September 5th.

by way of wager. They did not in any way depend on the rise or fall of the market. The brokerage due did not depend on the happening of any future event. Whatever the result of the principal contracts might be, and whichever party to them might have to pay differences, the brokerage due remained fixed as a percentage on the value of those contracts and it was due on the signing of the contracts. It may be noted that the legal point to be discussed was not raised in the memorandum of appeal, although it had been distinctly in issue in the Original Court (issue 3). When the appeal was filed the Privy Council's decision already referred to had not been delivered. We allowed the point to be argued as it was essential and important, but I thought it right that the learned Counsel for the defendant (respondent), Mr. Giles, who stated that he had come unprepared to meet the argument of appellant on this point, should have a further opportunity of being heard after preparation, and this opportunity was afforded him accordingly.

In *Thacker* v. *Hardy*, English Law Reports (Queen's Bench Division), IV, 685 it was held that the broker who bought and sold stock for his principal, even though he knew that the principal was gambling, was entitled to his brokerage and to an indemnity; but the case was differentiated from the present case by the fact that in *Thacker* v. *Hardy*, the broker incurred liabilities with the jobber or third party, whereas in the case before us the broker incurred no liability: he was simply to be paid for his services in bringing the buyer and seller together and negotiating the contract between them. There was no element of gaming or wagering between the stock-broker and Hardy.

By 8 and 9, Victoria, Chapter 109, section 18, "all contracts or agreements whether by parole or in writing by way of gaming or wagering shall be null and void," and in order to render collateral contracts void in English Law it was enacted in 1892 (55 and 56, Victoria) that any promise, expressed or implied, to pay any person any sum of money paid to him in respect of a contract rendered null and void by 8 and 9, Victoria, Chapter 109, section 18, or to pay any sum by way of commission or reward for any service in relation thereto is null and void. Until this law was passed such agreements as those now in dispute were enforceable at law: and in a *Canadian* case of 1895, *Forget* v. *Ostigny* (English Law Reports, Appeal Cases, 1395, page 318), it was still held by the House of Lords that, as between the principal and the broker who actually purchased stock but did not deliver it, and although the broker probably knew that the principal never intended to take delivery, the transaction was not one of wager or gaming and that brokerage was payable. Here again the broker probably incurred liability, which in the present case he did not; but it is difficult to see that this fact makes much difference in the legal principle involved. Mr. Giles has laid stress on the views expressed by the Master of the Rolls, who differed from the other Judges in appeal, in *Read* v. *Anderson* (13 Queen's Bench Division, 779), and to Lord Coleridge's expression of concurrence in those views which is to be found in *Tatam* v. *Reeve* (Law Reports, 1893, I Queen's Bench Division, 44); and the learned Counsel has also cited *Cohen* v. *Kittell*

Civil Regular Appeal No. 20 of 1901. September 5th.

(22 Queen's Bench, 806); but in the latter case the principal was suing for compensation for an agent's failure to make bets, of which neither the principal nor the agent could have enforced payment if the bets had been made. The expression of dissent above referred to cannot affect what was held to be the law in England at the time the decision in *Read* v. *Anderson* was given.

In Bombay it is provided by Act III of 1865, section 2, that no commission or brokerage can be recovered on account of any agreement by way of wager if the broker was aware of the nature of such agreement. Consequently in *Doshi Talakshi* v. *Shah Ujamsi Velsi* (24 Bom., 227, 1900) a broker was held unable to recover commission or brokerage in respect of wagering contracts for the sale and purchase of cotton. The case was very similar to the present one, and no doubt, but for the Act already cited plaintiff would have recovered brokerage, as happened in the English cases before the Gaming Act of 1892 (55 and 56, Victoria), in the *Canadian* case above quoted and in the Bombay case reported (12 Bombay High Court, 51) where an agent claimed brokerage fees due to him as agent in effecting, or for his services in connection with, a wagering transaction of a kind similar to this present one. The suit was brought after the Act of 1865 was passed, but the transactions had occurred previously.

In regarding the knowledge of the plaintiff of the nature of the principal contract, which was by way of wager, as obviously fatal to his claim, the learned Judge appears to me to have come to a hasty conclusion. A contract by way of wager is not an illegal contract, although, or because, it cannot be enforced in a Court of Law. Story's *Law of Agency* has been cited to show that an agent can never recover commission on an illegal transaction, whether positively prohibited by law or by morals, or by public policy; but it has not been shown that the principal transaction was immoral, or contrary to public policy or contrary to law. These were not transactions entered into for any illegal object. If it had been so, no doubt the collateral agreement would be tainted and no effect should be given to it. The Act, 19, George II, Chapter 37, enacts that no assurance by way of gaming or wagering *shall be made*, and every such assurance shall be void to all intents and purposes. Probably agreements subsidiary to such *prohibited* assurances would have been held tainted and void also; but section 30 of the Indian Contract Act, which is now relied on by the respondent, merely makes agreements by way of wager void.

I therefore come to the conclusion that, although a contract to pay differences only is void as being of the nature of a wager, collateral agreements which are themselves devoid of the element of wagering, though they may be entered into with knowledge of the nature of the principal contract, are not avoided by section 30 of the Contract Act or by any other provision of law. The decree of the learned Judge on the Original Side of this Court must be reversed and the plaintiff will get a decree for the amount claimed, together with all costs.

Birks, J.—The (plaintiff) appellant in this case, M. A. Oothaman, sued the firm of Kong Yee Lone & Co. for Rs. 7,215-12-0, being brokerage at 6 annas per cent. on rice bought for the defendants, amounting

Civil Regular Appeal No. 20 of 1901. September 5th.

to Rs. 19,24,200 in value. For the purposes of this appeal it is not necessary to consider the various defences set up by the defendants as it is admitted that the decision of their Lordships of the Privy Council in the case of *Kong Yee Lone & Co. v. Lowjee Nanjee*, dated the 13th June 1901, will apply to the facts of this case. It is conceded that as between S. T. S. Carpen Chetty and the other vendors and the defendants the contracts entered into were wagering contracts within the meaning of section 30 of the Contract Act. The only question for us to determine is whether the plaintiff, who sues as a broker, and presumably knew the character of the contracts entered into, is himself precluded from recovering his brokerage. The learned Judge on the Original Side of this Court has held that he is, for the reasons assigned in his judgment in Civil Regular No. 75 of 1900, *Lowjee Nanjee* v. *Wong Kain Sow and others*. In that case I understand the plaintiff sued as holder in due course of two notes endorsed by Oothaman, the broker to whom they had been handed by the payee for collection as representing a part of the "differences" in the wagering contract. Lowjee Nanjee, the holder, was therefore, if he had notice of the nature of the transactions, in the same position as one of the principals who are debarred from suing for these "differences" by the provisions of section 30 of the Contract Act. The reasons which may have rightly decided the learned Judge to dismiss that suit are not applicable to the present case, where the plaintiff is merely suing for brokerage with respect to contracts which are void as between the principals to those contracts. Mr. Eddis for the appellant relies on the case of *Thacker* v. *Hardy* (English Law Reports, IV Queen's Bench. 685), where the plaintiff was a broker and sued for commission and indemnity with respect to certain speculative transactions on the Stock Exchange. The judgment of Mr. Justice Lindley in that case that the suit was neither barred by 8 and 9, Victoria, Chapter 109, section 18, which corresponds to section 30 of the Contract Act, nor was illegal on the grounds of public policy, was affirmed by Bramwell, Brett and Cotton, L.JJ. The remarks of Cotton, L. J., may be quoted: "The essence of gaming and wagering is that one party "is to win and the other to lose upon a future event, which at the "time of contract is of an uncertain nature, that is to say, if the event "turns out one way, appellant will lose, but if it turns out the other way he will win." But that is not the state of facts here. The plaintiff was to derive no gain from the transaction; his gain consisted in the commission which he was to receive, whatever might be the result of the transaction to the defendant. It is urged by Mr. Giles that transactions on the English Stock Exchange are no guide, as in the majority of cases the brokers have no means of knowing whether they are engaged in genuine or speculative transactions, while in this case the Judge has found that the plaintiff abetted a big gamble. I do not think that this affects the question. The present suit would have been barred in England by the recent Statute of 55 and 56, Victoria, Chapter 9, but it appears to be maintainable in India. For these reasons I would reverse the decree of the learned Judge and give the plaintiff a decree with costs.

Civil Miscellaneous Application No. 202 of 1901. September 10th.

Before the Chief Judge and Mr. Justice Birks.

LESLIE (APPLICANT) v. THE COLLECTOR OF MERGUI (RESPONDENT).

Messrs. *Eddis*, *Connell* and *Lentaigne*—for applicant.

Appeal from order of Collector—Revision of orders of Collector—Land Acquisition Act, ss. 18, 55.

Held,—that in the absence of rules framed under section 55 of the Land Acquisition Act on the subject of appeals from the orders of a Collector or regarding revisions of such orders, if a Collector wrongly refuses to make a reference under section 18 of the Act, or passes any other order in the course of his proceedings which a party may wish to appeal against there is no authority to whom the party can make application unless it be a superior executive or revenue officer.

THIS is an application for the revision of an order of the Collector of Mergui made under the Land Acquisition Act in case No. 436 of 1901, and of an order made by the Deputy Commissioner of Mergui on the 8th July rejecting an appeal or application against the first-mentioned order.

On the 30th March 1901 the Collector appointed under the Act made an award in favour of Robert Leslie, the applicant. The claimant was dissatisfied with the compensation awarded but he made no application for a reference to the Court under section 18 of the Act until, as is admitted, long after the period prescribed in section 18 (*2*) (*a*) had expired.

He appears to have gone to the Commissioner's Court instead, arriving on the 19th April. That Court, it is said, was then closed, and on the 21st April the Commissioner went on tour, returning to Moulmein on the 11th May. The claimant was, he states, then ill, and thus made no application to the Commissioner until the 20th May. The Commissioner decided that he had no jurisdiction to entertain an objection to the award.

Leslie arrived back in Mergui on the 11th June, and the following day made an application which, under section 18 (2) (*a*), the Collector on the 17th June held to be barred by limitation. The fact that this application was time-barred is not disputed.

Then on the 6th July the claimant made an application to the Deputy Commissioner (or Collector) of Mergui, who considered that he could only treat the application as an appeal against the Collector's order refusing to make a reference to the Court. The Deputy Commissioner was apparently of opinion that no Court would hold that the Collector's order was wrong; but he dismissed the application on the 8th July on the ground that he had no jurisdiction. The Deputy Commissioner, however, considered that the claimant had a grievance, the Collector's proceedings being faulty and there having been good grounds for an application to the Court. The claimant then proceeded again to Moulmein, and, after further delay owing to want of necessary papers, &c., he made an application to this Court on the 27th August.

The learned Counsel for the applicant, Mr. Eddis, admits that the application is "enormously out of the time strictly and technically," but refers to the delays caused by the absences of the Commissioner

Civil Miscellaneous Application No. 202 of 1901. September 10th.

and Deputy Commissioner and to the difficulties and delays of communications in the Tenasserim Division. He has not, however, shown any sufficient grounds on which this Court can interfere.

Neither of the orders complained of was passed by any officer or Court under the authority of this Court. The order of the Collector (appointed under the Act) refusing to make a reference is made under section 18 of the Land Acquisition Act and not by a Court.

The prayer at the close of the application to this Court is "that the "Collector may be ordered to make a reference under section 18 of the "Land Acquisition Act to the proper Court."

From the definition of the expression "Collector" in section 3(*c*), it would seem that a Collector may be subject to the Commissioner or other executive or revenue superior; but he is not shown to be in any way subject to this Court. I have searched the rules made under the Act and published in the Land Acquisition Manual, but do not find any rules made under section 55 of the Act on the subject of appeals from orders of a Collector or regarding revision of such orders.

Supposing the Collector wrongly refuses to make a reference under section 18, or passes any other order in the course of his proceedings which a party may wish to appeal against, there is, it would seem, no authority to whom the party can make application, unless it be, as before suggested, a superior executive or revenue officer.

I am of opinion that this application must be rejected.

Before the Chief Judge.

Criminal Appeals Nos. 302—305 of 1901. September 11th.

AUNG THEIN AND OTHERS *v.* CROWN.

Messrs. *Eddis, Connell* and *Lentaigne*; Messrs. *Chan Toon* and *Das*; Mr. *Dawson*; and Mr. *Bagram* for appellants.

Examination papers, Disclosure of Government Departmental—Indian Official Secrets Act, ss. 3, 4—Retracted confession of accused as against co-accused—Indian Evidence Act, s. 30—Interpretation of the word "confession."

Held,—that the disclosure of Government Departmental Examination papers may constitute an offence under the Indian Official Secrets Act (15 of 1889).

Held further,—that there is nothing in section 30 of the Indian Evidence Act which would exclude, as against persons being jointly tried for the same offence, a confession made by one of the accused. duly proved, simply because at the trial the confession is withdrawn or denied.—*Pat Tha U* v. *Queen-Empress*, P. J., L. B., 642, dissented from.

The word "confession" must be strictly interpreted for the purposes of section 30, Indian Evidence Act. A confession must be a confession of guilt or a confession of facts which constitute in law the offence charged. Mere admissions of incriminating facts will not amount to a confession unless those facts and the necessary interences from them amount to an offence.

THE first accused, Nga Aung Thein, has been convicted on three charges framed under section 3 (1) (*b*) of the Official Secrets Act, 1889. The other four accused, namely, Nga On, Nga Ba Din, Nga Pe Bu nd Nga Po Gyi, have been convicted of the offence of abetting Nga Aung Thein in the commission of offences under the aforesaid section

Criminal Appeals Nos. 302—305 of 1901. September 11th.

of the Act. Each of the accused has been sentenced to six months' rigorous imprisonment.

The case gave rise to numerous arguments on points of law in the District Magistrate's Court, and the same points, mainly, have been dwelt on in this Court in appeal, and they have been argued at great length by several advocates for the appellants.

I propose, first, to deal with the question of the applicability of the Official Secrets Act to the subject of these charges. Copies, not originals, of examination papers which were set for the Government Departmental examinations of the 3rd and 4th June last, were found in the possession of some of the accused and these had been communicated by the first to the other accused. It appears that appointments to, retention and promotion in, and removal from, Government service depends, under varying circumstances, on these examinations. The papers are set by examiners who may or may not be Government officers. In this case, judging from the names, they were all Government officers. The examinations are controlled by a Board composed wholly of Government officers under the presidency of the Commissioner of Pegu.

It is urged that the Act under which these prosecutions have been instituted was intended to apply only to matters Naval and Military and perhaps to those of obvious political importance; and reference has been made to a circumstance which was cited during the discussion on the Bill as an illustration of the kind of disclosure it was intended to prevent. It had been urged, further, that the examination papers, prepared and authorized by Government officers under Government rules, were not official documents. I see no reason for discussing this last point. No argument of any value has been brought forward in support of it. There can be no doubt that the disclosure of these examination papers must come within the terms "disclosure "of official documents and information."

Endeavour has been made to show that the word "such" in section 3 (*1*) (*b*) must be taken to restrict the class of documents, knowledge, &c., referred to in that section, to documents obtained from a fortress, arsenal, &c., or from an *office* which, as is further urged, must be an office in one of the places, fortress, arsenal, &c., which precede the word "office" in section 3 (*1*) (*a*) (*i*).

The District Magistrate appears to be correct in holding that the word "such" is to be taken with the following word, as meaning those documents, &c., which have been obtained by an offence under section 4 of the Act. It is hardly necessary to discuss the meaning of the word "office" in section 3 (*1*) (*a*) (*i*): but it may be remarked that there seems to be no sufficient reason in law to restrict the meaning of the word in the manner proposed. It is not a question of the interpretation of the words "other like place."

Section 4 (*1*) refers to "any information," terms as wide as possible, and terms which in themselves would include such documents as examination papers. Nor, under the circumstances, can it reasonably

be doubted that the disclosure of the papers before the examination to, or for the benefit of, candidates for the examination would be a disclosure to persons to whom the information contained therein ought not in the public interest to be communicated at that time.

I see no sufficient reason, then, for concluding that the facts alleged in this case could not constitute an offence under section 4 *(1)*, an offence which is described as a breach of official trust.

In section 3 *(1)* (*b*) we do not find the phrase "otherwise in the public interest," but only "in the interest of the State," and it is argued that this kind of "school-boy cribbing" is not a matter of State interest.

The District Magistrate has given reasons which seem to be sound for holding, though this point is not quite free from doubt, that it was against the interest of the State that these papers should be communicated to persons who occupy, gain, or retain positions of great public responsibility as a result of passing the Departmental Examinations. I see no strong reason, then, why the fact alleged against the accused should not constitute an offence under section 3 (1) (*b*).

I may now refer to the question of the admissibility and relevancy of statements made by the accused and to some matters of evidence.

I agree with the District Magistrate that the statements made to the Assistant Magistrate on the 4th and 5th June are not inadmissible, either because they were recorded under section 164 Crminal Procedure Code, or because they were made while Nga Aung Thein and Saya On were in police custody, or, again, because they are not confessions of guilt, or because they were made when these persons were accused of a different offence, namely, theft. The statements have been fully proved: there is nothing to show that they should be excluded under section 24 or section 26 of the Evidence Act.

These statements were rightly received as admissions on the part of the accused. Similarly, the statement made by Nga Po Gyi, even though made in reply to a demand by his Deputy Commissioner at Yamèthin for an explanation of that clerk's conduct, does not appear to me to be excluded by section 24 of the Evidence Act. It has not been suggested what grounds the Deputy Commissioner's order could give Nga Po Gyi for supposing that he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. "Proceedings," it may be noted, have been held to mean criminal proceedings; but in any case section 24 is not shown to be applicable.

While admitting the statements, or, as he calls them sometimes in his judgment, the confessions of Nga Aung Thein and Nga On as evidence against the respective makers, the District Magistrate, following a ruling of the late learned officiating Judicial Commissioner (*Pat Tha U and three others* v. *Queen-Empress*, P.J., L.B., page 642), by which he was bound, held that the confessions, having been with-

Criminal Appeals Nos. 302—305 of 1901. September 11th.

drawn before him, the District Magistrate, at the trial, could not be taken into consideration against the other accused at the trial. If the District Magistrate has correctly interpreted this ruling, I must say that I feel bound to dissent from it. I see nothing in section 30 of the Evidence Act to exclude, as against persons being jointly tried for the same offence, a confession made by one of the accused and duly proved, simply because at the trial the confession is withdrawn or denied. But at the same time I think it very doubtful, or more than doubtful, if the statements referred to are confessions in the strict sense in which that word must be interpreted for the purposes of section 30 of the Evidence Act. Such confessions must be confessions of guilt or confessions of facts which constitute in law the offence charged.

Mere admissions of incriminating facts will not amount to a confession, unless those facts and the necessary inferences from them amount to an offence.

In this case, although possession and communication of the examination questions, or copies of them, were admitted, there was no admission of the main ingredient of the offence charged under section 3 (*1*) (*b*), namely, knowledge that the documents were obtained by an act constituting an offence under section 4 (*1*). The accused were not then even charged with the present offence. The Magistrate has, it is true, found that there was this knowledge, but I do not think this finding can be taken to relate back to the statements in question and turn them into confessions. If A, being charged with murdering X, says "I and B did kill X, but he tried to kill us and we merely acted in self-defence," this would not amount to a confession although it would be an admission, on the part of A, and it could not be taken into consideration against B, merely because the Judge in the end might come to the conclusion that the plea of self-defence was false.

I proceed now to deal with the evidence; and I may say at once that the evidence against Nga Pe Bu is not, in my opinion, sufficient to justify a conviction, even if the conviction were not open to another objection to be dealt with further on.

The evidence of U Maung Gyi and Teik Tin Dok is weak, and Nga Chit Pe, who was called for the defence, renders it still weaker. U Maung Gyi was recalled for the defence and his evidence leaves room for considerable doubt as to Pe Bu's complicity. The Magistrate relies a good deal on the letter signed by Maung Pe Bu, which was found with Nga Aung Thein. No evidence was adduced to prove that this was written by the accused Nga Pe Bu, though, no doubt, if he did write it, evidence could easily have been produced; nor was he even asked if he wrote the letter. The Magistrate, before writing his judgment, compared the signature with the accused Pe Bu's signature on the record of his examination and considered they were alike. I think it is reasonably urged that this evidence, or opinion, which, so far as appears, neither the accused nor his advocate had any opportunity of rebutting, is not sufficient to justify Nga Pe Bu's conviction.

Criminal Appeals Nos. 302—305 of 1901. September 11th.

The evidence against the other accused taken with their respective admissions, which I have held to be admissible and believe to be in the main true, amply prove the actual facts alleged as regards the obtaining and communication of the information contained in the examination papers.

But the really essential points in the case remain to be discussed, namely, whether an act such as is made punishable under section 4 (*1*) and (*2*) is proved to have been committed, and whether the knowledge required by section 3 (*1*) (*b*) can be held to be established against the accused. The evidence shows that precautions are taken to prevent the disclosure of the contents of the examination papers. It is asserted, with some exaggeration, however, that the evidence proves too much by reducing the possibility of divulgence to a few officers who are beyond suspicion. From the fact that the Treasury paper did not reach the Secretariat, though it was one of the papers of which a copy was obtained, it appears that the Secretariat was not the only office from which the papers may have been procured; and the circumstances that Aung Thein is an Assistant Government Translator and Thein Maung, from whom Aung Thein says he received the papers, is a Secretariat clerk, lose much of their possible significance. The papers were sent in manuscript by the different examiners to the Commissioner of Pegu, who despatched some of them to the Secretariat to be translated. The Commissioner then sent them to the Government Press, where they remained ten days or more, proofs being submitted meanwhile. The final printed copies were then distributed at one and the same time so as to reach distant centres in ample time for the examination; and the papers do not appear to have been obtained by any of the accused until three days before the beginning of the examination. The papers had by that time been backwards and forwards between offices in Rangoon, and had passed through many post offices and into many hands. There is no evidence regarding the precautions taken in the district or other offices outside Rangoon, nor is there anything to show that the seals used in the Commissioner's office are known to the receiving offices or were carefully examined on receipt. This, perhaps, may be, however, presumed. Judging from the time when the papers reached the hands of Aung Thein, it appears that they must have got out some time after the printed papers had been distributed by the Commissioner of Pegu in various directions. It may be noted that, although the printed copies are kept sealed and in a safe in the Commissioner's office, the manuscript questions and the keys to them are merely stated to be kept in his office sealed up. There is no evidence as to the actual condition of this packet of manuscript questions and answers.

Maung Aung Thein was, as has been mentioned, an Assistant Government Translator, and probably worked in the Secretariat, but he is not shown to have had any opportunity himself by reason of his office, of obtaining the papers, nor is this even suggested by the prosecution. Aung Thein and Maung On admit that the papers were actually given to them by one Thein Maung, a clerk in the Secretariat. As already stated, the Treasury paper did not require translation and

Criminal Appeals Nos. 302—305 of 1901. September 11th

was not sent to the Secretariat. There is no evidence who this man Thein Maung was. It is not shown that he had any opportunity by virtue of his office of obtaining the papers. Maung On, indeed, says they were obtained by Thein Maung from a Municipal clerk, Maung Po Yon. Such a person could have no special opportunity of getting hold of the papers.

The District Magistrate holds that the information could only have been obtained by some person by means of his holding an office under His Majesty and that any other supposition is unreasonable. But the evidence seems to me to fall short of the reasonable certainty which is required. No doubt, if, by means of holding an office, a person had opportunities of stealing or misappropriating the papers, although he might be in no way connected with their custody or preparation, and, if he did steal or misappropriate them, it might be held that section 4 (*1*) applied to his act: but we are asked to assume that the information divulged could only have been obtained by a person by means of his holding an office, because no other method of disclosure is practically possible. Nothing as to this important point can be specially inferred from the persons Thein Maung or Po Yon, to whom the papers may be said to be traced, because they are not shown to have had any special opportunities of obtaining the information either regularly or dishonestly. The argument used by the District Magistrate would be equally applicable if the papers had been given to Aung Thein by any other person, that is, the argument that they must originally have been disclosed by a person who got them by means of holding an office. No attempt has been made in this Court, nor apparently in the District Magistrate's Court, to locate the source of alleged official leakage. The District Magistrate thinks Rangoon must have been the source, but Rangoon is a wide field. The papers passed through many offices and many hands, and it is not even shown that all these hands were those of Government officers. Copies may have been stolen at any of several stages and from several offices, or between those offices, and by any class of persons. No precise dates are given as to when the papers were first received by the Commissioner of Pegu, when they were distributed or when they were received at the various examining centres, and there appears to have been a wide range of time as well as of place within which the leakage, theft, or careless loss may have occurred. There should be more and stricter proof than there is in this case of the essential fact required to constitute an offence under section 4 (*1*). It may not be necessary to demonstrate the particular person who by means of his office obtains and communicates information; but, before an act described in section 4 (*1*) can be said to be proved, there must at least be reasonable certainty that the information could not have been obtained by other means. The District Magistrate thought there was this reasonable certainty. It is a matter of evidence and of inference from proved facts; and I am bound to say that, considering the circumstances already referred to, I am unable to agree with the District Magistrate. There is, it seems to me, room for reasonable doubt. The District Magistrate cites the definition of the word "proved;" but it must be

Criminal Appeals Nos. 302—305 of 1901. September 11th.

borne in mind that the *act* which is to follow in this case on the supposition that the fact asserted exists is conviction of a criminal offence and a sentence of six months' rigorous imprisonment. In ordinary social or other matters of life and business a prudent man might act on less certain evidence than is required in a case of this sort. The turpitude of the accused cannot affect the matter.

If the act contemplated by section 4 (*1*) were held to be proved, it would also have to be proved against each of the present accused that they knew of this fact. Section 3 (*1*) (*b*) begins, "Where a person *knowingly* having possession of, &c." It is admitted by the learned Government Advocate that this word *knowingly* applies to knowledge that an act described in section 4 (*1*) has been committed; but he considers that the word is equivalent to "not unconsciously" or "not innocently."

I do not see how this interpretation can be admitted. The legislature might have added such words as "or has *reason to believe* that the knowledge has been so obtained;" but we have merely the words implying actual knowledge or, at least, knowledge of such facts as could leave no reasonable doubt in the mind of a person of ordinary intelligence that an offence under section 4 (*1*) had been committed.

We have then, to my mind, two points regarding which doubt is reasonable, namely, whether the information was obtained by a person by means of his holding an office and, secondly, whether each of the accused can be said to have known that this act had been so done.

The accused must all get the benefit of these doubts. I should have been unable in any case to support the conviction of Pe Bu for reasons already recorded. Nga Aung Thein, Nga On, Nga Ba Din, Nga Pe Bu and Nga Po Gyi are acquitted and will be discharged. They are on bail. Their bail-bonds will be cancelled.

Before Mr. Justice Birks.

Criminal Revision No. 1391 of 1901. September 13th.

U WARADAMA *alias* MAUNG NU *v.* CROWN.

Maung Kyaw—for applicant.

Withdrawal by District Magistrate of case to his own file—Accused entitled to notice of withdrawal and to recall witnesses already examined—Defamation—Good faith—Indian Penal Code, s. 499, Exception 1 (b).

When a District Magistrate withdraws a case to his own file at the instance of the complainant, it is incumbent on him to give notice to the accused and to ask the accused if he wishes the witnesses already examined to be recalled.

In a complaint made against the accused for defamation of character it is clearly open to the accused to prove that the allegation he made was true. If found to be untrue, his persisting in the imputation would be evidence of malice and, useful to the Court to decide on the proper penalty. If true the accused might be protected by Indian Penal Code, Exception 1 (*b*), section 499, which expressly states that whether or not it is for the public good that the imputation should be published is a question of fact.

The complainant, Ma Hnin Ma, filed a complaint in the Court of the District Magistrate, Kyaukpyu, on the 16th May 1901, charging the Naga *Póngyi* U Waradama with defamation in telling the people that she had been found with a rival *póngyi* in the compound of his

Criminal Revision No. 1391 of 1901. September. 13th.

kyaung at midnight. The complainant was examined and the case fixed for trial on the 5th June. The case was called on that date, but summons had not been served. On the 8th June the case was transferred to the Headquarters Magistrate, Maung San Baw U, for trial. That officer examined the complainant and five other witnesses for the prosecution on the 19th June and adjourned it to the 22nd. On that date the District Magistrate withdrew the case to his own file. There is a note on the diary that the advocate for the accused was heard, but the retransfer was made at the instance of the complainant, and there is nothing to show that the District Magistrate asked the accused, if he wished the witnesses already examined to be recalled. Under section 350 Criminal Procedure Code, the accused is entitled to demand this. In the case of *Umrao Singh*, 3 All., 749, it was held that where only one party applied for a transfer under this section notice should be given to the other. The District Magistrate called the case on the date fixed by the Headquarters Magistrate, possibly for final orders, and framed a charge on the 24th. He refused to allow the accused to call witnesses to show that he was acting in good faith and he relies on section 257 Criminal Procedure Code, as justifying his action. That section says "that the Magistrate *shall* issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice." Now, whether the imputation was true or not, it is, I think, clearly open to an accused in a criminal trial to prove that the allegation he made was true. If found to be untrue, his persisting in the imputation would be evidence of malice and useful to the Court to decide on the proper penalty. If true, the accused might be protected by Exception 1 (*b*) section 499, which expressly states that whether or not it is for the public good that the imputation should be published is a question of fact. The District Magistrate says the only question at issue is one of law. On the 25th, apparently before the judgment was delivered, he received an application objecting to his trying the case and alluding to the fact that he had no notice of the withdrawal and that the witnesses for the prosecution had not been re-examined. I do not think that the District Magistrate should have proceeded with the case or disallowed this objection. It does not appear to me that any adequate grounds were shown for the withdrawal in the first instance. The petitioner consented to the Headquarters Magistrate trying the case in the first instance, and apparently it was only when all her evidence was taken and she thought that the case might be given against her that she applied for it to be withdrawn. It appears from a petition filed on the 25th that a number of persons applied to the Court to adjourn the case with a view to a compromise. The District Magistrate's order on this is correct, but I do not see that the case need have been hurried through in the way it was. Only three days intervened between the retransfer and delivery of judgment, the accused not being allowed to call any witnesses. I shall follow the example of Mr. Justice Straight in the case already cited and forbear to express any opinion on the actual merits of the case. The orders of the

District Magistrate withdrawing the case are set aside and the case will be restored to the file of the Headquarters Magistrate for him to proceed with the inquiry and pass such orders as he may deem fit. The sentence passed by the District Magistrate is set aside and the fine will be refunded.

Criminal Revision No. 1391 of 1901. September 13th.

Before Mr. Justice Birks.

CROWN *v.* SAN E AND ANOTHER.

Criminal Revision No. 1599 of 1901. September 27th.

Procedure of Magistrate to whom a case has been referred—Criminal Procedure Code, s. 349.

Though a Magistrate to whom a case is referred for higher punishment, or punishment different in kind from that which the referring Magistrate is empowered to inflict, should as a rule pass final orders and should not refer the case back to the referring Magistrate to pass orders which he could pass himself, he is not debarred from committing the case or referring it to an officer of higher powers than himself.

I DO not understand why this case has been reported under section 438. It appears that the 3rd class Magistrate of Kama convicted the two accused, Nga San E and Nga Tha Hmat, under section 380-109 and sent up the case for higher punishment to the Subdivisional Magistrate, who is only a 2nd Class Magistrate and not yet empowered to pass sentences of whipping. That officer expressed an opinion that the second accused should be whipped as a first offender and sent up the case for the orders of the District Magistrate. That officer has held that the proceedings of the Township Magistrate were void as the offence was really one coming under section 411, which a 3rd class Magistrate is not competent to try, and that therefore he could not pass a sentence under section 411, and he also expressed the opinion that the second accused should be acquitted altogether. Now, as to the proceedings being void, it appears that the theft or house-breaking was on the 19th August and the stolen property was recovered in the house of the first accused on the 21st. This possession was sufficiently recent to justify the belief that the receivers were actually concerned in the theft. No doubt the 3rd class Magistrate should not have attempted to try the case, but I do not think his proceedings are void as he had jurisdiction under section 380-109. Section 349 (2) says, "The Magis-"trate to whom the proceedings are submitted may, if he thinks fit, ex-"amine the parties and recall and examine any witness who has already "given evidence in the case, and may call for and take any further evi-"dence, and shall pass such judgment, sentence or order in the case as "he thinks fit, and as is according to law." The only point on which there seems any ambiguity is whether the Subdivisional Magistrate could have referred the case to the District Magistrate instead of passing final orders himself. The result of the rulings under this section appears to be that, though a Magistrate to whom a case is so referred should as a rule pass final orders, and should not refer the case back to the referring Magistrate to pass orders which he could pass himself, he is not debarred from committing the case or referring it to an officer of higher powers than himself. I hold, therefore, that the District Magistrate has jurisdiction to deal with the case under section 349 and

Criminal Revision No. 1599 of 1901. September 27th.

he can pass an order acquitting the second accused, and if he thinks the first accused should be convicted under section 411 he can frame a charge and call upon him to answer to such charge. It would be open to him also to acquit the accused on the charges framed and to direct a fresh trial before a competent Magistrate on such section as he thinks appropriate.

Before Mr. Justice Fox.

Civil Revision No. 98 of 1901. October 4th.

MAUNG KYWET *v.* MAUNG KIN.

Messrs. *Agabeg* and *Maung Kin*—for applicant (plaintiff).

Error on a point of law, Decision containing an—Jurisdiction, Exercise of, illegally or with material irregularity.

Error in law does not amount to acting in the exercise of jurisdiction illegally or with material irregularity.

Amir Hassan v. *Sheo Buksh*, I. L. R., 11 Cal., 6, and *Enat Moudal* v. *Balaram Dey*, 3 Cal. Weekly Notes, 581, followed.

NO appeal lies to this Court. The grounds for application in revision are that the lower Courts erred in law. No question of procedure is involved.

Error in law does not amount to acting in the exercise of jurisdiction illegally or with material irregularity, *see Amir Hassan* v. *Sheo Buksh*, I. L. R., 11 Cal., 6, and the judgment of Maclean, C. J., in *Enat Moudal* v. *Balaram Dey*, 3 Cal. Weekly Notes, 581, which, appears to me to state the correct view of the effect of their Lordships of the Privy Council decision in the case first quoted.

The application is rejected.

Before Mr. Justice Fox.

Criminal Revision No. 1108 of 1901. October 7th.

CROWN *v.* MI HLA YIN.

Order of release on probation of good conduct—Criminal Procedure Code, s. 562—Criminal breach of trust as a servant—Indian Penal Code, s. 408.

Before passing an order under section 562 Criminal Procedure Code, a Magistrate must record an order of conviction of one of the offences in respect of which an order under that section is lawful.

If an accused is convicted of criminal breach of trust as a servant under section 408 of the Indian Penal Code no order under section 562 Criminal Procedure Code, can be made.

BEFORE passing an order under section 562 of the Code of Criminal Procedure the Magistrate should have recorded an order of conviction of one of the offences in respect of which an order under that section is lawful. The accused was charged with criminal breach of trust as a servant. If she had been convicted of that offence no order under section 562 could have been made.

I have considered the evidence and do not think conviction would have been justified on it. There is not sufficient evidence to show that the accused had any dishonest intention with regard to the bangles she had on when she left her mistress' house. I find the accused not guilty. The bond given under section 562 will be cancelled.

Before the Chief Judge.

Civil Revision No. 86 of 1900. November 28th, 1901.

MAUNG PU GYI *v.* MAUNG SHWE HMYIN.

Messrs. *Burjorji* and *Dantra*—for applicant. | Mr. *Hamlyn*—for respondent.

Remand of case for re-trial—Civil Procedure Code, s. 566.

Where a plaintiff has had full opportunity of presenting his case in complete form before the Original Court, it is manifestly dangerous for an Appellate Court to remand the case for what may be practically a re-trial. In this case the issue framed at the trial covered the ground and, in remanding the case for further evidence, the Court acted with material irregularity and the High Court is bound to consider the case on revision and may interfere even in a matter of fact.

The plaintiff, Nga Shwe Hmyin, sued on a bond alleging that Nga Po Khaing had executed the bond as principal and the other defendant, Nga Pu Gyi, present applicant, as security.

Execution was denied by both defendants. The Judge of the Court of First Instance framed an issue on the execution of the document and on the evidence before him, the two alleged witnesses to execution having denied any part in the transaction, and the only witness, Nga Lu Ka, who had been both named at the outset and examined for plaintiff having given hearsay evidence only, the Judge dismissed the suit. The alleged witnesses to execution were named by plaintiff, but ware called and examined by the defendant. The plaintiff named two others later whom he said he had forgotten. The Judge did not consider their evidence sufficient. There can be no question the dismissal of the suit was correct.

The Appellate Court remanded the case under section 566 Code of Civil Procedure, framing issues. It is now urged that the issue framed by the Court of First Instance covered the ground and that it was not necessary to frame issues or refer the same for trial; that the Appellate Court acted in the exercise of its jurisdiction illegally or with material irregularity. In this view I cannot but concur. The original issue was perfectly intelligible and put the execution of the document sued on in issue. The plaintiff signally failed to prove execution.

The case should not have been remanded. This step gave plaintiff an opportunity of making up a fresh case and in fact he seems to have altered the details of his case as well as his witnesses. It is manifestly dangerous to remand a case for a re-trial, which is what was practically done, when plaintiff had full opportunity of presenting his case in complete form. This Court is very unwilling to interfere on matters of fact and would not do so without some such reason as is sufficient under section 622 Code of Civil Procedure in a non-appealable case. The applicant, however, seems to me to have made out a case for interference, since there should have been no remand, and I therefore think it a duty to consider the case in revision. So far as this applicant, Nga Pu Gyi, is concerned, the decree of the Appellate Court is set aside and the plaintiff's claim against Nga Pu Gyi is dismissed with all costs.

Civil Second Appeal No. 182 of 1901. December 12th.

Before Mr. Justice Fox.

SHWE EIK KE *v.* THA HLA AUNG AND THREE OTHERS.

Maung Kyaw—for appellant. | Mr. *G. B. Dawson*—for respondents.

Ancestral lands—Division and separation of shares amongst co-heirs—Pre-emption—Relations of remote degree.

The plaint lands belonged originally to the plaintiff's grandparents. On the death of plaintiff's grandmother her six children divided the ancestral property and the property which was the subject-matter of the suit fell to the share of the grandmother of first and second defendants. The plaintiff claimed, notwithstanding the division and separation of shares amongst the children of his grandparents, that he was a co-heir with those defendants in respect of the land in suit, and that those defendants were under obligation to offer the land to him for sale before selling it to strangers.

Held,—that there is no authority for holding that before a Burman can sell his property to others he is bound to offer it first to every one of his relations including those of remote degree. Upon the division of the property amongst the children of plaintiff's grandparents each child took the particular lot or lots which fell to him free from all obligation as regards pre-emption, and *á fortiori* the descendants of each child also took the lot or lots which devolved on them respectively free from such obligation.

Nga Myaing v. *Mi Baw*, S. J., 39, discussed.

THE plaintiff sued to set aside a sale of ancestral lands which had been made by the two first defendants (who were his first cousins once removed) to the third and fourth defandants, and to enforce an alleged right of pre-emption in respect of the land.

The plaint alleged that the lands belonged originally to the plaintiff's grandparents, who were also the great-grandparents of the first and second defandants, but it also stated that upon the death of the plaintiff's grandmother over 40 years previously, her six children had divided the ancestral property, and that the property, which was the subject-matter of the suit, fell to the share of the grandmother of the first and second defendants.

The plaintiff claimed, notwithstanding the division and separation of shares amongst the children of his grandparents, that he was a co-heir with those defendants in respect of the land in suit, and that those defendants were under an obligation to offer the land to him for sale before selling it to strangers. This last contention was apparently based on the ruling in *Nga Myaing* v. *Mi Baw*, Selected Judgments, page 39; but in my judgment the ruling in that case does not go further than to say that if one co-heir wishes to sell his share, he is bound to offer it to his co-heirs before selling it to strangers, and it is not an authority for holding that before a Burman can sell his property to others, he is bound to offer it first to every one of his relations including those of remote degree. It appears to me that upon the division of the property amongst the children of the plaintiff's grandparents, each child took the particular lot or lots which fell to him or her free from all obligation as regards pre-emption, and *á fortiori* the descendants of each child also took the lot or lots which devolved on them respectively free from such obligation.

In fact the plaintiff was not a co-heir with the first and second defendants, the property in suit having devolved absolutely upon the first and second defendants. Upon the facts stated in the plaint the suit was not, in my opinion, maintainable, and I dismiss the appeal with costs.

Before Mr. Justice Fox.

ABDOOLA *v.* AH WA.

Special Civil Second Appeal No. 158 of 1901. December 12th.

Messrs. *Chan Toon* and *Das*—for appelant. | *Maung Kyaw*—for respondent.

Husband and wife—Restitution of conjugal rights—Mohamedan Law.

A Mohamedan wife cannot resist a suit for the restitution of conjugal rights on the ground that her dower has not been paid.

Abdul Kadir v. *Salima*, I. L. R., 8 All., 149, and *Kunhi* v. *Moidin*, I. L. R., 11 Mad., 327, followed.

THE suit was in effect one for restitution of conjugal rights brought by a Mohamedan husband against his wife.

The original Court granted a decree as prayed for. The lower Appellate Court reversed that decree on the ground that the husband not having paid the deferred portion of the dower agreed upon at the time of marriage was not entitled to sue for restitution of conjugal rights.

The Additional Judge's attention was not called to the Full Bench Ruling in the case of *Abdul Kadir* v. *Salima*, I. L. R. 8 All., 149, in which the subject was discussed at length by a learned Mohamedan Judge, whose opinion was adopted by the Full Bench.

That ruling is an authority for holding that a Mohamedan wife cannot resist a suit for restitution of conjugal rights on the ground that her dower has not been paid.

It was followed in the case *Kunhi* v. *Moidin*, I. L. R. 11 Mad., 327, and no argument has been addressed to me which throws any doubt upon its correctness. I reverse the decree of the District Court. There will be a decree ordering the defendant to return to co-habitation with the plaintiff and otherwise to yield to him his conjugal rights.

Each party will bear his and her own costs in all the Courts.

Before the Chief Judge.

CASSIM *v.* CROWN.

Criminal Revision No. 1741 of 1901. December 13th

Maung Kyaw—for applicant.

Sureties—Bond—Burma Gambling Act, s. 17.

Where a bond for Rs. 3,000 was required under section 17, Gambling Act, separate sureties for the amounts of Rs. 3,000 and Rs. 2,000 were accepted. On the face of the orders it would look as if security were given for Rs. 5,000, though all that could be properly demanded is security amounting jointly and severally to Rs. 3,000 or sureties severally bound for such sums as will make up Rs. 3,000.

THE case rests on evidence of general repute and the taking of such evidence as a foundation for proceedings under section 17 of the Gambling Act is warranted by the terms of the section. I see no sufficient reason for interference with the conclusion the Magistrate came to.

The amount of the bond, Rs. 3,000, for which amount security is taken is said to be excessive and the existing sureties are, it is stated, unwilling to continue to stand security as they have been doing for a year. The amount does seem to me excessive and the form of the

order for separate sureties probably makes it difficult to find sureties. On the face of the order it would look as if security were given for Rs. 5,000, though all that could properly be demanded is security amounting jointly and severally to Rs. 3,000, or sureties severally bound for such sums as will make up Rs. 3,000. The order is modified to one directing a bond for Rs. 1,500 with two sureties jointly and severally bound in that sum.

Civil Regular Appeal No. 34 of 1901. December 20th.

Before the Chief Judge and Mr. Justice Fox.

MOHAMED ESOOF ISMAIL AND COMPANY *v.* KHOO SIN THWAK AND KHOO KÔK ÔN.

Messrs. *Lowis, Giles* and *Thornton*—for appellants. | Messrs. *Eddis, Connell* and *Lentaigne*—for respondents.

Breach of contract—Sale and purchase—Damage, Measure of—Market-rate—Artificial inflation of prices—Legitimate mercantile transaction.

It is settled law that the market value of a marketable commodity at the time when the contract was broken controls the measure of damages for breach of a contract for the sale and purchase of such commodity, and damages are estimated at the difference between the contract price and the market value or price at the time of the breach.

Where, however, the defendants argued that the high price of rice in the market on the contracted date for delivery was entirely due to the operations of the Syndicate to which the plaintiffs belonged and that the Syndicate's purchases were not *bonâ fide* mercantile transactions.

Held,—that, even assuming that this was proved, it is not for Courts to dictate to merchants what transactions they may and what transactions they may not enter into. The transactions were not illegal or immoral and were not gambling transactions. To refuse to accept the market-rate actually ruling, admittedly—if a genuine rate—the proper measure of damages, on the ground that the rate was intentionally forced up by the plaintiffs' purchases, would introduce into commercial transactions elements of uncertainty and confusion, the results of which cannot be foreseen.

Copleston, C. J.—The plaintiffs sued to recover damages for non-delivery of 8,000 bags of rice which plaintiffs had purchased at Rs. 267-8-0 per 100 bags, to be delivered in October, and they claim as damages Rs. 6,600, the difference between the price above mentioned and Rs. 295, which the plaintiffs allege was the market rate on the 31st October, the last day of the month within which delivery had to be made.

The defendants in their written statement denied that the market-rate on the 31st October was Rs. 295, and further denied that the plaintiffs had suffered damage to the extent claimed.

It is urged that by forward purchases of rice for delivery in October, followed by extensive purchases made by the Chinese Syndicate of which the plaintiffs' firm was a member, the plaintiff artificially forced up the price of rice in October, even to the very last day of the month, with the object of recovering heavy damages based on the fictitious market-rate manufactured by the plaintiffs themselves. It was also alleged in argument that the plaintiffs, by their forward purchases and by purchasing about three lakhs of bags in October, made it impossible for the ten large mill-owners, whose rice alone was to be delivered, to supply the quantity bought. It was further argued that

Civil Regular Appeal No. 34 of 1901. December 20th.

the rate to which the large mills were forced up was not the market-rate, and that plaintiff might have obtained equally good rice of the proper description from the small mill-owners at lower rates.

The learned Judge on the Original Side held that, even assuming that the market-rate had been worked up as alleged by the defendants, still the defendants were bound by the market-rate of the large mills on the 31st October.

The learned Judge found, as regards the combination of the Chinese Syndicate, that "their object was not illegal, nor their means nor the "result, and I cannot set up any judicial or normal rate for rice of the "quality and description sold under the contract in suit, as the rate "ruling on the 31st October 1900 as against Rs. 295, which has been "shown to have been the legal rate ruling on that day."

In my opinion, making the assumption the learned Judge does of the intentions of the plaintiffs, his conclusion is correct. But I would say that, although it is possible and even probable that they bought in order to manufacture a high market-rate, this is not satisfactorily proved to be the case. There were other buyers besides the Syndicate, and up to about the 23rd October, natives of India, who with defendants about that date formed a combination to abstain from buying, were also making purchases. It is unnecessary to go into the details of these purchases by others than the Syndicate. The learned Judge has cited instances of such purchases. The collapse of prices on November 1st and subsequent days is no doubt important, but it is not conclusive evidence of plaintiffs' motives. That the market-rate in the small mills was lower than that in the large mills is not proved: there is evidence given by the defendants' own witnesses as to the high rate prevailing. Nor is it proved that plaintiffs could, or should, have procured rice of equally good quality from the small mills. There is evidence regarding the quality of the rice milled in defendant's mill that would on the face of it justify a refusal to accept their rice in lieu of that which defendant had contracted to supply. I understood Mr. Giles to assert that the large mills could not possibly supply the rice required to enable the defendant to fulfil his contract; but Mr. Lowis, who replied to Mr. Eddis, appeared to admit that, if the defendant had cared to pay the high artificial rate then ruling, the defendant could have procured rice from the large mills in time. He neither did this, nor repudiated the contract; and, before the 31st October, there was no reason why the plaintiffs should themselves endeavour to purchase rice elsewhere. They would have run a great and unnecessary risk. We are asked finally to say that, as the rate was fictitious and forced up in order to enhance damages, such rate, otherwise admittedly the rate to govern the amount of damages claimable in this suit, should not be accepted as the measure of damages, but that merely nominal damages should be allowed because there was admittedly an actual breach of contract. There is certainly no evidence which would enable this Court to fix a different market-rate from that asserted by the plaintiffs. That of the three witnesses for the defence is quite insufficient, even if it be not in favour, as I think it is, of the plaintiffs' contentions on this point.

Civil Regular Appeal No. 34 of 1901. December 20th

The case of *Wigsell and others* v. *The Corporation of the Indigent Blind*, Law Reports, 8, Queen's Bench Division, 357, has been cited: but I shall not discuss it as it does not seem to me to be in point.

The measure of damages in a case of this kind must be the market-rate on the last day on which defendant could fulfil his contract. There is no evidence worth the name that plaintiffs had any means of remedying the inconvenience caused by the defendants' failure, or improperly neglected to use such means. Defendants did not trouble themselves to buy and supply the rice and plaintiffs had no opportunity or cause for doing so before the expiry of the 31st October.

In my opinion the defendants failed to make out by their own evidence, or to elicit from the witnesses for the plaintiffs, the fact that the plaintiffs' transactions were intended merely to manufacture evidence of market-rate with a view to obtaining heavy damages for failure of mill-owners or others including defendants to fulfil their contract.

But I am also of opinion that, if the object of the Chinese combination was to inflate or force up prices, it was one which this Court cannot possibly hold to be illegal or immoral. To refuse to accept the market-rate actually ruling, which is admittedly, if a genuine rate, the proper measure of damages, on the ground that this rate was intentionally forced up by the plaintiffs' purchases of rice, would introduce into commercial transactions elements of uncertainty and confusion, the results of which cannot be foreseen. The purchases were genuine and it is not suggested that the transactions were gambling transactions, though the term speculative has frequently been used in describing them, and no doubt speculation is a common accompaniment of rice transactions as of many other contracts. The appeal, in my opinion, must be dismissed with costs.

Fox, J.—The suit was one by purchasers against sellers for damages for breach of contract to deliver rice. The breach was admitted, consequently the only question that could arise was as to the amount of damages to which the plaintiffs were entitled. It is settled law that the market value of a marketable commodity at the time when the contract was broken controls the measure of damages for breach of a contract of sale and purchase of such goods or things as are dealt with in a market, and damages are estimated at the difference between the contract price and the market value or price at the time of breach.

The plaintiffs proved by unquestionable evidence that the market price of the description of rice contracted for was on the last day of October Rs. 295 per 100 baskets.

The defendants contend that damages should not be allowed according to the rule stated above, because, although holders of rice sold and delivered on that day at the above rate, the plaintiffs belonged to a Syndicate which had designedly entered into a combination to raise the market price with a view to obtaining larger profit from persons from whom they had bought rice under forward contracts for delivery in October, and that the rate above stated was entirely the result of the Syndicate's operations.

Certain passages from Mr. Sedgwick's Treatise on the Measure of Damages have been quoted in support of the contention on behalf of

Civil Regular Appeal No. 34 of 1901. December 20th.

the defendants: no doubt, Mr. Sedgwick's comments are entitled to great respect, but no judicial decision has been quoted in which the views expressed in the passages quoted have been adopted, nor has any case been cited in which any contention adopting such views has even been raised. The rule I have stated as governing the measure of damages in cases of breaches of contracts for sale and purchase of goods may be open to criticism as to its absolute soundness and universal applicability; but it is a settled rule and for Courts to depart from it and to enter into an enquiry as to why a market price has come to be what it is would be to enter into such a wide field of enquiry that arrival at any certain conclusion would be in many cases almost hopeless, and, further, any departure from the rule would entail an amount of uncertainty which could not but be disastrous to persons engaged in commerce.

Upon the assumption that it was proved in the case that the high price of rice in the market on the 31st October was entirely due to the operations of the Syndicate to which the plaintiffs belonged, it was argued that the Syndicate's purchases were not *bonâ-fide* mercantile transactions. It is not, however, for the Courts to dictate to merchants what transactions they may and what transactions they may not enter into. If the legislature or any governing law pronounces certain contracts to be illegal or void, it is the duty of the Courts to apply the rules so laid down to particular contracts which come before them for adjudication, but apart from prohibitions so prescribed, people engaged in commerce are themselves the judges of what is and what is not a legitimate mercantile transaction.

While concurring in thinking that the decree of the learned Judge who tried the suit was right, I guard myself from assenting to his view that the rate at which rice produced at mills other than those named in the contract could not be a factor to be considered in arriving at the market-rate of rice of the description and quality contracted for.

It is unnecessary to give an express decision upon this point, because, in my opinion, there was no credible evidence in the case on which it could be held that rice of the description and of quality equal to that contracted for was sold or was for sale in the market on the 31st October at a lower rate than Rs. 295 per 100 baskets.

I concur in dismissing this appeal with costs.

Before Mr. Justice Birks.

Criminal Revision No. 1422 of 1901. November 13th.

CROWN *v.* SHAN BYU AND ANOTHER.

Previous conviction of offence of same group—House-breaking—House-theft—Indian Penal Code, ss. 457 and 380—Whipping—Whipping Act, s. 2, Groups A and D.

In section 2 of the Whipping Act an offence under Group D is distinguished from one under Group A.

Held,—that where there has been a previous conviction of house-theft a subsequent conviction of house-breaking does not render the offender liable to whipping although the offence of house-theft was included in the house-breaking.

THE Sessions Judge of Arakan considered the sentence of whipping on appeal but did not consider it illegal, as the offence of house-theft was included in the house-breaking. It certainly seems a common-sense view, but does not appear to be the intention of the legislature.

Criminal Revision No. 1422 of 1901. November 13th.

Group D is distinguished from Group A in section 2 of the Whipping Act, though lurking house-trespass or house-breaking is not punishable with whipping under section 2 unless committed with a view to commit an offence punishable with whipping, such as theft. Penal provisions must be strictly construed. The sentence under section 457 not having been altered to one under section 380 on appeal, the sentence of whipping was illegal and for formal purposes must be set aside in Shan Byu's case as in that of Pan Zan, and I order accordingly.

Civil Revision No. 66 of 1901. December 23rd.

Before Mr. Justice Fox.

MAUNG PYO THA *v.* KO MIN PYU AND ANOTHER.

Mr. *Dawson*—for applicant. | Messrs. *Burn* and *Burn*—for respondents.

Debtor and creditor—Sureties—Waiver of claim against principal debtor—Discharge of sureties—Contract Act, s. 134.

Where a plaintiff, having instituted a suit against both the principal debtor and his sureties, expressly waived his claim against the principal.

Held,—that he thereby, by his own act, brought about, as a necessary consequence, the dismissal of his suit against the principal. This brought the case within the following words of section 134 of the Contract Act: "The surety is discharged by any act of the creditor, the legal consequence of which is the discharge of the principal debtor."

IT has been contended upon the authority of the decisions in the cases of *Shaik Alli* v. *Mahomed*, I. L. R. 14 Bom., 267, and *Krishto Kishori Chowdhrain* v. *Radha Romun Munshi*, I. L. R. 12 Cal., 330, that the Additional Judge of the Rangoon Small Cause Court was wrong in holding that the second and third defendants who were sureties for the first defendant, were discharged by reason of the plaintiff having waived his claim against the first defendant.

The present case, however, appears to me to be distinguishable from the cases cited.

In neither of those cases did the plaintiff by his own act relinquish his claim. In the present case the plaintiff having instituted a suit against both the principal and sureties expressly waived his claim against the principal: he thereby, by his own act, brought about, as a necessary consequence, the dismissal of the suit against the principal. This appears to me to bring the case within the following words of section 134 of the Contract Act: "The surety is discharged by any act of the creditor, the legal consequence of which is the discharge of the principal debtor."

The application is dismissed with costs—two gold mohurs allowed as advocate's fee.

Criminal Revision No. 1516 of 1901. January 2nd, 1902.

Before Mr. Justice Birks.

CROWN *v.* MAUNG YAN WE.

Sentence—Imprisonment in default of payment of fine—Gambling Act, s. 12—General Clauses Act, s. 25.

On a conviction for a first offence under section 12 of the Burma Gambling Act, a sentence of imprisonment in default of payment of fine should not exceed three weeks.

Attention drawn to the provisions of section 25 of the General Clauses Act (X of 1897) and their general effect in relation to fines.

THE accused in this case, Maung Yan We, is a ten-house *gaung* and has been convicted under section 12, clauses (*a*) and (*c*) of the Burma

Criminal Revision No. 1516 of 1901. January 2nd, 1902.

Gambling Act, I of 1899, and sentenced to pay a fine of Rs. 25 and in default to suffer one month's rigorous imprisonment. Section 12 of the Gambling Act reads as follows: "Whoever, (*a*) being the owner or occupier, or having the use of any house, enclosure, room, vessel or place, opens, keeps or uses the same as a common gaming house; or (*b*) being the owner or occupier of any house, enclosure, room, vessel or place, knowingly permits the same to be opened, used or kept as a common gaming house; or (*c*) has the care or management of, or in any manner assists in conducting the business of any common gaming house; or (*d*) advances or furnishes money for the purpose of gaming with persons frequenting any common gaming house, shall be liable for a first offence to a fine not exceeding two hundred rupees or to imprisonment for any term not exceeding three months, and for a subsequent offence to a fine not exceeding four hundred rupees or to imprisonment for any term not exceeding six months."

It may be noted that clauses (*a*), (*b*), (*c*) and (*d*) define the nature of the offence, while the last clause provides two penalties, *i.e.*, three months for a first, and six months for a subsequent offence. The Magistrate should have noted in his final order whether the conviction was under the first or second clause of this section. The offence in this case was committed on the 14th May 1901, and the Magistrate has recorded in his judgment that it was a first offence The maximum sentence of imprisonment which can be imposed for a first offence is three months, and one month is more than one-fourth of three months. The sentence in default must therefore be reduced to three weeks' rigorous imprisonment.

Cases so constantly occur in which Magistrates go wrong in their sentences in default that I think it desirable to call attention to the change in the law effected by Act X of 1897. Sections 63 to 70 of the Penal Code, both inclusive, prescribe the procedure ordinarily applicable to sentences of fine and imprisonment. Section 5 of the General Clauses Act, I of 1868, provided as follows: "The provisions "of sections 63 to 70, both inclusive, of the Indian Penal Code, and of "sections 386, 387 and 389 of the Code of Criminal Procedure (Act 25 "of 1861), shall apply to all fines imposed under the authority of any "Act *hereafter to be passed* unless such Act contain an express provi- "sion to the contrary." The old Gambling Act, III of 1867, and the Police Act, V of 1861, being Acts passed before Act I of 1868, were not affected by this provision of law. The Magistrate in this case has overlooked the ruling of the Special Court in *Queen-Empress* v. *Nga Myaing Gyi and another*, page 494, P. J., which expressly overrules *Queen-Empress* v. *Nga Son Gaung and others*, page 486, S. J., and cancels paragraph 68 of the Criminal Circulars. Section 25 of the General Clauses Act, X of 1897, reads as follows: "Sections 63 to 70 "of the Penal Code and the provisions of the Code of Criminal Pro- "cedure for the time being in force in relation to the issue and the "execution of warrants for the levy of fines shall apply to all fines "imposed under any Act, Regulation, Rule or Bye-law unless the "Act, Regulation, Rule or Bye-law contains an express provision to "the contrary." This section therefore applies to these provisions with

Criminal Revision No. 1516 of 1901. January 2nd. 1902.

retrospective effect and in this respect differs from section 5 of Act I of 1868. This was pointed out by Mr. Hosking in *Queen-Empress* v. *Ah Hein*, 385, P. J., but appears to have been generally overlooked. The following simple rules will prevent the frequent mistakes made at present:—

(1) Where the section under which the accused is convicted is punishable with *fine only*, section 67 Penal Code applies: the imprisonment in default must be simple and may extend to two months for a fine not exceeding Rs. 50, &c., as provided in that section, provided it does not exceed the term the Magistrate trying the case can impose under section 32 Criminal Procedure Code.

(2) Where the section under which the Magistrate convicts provides a term of imprisonment in any case with a fine either as an additional or alternative sentence and the Magistrate sentences to fine only, the maximum imprisonment in default of fine is one-fourth of the term of imprisonment provided in the section.

(3) When the section provides for imprisonment and fine or imprisonment as well as fine and the Magistrate sentences to imprisonment and fine and imprisonment in default of fine, there is a further limitation introduced by section 33 Criminal Procedure Code, to the imprisonment in default of fine, *i.e.*, one-fourth of the Magistrate's own powers under section 32 Criminal Procedure Code.

(4) The first limitation, *i.e.*, one-fourth of the maximum term of imprisonment provided in the section, is now of universal application unless there is an express provision to the contrary, *e.g.*, the proviso to section 37 of the Police Act as amended by Act VIII of 1895, the last clause of section 9 of the Opium Act, and the second proviso to section 250 Criminal Procedure Code, which postpones the imprisonment in default till the compensation ordered is shown to be irrecoverable.

It is not creditable to Magistrates that such frequent mistakes should be made in passing sentences in default of fine.

Civil Second Appeal No. 161 of 1901. January 3rd. 1902.

Before Mr. Justice Fox.

QUAILEY v. AH BAN SHOKE.

Messrs. *Eddis, Connell* and *Lentaigne*—for appellant. | Mr. *Jordan*—for respondent.

Suit against Public Officer—Notice—Civil Procedure Code, s. 424.

In a suit against an Excise Superintendent for damages for unlawful arrest, assault and malicious prosecution, when such arrest and prosecution purported to have been made and instituted by the defendant in his official capacity—

Held,—that a notice as required by section 424 Civil Procedure Code, was undoubtedly a necessary preliminary to the institution of such suit. *Shahunshah Begum* v. *Fergusson*, I. L. R., 7 Cal., 499, distinguished. *Jogendra Nath Roy Bahadur* v. *Price*, I. L. R., 24 Cal., 584, followed.

THE substantial question in this appeal is whether the suit could be

instituted without the notice contemplated by section 424 of the Code of Civil Procedure. The suit was against an Excise Superintendent for damages for unlawful arrest and assault, and malicious prosecution.

Civil Second Appeal No. 161 of 1901. January 3rd, 1902.

The defendant purported to have made the arrest, and to have instituted the prosecution in his official capacity, consequently the case *primâ facie* fell within the section.

The Divisional Court, upon the authority of certain passages in the judgment in the case of *Shahunshah Begum* v. *Fergusson* (Official Trustee), I. L. R. 7 Cal., 499, held that notice was not a preliminary necessity.

In the case of *Jogendra Nath Roy Bahadur* v. *J. C. Price*, I. L. R. 24 Cal., 584, it was held, and I agree, that the remarks made by Mr. Justice Cunningham in the case of *Shahunshah Begum* v. *Fergusson* must be taken in connection with the facts of that particular case, and not as of general application.

In my judgment a notice as required by section 424 was undoubtedly a necessary preliminary in the present case, and not having been given, the original Court had no jurisdiction or authority to entertain the suit.

The decrees of both the Lower Courts are reversed, and the suit will stand dismissed with costs. The plaintiff must also pay the defendant's costs in the lower Appellate Court and in this Court.

Before the Chief Judge.

CROWN *v.* ABDUL RAMAN AND THREE OTHERS.

Criminal Revision No 108 of 1902. January 8th.

Milk—Water added to, for sale—Indian Penal Code, s. 272.

To mix water with milk for sale is no offence under section 272 of the Indian Penal Code in the absence of anything to show that such milk was rendered noxious as food or drink by such admixture.

THE District Magistrate points out that the complainant should have been examined before the issue of process. It seems unlikely that the case was taken up under section 190 (*1*) (*c*).

As the District Magistrate further notes, no offence was committed. Mixing water with milk intending to sell the compound is in itself no offence under section 272 Indian Penal Code.

There is nothing to show that the milk was rendered "noxious as food or drink" by the admixture of water.

Apparently the four accused persons should have been separately tried; but the proceedings are so meagre that this point cannot be certainly ascertained from the record.

The convictions and sentences are set aside and the fines will be refunded.

Special Civil Second Appeal No. 110 of 1901. January 15th, 1902.

Before Mr. Justice Fox.

MA KYI KYI *v.* MA SHWE AND ANOTHER.

Messrs. *Eddis, Connell* and *Lentaigne*—for appellant (plaintiff). | Mr. *Hla Baw*—for respondents (defendants).

Remedy against property given as security for debt when relief against a debtor personally is barred—Limitation Act, Schedule II, Articles 57, 59, 67, 80, 120.

It does not follow that when relief against a debtor personally is barred by limitation, remedy against property given as security for the debt is also barred.

Where therefore certain bullocks hypothecated to the plaintiff were in the possession of the defendants at the time the plaintiff filed his suit and were subsequently sold under decree of the original Court—

Held,—that although relief by way of a personal decree against the defendant was declared on appeal to be barred, the plaintiff was entitled to the proceeds of sale of the bullocks.

Ram Din v. *Kalka Prasad*, I. L. R., 7 All., 502, *Min Chand* v. *Jagabundhu Ghose*, I. R. L. 22 Cal., 21, followed; *Vitla Kamti* v. *Kalekara*, I. L R., 11 Mad., 153, dissented from.

THE plaintiff lent Rs. 300 to the defendants at interest on the 1st waning of *Nayon* (26th May 1896), and on that date they executed two bonds in her favour by which they hypothecated to her their four bullocks, giving to her a right to take possession of them in case the amounts due were not paid on demand. On the 14th November 1899 the plaintiff sued the defendants for Rs. 700, alleged to be then due upon the bonds, after allowing for interest paid.

The defendants set up that the suit was barred by limitation, but the original Court held that it was not barred.

The defendants appealed to the District Court, which held that Article 59 of the second Schedule of the Limitation Act was applicable, and remanded the case for trial upon an issue as to whether the alleged payment of interest had been made so as to effect a new period for computation of limitation under section 20 of the Act.

The original Court found that payment of interest within such time had been made, and gave a decree in the plaintiff's favour. The defendants then appealed to the Divisional Court, to which, after the Lower Burma Courts Act, 1900, came into force, an appeal lay, and that Court found that no interest had been paid as such before the expiration of the period prescribed in Article 59, and that there was no payment of principal recorded as required in section 20 of the Limitation Act. In a previous order I have held that there is no ground for differing from these conclusions. The plaintiff's advocate, however, contended before the Divisional Court (and he was, under section 591 Civil Procedure Code, entitled so to do), that the District Court's ruling upon the period of limitation applicable was erroneous. The plaintiff's right to a decree ordering the defendants personally to pay the amounts due upon the bond was in my judgment clearly barred: Articles 57, 59 67 and 80 of the 2nd Schedule of the Limitation Act would each make a suit for a personal decree beyond the period allowed for institution of a suit for such relief. The plaintiff, however, claimed an order directing the sale of the bullocks hypothecated to her. It does not follow that, when relief against a debtor personally is barred, remedy against property given as security for the debt

Special Civil Second Appeal No. 110 of 1901. January 15th, 1902.

is also barred. See *Ram Din* v. *Kalka Prasad*, I. L. R. 7 All., 502. The reliefs claimed in the present suit were practically the same as those claimed under somewhat similar circumstances in the cases of *Min Chand Baboo* v. *Jagabundhu Ghose*, I. L. R. 22 Cal., 21. In that case it was held that although relief by way of a personal decree was barred, the suit so far as it sought to enforce the plaintiff's charge upon the property pledged fell within Article 120 of the 2nd Schedule to the Limitation Act. I follow that decision rather than the decision of the Madras High Court in *Vitla Kamti* v. *Kalekara*, I. L. R. 11 Mad., 153. Upon the evidence taken upon the remand ordered by this Court, it is clear that the bullocks hypothecated to the plaintiff were still in the possession of the defendants at the time the suit was filed, and that they were subsequently sold under the decree of the original Court.

In my judgment the plaintiff was entitled to a decree ordering that if the defendants did not pay the amounts (Rs. 700) claimed by a fixed date (which should have been named), the bullocks hypothecated should be sold, and the net proceeds of sale should be paid to the plaintiff towards satisfaction of the amount due on the bonds sued upon. She was not, however, entitled to a decree ordering the defendants personally to pay such amounts. As the bullocks were in fact sold under the original Court's decree, it follows that in my judgment she was entitled to the proceeds of the sale, and if in consequence of the reversal of the original Court's decree the defendants have received such proceeds, she will be entitled to recover the amount from them.

I reverse the decree of the Divisional Court dismissing the suit. The decree of the original Court, however, is not restored in the form in which it was passed.

There will be a decree declaring that the plaintiff was entitled to have such bullocks sold by the Court, and to have the net proceeds of the sale of them paid to her towards satisfaction of Rs. 700 due upon the bonds.

The defendants having succeeded in their contention that they were not personally liable, each party will bear his and her own costs in all the Courts.

Before Mr. Justice Fox and Mr. Justice Birks.

Civil Miscellaneous Appeal No. 129 of 1901. January 20th, 1902.

MAUNG YE GYAN v. MA HMI AND THREE OTHERS.

Messrs. *Chan Toon and Das*—for appellant.

Letters of administration—Form of proceedings in cases where there is contention—Effect of grant of probate or letters—Objectors' rights not prejudiced—Probate and Administration Act, s. 83.

District Courts should follow the procedure of Chapter XI of the Code of Civil Procedure in all applications for letters of administration which are contested.

In a proceeding the object of which is to determine whether the applicant has the first claim to be clothed with the right to represent the deceased, the question of what the estate consisted of, and whether the property which the applicant

Civil Miscellaneous Appeal No. 129 of 1901. January 20th, 1902.

alleged to be the estate did in fact belong to the deceased at time of his death, and the fact that the property was in the objectors' possession are not matters which should be gone into. It is not the province of the Court to go into questions of title, and the grant of letters of administration does not in any way prejudice the objectors' rights if the property really belonged to him and not to the deceased.

The grant of probate or letters of administration only perfects the representative character of the grantee to the property which did in fact belong to the deceased at the time of his death, and enables the grantee to sue in a regular suit for property which he alleges to have belonged to the deceased at his death, although others claim it as theirs. *Behary Lall Sandyal* v. *Juggo Mohun Gossain*, I. L. R., 4 Cal., 1, and *Nanhu Koer* v. *Somirun Thakur*, 8 Cal., L. R., 287, followed.

Fox, J.—The appellant applied to the District Court for letters of administration to the estate of his stepmother Ma Sa Be. In a schedule to his petition he set out three pieces of paddy land in the district as the assets of the estate likely to come to his hands if letters were granted to him.

The respondents, who are nephews and nieces of the deceased, entered a *caveat* and opposed the grant on the following grounds:—

(1) That they had been adopted as children by Ma Sa Be and were her only heirs.

(2) That the applicant had after his father's death claimed his share of inheritance in the joint property from his stepmother, and had received it.

(3) That he was not an heir of his stepmother according to Buddhist law.

(4) That the applicant had lived and worked separately from his stepmother, and consequently had forfeited any right of inheritance he might have had.

(5) That previous to her death Ma Sa Be had partitioned and divided all her properties amongst the objectors, and had no property at the time of her death.

(6) That the paddy lands set out in the schedule to the application were not the property of the deceased.

Issues were suggested by the advocates for the parties, but apparently none were fixed by the Court. Section 83 of the Probate and Administration Act provides that in any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a suit according to the provisions of the Code of Civil Procedure; consequently District Courts should follow the procedure of Chapter XI of the Code in such cases. A great part of the evidence in the case was directed to the allegations set out under the fifth and sixth heads above.

The District Judge while holding that the question of title to the property did not come in, and was not material, based his decision dismissing the application upon the objectors being in possession of the property alleged by the applicant to be the estate of Ma Sa Be, and upon the applicant's not having had anything to do with the property since his father died many years ago.

Civil Miscellaneous Appeal No. 129 of 1901. January 20th, 1902.

These matters were not, in my judgment, the material matters to be decided on in the proceeding.

The applicant was claiming letters of administration as the sole heir of, and entitled to, his stepmother's property.

If the deceased had no natural or adopted children, he, as stepson, would, according to the decision in *Ma Gun Bon* v. *Maung Po Kwe*, Chan Toon's Leading Cases, 406, and P. J., U. B., 3rd quarter, 1897, page 1, be entitled to his stepmother's estate, unless he had forfeited his right to inheritance.

If, however, the objectors had been, as they alleged, adopted as children by Ma Sa Be, they would be entitled to the estate, and the applicant would have no right or claim to letters of administration.

The question of what the estate consisted of and whether the property which the applicant alleged to be the estate did in fact belong to the deceased at the time of her death, and the fact that the property was in the objector's possession were not matters which should have been gone into in a proceeding the object of which is to determine whether the applicant had the first claim to be clothed with the right to represent the deceased. In *Behary Lall Sandyal* v. *Juggo Mohun Gossain*, I. L. R. 4 Cal., 1, followed in *Nanhu Koer* v. *Somirun Thakur*, 8 Cal., L. R. (O'Kinealy's) 287, it was held that it is not the province of the Court upon a proceeding similar to the present one to go into questions of title, and that the grant of probate or of letters of administration would not prejudice in any way the objector's rights if the property really belonged to him, and not to the deceased.

The grant of probate or letters of administration only perfects the representative character of the grantee to the property which did in fact belong to the deceased at the time of his death, and enables the grantee to sue in a regular suit for property which he alleges to have belonged to the deceased at his death, although others claim it as theirs.

Owing to issues not having been framed I think that the attention of the Court and of the parties was not sufficiently directed to the essential matters for determination in the case, and that the case should be remanded to the District Court to try the following issues :—

(1) Were the objectors or any of them adopted by Ma Sa Be as *kittima* children ?

(2) If the objectors were not so adopted, did the applicant forfeit his right of inheritance in Ma Sa Be's estate by living and working separately from her ?

The District Court will record any further evidence the parties may offer on these issues, and return its findings on them to this Court with the evidence taken within three months from the date of this order.

Birks, J.—I concur.

Criminal Revision No. 104 of 1902. January 22nd.

Before the Chief Judge.

CROWN v. THA DUN U.

Release of accused on probation of good conduct—Receiving stolen property—Theft—Criminal Procedure Code, s. 562—Charge and conviction in the alternative.

The offence of retaining stolen property, which is one punishable with more than two years' imprisonment, is not one of the offences to which the provisions of section 562 Criminal Procedure Code can be applied in the case of first offenders.

Where an accused was charged and convicted in the alternative of offences under sections 379 and 411—

Held,—that section 562 could not be applied.

THIS case has been referred under section 438 Criminal Procedure Code by the Sessions Judge, Irrawaddy. The accused was charged and convicted in the alternative under sections 379 and 411 Indian Penal Code, and the Magistrate applied the provisions of section 562 Criminal Procedure Code. There was no distinct finding as to the offence committed, and, unless it was theft, section 562 would not apply. The offence of retaining stolen property is not one of the offences specified in section 562 Criminal Procedure Code, and it is punishable with more than two years' imprisonment. The Sessions Judge does not think a retrial necessary, but recommends that the bond given under section 562 be cancelled. The bond is hereby cancelled as being illegal. But it seems necessary that some legal order should be passed on conviction, and the case will go back to the Magistrate for the purpose of his passing some legal sentence. It may of course be nominal if the Magistrate thinks such order fit.

Criminal Miscellaneous Appeal No. 10 of 1902. January 29th.

Before the Chief Judge.

CROWN v. HODGSON AND ANOTHER.

The Government Advocate—for the Crown.

European British subject—Power to try or to commit to a Sessions Court not taken away from Magistrates—Lower Burma Courts Act, s. 8 (1) (a) and (b).

The provisions of section 8 *(1) (a)* and *(b)* of the Lower Burma Courts Act, 1900, do not mean that all commitments that are made of European British subjects must be made to the Chief Court of Lower Burma, but that where under the Code of Criminal Procedure a commitment is made to a High Court it is to be made to the Chief Court of Lower Burma. The power to try the case or to commit to a Sessions Court is not taken away from Magistrates.

The fact that an European British subject claims in Upper Burma to be tried by jury does not in itself form a ground for commitment to the Chief Court. The commitment in the case either should not have been made at all or should have been made to a Court of Session, section 447 (*1*). In case section 451 (*9*) applied action should have been taken thereunder.

Commitment held to be illegal and quashed.

APPLICATION has been made by the Government Advocate to this Court to quash the commitment of Major Hodgson on charges under sections 379, 109, 411 and 403, Indian Penal Code, and of Mahabu Ali on a charge under section 379 Indian Penal Code, the commitment having been made by the District Magistrate, Mônywa, Upper Burma. The main reason why the application is made at all, since by virtue of section 532 (*1*) Criminal Procedure Code, this Court could probably accept the commitment, is the great inconvenience likley to be caused

Criminal Miscellaneous Appeal No. 10 of 1902. January 29th.

to the public service, and to persons concerned, by the holding of the trial in Rangoon. But the grounds on which this Court is asked to quash the commitment under section 215 are two, namely, firstly, that under section 447 (*1*) it is only in case the offence cannot, in the opinion of the Magistrate, be adequately punished by him that the Magistrate should commit at all, and secondly, that under the same section (*1*) and (*2*) the commitment on the above charges could only legally be made to the Court of Session. It appears from papers filed with the proceedings that the District Magistrate and the Sessions Judge thought that as the accused, Major Hodgson, a European British subject, claimed to be tried by a jury, there was no alternative but to send the case before the High Court of Lower Burma, because there was no provision in Upper Burma for trial by jury. The question whether the offence could be adequately punished either by the District Magistrate or the Sessions Judge, sections 446, 447 (*1*), 449, Criminal Procedure Code, was not considered and did not affect the order passed by the District Magistrate. As to the point of provision for trial by jury in Upper Burma the Government Advocate supposes that clause II (*5*) of the Schedule to the Upper Burma Criminal Justice Regulation, 1892, was in the minds of the District Magistrate and of the Sessions Judge ; but in any case, whatever the effect of that clause in respect of persons other than European British subjects may be, clause XVII of the said schedule enacts that the Code in its application to the trial of European British subjects shall not be affected by the provisions of the Schedule. The Code of Criminal Procedure governs the procedure in regard to European British subjects both in Upper and Lower Burma.

The difficulty or impossibility of obtaining a jury does not appear to have been considered and was not in the mind of the Magistrate or the Sessions Judge in the consideration of the proper procedure in this case. It is supposed that a jury could be obtained at any rate at Sagaing. Had there, however, been the belief that a jury could not be constituted, the provisions of section 451 (*9*) should have been followed.

Chapter XXXIII contains special rules regarding European British subjects, and it appears that, unless there was the aforesaid difficulty regarding the constitution of a jury, in which case section 451 (*9*) applied, the District Magistrate should have tried the case himself, provided he was of opinion that he could pass an adequate sentence in case of conviction. Secondly, it appears that, in case he decided to commit, he should have committed to the Court of Session, since the offences charged are not punishable with death or transportation for life [section 447 (*2*)].

The provisions of section 8 (*1*) (*a*) and (*b*) of the Lower Burma Courts Act, 1900, do not mean that all commitments that are made of European British subjects must be made to the Chief Court of Lower Burma, but that where under the Code a commitment is made to a High Court, it is to be made to the Chief Court of Lower Burma. The power to commit to a Sessions Court is not taken away from Magistrates. For the two reasons, namely, that the Magistrate should

Criminal Miscellaneous Appeal No. 10 of 1902. January. 29th.

not, without forming an opinion as to whether he could adequately punish or not, have committed at all, and that committal should have been to the Court of Session, I quash the commitment and direct the District Magistrate to proceed according to law. That is to say, if a jury can be constituted, the District Magistrate should try the case himself or, if necessary, commit for trial to the Court of Session, and in case there is insuperable difficulty in respect of a jury, the District Magistrate should proceed to act under section 451 (9). To save possible further trouble it may be as well further to remark that, in case the action of the Chief Court, as High Court, under section 451 (9) is required, it should be reported, in regard to the Court to which it is proposed to make a transfer, whether a jury can be constituted for a trial by such Court.

Special Civil Second Appeal No. 113 of 1901. February. 3rd, 1902.

Before Mr. Justice Fox and Mr. Justice Birks.

U TO AND ANOTHER *v.* R. M. M. S. MEYAPPA CHETTY AND FOUR OTHERS.

Messrs. *Lentaigne* and *Hla Baw*—for appellants (plaintiffs). | Messrs. *Lowis, Giles* and *Thornton*—for respondents (defendants).

Land purchased from ostensible owners—Claim to recover—Proof of purchase with notice.

Where plaintiffs had, by giving possession and reporting to the thugyi years previously that they had sold the land outright to the first defendant, put him in the position of ostensible owner of the property, and first defendant in turn put the second and third defendants in the position of ostensible owners.

Held,—that plaintiffs in claiming to recover from persons who had bought from the ostensible owners were bound to allege that those persons bought with notice, actual or constructive, that the land was not the absolute property of the ostensible owners, and to fix them with knowledge of this.

Fox, J.—The plaintiffs sued to redeem a piece of paddy land upon payment of Rs. 440, which they alleged to be the balance due upon the original sum of Rs. 2,000 lent by the first defendant.

The first transaction with him mentioned in the plaint took place in the year 1251 (1890). On that occasion the plaintiffs had reported to the thugyi that they had sold the land outright to the first defendant, and consequently the names of the owners were mutated in the Revenue registers.

The plaintiffs then alleged that in 1253 (1892) they had paid off the sum originally lent, and that the first defendant had given them back the plan of the land and *pyatpaing* made out when the original transaction was entered into, but that the first defendant did not retransfer the land back into their names because a debt owed by some of their relations for whom they were sureties was still outstanding.

They set out various subsequent transactions with the first defendant, and alleged that the result of them all was that only Rs. 440 was due at the time of suit.

They further set out that on the 11th March 1896 the first defendant had without their knowledge and consent sold the land to the second and third defendants for Rs. 700; and that on the 18th March 1899 the second and third defendants had sold the land to the fourth and fifth defendants for Rs. 2,500.

Special Civil Second Appeal No. 113 of 1901. February 3rd, 1902.

Although these last defendants were obviously the parties interested to the greatest extent in the land, for they had paid Rs. 2,500, and the plaintiffs sought to recover it from their possession on payment of Rs. 440 only, the prayer of the plaint contained no express claim for relief against them: it only asked that the first defendant, who was stated to have parted with the land four years previously, should be ordered to reconvey the land upon payment of the Rs. 440 or such sum as should be found due.

No relief was claimed against the second and third defendants either, and it is not apparent why they were joined as parties to the suit, or to this appeal. The fourth and fifth defendants were originally not made parties to this appeal, but upon the Court pointing out that it could not under any circumstances give a decree for redemption unless the persons in possession who claimed to hold the land as their absolute property were made parties, the appellants applied to have them as well as the second and third defendants added as parties. We have heard a lengthy argument from the appellants' counsel upon the transactions between the plaintiffs and the first defendant, and as to what their result should be held to be.

In my judgment these matters were and are not in point until and unless the plaintiffs proved that the fourth and fifth defendants bought the land with notice that their vendors had no title to it, or at any rate that the plaintiffs had a right to redeem it.

The plaintiffs had by giving possession and by reporting to the thugyi years previously that they had sold the land outright to the first defendant, put him in the position of ostensible owner of the property. He in turn had put the second and third defendants in the position of ostensible owners. Under the circumstances the plaintiffs, in claiming to recover from persons who had bought from the ostensible owners, were bound to allege that those persons had bought with notice, actual or constructive, that the land was not the absolute property of the ostensible owners, and to fix them with knowledge of this.

No such case was alleged or made out in the present case.

The appeal should, in my opinion, be dismissed with costs.

Birks, J.—I concur.

Before the Chief Judge and Mr. Justice Birks.

Civil Regular Appeal No. 35 of 1901. February 3rd, 1902.

MI SAN MRA RHI *v.* MI THAN DA U AND TWO OTHERS.

Messrs. *VanSomeren* and *Fagan*—for the appellant (defendant). | Messrs. *Chan Toon* and *Das*—for the respondents (plaintiffs).

Buddhist Law—Inheritance—Son of divorced wife—Filial relations—Maintenance by father—Revival of lost rights.

A daughter and son lived with their mother after she had been divorced from their father. There was division of property at the time of the divorce, and further property was assigned to the children. At the time of divorce the daughter and son were aged six and eight years. The father died when the children were eleven and thirteen years of age. They did not and could not of their own accord renew filial relations with their father. Though the father took an active interest in their education and helped towards their support, he did not take them into his own household or family.

Civil Regular Appeal No. 35 of 1901. February 3rd. 1902.

Held,—that under the circumstances mentioned the son as much as the daughter was excluded from inheriting in the deceased father's estate.

The children of separated parents are included among those children who cannot inherit, and no distinction is made between sons and daughters.

The mere fact of a father helping to educate or maintain a son is not sufficient to revive rights which such son had lost in law and intention at the time of his mother's divorce.

Mi Thaik v. *Mi Tu*, S. J., 184; *Ma Shwe Ge* v. *Maung San*, S. J., 296; *Maung Hmat* v. *Ma Po Zon*, P. J., L. B., 469; *Ma Pon* v. *Maung Po Chan*, Chan Toon, 450; distinguished; *Maung Ba Kyu* v. *Ma Zan Byu*, P. J., L. B., 299, dissented from.

Birks, J.—The plaintiffs-respondents in this case, are the minor son and daughter of Mi Shwe Bon. They sue, by their mother and guardian, the third wife of Maung San Do Aung, the late Myoôk of Myohaung, San Kyaw U and Mi San Mra Rhi, the two children of the first wife Mi Go Leik Pyu, for a share in the estate of their deceased father. They claimed a one-third share in the properties acquired by the deceased during his first marriage (Schedule A), a two-thirds share in the property acquired during the marriage with their mother Mi Shwe Bon (Schedule B), and half share of the property acquired by deceased since his divorce from Mi Shwe Bon in 1894 (Schedule C). The defendants filed a written statement in which they took exception to several items in the three schedules annexed to the plaint, and denied that the plaintiffs were entitled to any share in the estate at all. The Court of First Instance has found that the property mentioned in Schedule A amounted to Rs. 1,650, in Schedule B to Rs. 548-9-0 and in Schedule C to Rs. 4,592, and that the moveable property was Rs. 5,146. A decree was given in favour of the plaintiffs for one-third share in A, two-thirds in B, and half share in C, and a half share in the moveable property.

Against this decision the defendants have appealed on the following grounds:—

(1) That the Lower Court erred in finding that children of a divorced wife were entitled to share in the whole estate of their father by reason of his acts of kindness towards them after divorce.

(2) That the Lower Court erred in law in holding that the children of the divorced wife are entitled to participate at all in their father's estate.

(3) That the Lower Court erred in law in apportioning to the children of the divorced wife any share of the property acquired either before or after the deceased's coverture with the wife whom he divorced.

(4) That the Lower Court erred in finding that the jewellery given to the plaintiffs on account of Mi Shwe Bon and the children were *thinthi*, and erred in not bringing their value into account for the purpose of any division to which they might be entitled.

(5) That the Lower Court erred in holding that the piece of land belonging to Mi Nan Tha and mortgaged to the deceased in the name of San Gyaw U was *thinthi*, and erred in not bringing its value into account for the purpose of any division to which they might be entitled.

Civil Regular Appeal No. 35 of 1901. February 3rd, 1902.

(6) That the Lower Court erred in giving a simple money decree.

(7) That the Lower Court erred in law in ruling that the shares to which the plaintiffs would be entitled were a one-third, two-thirds and a half.

The following facts are either admitted or proved:—

San Do Aung's first wife was Ma Go Leik Pyu and the two defendants are the children of their marriage. She died in 1884 and he married Mi San Hla Pyu, who was divorced and had no issue. The claims of the second wife appear to have been settled. He then married Mi Shwe Bon in June 1886 and had three children, the two plaintiffs Mi Than Da U and San Tun Aung, and another child, since deceased. The plaint states he took a fourth wife, Mi Ni, shortly before his death in August 1899. It has been stated that the Myoôk had six wives altogether, but only four are referred to in the proceedings. It is admitted as between the parties to the present suit that there are no other claimants to the estate except the children of the first and third marriages. The deceased began life as a clerk, but he had been a Myoôk on Rs. 175 for one year before the death of his first wife. Mi Shwe Bon says she lived with him at Myohaung but remained at Akyab when he was transferred to Pauktaw and subsequently to Upper Burma. He was transferred to Gwa and came up from there on leave at the time of his divorce in March 1894. Mi Shwe Bon admits he divorced her as she could not get on well with his children by his first wife. She says he told her she must take 30 or 40 ticals of gold for herself and 40, 50 or 60 ticals for his children and go. He agreed to pay her Rs. 20 a month for the children. A divorce paper was made out, but this Mi Shwe Bon has lost. At the time of the divorce he seems to have had two houses in Akyab, the first, a pucca house, was begun at the time of his third marriage and as it was built on land belonging to his first wife's parents, it is probable that it was built with money acquired during the first marriage. Mi Shwe Bon lived with the children of the first marriage in this pucca house when her husband was serving in stations outside Akyab, though she seems to have lived for a time with him at Myohaung. It is admitted that after the divorce she lived with her father, but she says San Tun Aung remained in the pucca house for nine months and his sister for two months after the divorce. I think, however, it is clear from the admission of U Mra U and the Lay School teacher, Hla Saw Pru, that the children of the third marriage resided permanently with their mother, though they paid visits to their father both in Akyab and Myohaung. There seems no reason to doubt that the deceased did provide for the education of his children by the third marriage at the time of the divorce, though Mi San Mra Rhi professes ignorance of this. The evidence shows that he sent his son to school and took an interest in the marriages of both the children. There is a considerable conflict of evidence as to whether Mi Shwe Bon took more than her proper share of the property at the time of the divorce. She brought no property to the marriage but has influential relations. She

Civil Regular Appeal No. 35 of 1901. February 3rd, 1902.

is the niece of U Mra U, who was for many years *Akunwun* at Akyab and who has taken an active part in these proceedings on behalf of his nephews. Her relations were much opposed to the divorce. It seems probable that the deceased consented to her taking more than she was entitled to on the understanding that her children were not to take anything after his death. It seems probable that if the divorce deed contained provisions that the children of the divorced wife were to be heirs to San Do Aung after his death it would not have been mislaid. According to the evidence of San Gyaw U this document has been suppressed by the plaintiffs' party. It seems clear from the evidence which (though noted as irrelevant) has been recorded that U Mra U and others put considerable pressure on the defendants to consent to an arbitration as to the estate. Mi Ni, the fourth wife, appears as a witness for the defendants and deposes that she was reluctant to marry the deceased as he had another wife. He told her not to be afraid as he had divorced her and turned them out. She is living now with the children of the first marriage. Whether the gold given to the children of the third marriage at the time of divorce was *thinthi* or not, does not seem to me material. It was clearly settled upon them as a provision at the time of divorce and precautions were taken that Mi Shwe Bon should not spend it. The deceased does not appear to have any ancestral property, though he saved a good deal of money and bought land in Myohaung, granted *pattas* to himself *benami*, and advanced money to traders, and employed his peon Hla Aung to assist him in all these questionable transactions. The evidence is conflicting as to whether the first wife Mi Go Leik Pyu was poor or rich. Her son says her parents were fairly well to do and it is admitted they kept a shop and the site on which the pucca house was built belonged to them.

These are the principal facts. For the plaintiffs it is contended that the children of a divorced wife are heirs to their father and reliance is placed on Mr. Aston's ruling in *Maung Ba Kyu* v. *Ma Zan Byu* (280, Chan Toon). It is also urged that as the plaintiffs are both minors they would naturally live with their mother after the divorce, and it would be inequitable that they should lose their inheritance in their father's estate because they have not lived with him as they could not "work or plan" as held in Mi Shwe Ge's case (47, Chan Toon). For the defendants it is urged that Mr. Aston's ruling in Maung Ba Kyu's case has not been followed; that the children of a divorced wife are only entitled to inherit in the new family; and that in this case the evidence shows that Maung San Do Aung provided adequately for the children of his third wife by the divorce agreement and that the maintenance paid was due to this agreement. It has been urged also that the divorce was occasioned by the misconduct of Mi Shwe Bon in quarrelling with the children of the first marriage and neglecting her husband.

I think it must be held that the divorce was by mutual consent, but that there was an agreement at the time of the divorce which made adequate provision for the minors.

Civil Regular Appeal No. 35 of 1901. February 3rd, 1902.

The question to determine is whether, under the circumstances of the case, the minors are entitled to inherit in San Do Aung's estate, because he evinced a certain amount of interest in their welfare after the divorce.

The present case can be distinguished from any of those cited inasmuch as there are two minor children, a son and a daughter, and their divorced mother had no separate property of her own and did not contract a second marriage. It may be also noted that the children of neither family lived with their father when he was serving in stations outside Akyab.

The principal case which tells in the defendant's favour is *Mi Thaik's* case (227, Chan Toon). The principal case in favour of the plaintiffs is *Maung Ba Kyu's* case (280, Chan Toon). It will be necessary to examine these two decisions to see which should be followed. In *Mi Thaik's* case, which was decided by Mr. Jardine, the right of a daughter to inherit in the estate of her natural father after he had divorced her mother was considered. I gather from this decision that Mr. Jardine held—

(1) that the rules as to inheritance contained in Chapter X of the *Manukyè* referred only to cases of wives remaining in the house family, and that there are special provisions for dealing with the case of children of divorced wives ;

(2) that in Buddhist Law children were considered as property as their parents had a right to sell them ;

(3) that the parents made final arrangements at the time of the divorce for the custody and maintenance of the children ;

(4) that in the absence of any special contract, the presumption would be that the father took the sons and the mother the daughters ;

(5) that the ordinary rules of the *Dhammathats* were constantly departed from in practice by arbitration by *lugyis*.

This decision was reviewed among others by Mr. Aston in *Maung Ba Kyu's* case, where the interest of a minor son living with his divorced mother under a special arrangement made at the time of divorce was considered. He distinguished the case of Mi Thaik as not applying to a son, and noted that Mr. Jardine had not ruled that divorce extinguished the rights of children to inherit from their natural parents. As a matter of fact he overruled that case in holding that the position of the children of a divorced wife was similar to that of the children of an *atetmaya*, and he quotes the following passage from Book 12 of the *Manukyè*, in support of this opinion : "That the law for "partition of the property between the wife or wives and children on "the death of the husband in any of these cases is all contained in the "Chapters on Inheritance" (page 346, *Manukyè*, 2nd Edition).

Civil Regular Appeal No. 35 of 1901. February 3rd. 1902.

The other cases cited are *Maung Hmat and others* v. *Maung Po Zon* (298, Chan Toon), *Ma Sein Nyo* v. *Ma Ngwe* (360, Chan Toon), *Ma Pon and others* v. *Maung Po Chan* (450, Chan Toon). These cases seem all to have been decided against the claims of a grown-up daughter who elected to live with her mother after divorce. In Ma Sein Nyo's case the learned Judicial Commissioner of Upper Burma held that though the plaintiff was a minor at the time of the divorce she was not entitled to any share of her father's estate. Mr. Aston's decision is not referred to, nor the general clause at page 346 of the *Manukyè*, 2nd Edition, that he cites; but the case of *Mi Thaik* v. *Mi Tu* is referred to with approval. In the case of *Ma Pon and two* v. *Maung Po Chan* (450, Chan Toon), Mr. White has followed this ruling and adopts with approval the passage quoted at page 453 of that work.

I note that in Ma Sein Nyo's case the learned Judicial Commissioner remarked that the appellant in the Court below had relied on the *Atta-than-kepa* and that the lower Appellate Court had held it to be of no authority. The actual sections quoted are not mentioned, but Mr. Burgess observed that there was no reason why the *Atta-than-kepa* should not be consulted and considered as one of the principal works on Buddhist Law.

I can only find applicable to the present case two passages which deal with the rights of children of divorced parents as distinguished from parents living separately. These are sections 236 and 245, which read as follows:—

"236.—Under the eleventh of the 16 heads of laws is the law as to the equitable disposition of an estate in the absence of heirs.

A woman whilst pregnant separates from her husband and marries another, and whilst she is living with the second husband a child is born. The first husband from whom the woman separated dies: the law as to whether the son so born is entitled to inherit is as follows:—

If the husband from whom the woman separated left *no children* the son born after the separation is the sole heir, and he shall get all the property to which his father was entitled by inheritance. If the natural father dies whilst living with the grandparents, the son born after the separation shall not be entitled to his father's share but to a grandson's share. If the deceased dies whilst living with one of his brothers or sisters, the property left by him shall be equally divided between the party with whom he lived and the son born after the separation.

245.—The law of partition between a son whose parents had separated after the father had paid damages, and the co-heirs of the father.

If the deceased father had no wife or children, but lived alone, let the son take all property his father exclusively owned and possessed. If the father had been living with his parents at the time of his death, the son cannct succeed to his father's estate. If the deceased had been living with any of his co-heirs at the time of his death, let his property which he exclusively owned and possessed be divided into six shares and let the son have one share, and let the other five shares be given to the deceased father's co-heir with whom he lived."

It would appear from these sections that it is only when the natural father has no children and is either living alone or with his other relations that his son by his divorced wife gets a share. Section 236 of the *Ata-than-kepa* is the converse of section 54 of the *Manukyè*, which details the rights of the unborn son in the estate of his step-father. The doctrine laid down in section 236 seems analogous to that laid down in section 51 of the *Manukyè*, which deals with the rights of an illegitimate son. The *Dhammathats* recognise the tie of blood, but as in all ancient laws the rights of individuals as such are postponed to their rights as members of a family.

The family tie is severed by divorce, and the rights of the children of a divorced pair seem to depend upon the arrangements made at the time of the divorce as to which branch of the two families they shall belong to. The children while minors are bound by the choice of their parents in this respect, but if brought up by the mother, as is usually the case, they can rejoin the father's family when they attain years of discretion. As held by Mr. Burgess in Ma Sein Nyo's case "In a country where testamentary rights have not been generally "recognised, and where the same man and woman frequently forms and "dissolves more than one matrimonial union it is a necessary conse-"quence that the continuance of the family relations intended to give "a right of inheritance should be manifested by outward and visible "symptoms sufficient to leave no doubt as to the true position of "affairs." Applying this principle to the present case I find that the children of the third marriage lived permanently with their natural mother after her divorce from Maung San Do Aung till the dates of their own marriages. The children of the first marriage were of age at the time of the divorce, and as no quarrels between the children are alleged, one would have expected to find the son at least living with his step-sister in the pucca house. The general principle is that the father takes the son and the mother the daughters on divorce unless a special arrangement was made. In this case, as far as the evidence goes, the two children were treated by the father as having the same claim to maintenance and provision. There is also the direct evidence of the fourth wife that her husband told her he had turned them out. The presumption is that the father would have taken the children away from the mother, as he had a family residing in Akyab who would look after them, if he intended them to inherit. It is admitted by Mi Shwe Bon that her husband

Civil Regular Appeal No. 35 of 1901. February 3rd, 1902.

was very angry with her and he made no attempt since his divorce to see her or renew friendly relations, which one would have expected had he considered her a suitable guardian of minor children remaining in the family and having an equal claim with his other children to share in his estate. For these reasons I would allow the appeal and dismiss the suit with costs throughout.

Copleston, C. J.—I have read the judgment of my learned colleague and agree with him in the conclusion arrived at. I will briefly remark on the decisions of the learned Judicial Commissioners which have been referred to by the learned Counsel engaged in arguing this appeal. It does not follow from the case of *Maung Shwe Lin* v. *Mi Nyein Byu* (P. J., L. B., 175) that the affairs of the children of persons divorcing and remarrying are to be presumed to be settled at the time of divorce or remarriage. The decision merely affirms that in the absence of special circumstances there is in the case described a presumption that the affairs as regards shares of husband and wife in jointly acquired property are settled at the time of divorce. This decision does not help us in the present case, where it is the question whether a son and daughter of a divorced wife can claim a share in the property retained or acquired by their father and his other wives.

In *Mi Thaik* v. *Mi Tu* (S. J., 184) Mr. Jardine held that under the circumstances set out a daughter of a woman divorced by mutual consent from her husband, the daughter living with her mother, was not entitled to a share in the joint property of the father and his second wife. In the case before us the daughter and son lived with the mother Mi Shwe Bon after the divorce and until their father's death. At the time of divorce, in 1894, they were aged six and eight years, and the father died in 1899, when the children were therefore eleven and thirteen years of age. They did not and could not of their own accord renew filial relations with their father Maung San Do Aung, though it is true the father took an active interest in their maintenance and education. Nor did their father take them into his own household or family. Unless the case of a son can be distinguished from that of a daughter this decision in the case of *Mi Thaik* v. *Mi Tu* would seem to exclude the present claimants from the shares they claim.

In *Ma Shwe Ge* v. *Maung Lan and one* (S. J., 296), Mr. Ward held that the children of a divorced wife could not claim a share in the property acquired after divorce and during a subsequent marriage unless they had continued to work and plan with their father after their mother's divorce. This ruling is not applicable to children who cannot work and plan. In the case of *Maung Hmat and others* v. *Ma Po Zon.* (P. J., L. B., 469) the decision proceeded on similar grounds and the daughter was held to be excluded from a right to share in the property acquired during her father's marriage with his first wife and also from property acquired by her father and his other children after her own mother's divorce. The latest decision cited on the subject is one of the Judicial Commissioner, Upper Burma, *Ma Pon and others* v. *Maung Po Chan and others* (Chan Toon, page

Civil Regular Appeal No. 35 of 1901. February 3rd, 1902.

450). Mr. Thirkell White held that daughters living with their divorced mother and not maintaining filial relations with their father were not entitled to share in his estate when there has been a division of property at the time of divorce. The decision as set out in the last paragraph of the judgment is guarded; but the learned Judge remarks that the intention of the law seems to be that on divorce separate households should be constituted and that the members of each household should not retain the right of sharing in the estate of the other.

In the present case I see no reason to doubt that there was a division of property between Mi Shwe Bon and Maung San Do Aung at the time of the divorce; and, further, it appears that property was assigned to the children. The deed of divorce is not forthcoming, but the transaction seems to have been *intended* at any rate to be a final settlement of claims of Mi Shwe Bon and her children. Such intention might not necessarily operate to exclude from a right in their father's estate, but it must be taken into account. Then, as to the maintenance of filial relations, the children lived with their mother. They did visit their father, and he helped both to support and educate them, but they never rejoined his family, and I do not think it can be said that filial relations were either maintained or renewed. For these reasons and for reasons given in the rulings above cited I am of opinion that the daughter at any rate is excluded from the rights she claims. The further question is whether the son occupies a different position. I can see no sufficient reason for holding that he does. It is true that at the time of divorce the father usually takes the sons and the mother the daughters, and that in that case the sons of a divorced wife would share in the deceased father's estate; but it does not follow that when a son remains with the mother he retains the rights he would have had had he continued in his father's household or family. Mr. Aston, in the case of *Maung Ba Kyu* v. *Ma Zan Byu* (P. J., L. B., 299), came to the conclusion that, in spite of a divorce by mutual consent with equal division of joint property and in spite of the fact that the son, a minor, lived with his mother, the son was not divested of his right to share in his father's estate. This decision appears to have been come to partly on the ground of the child being a son, and partly by following the law applicable to the rights of children of successive wives to share in the estate of their deceased father. In this latter case it does not matter whether the child is a son or a daughter, and I am unable to agree that the law applicable to children of successive undivorced wives is a safe guide in the case of children of divorced parents. At the end of Book X of the *Manukyè Dhammathats* the children of separated parents are included among those children who cannot inherit, and no distinction is made between sons and daughters. The son, San Tun Aung, before his father's death was quite old enough to have been taken from his mother's into his father's family, if his father intended him to become again part of his own family; but he did not rejoin his father. Nor can I agree that the fact of his father helping to educate or maintain him is sufficient to revive rights which he had lost, as I believe was the case in law and intention, at the time of his mother's divorce

Civil Regular Appeal No. 35 of 1901. February 3rd, 1902.

assumed to be by mutual consent when he received a considerable amount of property, against the waste of which by his mother precautions were taken.

The son is, in my opinion, as much excluded under the circumstances as the daughter.

I am therefore of opinion that the decree of the District Judge should be reversed and the claim of the plaintiffs be dismissed with costs.

Civil Regular Appeal No. 40 of 1901. February 3rd, 1902.

Before Mr. Justice Fox and Mr. Justice Birks.

ABDUL MAJID *v.* K. P. M. VELLIAN CHETTY.

Messrs. *Lowis, Giles* and *Thornton*—for appellant (defendant).

Messrs. *Agabeg* and *Maung Kin*—for respondent (plaintiff).

Contract Act, ss. 62, 63—Novation—Release.

Plaintiff sued for the balance due by the defendants on promissory notes. He admitted that by an agreement subsequent to the promissory notes he had agreed to release the first defendant on his paying half the amount due on the notes, but as the first defendant had not paid the half in full, he claimed to be entitled to sue both defendants for the full amount due upon the original notes.

The document executed by the plaintiff was in fact an absolute release of the first defendant from all liability on the promissory notes.

Held,—(1) that the release could not be treated as a mere agreement to release upon full payment of half the amount due on the notes; (2) that the plaintiff had no right of suit against the first defendant on the promissory notes. *Manohur Koyal* v. *Thakur Das Naskar*, I. L. R. 15 Cal., 319, distinguished.

Fox, J.—The plaintiff alleged that Rs. 11,408 had been due to him as the unaccounted for balance of advances made by him to the two defendants as his paddy-purchasing agents upon 10 promissory notes for sums amounting to Rs. 23,550.

He further alleged that the first defendant had by a written agreement agreed to pay him one-half of the above balance, namely, Rs. 5,734, provided no further claim was made against him by the plaintiff, but that of this defendant had only paid Rs. 3,000, and consequently he claimed that as this defendant had not fulfilled this agreement he was entitled to sue him for the amount due upon the original promissory notes, less the Rs. 3,000, paid under the agreement.

The first defendant, who is the only appellant in this case, alleged that the defendants had claims against the plaintiffs for the expenses incurred by them as purchasing agents, and also on account of their having been stopped purchasing the full amount of paddy which the parties interested had contemplated, and that there had been a settlement of account and agreement under which the plaintiff had released him from all liability in respect of the advances made upon his paying Rs. 2,000, in cash, and giving a promissory note for Rs. 1,000. The District Court treated the case, so far as the first defendant was involved, as one in which the principle upon which the case of ***Manohur Koyal* v. *Thakur Das Naskar***, I. L. R. 15 Cal., 319, was

Civil Regular Appeal No. 40 of 1901. February 3rd, 1902.

decided, applied. In that case the plaintiff sued to recover Rs. 1,173, as being due upon a bond. It was found as a fact that after the due date of the bond an arrangement had been come to between the plaintiff and the defendant by which the plaintiff agreed to accept in satisfaction of what was due to him at the time of the arrangement Rs. 400 in cash, and a fresh bond for Rs. 701, payable by instalments; and it was further found that the plaintiff never intended to, or agreed to, accept the naked promise of the defendant to pay Rs. 400, and to give the bond for Rs. 701. The defendant did not pay the Rs. 400, or give the bond, but pleaded that there had been a novation of the original contract by reason of the subsequent agreement, and that the suit being based on the original contract could not be maintained, and he relied on the provisions of sections 62 and 63 of the Contract Act in support of his contention. It was held, however, that neither section had any bearing on the case, and that upon breach by the defendant of the terms which he had made, and upon the non-performance by him of the terms of the satisfaction which he had promised to give, the parties were relegated to their rights and liabilities under the original contract, and that consequently the plaintiff was entitled to the relief he claimed.

In the present case, however, the subsequent document which the plaintiff executed is not a mere agreement containing a promise on the first defendant's part to pay half the amount due to the plaintiff upon the original contracts or promissory notes: it is an absolute release of the first defendant from all liability on those notes. Consequently the plaintiff can have no right after the execution of such a document to sue the first defendant upon the promissory notes.

Counsel for the respondent has asked us to treat the document as an agreement on the first defendant's part to pay Rs. 5,734, and has urged that his client must have understood that he was entering into an agreement, and that the first defendant must have fraudulently induced his client to sign the document upon the promise to pay the Rs. 5,734. No case of fraud or mistake is set forth in the pleadings, nor in the evidence, nor was any such case put in issue. No doubt it is common ground that only Rs. 3,000 was paid by the first defendant, whereas by the document the plaintiff acknowledges to have received Rs. 5,734 from him. The first defendant's explanation of this is that the plaintiff really released him for a payment of Rs. 2,000 in cash and a promissory note for Rs. 1,000, but as he wanted to hold the other defendant liable for the other Rs. 5,734 the plaintiff himself had the statement as to having received Rs. 5,734 from the first defendant entered in the document in order that the second defendant should not know that the first defendant had been released for a smaller sum than he was held liable for. It is unnecessary to go into the question as to whether the first defendant's allegations as to the terms of settlement with him are true or not.

The terms of the document must govern the decision of the case as against the first defendant. In *Ashgar Ali* v. *Delroos Banoo Begum*, I. L. R. 3 Cal., 324, their Lordships of the Privy Council say: "Undoubtedly if a person of competent capacity signs a deed, it is to

Civil Regular Appeal No. 40 of 1901. February 3rd, 1902.

"be presumed that he understood the instrument to which he has "affixed his name." No case of fraud or mistake in connection with the document having been even alleged, the plaintiff must be held bound by it.

In my judgment this appeal must be allowed, and the District Court's decree against the first defendant Abdul Majid must be set aside, and the suit against him dismissed with costs. He is also entitled to his costs of this appeal.

The second defendant not having appealed, the District Court's decree against him remains unaffected.

Birks, J.—I concur.

Before the Chief Judge.

CROWN *v.* PYA GYI.

Criminal Revision No. 1337 of 1901. February 7th, 1902.

Kazawye—Fermented liquor defined—Excise Act, Burmese translation, s. 51.

Kazawye, a generic term for fermented liquor, has not been declared * to be included in the term "fermented liquor" as defined in section 3 (*h*) of the Excise Act. In convictions under that Act for the illegal possession of fermented liquor it is necessary to prove that the fermented liquor is one of those within the meaning of the term as used in the Act.

THE District Magistrate has submitted a report which purports to give the reason of the Magistrate who tried the case for convicting Nga Pya Gyi of possession of *kazawye* and sentencing him to a fine of Rs. 50, under section 51 of the Excise Act: "Magistrate Maung Pa present. He produces section 51, Excise Act, Burmese edition, Burma Excise Manual, page 243, last edition. '*Kazawye*' is therein mentioned at the end of the first and commencement of the second line." The Magistrate relies on the use, in section 51 of the Burmese translation of the Act, of the term *kazawye*, which is believed to be a correct translation of the words "fermented liquor," though not of the word "liquor" (section 51). It seems that the Magistrate is unaware of the fact that the term "fermented liquor," in section 30, to which section 51 refers back, is defined in section 3 (*h*) and that there is in force a notification under that clause, namely, Notification No. 36, dated 14th August 1895, in which certain kinds of fermented liquors, *kaung*, *seinye*, *hlawza*, *seye* and *tari* are declared to be included in the term "fermented liquor." *Kazawye* is not included. If it were, the effect would, apparently, be to declare *all* fermented liquors to be "fermented liquor" for the purposes of the Act.

At the time I made the reference I expected that the Magistrate would report that the *kazawye*, or fermented liquor, in the case before me was included in *seye* or one of the other liquors mentioned in the notification above cited. Since he, in the presence of the District Magistrate, has not done so, and as the District Magistrate adds no remarks on the subject, I must conclude that the *kazawye* in question was not one of those fermented liquors the possession of which in excess of a certain quantity is forbidden. Of course it is for

* It has now been so declared by Financial Department Notification No. 27, dated 20th May 1903.

the prosecution to prove that the liquor is "fermented liquor." Many cases have come before me in which convictions were had for the possession of *kazawye*, a generic term for fermented liquor, and I have referred this case for report and have dealt with it at some length not for any special peculiarity in the case, but mainly because it seems necessary to point out the need for proving that the fermented liquor in respect of which they convict under the Excise Act is one of those within the meaning of the term as used in the Act.

Criminal Revision No. 1337 of 1901. February 7th, 1902.

The conviction and sentence in this case are set aside and the fine must be refunded.

Before Mr. Justice Fox.

TAN SEIN *alias* MAUNG SAING *v.* CROWN.

Mr. *Jordan*—for applicant.

Criminal Revision No. 1788 of 1901. February 10th, 1902.

Arrest—Restraint—Handcuffs, Abuse of the use of—Bailable offence—Resistance to unlawful force—Indian Penal Code, s. 224—Criminal Procedure Code, ss. 46, 50.

It is by no means necessary that a police officer should in arresting an accused person immediately proceed to put handcuffs on him, or to tie him with cord or chain. Such articles are used as means of restraint, and their use can only be justified under the provisions of sub-section 2 of section 46 of the Criminal Procedure Code, or under the general provisions contained in section 50 of the same Code.

When the offence against an accused is a bailable offence, the police have no authority to attempt to put handcuffs on him in the first instance, and would only be justified in using them if for some special reason there had been reasonable grounds for believing that he, after a proper arrest, would attempt to escape and was likely to do so, or he could not be got to go to the police-station except by such amongst other means.

Trivial resistance to unlawful force on the part of an arresting officer does not constitute an offence under section 224 Indian Penal Code. The law regarding arrest and restraint of persons distinguished.

It is highly important that Magistrates should check any abuse by police officers of their powers and should insist on the plain provisions of the law being carried out. It is obvious that the abuse of the use of handcuffs may be made the means of very great oppression by unscrupulous officers.

ON the 1st October 1901 a postal peon complained at a police-station that the applicant in this case, who is a Chinese shopkeeper in Payagyi village, had assaulted him in the execution of his duties. The applicant was tried on a charge of an offence punishable under section 353 of the Indian Penal Code and was acquitted in November.

On the 17th October the Police Sergeant who went to arrest the applicant on the above charge reported that the applicant had resisted being arrested, and made a charge against him of an offence punishable under section 224 of the Indian Penal Code.

He was tried on this latter charge in December, and on being found guilty was sentenced to one month's rigorous imprisonment on the 17th December. The Magistrate found that the applicant had not come to the Sergeant when first called, and that when he subsequently did come he promptly proceeded to question the Sergeant's authority to arrest him, and refused to allow himself to be arrested, and that he then rose and, when the Sergeant tried to catch him, he closed his

Criminal Revision No. 1788 of 1901. February 10th, 1902.

fists and struggled, and it was only when the *ywathugyi* came to help that he gave in and allowed himself to be handcuffed.

The Magistrate does not appear to have clearly appreciated what constitutes an arrest, and he appears to have thought that the Sergeant was justified in at once handcuffing the applicant. The questioning of the authority of the Sergeant was not an offence, nor was the applicant's saying that he would not allow himself to be arrested. What resistance there was, and it was trivial, was to his being handcuffed. The Sergeant had authority to arrest the applicant for the offence charged, but his action shows that he considered handcuffing an accused the only way of making an arrest.

This erroneous impression may be prevalent amongst the subordinate police, and the frequency of complaints by arrested persons regarding the indignity forced on them in being handcuffed, and taken through towns and villages under such conditions, and sometimes under even worse conditions, seems to me to render it desirable to call attention to the law regarding arrest and confinement of persons arrested. Section 46 of the Code of Criminal Procedure enacts that "(1) in making an arrest, the police officer or other persons making "the same shall actually touch or confine the body of the person to be "arrested, unless there be a submission to the custody by word or "action; (2) if such person forcibly resists the endeavour to arrest "him or attempts to evade the arrest, such police officer may use all "means necessary to affect the arrest."

From these provisions it is apparent that all that is necessary to constitute an arrest is that the arresting officer shall touch the body of the person to be arrested, and that even the touching of the body is not necessary when the person to be arrested submits to the arresting officer's custody by word or action. The provisions imply that the arresting officer should intimate to the person he intends to arrest that he is about to do so, and if he touches him, that he does so in pursuance of his intention. In the case of persons charged with minor offences and even in some cases of persons charged with grave offences an opportunity should be given to the person to be arrested of "submitting to the custody by word or action."

After an arrest has been effected in either of the above ways, that is to say, either by the accused having submitted to the custody of the arresting officer, or by that officer having touched him in the process of making the arrest, the accused is thereafter in the arresting officer's custody even if that officer does not actually hold or confine him, and if the accused intentionally escapes or attempts to escape from that officer's custody, or from any other officer's custody before he is duly released, he commits an offence punishable under section 224 of the Indian Penal Code.

From the above it will be seen that it is by no means necessary that a police officer should in arresting an accused immediately proceed to put handcuffs on him, or to tie him with cord or chain.

Such articles are used as means of restraint, and the use of them can only be justified under the provisions of sub-section 2 of section 46 above quoted, or under the following general provision contained

in section 50 of the same Code, namely:—"The person arrested shall "not be subjected to more restraint than is necessary to prevent his "escape."

Criminal Revision No. 1788 of 1901. February. 10th, 1902.

The Executive Government has framed or sanctioned rules regarding the use of handcuffs for the guidance of police officers. They are of course subject to the general provision of the law contained in the section last quoted, and possibly under some circumstances a plea by an arresting officer that he had followed those rules would not be held to be justification for having infringed the provisions of section 50 of the Code of Criminal Procedure, but no doubt in the vast majority of cases these rules may be safely acted upon.

Those rules are as follows:—

"897. (1) No person arrested by a police officer on a charge of having committed a bailable offence should be handcuffed unless for some special reason it is believed that he is likely to escape.

(2) No person arrested by a police officer on a charge of having committed a non-bailable offence should be handcuffed if from his known antecedents, his respectable position in life and settled occupation, it is improbable that he will attempt to escape or offer violence:

Provided that handcuffs should always be used in the following cases, unless the person to be handcuffed may be exempted under Rule (3):—

(1) In the case of any person accused of—

(*a*) offences relating to coin, sections 231 to 254, Indian Penal Code;

(*b*) murder and culpable homicide, sections 302 to 304, Indian Penal Code;

(*c*) attempt to commit murder and culpable homicide, sections 307 and 308, Indian Penal Code;

(*d*) robbery, section 392, Indian Penal Code;

(*e*) dacoity, section 395, Indian Penal Code;

(*f*) any other offence classed as a "violent crime" (paragraph 848);

(*g*) any minor offence against property, if he has been previously convicted of any offence against property or has been ordered to find security for good behaviour.

(2) In the case of any person who has been arrested under section 55, clause (*c*), Criminal Procedure Code, as being an habitual robber, house-breaker, thief, or receiver of stolen property, or under clause (*a*) or clause (*b*) of the same section as lurking with a view to committing a cognizable offence, as being without ostensible means of subsistence, or as unable to give a satisfactory account of himself, if such person has been previously convicted of any offence against property.

Criminal Revision No. 1788 of 1901. February 10th, 1902.

(3) No person shall be handcuffed who by reason of age, sex, or infirmity can be easily and securely kept in custody without handcuffs.

(4) Handcuffs, when they may be legitimately imposed under these rules, should be put on as soon as possible after the arrest is made, and not be removed until the person arrested has been placed in a secure lock-up. Before the prisoner is taken out from the lock-up the handcuffs should be put on again and not be taken off until he is once more in a safe place of confinement, or until a Magistrate orders their removal."

In the present case the offence charged against the applicant was a bailable offence, consequently according to Rule (1) the Sergeant had no authority to attempt to put handcuffs on the applicant in the first instance, and he would only have been justified in using them if for some special reason there had been reasonable grounds for believing that the applicant after a proper arrest would attempt to escape and was likely to do so, or if he could not get him to go to the police-station except by such amongst other means. There could have been no grounds for such belief under the circumstances detailed in the evidence.

If the Sergeant had done his duty he should have merely touched the applicant, informing him at the same time that he arrested him for the offence charged against him and that he must accompany him to the police-station, where he would be released upon his giving bail, or if the Sergeant was himself in charge of the police-station, he should have at once released the applicant under section 496 of the Code of Criminal Procedure upon his giving bail, as he offered to do, on the spot.

I hold that under the circumstances disclosed by the evidence the applicant did not offer any resistance or obstruction to the *lawful* apprehension of himself.

What he offered trivial resistance to was unlawful force upon the part of the arresting officer, and by doing that he did not commit an offence under section 224 of Indian Penal Code. I therefore reverse the conviction and find the accused not guilty of the offence charged against him, and his bail bond will be cancelled.

Even if what the accused actually did had constituted an offence, the punishment awarded by the Magistrate would have been grossly excessive.

No person of ordinary sense and temper would have taken notice of or umbrage at the applicant's method of expressing his annoyance at the highly inconvenient results to him of a charge being made against him, which, judging from the result of the trial on that charge, was unfounded.

I have entered somewhat fully into the law regarding arrest and restraint of accused persons, because it appears to me highly important that Magistrates should check any abuse by police officers of their

powers, and that they should insist upon the plain provisions of the law being carried out.

Criminal Revision No. 1788 of 1901. February 10th, 1902.

Although in this case the Sergeant's action appears to have been due to mere pique at his authority being questioned, it is obvious that the abuse of the use of handcuffs may be made the means of very great oppression by unscrupulous officers, and consequently any such abuse calls for condemnation and action by the Magistracy.

Before Mr. Justice Fox and Mr. Justice Birks.

Civil Miscellaneous Application No. 8 of 1902. February 13th.

MA ME GALE *v.* MA SA YI.

Messrs *Lowis, Giles* and *Thornton*—for applicant. | Messrs. *Chan Toon* and *Das*—for respondent.

Privy Council appeals—Security for costs, Form of—Immoveable property, Mortgage-bonds of—Time taken in testing value—Limitation—Civil Procedure Code, s. 602 (a)

Security for costs in appeal to the Privy Council may be given in the form of mortgage-bonds of immoveable property; but parties must take the risk of not being within time if in consequence of the time taken in testing the value of the security it is not accepted within the time allowed for giving security.

No security of immoveable property should be accepted except a first mortgage by registered deed of freehold or absolutely held property In every case the value of the property should exceed by at least one-third, or if consisting of buildings, by at least one-half the amount of security required.

IN the absence of any rules made by this Court specifying in what form security for costs under section 602 (*a*) of the Code of Civil Procedure must be given in this Court, we think that any form accepted by the High Courts in India should be accepted in this Court.

The rules of the Calcutta and Bombay High Courts admit of security being given in the form of mortgage bonds of immoveable property, but at the same time provide a procedure for testing the worth of such security. We think that such procedure should be followed in this Court.

It is the duty of the would-be appellant to tender security. If the applicant in this case tenders security in the form of a mortgage bond, notice of such tender will be given to the respondent's advocate. Obviously the title-deeds of the property should be tendered with the mortgage bond. If the property is situate in Rangoon, the question of the value of the property can be gone into here. If, however, the property is situate in any district outside of Rangoon, the mortgage bond and title-deeds will be sent to the District Court of the district in which the property is situate for report upon the value. In such Court the parties should be given an opportunity of being heard upon the question of the value in case it should be disputed.

Upon receipt of the report the matter should, after notice to the parties' advocates, be laid before the Bench of this Court for decision as to whether the security offered should be accepted.

If parties offer security in the form of immoveable property, they must, we think, take the risk of not being within time, if in consequence

1902.

MA ME GALE v. MA SA YI.

of the time taken in testing the value of the security it is not accepted within the time allowed for giving security.

We do not think that any security of immoveable property except a first mortgage by registered deed of freehold or absolutely held property should be accepted, and that in every case the value of the property should exceed by at least one-third, or if consisting of buildings by at least one half, the amount of security required.

Before Mr. Justice Birks.

CROWN *v.* SHWE PE AND NINE OTHERS.

Criminal Revision No. 189 of 1902. March 4th.

Common gaming-house, Owner of, present for purpose of gaming—Double conviction—Burma Gambling Act, ss. 11, 12.

The owner of a common gaming house who was present for the purpose of gaming, and taking a small commission,

Held,—not liable to a conviction under section 11 as well as under section 12 of the Burma Gambling Act, 1899. *Queen-Empress* v. *Aw Wa* and *Tan Win*, 1 L. B. R., 33, followed.

THE first accused Nga Pe in this case has been found guilty of having gambled, and also of having acted as a "*daing*," and with having thereby committed offences under sections 11 and 12 of the Burma Gambling Act. He has been sentenced to pay a fine of Rs. 5 with seven days' rigorous imprisonment in default of fine under each section. Now under section 11 of the Act "actual playing" is put on the same ground as "being present for the purpose of gaming," and seems included in the more serious offence provided for in section 12 (*c*). Nga Pe in this case was the house owner and received a commission of one-tenth of a pice. He was present for the purpose of gaming and merely took this commission as he was the house owner. The double conviction is, I think, illegal for the reasons stated by the Full Bench in *Queen-Empress* v. *Aw Wa and Tan Win*, 1 L. B. R., 33. The conviction under section 11 is set aside and the fine of Rs. 5 will be refunded.

Before Mr. Justice Fox and Mr. Justice Birks.

MAUNG PO AND ANOTHER *v.* MAUNG KYA ZAING.

Civil Miscellaneous Appeal No. 148 of 1901. January 21st, 1902.

Chan Toon and *Das*—for the appellants. | *Agabeg* and *Maung Kin*—for the respondent.

Letters of Administration—Objector asking for letters himself—Practice—Procedure—Probate and Administration Act, s. 64—Court Fees Act, s. 19 (1).

When a caveator files a petition objecting to the grant of letters of administration and concluding with a prayer that letters may be granted to him, this does not constitute a sufficient application for letters within the meaning of section 64 of the Probate and Administration Act.

No order entitling a petitioner to letters ought to be made until the petitioner has filed in Court a valuation of the property in the form set forth in the third Schedule of the Court Fees Act, and the Court is satisfied that the fee mentioned in the first Schedule has been paid on such valuation.

When an objector asks for letters himself he should be required to put in a petition setting out the facts required in section 64 of the Probate and Administration Act, together with a proper valuation of the estate.

Birks, J.—The appellants in this case, Maung Po and Mi Shwe Lun, are two of the objectors to the grant of letters of administration

to Maung Kya Zaing, who applied for letters of administration as the father and guardian of Mi Mya Sin. It appears from the judgment of the District Judge of Mergui that there were three applications for letters: (1) by Maung Kya Zaing on behalf of the adopted daughter of Ma Win Tha, deceased, whose estate is the subject of these proceedings; (2) by Maung Sein Han on behalf of Mi Hla U, who is said to be adopted; and (3) by Mi Shwe Lun on behalf of Mi Bu Lôn, also said to have been adopted by Ma Win Tha. It is admitted that Maung Po, Ma Mya Sin and Ma Hla U Me are the nearest blood relations to Ma Win Tha, being descended from Ma Yôk, who was a cousin of the deceased. Ma Bu Lôn is a complete outsider. Her mother and guardian, Mi Shwe Lun, has died since the appeal was filed, and Maung Sein Han, the step-father and guardian of Ma Hla U Me, has not appealed. Maung Po, the surviving appellant, did not himself apply for letters of administration. There are altogether four proceedings sent up. In case No. 4, Maung Kya Zaing filed his application for letters of administration and on the same day filed an application No. 5 for the Court to appoint an administrator *pendente lite* under section 34, alleging that Maung Po, the present appellant, had stolen the keys and was spending as he likes. In that case Maung Po filed an application objecting to this application and his petition concludes with a statement that he is of age and wishes to administer, but his final prayer is merely that the application be dismissed. On the 27th March the District Judge appointed the bailiff as administrator *pendente lite* and remarked that Maung Po's objections were not seriously urged.

Mr. Chan Toon contends that this objection constitutes an application for letters of administration, but Maung Po does not appear to have filed any other petition, though he was examined as an objector in case No. 4. Orders were passed in case No. 4, though the other applicants were examined in cases Nos. 6 and 7. It is rather confusing to have the proceedings in connection with a single estate split up in this way. It is clear that the District Judge did not consider Maung Po an applicant for letters of administration at all and indeed records in his judgment that he did not apply. The District Judge seems to have considered the different claims and held Maung Kya Zaing the most fit person to administer. We are asked to set aside this decision on the ground that Maung Po has now attained his majority and is admittedly an adopted son living with his adopted mother at the time of her death. I see in his evidence that he admits Ma Win Tha enjoined him to live with his step-father and that he disobeyed her. The evidence seems to warrant the conclusion at which the District Judge arrived that it was necessary to appoint some one to look after the property *pendente lite*. On the merits we think there is no ground for interference. A question was raised during the hearing of this appeal which requires consideration. Mr. Chan Toon contends that when a caveator files a petition objecting to the grant of letters and concluding with a prayer that letters may be granted to him, this constitutes a sufficient application for letters within the meaning of section 64 of the Act. In this opinion we do not concur.

1902.

MAUNG PO v. MAUNG KYA ZAING.

It may have been the practice in District Courts to grant letters of administration to objectors who asked for grants to themselves in preference to the claimant, but in view of the provisions of section 19 (I) of the Court Fees Act, as amended by Act XI of 1899, it seems clear that no order entitling a petitioner to letters should be made until the petitioner has filed in Court a valuation of the property in the form set forth in the 3rd Schedule and the Court is satisfied that the fee mentioned in No. 11 of the 1st Schedule has been paid in such valuation. It is clear therefore that when an objector asks for letters himself he should be required to put in a petition setting out the facts required in section 64 of Act V with a proper valuation of the estate. In the present case I see that Maung Kya Zaing has been required to give security in the sum of Rs. 7,000. The estate was valued at Rs. 5,000 roughly by him, but no proper valuation appears to have been made. The bailiff has filed a schedule of the property actually taken over by him, but there is no valuation as required by section 19 (I) of the Courts Fees Act. The sureties offered are reported to be worth Rs. 9,000. The District Judge should see that these provisions of the law are strictly adhered to in future. The appeal is dismissed with costs—three gold mohurs.

Fox, J.—I concur.

Civil Revision No. 55 of 1901. January 30th, 1902.

Before Mr. Justice Copleston, Chief Judge.

SAN TUN PRU *v.* MI ANI ME AND FOUR OTHERS.

Chan Toon and *Das*—for the applicant. | *Broadbent*—for the respondents.

Attached property—Enquiry into applications for removal of attachment—Remedy of objector or claimant against order—High Court—Revisional jurisdiction—Procedure—Practice—Civil Procedure Code, ss. 278, 280, 281, 622.

The questions which have to be considered during an investigation under section 278, Civil Procedure Code, are comparatively simple, and questions of legal rights and title are not relevant except so far as they may affect the decision as to whether the possession is on account of, or in trust for, the judgment-debtor or some other person.

In enquiries into applications for the removal of attachment, where a Court wanders from the points necessary to be considered and does not make an investigation and pass an order such as the claimant is entitled to in accordance with the terms of sections 278—281, the High Court will not refuse to grant the extraordinary remedy of revision, notwithstanding that the claimant or objector has open to him a remedy by way of suit under section 283.

Ittiachan v. *Velappan*, I. L. R. 8 Mad., 484, and *Guise* v. *Jaisraj and another*, I. L. R. 15 All., 405, dissented from.

This is an application for revision of an order passed under sections 280 and 281 of the Code of Civil Procedure. The petitioner San Tun Pru applied for removal of attachment from three buffaloes, which he stated had been given to him by his father Thaukra Aung, the husband of the judgment-debtor Ma Zan U. He appears to have claimed also that the said buffaloes were in his possession at the time of attachment, having been let out by him in a grazing ground.

The application was made under section 278 Civil Procedure Code. An investigation was held and claimant adduced evidence as required by section 279.

1902.

SAN TUN PRU v. MI ANI ME.

The Judge thought that the evidence produced by the claimant rather negatived the alleged gift; but apart from that, the Court held that as the buffaloes were the joint property of Thaukra Aung and Mi Zan U, the gift was abortive as regards Mi Zan U's half share; and the Judge held further that, for reasons which are not very clear and appear far-fetched, Thaukra Aung was liable for one-third of the costs in respect of which the attachment had been made against judgment-debtor Mi Zan U. It is noted by the Judge that if Mi Zan U had won the suit, the costs of which were the cause of the attachment, Thaukra Aung would have benefited. The Court finally rejected the objector San Tun Pru's claim "to the extent of half the value of the buffaloes "as Mi Zan U's share and one-third of Thaukra Aung's half share in "them." It is not definitely stated that the claim was allowed in respect of two-sixths of the value of the attached buffaloes, but this would seem to be the meaning of the order, the buffaloes themselves—the property attached—remaining under attachment. The order based on the value (unascertained of course) of the attached property is remarkable on this ground as well as on others. The question of in whose possession the buffaloes were at the time of attachment was not decided, but it appears not to have been denied that they were in the objector petitioner's possession. As the gift was apparently considered to be negatived, it may be supposed that a portion of San Tun Pru's claim, or its value, was allowed on some other unspecified ground. This point has not been dealt with in argument and is merely mentioned incidentally with reference to the vague nature of the order passed.

The part of the order now objected to, and in respect of which this application is made, was passed no doubt under section 281. This section enacts that "if the Court is satisfied that the property was, at "the time of attachment, in possession of the judgment-debtor as his "own property and not on account of any other person, or was in the "*possession of some other person in trust for him* or, &c., the Court "shall disallow the claim." The property was not alleged, or decided, to be in the possession of the judgment-debtor, nor was it suggested, or held by the Judge, that the property was held by the claimant or any person *in trust* for the judgment-debtor. That being the case section 281 did not apply and the claim should not have been disallowed. Section 282 did not apply. The question of possession and trust in the terms set out in sections 280 and 281 do not appear to have been considered; but the Court went into rather elaborate legal questions as to mutual claims of husband and wife and as to a share possibly due in respect to some inheritance. The questions which have to be considered during the investigation under section 278, Civil Procedure Code, are comparatively simple and questions of legal rights and title are not relevant except so far as they may affect the decision as to whether the possession is on account of, or in trust for, the judgment debtor or some other person.

It is not suggested that this Court is debarred by section 283 from interference in this case under section 622, but it is argued that because there is a remedy by suit (section 283), the High Court should refuse to exercise the extraordinary powers given it by section 622.

1902.

SAN TUN PRU v. MI ANI ME.

The Madras High Court seems to have held this view in a Full Bench Ruling—*Ittiachan* v. *Velappan* (1), and in *Guise* v. *Jaisraj and another* (2) it was held that the High Court should not grant the extraordinary remedy of revision while the parties had open to them a remedy by way of suit. On the other hand, in the case of *Sheoraj Nandan Singh* v. *Gopal Suran Narain Singh* (3) a Bench of the Calcutta High Court did interfere under section 622, even where, as it appears, the order revised found that the petitioner or objector was "in possession of the property in trust for the judgment "debtor," that is to say, when the finding was practically on the face of it in the terms of section 281 Civil Procedure Code. The Judges went into details of the case and passed an order in petitioner's favour. In the case now before me, on the face of the order, the Court has not considered the points necessary to be considered in the investigation made under section 278, and has considered other points not at all apparently necessary for a determination of the questions rightly before it. Had the Judge found on the evidence in accordance with the terms of section 280 or section 281, or even in terms which could reasonably be construed to be their equivalent, then, however erroneous such findings might have appeared to me, whether from the application of bad law or from mistaken weighing of evidence, I should have held that, as the Court had made the investigation required by law and had come to a decision on the face of it practically in accordance with the section cited above, the petitioner should be left to the remedy of a suit: but the order in this case is not of such a nature. The claimant was entitled to an investigation and to an order in the terms of the sections 278—281, and he did not get it, and it appears to me that it would be unjust to refuse the remedy he seeks in revision. The order made in the summary investigation should proceed according to law, and the claimant is entitled to have an order directing the Judge to follow the proper procedure or directions of the sections applicable.

There are manifest inconveniences in allowing too free a use of section 622; but it is difficult to see how the Courts which not unfrequently wander from the point in their enquiries into applications for removal of attachment can be guided right if an application for revision in a case like this is refused as a matter of course, whatever the nature of the inquiry made or order passed—simply because there is another remedy open. Finally, I am of opinion that the Judge in his enquiry under section 278 and in his decision thereon acted with material irregularity and I set aside the order rejecting San Tun Pru's claim. The Court will proceed to determine the question of possession and any other points necessary for a decision in accordance with the terms of sections 280, 281. Costs of this application to follow the result. It does not follow that in every case of this kind in which material investigation appears necessary this Court will interfere; but having regard to the nature of these cases and to the need for guiding the Subordinate Courts I have decided to use the powers conferred on the Court by section 622.

(1) I. L. R. 8 Mad., 484, at p. 493. | (2) I. L. R. 15 All., 405.
(3) I. L. R. 18 Cal., 290.

Before Mr. Justice Copleston, Chief Judge.

MA THA DUN AND ANOTHER *v.* MAUNG SHWE DOK AND THREE OTHERS.

Civil Second Appeal No. 21 of 1902. February 3rd.

Villa—for appellants (plaintiffs).

Order dismissing an appeal for default, Right of appeal against—Special remedy—Order refusing to re-admit an appeal, Right of appeal against—Civil Procedure Code, ss. 556, 588 (27).

An order dismissing an appeal for default is not one falling within the definition of a "decree" as contained in section 2, Civil Procedure Code. It cannot be regarded as "the formal expression of an adjudication upon a right claimed," there having been no adjudication in the Appellate Court on the right claimed, and the order being no formal expression of such a matter.

There is no right of appeal from an order dismissing an appeal for default under section 556, Civil Procedure Code.

A special remedy, however, is granted by section 558, Civil Procedure Code, and from an order under that section refusing to re-admit an appeal there is an appeal under section 588 (27).

Ramchandra Pandurang Naik v. *Madhav Purushottam Naik*, I. L. R. 16 Bom., 23, *Modalatha*, I.L.R. 2 Mad., 75, and *Ablakh* v. *Bhagirathi*, I.L.R. 9 All., 427, dissented from. *Jagannath Singh* v. *Budhan and others*, I.L.R. 23 Cal., 115, followed.

THIS purports to be a second appeal under setion 584, Civil Procedure Code. The first question to be decided is whether the appellants Ma Tha Dun and Maung Pan have any right of appeal. In paragraph 2 of the memorandum of appeal it is stated that the appellants appealed to the District Judge against the decision of the Township Judge, but this appeal was dismissed for default.

In the case of *Modalatha* (1) an appeal under similar circumstances (Act X, 1877) was allowed. Again in *Ramchandra Pandurang Naik* v. *Madhav Purushottam Naik* (2) it was held by Mr. Justice Birdwood that an order dismissing an appeal for default was one falling within the definition of a decree contained in section 2, Act XVI, 1882. The other Judge on the Bench expressed no opinion on the point.

In *Ablakh* v. *Bhagirathi* (3) a first appeal in a case dismissed for default was allowed. But in *Jagannath Singh* v. *Budhan and others* (4) the opposite view was taken by a Bench of two Judges, and it was held that no appeal lay from an order dismissing an appeal for default under section 556.

Decree is defined in section 2 of the Code to mean "the formal "expression of an adjudication upon any right claimed or defence set up "in a Civil Court," &c. Certain orders are included in the definition. It is difficult or impossible to see how an order which on the mere ground of the non-appearance of appellant dismisses an appeal for default can be regarded as "the formal expression of an adjudication "upon a right claimed." There has been no adjudication in the Appellate Court on the right claimed, and the order is no formal expression of such a matter.

A special remedy is granted by section 558, and from an order under that section refusing to re-admit an appeal there is an appeal under section 588 (27). I hold that there is no appeal from an order dismissing

(1) I. L. R. 2 Mad., 75.
(2) I. L. R. 16 Bom., 23.
(3) I. L. R. 9 All., 427.
(4) I. L. R. 23 Cal., 115.

1902.

MA THA DUN v. MAUNG SHWE DOK.

an appeal for default under section 556, and the appeal now before me is therefore dismissed under section 551, Civil Procedure Code.

I do not go into the question raised in paragraph 4A of the memorandum of appeal, as the appeal being dismissed on the preliminary point the question of the jurisdiction of the Court of First Instance to entertain the suit cannot be dealt with in appeal, though possibly it is open to the appellants to apply for revision under section 622, Civil Procedure Code.

Special Civil Second Appeal No. 201 of 1901. February 3rd, 1902.

Before Mr. Justice Copleston, Chief Judge.

MAUNG WEIK *v.* MAUNG SHWE LU.*

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

Buddhist husband and wife—Joint property—Alienation of half, Power of husband as to—Consent, want of, of wife—New defence raised in appeal—Civil Procedure Code, ss. 542, 566.

There is no authority for holding that a Buddhist husband can without the consent of his wife alienate half of any land which they may jointly possess—*Ma Thu* v. *Ma Bu*, S. J. L. B., 578, cited.

Although an Appellate Court was not bound to entertain questions as to the wife's interest in the land and as to her consent to the sale thereof—questions which had not been raised in the Court of First Instance or entered originally as grounds of appeal—it nevertheless did not err in so doing in the interests of justice and in order to avoid further litigation, provided, as was the case, that full opportunity of adducing evidence was afforded to both parties.

Poran Sookh v. *Parbutty Dossee*, I. L. R. 3 Cal., 612; *Lachman Prasad* v. *Bahadur Singh*, I. L. R. 2 All., 884; *Damodar Madhowji and others* v. *Parmonandas Jeewandas*, I. L. R. 7 Bom., 155; *Ram Narain Roy* v *Nil Monee Adhikaree*, 23 W. R., 169; *Mussamut Ustoorun* v. *Babu Mohan Lall*, 21 W. R., 333, and 17 W. R., 407; distinguished.

THE plaintiff sued to recover possession of certain land from the defendant on the ground that defendant had sold him the land on condition of his paying the revenue due on the land for the year; which he did pay. Defendant denied the sale and alleged that he made the land over to the plaintiff for one year only. Both the Court of First Instance and the lower Appellate Court found that the land had been sold outright; but the lower Appellate Court thought that the wife of defendant had an interest in the land, that she was not present at the original transaction between her husband defendant and the plaintiff and that she had subsequently refused to ratify the transfer. The point had not been raised in the suit or in the memorandum of appeal, but the Court allowed it to be raised by the defendant's advocate during the hearing of the appeal. The Judge remanded the case under section 566, Civil Procedure Code, to the Court of First Instance for trial of the two issues as to joint ownership and consent, Mi Le, the wife of defendant, being made a defendant in the suit. The Township Judge found that the wife was joint owner, and that she had not consented to the sale. The Appellate Court agreed with these findings and, holding that consent of the wife was necessary, dismissed plaintiff's suit.

The questions raised in the grounds of appeal in this Court are mainly as to the legality of the action of the Court of First Appeal in allowing the two questions above mentioned to be raised and in remanding the case for trial of issues framed for their determination.

* Over-ruled by *Shwe U* v. *Ma Kyu*, 3 L. B. R., 66.

It is urged that sections 542 and 566, Civil Procedure Code, do not sanction this procedure, and that the appellant should only be heard in support of grounds of objection to the decree which are not set out in the memorandum of appeal when the decree appealed against is on the face of it illegal, and that there was nothing illegal on the face of this decree. In support of this contention the following rulings are cited: *Poran Sookh* v. *Parbutty Dossee* (1) and *Lachman Prasad* v. *Bahadur Singh* (2) but these are cases going to show that the Court *ought* to allow objections to be raised when the decree is illegal on the face of it and not that the Appellate Court should refuse to hear the appellant on new grounds in all other cases.

It is urged further that "an entirely new defence based on an entirely "different or separate cause of action, defence or basis than those set "up by him (defendant) in the Court of First Instance or in his grounds "of appeal" should not have been permitted to be raised.

The case of *Damodar Madhowji and others* v. *Parmanandas Jeewandas* (3) is cited as an authority for this objection. It cannot be said that the new defence is inconsistent with the former denial of the sale, inasmuch as a new defendant was brought into the case, and it was in her interest and not in that of the original defendant that the defence was allowed. The lower Appellate Court considered that, although the wife would have had a remedy by a separate suit, it was desirable to avoid fresh litigation by deciding the case completely with reference to the present suit.

Further in support of objection to the action taken by the lower Appellate Court under section 566 the following rulings are cited, *viz.*, *Ram Narain Koy* v. *Nil Monee Adhikaree* (4). In this case the High Court held that no question which has not been raised in the Court of First Instance and is not in the line of defence there should be put in issue at the appellate stage. But the Court held that the minor defendants in that case should not be prejudiced by the *laches* of their guardians and directed a remand for hearing of evidence on the point put in issue. The lower Appellate Court erred only in deciding the point on imperfect materials without a remand and full opportunity for both sides to be heard.

So, again, in *Mussamut Ustoorun* v. *Babu Mohan Lall* (5) a point not in issue having been decided by the Appellate Court at the appellate stage on probably imperfect materials, a remand was directed for retrial on the new issue. Another similar case (6) was cited. These cases are not in appellant's favour because in the present case full opportunity of adducing evidence was afforded. They in fact support the action of the lower Appellate Court under sections 542 and 566 in allowing a new point to be raised and decided.

Although I should probably not have held that the lower Appellate Court was bound to entertain the questions as to Mi Le's interest and consent, I am not prepared to say that the Court erred in so doing in

(1) I. L. R. 3 Cal., 612.
(2) I. L. R. 2 All., 884.
(3) I. L. R. 7 Bom., 155.
(4) 23 W. R., 169.
(5) 21 W. R., 333.
(6) 17 W. R., 407.

1902.

MAUNG WEIK
v.
SHWE LU.

the interest of justice and in order to avoid further litigation. In my opinion the lower Appellate Court acted within its powers.

It is further contended in this appeal that the sale was at any rate valid as regards the defendant Maung Shwe Lu's share in the joint property and that a decree should have been passed for half of the land in suit. No authority for this contention has been produced and I am of opinion that it is invalid. I am not aware that a husband can without the consent of his wife alienate half of any land that they may jointly possess. It is not suggested how the land so sold is to be determined. I think, though the point has not been argued, that the consent of the wife is necessary to the sale of any part of landed property jointly owned. There is nothing to take this case out of the scope of Mr. Fulton's decision in *Ma Thu* v. *Ma Bu* (1), and I hold therefore that the sale was altogether invalid for want of the consent of the wife Mi Le.

A further objection is taken to the order as to costs which were given against the present appellant-plaintiff. In the order of remand the Judge of the District Court said that the cost of the remand should in any case be borne by the "respondent," that is the plaintiff, on the ground that it was owing to plaintiff's default in not making the then appellant-defendant's wife a defendant or else in not alleging in his plaint that the appellant (defendant) was the sole owner of the land. It might no doubt be argued that the defendant should have alleged non-consent of his wife: but I see no reason for interfering with the order as to costs. Defendant and his wife were the real and ostensible joint owners of the land and plaintiff knew this when the defendant refused to confirm the transfer.

This appeal is dismissed with costs.

Special Civil Second Appeal No. 186 of 1901. February 25th, 1902.

Before Mr. Justice Fox.

MAUNG MO GALE *v.* MA SA U.

Agabeg and *Maung Kin*—for appellant. | *Chan Toon* and *Das*—for respondent.

Mortgage—Redemption suit—What judgment should contain when redemption is allowed—Forms for decrees.

When redemption is allowed the judgment should decree that the plaintiff will be entitled to redemption of the property sued for upon payment into Court of such amount as the Court finds to be due in respect of the mortgage, and should name a date on or before which such sum must be paid into Court. The date should be fixed in the case of cultivated land so that the party who has sown the crop shall have the benefit of it.

The judgment should then direct that if the plaintiff pays in the money on or before such date, the defendant shall after such date deliver over possession of the land to the plaintiff, together with any documents of title relating thereto which the defendant may have in his custody or power, and shall further do all things necessary to place the plaintiff in the same position in regard to the land as he was in previous to the mortgage.

This direction should be followed by an order that if the plaintiff makes default in paying in the money within the time allowed, then the plaintiff will from thenceforth be absolutely debarred and foreclosed from all right of redemption of the property, and the suit will stand dismissed with costs.

(1) S. J., L. B., 578.

1902.

MAUNG MO GALE v. MA SA U.

Maung Myaing v. Maung Shwe Yon, 1 L. B. R., 85, followed.

OBJECTION is taken to the manner in which the Additional Judge of the District Court dealt with the question of jurisdiction. No doubt an Appellate Court is bound to consider questions raised on appeal as to the jurisdiction of the original Court although objection may not have been raised in such Court, provided it appears on the face of the proceedings that the original Court had no jurisdiction—*see Maung Myaing* v. *Maung Shwe Yon* (1) and numerous cases referred to in O'Kinealy's notes on section 15 of the Code of Civil Procedure.

In this case, however, it did not clearly appear that the land sued for was worth over Rs. 500 at the time of suit, consequently I think the District Court's decision on the question of jurisdiction was correct.

On the merits I agree with the District Court's view that the plaintiff had clearly proved that the transaction between her and the defendant was one of mortgage and was not a sale.

The case was one of a numerous class of cases which come before the Courts in this province. A cultivator who owned land owed money to a money-lender. The latter presses for payment, and the cultivator has no money. The money-lender requires security and insists upon the land being placed in his name in the revenue register: the *Taiksaye* informs the parties that the names cannot be mutated unless the cultivator reports to him that the land has been sold outright: the cultivator consents to make this report upon a promise by the money-lender that he will allow redemption: accordingly the *Taiksaye* enters as the report to him statements in unequivocal terms that the land has been sold outright, and tells the parties that the transaction must be registered in the Myoôk's office, or in other words that it must be effected and completed by a registered deed.

The above facts were in my judgment clearly proved in this case.

The fact and terms of the report cannot, in my opinion, be held to have altered the real nature of the transaction, which was in fact a mortgage, and being a mortgage the plaintiff was entitled to redeem the land upon payment of the money for which the land was made over as security.

The judgment of the Additional Judge of the District Court does not set out all that should be set out in a judgment allowing a plaintiff to redeem, and the appellate decree is likewise defective.

When redemption is allowed, the judgment should declare that the plaintiff will be entitled to redemption of the property sued for upon payment of such amount as the Court finds to be due in respect of the mortgage, and should name a date on or before which this sum must be paid into Court. The date should be fixed in the case of cultivated land so that the party who has sown the crop shall have the benefit of it, and probably the 1st April or the first day of the Burmese New Year will in most cases be found to be the most convenient date to fix, consistently with allowing the plaintiff sufficient time to make necessary arrangements for paying in the money.

The judgment should then direct that if the plaintiff pays in the money on or before such date, the defendant shall *after such date*

(1) 1 L. B. R., 85.

1902.

MAUNG MO GALE v. MA SA U.

deliver over possession of the land to the plaintiff together with any documents of title relating to the land which the defendant may have in his custody or power, and shall further do all things necessary to place the plaintiff in the same position in regard to the land as he was in previous to the mortgage.

This direction should be followed by an order that if the plaintiff makes default in paying in the money within the time allowed, then the plaintiff will from thenceforth be absolutely debarred and foreclosed from all right of redemption of the property and the suit will stand dismissed with costs.

The 4th Schedule to the Code of Civil Procedure does not contain any form for a decree in a redemption suit, and as the decrees in Subordinate Courts which come before this Court are usually very informal and very varied, I think it will be well to afford some guide to the Courts as to how decrees in such cases should run. The form which the original Court's decree in the present case should, in my opinion, have taken if it had decreed redemption, will afford such guide.

After filling up the form provided for decrees down to the words "it is ordered," the following should have been entered in writing:—

Preliminary Decree in Redemption Suit.

"It is declared that upon payment into this Court on on before the 1st day of April 1902 of the sum of Rupees three hundred and thirty (Rs. 330) less the amount of costs incurred by the plaintiff in this Court as taxed by the Officer of Court, the plaintiff Ma Sa U will be entitled to redemption of the piece of paddy land described in the plaint as follows, namely :—

"A piece of paddy land known as Holding No. 10 of 19 , measuring 22·00 acres, situate at Wunbawdat *Kwin*, Ingadaw circle, Kawa township, and bounded on the—

East by a piece of vacant land;
West by a piece of vacant land;
South by plaintiff Ma Sa U and Nga Po Kin's paddy land;
North by a piece of vacant land;

"And it is ordered that if the plaintiff shall pay such sum into this Court on or before such date then the defendant shall after such date deliver possession to the plaintiff of the said land, and of all such documents of title relating thereto as he may have in his custody or power, and shall further do all things necessary to place the plaintiff in the same position in regard to the land as she was in previous to the mortgage thereof to the defendant.

"It is further ordered that if the plaintiff shall make default in payment of the said sum into this Court within the time hereinbefore allowed, then the plaintiff will from thenceforth be absolutely debarred and foreclosed from all right of redemption of the said land, and this suit shall stand dismissed, and the plaintiff shall pay the defendant's costs as taxed by the officer of the Court."

1902.

MAUNG MO GALE v. MA SA U.

If the redemption money is not paid in by the time mentioned in the decree, then a final decree in a form similar to that given in Form No. 129 in the 4th Schedule to the Code of Civil Procedure should be passed, and in the present case it should run as follows :—

(TITLE OF CASE, &C.)

Final Decree.

"Whereas it appears to the Court that the plaintiff has not paid into this Court the sum of Rupees three hundred and thirty (Rs. 330) less the amount of her taxed costs before or on the 1st day of April 1902, pursuant to the decree made in this suit on the day of . It is ordered that the suit be and it is hereby dismissed, and the plaintiff is ordered to pay the defendant his costs as taxed by the officer of the Court."

I modify the decree of the Appellate Court, and there will be a decree of this Court embodying the orders contained in the form of preliminary decree I have given above.

The defendant must pay the plaintiff's costs in this appeal.

Before Mr. Justice Fox.

Criminal Revision No. 1779 of 1901. February 25th, 1902.

MA HNIN BYU *v.* MAUNG MYAT PU.

Wilkins and *Israel Khan*—for appellant. | *Agabeg* and *Maung Kin*—for respondent.

Maintenance—Payment of lump sum on previous occasion—Child not in starving condition—Criminal Procedure Code, s. 488.

Section 488 of the Code of Criminal Procedure is based on the proposition that there is a continuing obligation upon a father who has sufficient means to maintain his child.

The payment of a lump sum to the mother on some previous occasion is not a sufficient answer to an application by her or by any one else for an order for maintenance by the father.

The fact that the child is not in a starving condition cannot also be set up as an answer to an application. Although an actual refusal is not proved, if a man who is continuously bound to maintain his child does not in fact do so, he neglects to do so.

Ma Gyi v. *Maung Pe*, 1 L. B. R., 126, followed.

THE reasons given by the Magistrate for refusing to make an order for maintenance of the respondent's child were not valid. The payment of a lump sum to the mother on some previous occasion is not a sufficient answer to an application by her or by any one else for an order for maintenance against the father.

Section 488 of the Code of Criminal Procedure is based upon the proposition that there is a continuing obligation upon a father who has sufficient means to maintain his child.

In the case of *Ma Gyi* v. *Maung Pe* (1) I have held that parties cannot contract themselves out of that obligation.

The fact that the child is not in a starving condition can also not be set up as an answer to an application.

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

1902.

MA HNIN BYU
v.
MAUNG MYAT PU.

The questions a Magistrate has to consider and determine upon such an application are—

(1) Is the person against whom the order is sought the father of the child?
(2) Is the child unable to maintain itself?
(3) Has the father sufficient means to maintain the child?
(4) Has he refused or is he neglecting to maintain the child?

As to the last, although an actual refusal is not proved, if a man who is bound to continuously maintain his child does not in fact do so, he neglects to do so, and an order for a monthly allowance should be made. The child in this case is six years of age and *primâ facie* must be unable to main itself.

The order of the Magistrate is reversed, and the case will go back to him to fix the sum of the monthly allowance to be paid by the respondent to the petitioner under the section.

Civil Revision No. 94 of 1901. February 26th, 1902.

Before Mr. Justice Fox.

KANKANI AND TWO OTHERS *v.* MAUNG PO YIN.

Agabeg and *Maung Kin*—for applicant. | *Bagram* and *Mehta*– for respondent.

Promise without consideration—Acknowledgment on an account stated—Fresh contract—Cause of action.

A naked promise to pay what a person is already under an obligation to pay is, without consideration, and therefore does not constitute a fresh contract, breach of which would be the foundation of a cause of action.

An acknowledgment on an account stated does not in itself constitute a fresh contract.

Shankar v. *Mukta*, I. L. R. 22 Bom., 513, and *Ganga Prasad* v. *Ram Daya*, I. L. R. 23 All., 502, followed.

THE plaintiff based his claim upon the following state of facts :—

(1) That on the 3rd waxing of *Wazo*, 1260 B.E., the defendants being unable to pay him a debt of Rs. 50, which was already due to him, promised to pay him that sum with interest at the rate of 3 per cent. per mensem.
(3) That afterwards on the 1st waxing of "*Hnaung*" *Tagu*, 1260 B.E., the defendants, being unable to pay the sum of Rs. 175 then due by them to him, promised to pay such sum with interest at 5 per cent. per mensem.
(3) That the defendants had delivered to him some paddy towards satisfaction of the debts, leaving a balance for which he sued.

In his evidence the plaintiff alleged that on the dates above stated there had been settlements of account, and that one of the defendants had signed his account book in acknowledgment of Rs. 50 being due at the first settlement.

The original Court held that the plaintiff was debarred by section 63 of the Code of Civil Procedure from relying on his accounts, and also that the acknowledgment of Rs. 50 being due was inadmissible in evidence because it was not stamped, and it dismissed the suit.

1902.

KANKANI v. MAUNG PO YIN.

The Appellate Court found that there was evidence apart from the accounts which proved the plaintiff's claim and gave the plaintiff a decree.

Neither Court considered what causes of action the plaintiff was claiming on.

On the allegations in the plaint he was claiming upon promises by the defendants on the dates in question to pay to him what they already owed him, and so far as the Rs. 50 was concerned, he in his evidence was relying upon an acknowledgment on an account stated.

A naked promise to pay what a person is already under an obligation to pay is without consideration, and therefore does not constitute a fresh contract, breach of which would be the foundation of a cause of action.

Even if the acknowledgment had been proved, that would not have in itself constituted a fresh contract—*see Shankar* v. *Mukta* (1) and *Ganga Prasad* v. *Ram Dayal* (2).

It was not open to the plaintiff to sue except in respect of the original debts: if he had done this, the Courts would have had to see how far the provisions of the Limitation Act applied to the cases.

In the present case the Appellate Court has given the plaintiff a decree upon a non-existent cause of action, and in so doing has acted illegally within the meaning of section 622 of the Code of Civil Procedure.

The decree of the Appellate Court is set aside, and that of the original Court restored.

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

Before Mr. Justice Fox and Mr. Justice Birks.

Sepcial Civil Second Appeal No. 202 of 1901. March 3rd, 1902.

ABDUL KARIM v. PANA MUSTAN.

VanSomeren, Fagan and *Ah Yein*—for appellant.

Recognized agent, Suit by or against, in his own name.

A recognized agent cannot prosecute or defend a suit in his own name. An objection on this ground is not a mere technical one.

Mokha Harakraj Joshi v. *Biseswar Doss*, 5 B. L. R., App. 11, followed.

THE judgment of the Court was delivered by—

Fox, J.—The suit in this case was brought to have a deed of sale declared void and ineffectual and to recover possession of some land.

It was intituled "Abdul Karim, duly empowered agent and attorney "of Abdul Hashim, trader, residing in 4th Division, Moulmein, plaintiff, "against Pana Mustan, trader, residing in 4th Division, Moulmein, "defendant."

The original Court gave a decree declaring the deed of sale void and ineffectual, and ordering Pana Mustan to hand over the land to Abdul Hashim, and to pay costs of the suit.

(1) I. L. R. 22 Bom., 513. (2) I. L. R. 23 All., 502.

1902.

ABDUL KARIM v. PANA MUSTAN.

The defendant appealed to the Divisional Court making Abdul Hashim the respondent. That Court reversed the original Court's decree.

A memorandum of appeal was presented to this Court within time intituled in the same words as the plaint in the original suit.

The question now for determination is whether there is any appeal by Abdul Hashim before the Court.

In *Mokha Harakraj Joshi* v. *Biseswar Doss* (1) it was held th c recognized agent cannot prosecute or defend a suit in his own n at a and it was pointed out that objection on this ground was not a ame, technical one. mere

Counsel for the agent Abdul Karim asks us to allow an amendment, but we think that this cannot be done.

There is no proper appeal before the Court and the only course open to us is to order the return of the memorandum to the party who presented it. If the principal Abdul Hashim files an appeal, the question of limitation will arise, and will have to be decided by the Judge or Judges before whom the appeal comes.

No order as to costs.

Civil Second Appeal No. 232 of 1901. March 5th, 1902.

Before Mr. Justice Fox.

MAUNG NAUNG, APPELLANT (PLAINTIFF) *v.* MA BOK SON, RESPONDENT (DEFENDANT).

Maung Kyaw—for appellant. | *Eddis, Connell* and *Lentaigne*—for respondent.

Mortgage deed containing forfeiture clause—Land situated in place to which Transfer of Property Act has not been extended—Rule of English Equity Courts clogging rights of redemption.

Where a mortgage of land was effected by a registered instrument containing a clause stipulating that if the mortgagors did not redeem within two years the creditor (mortgagee) would be entitled to outright ownership of the land, and su h land was situate in a part of the country to which the Transfer of Property Act had not been extended—

Held,—that the mortgagor must be held bound by the clause, and that consequently he had no right to redeem the land.

Pattabhiramier v. *Vencatarow Naicken*, 7 B. L. R., 136; *Thumbusawmy Moodelly* v. *Hossain Rowthen*, I. L. R. 1 Mad., 1, followed *Maung Shwe Maung* v. *Maung Shwe Yit*, S. J. L. B., 549, and *Maung Tun Wa* v. *U Nyun*, S. J. L. B., 645, referred to.

THE plaintiff and his mother mortgaged a piece of paddy land to the defendant's deceased husband in May 1881.

In March 1901 the plaintiff brought a suit to redeem the land.

The transaction had been effected by a registered document, according to the terms of which the relationship of mortgagors and mortgagee was first created, but it contained a clause to the effect that if the mortgagors did not redeem within two years, the creditor (mortgagee) would be entitled to outright ownership of the land.

If section 60 of the Transfer of Property Act were applicable, or if the decision had to be according to the rules of equity as administered by the English Chancery Courts, this last clause would have to be

(1) 5 B. L. R., App. 11.

1902.

MAUNG NAUNG v. MA BÔK SÔN.

held to be invalid. The Transfer of Property Act, however, has not been extended to the part of the country in which the land is situate, and their Lordships of the Privy Council in the cases of *Pattabhiramier* v. *Vencatarow Naicken* (1) and *Thumbusawmy Moodelly* v. *Hossain Rowthen* (2) held that the rule of the English Equity Courts which forbids any clogging of the right of redemption is not applicable in India, and that a clause for forfeiture in a mortgage should be given effect to in the absence of any specific law to the contrary, or of any established practice. The clause in the document involved in the present case is in effect similar to that involved in *Pattabhiramier* v. *Vencatarow Naicken* (1), and in that case their Lordships held that the mortgagee's interest in the land became absolute by the mere failure of the mortgagor to redeem within the stipulated time.

In *Maung Shwe Maung* v. *Maung Shwe Yit* (3) Mr. Fulton, Judicial Commissioner, held in 1891 that the course of decision of the Courts in Burma up to that time had been that parties were free to make such contracts for the disposition of their lands as they think fit.

I am not aware of any decisions to the contrary since that time ; the decision in *Maung Tun Wa* v. *U Nyun* (4) delivered by the same learned Judge in 1892 did not affirm that the clause under which the mortgagees were to obtain absolute possession was absolutely invalid ; it merely decided that the clause in that *particular* case contained an extortionate stipulation against which a Court of Equity would grant relief.

There is nothing to show that in the present case the clause stipulating that the land should become the absolute property of the mortgagee if the money lent by him was not paid off within two years was of an extortionate nature, and under the rulings I have referred to the plaintiff must be held bound by the clause, and consequently he had no right to redeem the land.

The appeal is dismissed with costs.

Before Mr. Justice Fox and Mr. Justice Birks.

MA HLA *v.* MAUNG PYIN.

Civil Miscellaneous Appeal No. 178 of 1901.

March 6th, 1902.

Palit—for appellant.

Letters of Administration—Chins who are not Buddhists and Chins who are Buddhists—Indian Succession Act, ss. 332, 190—Probate and Administration Act, s. 85.

There are no rules under section 332 of the Indian Succession Act (X of 1865) exempting people of the Chin race from the provisions of that Act.

If Chins are Buddhists they will be governed by the provisions of the Probate and Administration Act (V of 1881). Under section 85 of this Act it is open to a Judge to refuse letters of administration.

There is no counterpart of section 190 of the Indian Succession Act in the Probate and Administration Act. A suit in respect of the property of an intestate Buddhist Chin can be maintained without letters of administration having first been granted.

(1) 7 B. L. R., 136.
(2) I. L. R. 1 Mad., 1.
(3) S. J. L. B., 549.
(4) S. J. L. B., 645.

1902

MA HLA v. MAUNG PYIN.

The necessity of stating clearly under what Act and sections letters of administration are issued pointed out.

An application for letters of administration cannot be converted into an application under the Guardians and Wards Act, VIII of 1890.

Birks, J.—The appellant, Ma Hla, in this case is a Chin woman and she applied for letters of administration to the District Judge of Sandoway alleging that she was the sister of Ma Su, the wife of Nga Shwe, who died shortly after her husband leaving two children, Ma Cho and Nga Kauk, who are in her charge. She applies for letters of administration to look after the interests of the minors. It is not clear from the petition whether it was intended to be under Act V of 1881 or under the Indian Succession Act. It would appear, however, from the judgment of the District Judge that the parties appealed to Chin custom and it is urged by the appellant's Advocate that the application should have been under the Indian Succession Act. I note that in the proceedings the appellant and the respondent are both described as Buddhists though of the Chin race and that the letters of administration issued to the objector Nga Pyin purport to be made under section 77, Act V of 1881. It is clear that the appellant Mi Hla brought a suit on behalf of the minors against Nga Pyin and Nga Tôk in Civil Regular No. 171 of 1901.

This was withdrawn on the ground that they wished to appeal against the order passed in the present case. Mr. Palit for the appellant points out that if the Indian Succession Act applies this course was necessary under section 190 of Act X of 1865.

It is alleged in the memorandum of appeal that Mi Hla was directed in that suit to take out letters of administration, but I do not find any order of the Judge to that effect in the proceedings. It would seem that the regular suit was withdrawn by Mi Hla on the advice of her Advocate who held that letters of administration were essential.

The appellant's application for letters is dated the 7th June and she distinctly asks for letters to be granted limited to the minors attaining the age of discretion. The Act applicable is not specified, but either section 31 of Act V of 1881 read with 95 would apply or else 215 of Act X of 1865 read with section 274.

On the 12th July the objectors Maung Tok and Maung Pyin filed a joint objection asking that either of them might be appointed administrator instead of Ma Hla. They seem also to have applied for letters of administration on behalf of the minors, though this is not quite clear.

The District Judge passed orders giving letters of administration to Maung Pyin on the 13th July 1901. The order does not specify under what section or Act they were to issue or what amount of security was to be demanded. They were, as a matter of fact, issued in Civil Indent Form 125 which is used for letters of administration under section 77 of Act V of 1881. The estate appears to have been valued at Rs. 360.

On the 20th July the appellant Ma Hla applied to the District Judge to revoke these letters on the ground (1) that the District Judge was acting contrary to section 445 of the Civil Procedure Code and (2) that letters of administration should not have been granted to Nga Pyin,

who is only the petitioner's half-brother and not approved of by the minors. Section 50 of Act V is not, however, quoted, nor does the District Judge appear to have passed any definite orders rejecting the application. The following endorsement is made on the petition: "See "paragraph 4. The woman made herself the custodian of the children. "They were never handed over by Court. When she applied for "letters of administration the application was opposed by Nga Pyin." I take it this means that the application was rejected.

The actual appeal is from the order of the 13th July. There are seven grounds of appeal. The appellant urges (1) that the District Judge was wrong in considering the right of a half-brother to administer as better than that of a sister; (2) that the appellant was the most suitable person to be a guardian of the minors as the objectors had taken forcible possession of their property; (3) that a limited grant should have issued; (4) that the petition for letters of administration should have been treated as an application made under Act VIII of 1890 (the Guardians and Wards Act).

I do not think we should be justified in amending the original application so as to convert it into an application under the Guardians and Wards Act. Section 83 of Act V of 1881 provides that in contentious cases "the proceedings shall take as nearly as may be the form of a "suit according to the provisions of the Civil Procedure Code in which "the petitioner for letters of administration shall be the plaintiff and "the person who may have appeared to oppose the grant shall be the "defendant." The proviso to section 53 of the Civil Procedure Code prohibits the amendment of a plaint so as to convert the suit into one of another and inconsistent character.

I have looked through the Rules Manual and I cannot find any notification under section 332 of Act X of 1865 exempting the Chin race from the provisions of that Act.

The case must, in my opinion, be remanded to the District Judge to report whether the parties are really Buddhists as would appear from the letter B shown in the Judge's handwriting in the deposition sheets. If they are Buddhists they will be governed by the provisions of Act V of 1881, and under section 85 of that Act it would have been open to the Judge to refuse letters of administration. Section 190 in Act X of 1865 has no counterpart in Act V of 1881, and the appellant if she is a Buddhist can continue her suit without letters of administration.

If the parties profess the Chin religion, section 190 of Act X will apply and the most suitable person to get a limited grant is the guardian of the minors. I do not think we can pass final orders till this question is answered.

I would therefore remand the case to the District Judge for a finding on the following issue:—

> Are Ma Hla and Maung Pyin Buddhists or Nat-worshippers, who follow the religious rites and ceremonies of the Chins?

The proceedings to be returned in two months' time.

Fox, J.—I concur.

Civil Second Appeal No. 164 of 1901. March 7th, 1902.

Before Mr. Justice Fox and Mr. Justice Birks.

YEW SIT HOCK *v.* MAUNG DAWOOD AND ANOTHER.

Eddis, Connell, Lentaigne and *Villa*—for appellant. | *Chan Toon* and *Das*—for respondents.

Sale—Purchase—Power of vendor—Reasonable care—Constructive notice—Transfer of Property Act, s. 41.

A purchaser from the ostensible owner cannot resist the real owner's claim unless he can show that he took reasonable care to ascertain that the transferring ostensible owner had power to make the transfer and that he acted in good faith.

What is to be deemed reasonable care depends on the circumstances of each case.

Mere reliance upon the entry of the vendor's name in the Government revenue registers is not under all circumstances sufficient to constitute reasonable care in ascertaining whether the vendor has power to make the sale.

Where therefore the information given by the vendor, namely that he derived his title under a registered deed, was such as to put any reasonable man upon enquiry and lead him to ask for production of the original deed, and if it was not produced to ask for explanation of its non-production, and in any case to require to see a registration copy of it—

Held—that the purchaser must be held to have had constructive notice of the contents of the deed owing to his negligence in not doing what any prudent man would have done.

Inderdawan Pershad v. *Gobind Lall Chowdhry*, I. L. R. 23 Cal., 790; *Partap Chand* v. *Saiyida Bibi*, I. L. R. 23 All., 442, *Maung Sa* v. *Ma Kyok*, P. J. L. B., 512; *Ram Kumar Kondoo* v. *McQueen*, 11 B. L. R., 53; and *Bisheshar* v. *Muirhead* I. L. R. 14 All., 362, referred to.

Fox, J.—The facts found by the Original and First Appellate Cour I take to be as follows :—

> The plaintiff Yew Sit Hock and his brother (the second defendant) Yew Sit Hin bought the land in which the plaintiff claims a half share in 1889, and it was conveyed to them both by a deed of sale, dated the 19th October 1889, which was duly registered.

Subsequently Yew Sit Hin's name alone was entered in the revenue registers as the owner of the land.

How the first entry came to be made does not appear on the evidence, but it was made a year or two before the plaintiff went to China. On the 14th December 1893, after the plaintiff had gone to China, taking with him the deed of sale of the 19th October 1889 and tax receipts, Yew Sit Hin, otherwise known as Maung Lin, conveyed the whole of the land to the first defendant, Maung Dawood, by a deed of sale dated the 14th December 1893, which was duly registered, and after some litigation the first defendant obtained possession and held such possession at the time this suit was brought.

The first defendant's defence to the suit was that he was a *bonâ fide* purchaser of the land from the ostensible owner without notice of the plaintiff's rights of joint ownership, and that the plaintiff was estopped by his conduct from setting up his claim.

The Divisional Judge dealt with the question of whether registration of the deed of sale of the 19th October 1889 constituted notice of the plaintiff's right to the land, and following the decision in *Inderdawan Pershad* v. *Gobind Lall Chowdhry* (1), he held that the regis-

(1) I. L. R. 23 Cal., 790.

tration of the deed was not sufficient to fix the first defendant with notice, and he held further that the plaintiff was estopped by his conduct in allowing the name of his brother alone to appear in the revenue registers as owner.

It appears to me that the doctrine of estoppel does not apply in the case.

The substantial question was whether the defendant had constructive notice of the plaintiff's right.

In considering this question the Divisional Court has not, in my opinion, attached sufficient weight to the fact that admittedly Yew Sit Hin informed the first defendant previous to the latter's paying the purchase money that he had brought the land under a registered deed.

There was in this case something more than mere registration, to which description of case the decision above quoted only applies.

The doctrine expressed in section 41 of the Transfer of Property Act is, I take it, of universal applicability. A purchaser from the ostensible owner cannot resist the real owner's claim unless he can show that he took reasonable care to ascertain that the transferring ostensible owner had power to make the transfer, and that he acted in good faith.

What is to be deemed reasonable care depends on the circumstances of each case, see *Partap Chand* v. *Saiyida Bibi* (1), the decision in which goes to show that mere reliance upon the entry of the vendor's name in the Government revenue registers is not under all circumstances sufficient to constitute reasonable care in ascertaining whether the vendor has power to make a sale.

In the present case the information given by the plaintiff's brother that he derived his title under a registered deed was such as, in my opinion, to put any reasonable man upon inquiry, and lead him to ask for production of the original deed, and if it was not produced to ask for explanation of its non-production, and in any case to require to see a registration copy of it. If the first defendant had taken this care in the present case, he must have become aware that the property did not belong to the plaintiff's brother alone.

Not having done this I think it must be held that he had constructive notice of the contents of the deed owing to his negligence in not doing what any prudent man would have done.

Not having taken the reasonable care which a purchaser is required to take, I fail to see how the first defendant can be heard to say that by reason of an act or omission on the part of the real owner, he was led into the belief that the property belonged absolutely to the ostensible owner, and that he had power to make the transfer, or to say, in the words of section 115 of the Evidence Act, that the real owner had by his declaration, act or omission, intentionally caused or permitted him to believe that the ostensible owner was in fact the real owner, and had power to make the transfer he did.

The decision in *Maung Sa* v. *Ma Kyok* (2), in which extracts from the judgments in *Ram Kumar Kondoo* v. *McQueen* (3) and in *Bisheshar* v. *Muirhead* (4) are given shows, in my opinion, fully and correctly what the law applicable in the present case is.

(1) I. L. R. 23 All., 442.
(2) P. J. L. B., 512.
(3) 11 B. L. R., 53.
(4) I. L. R. 14 All., 362.

1902.

YEW SIT HOCK v. MAUNG DAWOOD.

The plaintiff no doubt allowed his brother to appear as the ostensible owner, and he might have been estopped as against a purchaser who had not been put upon enquiry, but he has shown or rather it is admitted that the first defendant was told of the ostensible owner's title having been derived through a registered deed, and consequently the plaintiff has shown that the first defendant had constructive notice of the title, or in any case that circumstances existed at the time of purchase which should have put the first defendant on his guard and suggested enquiry, which enquiry, if made, would have resulted in his ascertaining the title of the plaintiff. Under such circumstances as ruled in *Bisheshar* v. *Muirhead* (1), the plaintiff, the real owner, may assert his title and is not estopped.

I would allow the appeal, but would not give the plaintiff any costs in any of the Courts, and would order the second defendant to pay the first defendant's costs.

It will be open to the latter to sue the second defendant for half the purchase-money he paid, as by the result of this decision the consideration for the purchase has failed to the extent of one-half. The decree of this Court will reverse the decrees of the Lower Courts and will declare that the plaintiff is entitled to a half share of the pieces of land situate in Tamway Kwin, Kôndan circle, Hmawbi township, Hanthawaddy District, known formerly as 3rd class Extra Suburban Lot No. 9, and decreeing that the same be partitioned between the plaintiff and the first defendant in equal portions, and the plaintiff be given possession of one portion.

The case will be remanded to the Original Court to deal with the question of mesne profits which has not been fully gone into.

The decree will award costs in the manner previously stated.

Birks, J.—I concur in the judgment just delivered. I was at first of opinion that in view of the concluding passage in the judgment of the Court of First Instance we should remand the case to have the second defendant examined. The Court of First Instance seems to have held that the two brothers were acting in collusion and that this was a fraudulent claim. Fraud must, however, be specially pleaded, and on the facts as actually found I do not think the question of estoppel arises.

The plaintiff was away in China at the time of the sale to the first defendant and, though his conduct raises a suspicion of fraud, I think we are bound to take the issues actually framed and decide the case upon them.

Civil Regular Appeal No. 36 of 1901. March 7th, 1902.

Before Mr. Justice Fox and Mr. Justice Birks.

MA SAW NGWE AND TWO OTHERS *v.* MA THEIN YIN.

F. A. Gyi—for appellants (defendants). | *Agabeg* and *Maung Kin*—for respondent (plaintiff).

Buddhist Law—Inheritance—Parents predeceasing grand-parents—Grand-children representing deceased parents, Shares of.

Among grand-children whose parents have predeceased their grand-parents, the only one who ranks with the surviving uncles and aunts is the eldest representative

(1) I. L. R. 14 All., 362.

1902.

MA SAW NGWE v. MA THEIN YIN.

of the eldest child: the others only take one-fourth of the share that their parents would have enjoyed.

Maung Hmaw v. *Ma On Bwin and others*, 1 L. B. R., 104: *Ma Pu and two others* v. *Ma Le*, 1 L. B. R., 93; *Maung Hmu* v. *Maung Po Thin*, 1 L. B. R., 50; *Ma Po and another* v. *Ma Shwe Mi*, Chan Toon's Rulings, 418; *In re Mi Thaik* 233, Chan Toon's Rulings; *Ma Mya* v. *Maung Po Thin*, P. J. L. B., 585, and *In re Maung Seik Kaung*, 1 L. B. R., 23, referred to.

Birks, J.—The plaintiff-respondent Ma Thein Yin is the granddaughter of Ma Paw, deceased, who had four children, as follows:—

(1) Maung Taung, the eldest son and first defendant.
(2) Ma So Ma Gale, the mother of the plaintiff, the second child and eldest daughter.
(3) Maung Bya, the third child and second defendant.
(4) Ma Shwe Meik, the fourth child who had four children.

Both Ma So Ma Gale and Ma Shwe Meik predeceased their mother. The plaintiff sues her two uncles and the children of Ma Shwe Meik for a one-fourth share of 19·30 acres of land.

The first and second defendants both filed written statements setting out (1) that the plaintiff had accepted Rs. 100 as her share of the inheritance in the lifetime of Ma Paw; (2) that as Ma So Ma Gale had predeceased her mother, the plaintiff was not entitled to one-fourth of Ma Paw's estate.

Ma Nyein, who was the eldest of the children of Ma Shwe Meik and guardian of the minors, filed a written statement saying that she and the other children were heirs, and praying that they might not be made defendants.

I understand this to mean that they wish to sue separately for their shares or to join as plaintiffs.

The learned Judge examined the plaintiff and practically decided the case *ex parte*. He accepted the statement of the plaintiff that she had not received Rs. 100 as her share and allowed her a one-fourth share upon the authority cited by Mr. Hla Baw. It is not clear what authority is referred to, though probably section 15 of Book 10 of the *Manukye* was cited in the Court below as it was here. It is evident that the question of law was not argued. The present appeal is filed on the ground that as the respondent's mother predeceased Ma Paw she is only entitled to one-fourth of what her mother would be entitled to.

The learned Judge's decision is in conformity with section 65 of Sparks' Code, which runs as follows: "The lineal descendants of any "person deceased represent their ancestor, that is, stand in the same "place as a person himself would have done had he been living. And "these representatives take neither more nor less but just so much as "their principals would have done."

An illustration is given of three sons B, C, and D, two of whom have predeceased their father A. Major Sparks gives the children of B and C the same rights as their respective fathers would have enjoyed had they survived. This section of Major Sparks' Code is evidently based on the Dhammathats referred to in section 105 of the Digest, but if it is intended to mean that in all cases a lineal descendant of any person deceased represents his ancestor it has been overruled by a Bench of this Court in *Maung Hmaw* v. *Ma On Bwin and others* (1).

(1) 1 L. B. R., 104.

1902.

MA SAW NGWE v. MA THEIN YIN.

Both the advocates who have argued this appeal rely on section 15 of Book 10 of the *Manukye*, which is to the following effect:—

"If the eldest son dies before his father and mother, the law of inheritance between his son and his son's uncles and aunts, is this: Because in case of the death of father and mother the eldest son is called father, let his son and his (the eldest son's) younger brothers share alike.

Should the eldest daughter die before the father and mother, this is the law for the partition of the inheritance between her daughter and her daughter's uncles and aunts: that the daughter of the eldest daughter and her (the eldest daughter's) younger sisters shall share alike because the eldest daughter, when grown up, stands in the place of a mother.

In case of the death of the younger children occurring before the parents the law for partition of the inheritance between their children and the (co-heirs) relations of their parents is this: The children of the deceased have one-fourth of the share which would have come to their parents."

Maung Kin for the respondent argues that the plaintiff as the daughter of the eldest daughter is entitled to the same share as her uncles and aunts.

Maung Gyi for the appellants argues (1) that paragraphs 1 and 2 of this section are alternative and (2) that there cannot be two "orasa" children in the same family He argues from this that Maung Taung, being admittedly the eldest child, it would be his child and not that of his younger sister that would be entitled to an equal share with the uncles and aunts. This view seems correct and in conformity with sections 212 and 213 of the *Attasankhepa*, which are as follows:—

The law of partition between the Orasa's children and his co-heir.

"212. During the lifetime of the parents, the Orasa's son or daughter dies leaving children; such children come under the denomination of 'Out-of-time grand-children' and cannot get the full share of their parents. They are only entitled to shares equal to those of the youngest of their uncles or aunts.

Explanation.—If the child of the deceased Orasa's son and daughter is the eldest born, only such child shall obtain equal shares with the youngest of his uncles or aunts. If, however, such eldest child is dead, and only younger children survive, they shall get only one-fourth of what would have been the share of their parents.

213. The law when 'Out-of-time grand-children' may inherit. During the lifetime of the parents the younger sons and daughters die leaving children who, being 'Out-of-time grand-children' are not entitled to the full share of the deceased. They shall get between them only one-fourth of what would have been the share of their parents."

It would appear from section 12 of the *Attasankhepa* that if the Orasa's child has more than one descendant it is only the eldest-born of those who can obtain an equal share with the youngest of the uncles and aunts. There is also a ruling of my own in *Ma Pu and two others* v. *Ma Le* (1), where the rights of out-of-time grand-children were discussed. It is admitted in this case that the Orasa son, Maung Taung, has not claimed his one-fourth share on the death of his father and he is not therefore debarred from claiming his share for the reasons stated in *Maung Hmu* v. *Maung Po Thin* (2).

(1) 1 L. B. R., 93. (2) 1 L. B. R., 50.

I hold therefore that the plaintiff, not being the daughter of the eldest child of Ma Paw, is only entitled to one-fourth of what her mother should get, as held in Ma Pu's case quoted above.

The next point to determine is what share do the children of Ma Paw get on the death of their mother, the father having died before. Maung Kin has quoted section 153 of the Digest and urges that the division should be made as there stated in the *Manukye*. This passage runs as follows :—

"On the death of the parents leaving both sons and daughters let the eldest son and daughter first take the clothes and ornaments of the father and mother respectively. Then let the remainder be divided into 15 shares and after the eldest has taken a share let each succeeding child take one-fifteenth of the property left after the brother or the sister next immediately preceding has taken his or her share. This mode of division shall be repeated twice over or six times over before the residue shall be divided equally among all the co-heirs."

The *Dhammathat Kyaw* says the share should be divided into 12, the *Warulinga* 10, while the *Dhammasara* gives 20 shares.

The principle adopted in the Dhammathats quoted in this section of the Digest is a graduated scale. I am not aware that these Dhammathats have ever been followed in Lower Burma. The custom here has undoubtedly grown up of an equal division among the co-heirs.

This question was considered by Mr. Burgess in the case of *Ma Po and Maung Shwe Gun* v. *Ma Shwe Mi* (1), where the question was whether two sisters should share equally. Mr. Burgess pointed out that the Dhammathats gave very varying rules. The following passage from his judgment may be quoted in favour of an equal division :—

"It seems to me therefore that when the rules are conflicting and uncertain when there is no proof as to what Dhammathat ought to be followed or what rule ought to prevail, when it cannot be shown that a particular direction is a living rule and not merely a dead letter, and when the circumstances of the case are not such as are contemplated by the object of the rule, the Court may safely accept a custom which is consonant with equitable principles. In the present case the appellants have failed to show the observance of any fixed rules in the Dhammathats and there are no means of telling which rule out of different rules is strictly applicable. There is evidence that in practice the complicated and intricate and in some respects fantastic rules in the Dhammathats are not taken as a guide, but that the principle of equality is followed: and the circumstances and relative positions of the parties disclose no grounds for making that difference between them in regard to their rights of inheritance which is at the root of the rule of succession to be found in the Buddhist text-book."

These remarks may be compared with those made by Mr. Jardine in *Mi Thaik's* case (2) as to the customary way of applying the Dhammathats through family councils and village arbitrators.

It has often been brought to my notice that parties to an inheritance suit consent to the shares fixed by arbitrators though they may not be justified by the Dhammathat. This seems to have been the case in Civil Second Appeal No. 48 of 1901 heard by the Chief Judge and myself where I pointed out that the children of the fourth and fifth daughters

(1) Chan Toon, 418. (2) Chan Toon. 233.

1902.

MA SAW NGWE v. MA THEIN YIN.

were only entitled to one-fourth of their mother's share as being "out-of-time grand-children." The other heirs in that case made no objection to their getting the full share.

In the present case the appeal is based on the fact that the learned Judge on the Original Side has made a wrong division according to the Dhammathats.

The only point for determination is whether the daughter of the eldest daughter can claim an equal share with the younger children of her grand-mother, she not being the eldest child. There is no other ambiguity in section 15 of Book X of the Manukye. In *Ma Mya* v. *Maung Po Thin* (1) I held that the eldest competent son was preferred to any daughter.

This seems to have been doubted in *Maung Seik Kaung's* case (2), though the question did not arise for decision. In both this case and in *Maung Seik Kaung's* case the eldest child was a son. I think, however, it is clear that there can only be one Orasa child in a family. The tendency of the decision both in Upper and Lower Burma has been to treat the other children except the Orasa as having equal rights.

The principle appears to be this: Among grand-children whose parents have predeceased their grand-parents the only one who ranks with the surviving uncles and aunts is the eldest representative of the eldest child: the others only take one-fourth of the share that their parents would have enjoyed had they survived.

I would therefore modify the decree of the learned Judge by giving the plaintiff a one-sixteenth share in the property in suit with costs on the amount decreed. I would not give costs in this appeal as the learned Judge heard the case *ex parte* and might have arrived at the same conclusion if the point of law had been argued.

Fox, J.—I concur.

Criminal Revision No. 21 of 1902. March 7th.

Before Mr. Justice Copleston, Chief Judge.

CROWN *v.* PO THIT.

Sentence—Fine in lieu of whipping—Remission of sentence—Discretion of Magistrate—Criminal Procedure Code, s. 395.

In case a whipping cannot be inflicted the only sentence that can be passed in lieu thereof is one of imprisonment. One of fine cannot be passed.

It is in the discretion of a Magistrate to remit a sentence of whipping.

Empress v. *Sheodin*, I. L. R. 11 All., 308, followed.

THE accused in this case was sentenced under section 379 Indian Penal Code to receive 20 lashes. Under section 395 Criminal Procedure Code the Magistrate converted the above sentence into one of a fine of Rs. 3 or in default 10 days' rigorous imprisonment. This was not a legal sentence. In case a whipping cannot be inflicted, the only sentence that can be passed in lieu thereof is one of imprison-

(1) P. J. L. B., 585. (2) 1 L. B. R., 23.

ment. One of fine cannot be passed [see *Empress* v. *Sheodin* (1)]. Presumably, since a fine of Rs. 3 seems to be no sufficient equivalent for 20 lashes, the Magistrate was very reluctant to have to send the accused, a boy of 16, to jail. In that case it was in his discretion to remit the sentence of whipping under section 395 Criminal Procedure Code.

1902.

CROWN v. PO THIT.

Before Mr. Justice Copleston, Chief Judge.

CROWN *v.* NGA SHEIN. *

Criminal Revision No. 271 of 1902. March 7th.

Theft and taking gift to help to recover stolen property—Double conviction—Cumulative sentence—Indian Penal Code, ss. 71, 379, 215.

Where a person is proved by recorded evidence to have committed a theft, and is also proved to have committed the offence described in section 215 Indian Penal Code such person may be convicted and sentenced for each of such offences, for the offences are distinct transactions which may be proved independently of each other. But where the theft is held to be proved not by direct evidence but by inference drawn from the facts which prove the commission of the offence under section 215 Indian Penal Code.

Held,—that separate convictions and sentences should not be passed.

Held,—further that if the offences are separate and distinct they should be separately tried, because they do not form part of the same transaction.

Nga Ok Gyi v. *Queen-Empress*, S. J. L. B., 449; *Queen-Empress* v. *Nga Tun Byu*, P. J. L. B., 226; distinguished.

THE Magistrate convicted Nga Shein under section 379 Indian Penal Code as well as under section 215 Indian Penal Code in respect of the same property because the offence under section 215 was proved and the theft had been recently committed. The Magistrate referred to the case of *Nga Ok Gyi* v. *Queen-Empress* (2) which supports a conviction for theft, when the person taking the gratification does, as in this case he did, point out where the stolen property is concealed, and when there is no evidence to show that any one else committed the theft. For the double conviction and separate sentences the Magistrate relies on the ruling of Mr. Aston, Judicial Commissioner, in *Queen-Empress* v. *Nga Tun Byu* (3) in which the learned Judicial Commissioner appears to have dissented from Mr. Ward's judgment in *Nga Shwe Kya* v. *Queen-Empress* (4) by holding that a person who commits a theft and subsequently takes a gratification for restoring the stolen property can be convicted under both sections 215 and 379 and be separately sentenced.

Mr. Ward appears to have thought that, if by committing the offence described in section 215, a person causes himself to be convicted of the theft, he cannot also be convicted under section 215, because he has done all in his power to cause his own apprehension and conviction. I am unable to adopt this reasoning. It is obvious, though this may not be an essential point, that the offender has no intention to cause his apprehension and conviction, and it is further impossible to say that he could not have done more than he did to effect his conviction, by giving himself up or by confessing instead of denying the theft.

(1) I. L. R. 11 All., 308.
(2) S. J. L. B., 449.
(3) P. J. L. B., 226.
(4) S. J. L. B., 461.

* Dissented from in *King-Emperor* v. *Nga To*, 2 L. B. R., 23.

1902.

CROWN
v.
NGA SHEIN.

I can, however, agree with Mr. Aston's ruling, so far as it goes to show that, where a person is proved by recorded evidence to have committed a theft, and is also proved to have committed the offence described in section 215 Indian Penal Code such person may be convicted and sentenced for each of the offences. But in the case before me now the theft is held to be proved not by any direct evidence, but by inference from the facts that a theft was committed and that the accused soon afterwards committed an offence under section 215 Indian Penal Code. From the commission of the minor offence the commission of the more serious offence is inferred, the former being as it were evidence of the latter and it seems to me improper that in this case there should be convictions and sentences for the two offences.

If the theft could be proved independently of the inference of theft drawn from the pointing out of the property there might be no objection to the double conviction and sentence; for the two offences may be distinct transactions. I regard the two convictions and sentences in this case as, to say the least of it, of very doubtful legality, and without going so far as to say that section 71 Indian Penal Code applies, I should hesitate to confirm these convictions, if I were hearing an appeal or an application for revision. As it is, the case has come before me in revision on this Court's own motion and the sentences have expired. There is now no need for interference. I think it well, however, to point out that while in some cases convictions both under sections 379 and 215, Indian Penal Code, may be legal and proper, there may be cases, such as the present, when, if the offender is convicted of theft, he should not also be convicted of the minor offence. Further, if the offences were separate and distinct, they should have been separately tried, because they cannot be said to have formed part of the same transaction.

Before Mr. Justice Birks.

Civil Second Appeal No. 236 of 1901.
March 17th, 1902.

KANUSAWMY PILLAY *v.* MAUNG CHIT PU.

Cowasjee and *Cowasjee*—for appellant (plaintiff).

Judgment of Appellate Court, Contents of—Civil Procedure Code, s. 574.

A lower Appellate Court passed the following judgment: "I see no reason to "interfere with the judgment of the lower Court based on facts. The legal quib-"bles raised in the appeal are not worth considering. Appeal dismissed with costs "against appellants."

Held,—that the judgment is not one fulfilling the requirements of section 574 Civil Procedure Code,

Sokawan v. *Babu Nand*, I. L. R. 9 All., 26, referred to.

THE plaintiff-appellant is a Chetty and sues for a mortgage decree on a deed, dated the 20th May 1898, first increase of *Nayôn* 1260, under which 10 acres of paddy land were mortgaged for Rs. 250, the amount with 3 per cent. per mensem interest to be paid in full in *Tabaung* 1260. He obtained a decree *ex parte* on the 4th December 1900 for Rs. 463-12-0 and costs Rs. 60. The Court of First Instance restored the case on the application of the defendant, and finally dismissed the claim, holding that the land had been taken over outright

1902.

KANUSAWMY PILLAY. v. MAUNG CHIT PU:

in satisfaction. It appears that the defendant had filed a written statement but failed to appear on the date fixed. The miscellaneous proceedings have not been sent up, but I understand that the defendant relied on being informed by the clerk of the date fixed for hearing, and the Judge records that sufficient cause was shown for restoring the suit. The chief ground of appeal urged now is that the judgment of the lower Appellate Court does not comply with the conditions of section 574 Civil Procedure Code. The judgment is as follows :—

"I see no reason to interfere with the judgment of the lower "Court based on facts. The legal quibbles raised in the appeal "are not worth considering. Appeal dismissed with costs against "appellant."

The judgment is somewhat more brief than the one condemned by the Allahabad High Court in *Sokawan* v. *Babu Nand* (1). It will be seen from the judgment of Mahmood, J., in that case that section 378 of the Code, which deals with irregularities of procedure, "cannot "be applied so as to throw upon a Court of Second Appeal duties which "the law only imposes on Courts of First Appeal, which duties would "obviously go beyond the limits of section 584 Civil Procedure Code." The attention of the District Judge is also invited to the rulings published at pages 1, 64, 343 and 590 of the Printed Judgments. There is nothing in the judgment of the lower Appellate Court to show that it had even mastered the facts in dispute. If the lower Appellate Court had given reasons for its decision or specified what the legal quibbles were, I should be in a position to say whether a second appeal lay under section 584. It has been held by me in a recent case, Civil Revision No. 75 of 1901, that this Court should not interfere under section 622 as a Court of Revision from an order passed under section 98 restoring a suit decreed *ex parte* as the plaintiff has his remedy under section 591. The objection now taken on second appeal that the Court of First Instance restored the case on insufficient grounds is an order of that kind. I have explained to the respondent who has appeared in person that I am merely remanding the case for adjudication on the merits as the lower Appellate Court has not complied with section 574 Civil Procedure Code. I will follow the procedure adopted by the Allahabad High Court and set aside the decree of the lower Appellate Court and remand the suit for a proper adjudication upon the merits with reference to the specific provisions of section 574 of the Civil Procedure Code.

Costs to abide the result.

Before Mr. Justice Copleston, Chief Judge, and Mr. Justice Birks.

CROWN v. SAN HLAING.

Criminal Reference No. 1 of 1902. March 18th.

Taking from lawful guardianship—Kidnapping—Indian Penal Code, s, 361.

An accused may be held guilty of having kidnapped a minor from lawful guardianship where there is no evidence of the accused having in any way enticed the minor away and where the evidence is to the effect that the minor of her own motion left her guardian's keeping, and proposed elopement to the accused and went with him of her own free will.

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(1) I. L. R. 9 All., 26.

1902.

CROWN v. SAN HLAING.

Queen-Empress v. *Nga Ne U*, S. J. L. B., 202; *Queen* v. *Bhungee Ahur*, 2 W. R. Cr. R., 5; *Queen* v. *Sookee*, 7 W. R. Cr. R., 36; *Queen* v. *Neela Beebee*, 10 W. R. Cr. R., 33, and *In re Dhuronidhur Ghose*, I. L. R. 17 Cal., 298, referred to.

REFERENCE made by Mr. Justice Fox under section 11 of the Lower Burma Courts Act in Criminal Appeal No. 56 of 1902.

The appellant has been convicted of an offence punishable under section 366 of the Indian Penal Code. The female kidnapped or abducted was a girl of between 13 and 14 years of age, whose parents were still living. Up to the time of the kidnapping or abduction she had been living with them. It was proved and admitted that sexual intercourse between the accused and the girl had taken place subsequent to the alleged kidnapping or abduction. The Additional Sessions Judge referred to the case of *Queen-Empress* v. *Nga Ne U*(1) as justifying a conviction, but that case merely affirmed that sexual intercourse with a Burmese female minor without the consent of her guardian constitutes "illicit intercourse" within the meaning of section 366 of the Indian Penal Code. The question which arises in this case was not touched upon.

That question is whether there was evidence of kidnapping or abduction.

To constitute abduction there must be evidence of force having been used or deceit practised upon the person who goes from one place to another.

To constitute kidnapping from lawful guardianship there must be evidence that the accused "took" or "enticed" the minor from the keeping of his or her lawful guardian.

In the present case there is no evidence on which it could rightly be held that the accused had abducted the minor or that he had enticed her away.

The only evidence as to what happened when the minor went away is that of the girl herself.

She said that she and the accused had been in love, and that in consequence of their love affair her parents had turned the accused out of their house, and were angry with her, and that on the day in question she went after the accused, met him at the bazaar, and called him away with her.

The question then is whether under such circumstances the accused can be held to have taken the girl out of the keeping of her father without his consent.

There is evidence of the accused having admitted to the father of the girl that he had taken her away, but the words used are not given, and consequently there must be some doubt as to whether the accused's statement at that time differed from his story given in the Courts.

There are remarkably few rulings by the Indian Courts as to what constitutes a taking from lawful guardianship.

In *The Queen* v. *Bhungee Ahur* (2) and in *The Queen* v. *Sookee* (3) it was held that under section 361 the consent of a minor is immaterial, and neither force nor fraud form elements of the offence, and that if it

(1) S. J. L. B., 202. | (2) 2 W. R. Cr. R., 5. | (3) 7 W. R. Cr. R., 36.

be shown that the accused induced the minor to leave his other guardian's house, it would be no defence that the girl was willing or anxious to go.

In *Queen* v. *Neela Beebee* (1) in which the kidnapped or abducted woman had of her own free will left her husband's house with the accused, it was held that the accused could not be convicted under section 361 or section 363 of the Indian Penal Code.

In the matter of *Dhuronidhur Ghose* (2) the kidnapped person appears to have left her husband's house of her free will, but no decision was given as to whether the party complained against could be held to have taken her away.

Mr. Mayne in his Criminal Law of India, section 452, says that the offence under section 361 of the Indian Penal Code consists in the violation of the rights of the guardian, and he refers to English cases which go to show that there can be a "taking" away of a minor even when the minor herself proposes or suggests the going away together.

Sir FitzJames Stephen in his Digest of the Criminal Law of England gives an illustration under Article 262 (page 179) as follows:—

"*A*, a girl under 16, asks *B*, by whom she had been seduced, "elope with her. *B* commits abduction."

He says also "the taking must be a taking under the power, charge "or protection of the taker, but it is immaterial whether the girl is "taken with her own consent or at her own suggestion, or against her "will."

The present case appears to me to be one in which the minor left her father's keeping of her own accord, and herself suggested elopement with the accused. It is open to question whether under such circumstances the accused can under the law of India be held to have kidnapped the minor. Under section 11 of the Lower Burma Courts Act, 1900, I refer the following question to a Bench of the Court: "Can an accused be held guilty of having kidnapped a minor "from lawful guardianship when there is no evidence of the accused "having in any way enticed the minor away, and when the evidence is "to the effect that the minor of her own motion left her guardian's "keeping, and proposed elopement to the accused and went with him "of her own free will?"

Copleston, C.J.—I would answer the question asked us in the affirmative. It appears to me that when a man—not himself a minor—accompanies a minor female as her protector or lover out of the keeping of her lawful guardian he may commit the offence of kidnapping. The consent of the girl is in such case immaterial and the man can be said to *take* the minor. In the case before the learned Judge who has made this reference it appears that the girl went to the bazaar of the village in which she lived and there met the accused, and at her own request went off with him to another village. While in the

(1) 10 W. R. Cr. R., 33. (2) I. L. R. 17 Cal., 298.

1902.

CROWN
v.
SAN HLAING.

bazaar of her own village this Burmese girl might, in my opinion, be held to be still in the keeping of her lawful guardian. Although she went at her own request she went to other villages and she went under the man's protection, sleeping with him several nights in two different houses. It is not at all probable that she would have left her home without the accused. In the case reported at 10 W. R., 33, the minor girl accompanied two females in order to make a petition against her husband and she acted throughout like a free agent. There was no concealment except as to the object of the journey. That case differs from the present. The object of the elopement in the present case was one which the prisoner shared and he acted as the girl's protector and not merely as a companion. This seems to me to justify a finding that there was a *taking*; and, unless the minor was already at the time of the taking out of the keeping of her lawful guardian the offence of kidnapping from lawful guardianship would be committed. Whether she was out of such keeping at the time she and the accused went off together would be a question of fact.

Birks, J.—I concur in the views expressed by the Chief Judge. In all these cases it is for the Court to draw a presumption under section 114 of the Evidence Act as to whether there was or was not a taking out of lawful guardianship. Whether the accused in this particular case enticed the girl is also a question either of direct evidence or of inference from the conduct of the girl and her lover. In cases where the minor deserts her parents' house to join a lover whom her parents have objected to, the offence committed by the man depends upon circumstances. In the case referred the accused knew the girl was a minor and that the parents had turned her out of the house. On the reference as stated I would answer in the affirmative, though the offence committed does not appear a serious one.

The final judgment of the Court was delivered by :—

Fox, J.—In accordance with the decision of the Bench to which I referred the main question arising in the case, I hold that the appellant was rightly convicted of an offence punishable under section 366 of the Indian Penal Code.

I do not think that the circumstances called for such a severe sentence, and I reduce the sentence to one of two years' rigorous imprisonment.

Before Mr. Justice Copleston, Chief Judge.

Criminal Revision No. 37 of 1902. March 21st.

ME DA LI *v.* CROWN.

Record of summary trial—Statement of reasons for conviction—Offence when not defined in the Indian Penal Code—Criminal Procedure Code, s. 263(h)—Indian Penal Code, s. 289.

The record of a summary trial, even though there be no appeal, should show in cases of conviction that there were facts proved sufficient to constitute an offence.

Where the offence is one described in section 289 of the Indian Penal Code, it should be clear on the record that the ingredients of the offence, which is not a defined one like theft, existed. Care should be taken to show that the offence has

1902.

ME DA LI v. CROWN.

really been committed and to record sufficient to enable a revising Court to form an opinion on the point.

In re Panjab Singh, I. L. R. 6 Cal., 579, and *Empress* v. *Shidgauda*, I. L. R. 18 Bom., 97, followed.

THE accused has been convicted under section 289 Indian Penal Code on the ground that a dog owned and possessed by him bit another person. The case was tried summarily. By the terms of section 263 (*h*) a brief statement of the reasons for conviction must be recorded.

The record merely states that "the complainant's witnesses say that the accused's dog bit the complainant. The witnesses of accused cannot say that another dog bit the complainant." The accused had asserted his ignorance whether his dog did bite complainant and offered to prove that it did not do so.

There is no indication on the record that either the Magistrate or the accused were aware of, or considered, the real gist of the offence, namely, knowing or negligent omission to take such order with the dog as to guard against probable danger to human life or probable danger of grievous hurt from the animal; and, in my opinion, the record of a summary trial, even though there be no appeal, should show, in case of conviction, that there were facts proved sufficient to constitute an offence. The "brief statement of the reasons" for conviction should include a good deal more than appears in this case. The offence now in question is described in section 289 and it should be clear on the record that the ingredients of the offence, which is not a defined one like theft, existed. Considering the common laxity of convictions under this section, it seems necessary to insist on care being taken to show that the offence has really been committed and to record sufficient to enable a revising Court to form an opinion on the point. The proper procedure in this matter was pointed out in the case *in re Panjab Singh* (1) and also in *Empress* v. *Shidgauda* (2). In the latter case the reasons recorded were almost identical with those recorded in the case now before me.

I set aside the conviction and sentence—fine to be refunded.

Before Mr. Justice Copleston, Chief Judge.

CROWN *v.* PO HLAW.

Criminal Revision No. 261 of 1902. March 25th.

Costs payable in addition to fine imposed—Court Fees Act, s. 31.

The amount of the court-fee paid on the complaint and of the process fees incurred by complainant should be paid *in addition to* the fine imposed and not *out of* the fine imposed on the accused.

Queen-Empress v. *Nga Tun*, S. J. L. B., 595, followed.

THE Magistrate should have ordered the payment of the court-fee on the complaint and of the process fees incurred by complainant to be made under the provisions of section 31, Court Fees Act, *in addition to* the fine and not out of the fine imposed on the accused. The other costs of prosecution which the complainant incurred were rightly ordered to be paid *out of* the fine under section 545 Criminal Procedure Code. The Magistrate's attention is invited to the ruling in *Queen-Empress* v. *Nga Tun* (3).

(1) I. L. R. 6 Cal., 579. | (2) I. L. R. 28 Bom., 97. | (3) S. J. L. B., 595.

Special Civil Second Appeal No. 224 of 1901. March 27th, 1902.

Before Mr. Justice Birks.

MA KYAW *v.* MA SHWE MA AND ANOTHER.

Lowis, Giles and *Thornton*—for appellant (defendant). | *Chan Toon* and *Das*—for respondents (plaintiff and first defendant).

Claim by puisne incumbrancer—Prior incumbrancer party defendant—Lien of prior mortgagee, Apportionment of among several properties.

While a Court may in a suit where a prior incumbrancer is a party defendant either order that the sale of the property should be held subject to the prior mortgage or that it should be sold free from the incumbrance of that mortgage if the prior incumbrancer so consents, there is no adequate authority for holding in a suit brought by a second mortgagee to bring to sale one out of several properties over which the first mortgagee holds a lien, that the first mortgagee can be compelled to assent to an apportionment of his lien among the different properties.

Maharajah Kisher Pertab v. *Lalla Nund*, 25 W. R., 388; *Ram Dhun Dhur* v. *Mohesh Chunder*, 9 Cal., 406; *Kanti Ram* v. *Kutubuddin*, 22 Cal., 33, distinguished.

THIS is an appeal on a question of law. The plaintiff-respondent sues the original mortgagor Kyaw We, the intermediate purchaser Ba E, and the first mortgagee and assignee of the purchaser's rights, Ma Kyaw, for a right to bring one of three pieces of paddy land to sale as second mortgagee.

It is admitted that the advance of Rs. 5,000 lent to Kyaw We on the mortgage deed of the 29th April 1898 was really Ma Kyaw's money and that she has a first lien on the three pieces of land mentioned in that document. The plaintiff Ma Shwe Ma advanced Rs. 2,700 on a second mortgage of the first of these pieces of land in Site-tan *kwin* (also known as Kyunbin *kwin*). The first and second pieces of land were sold by Kyaw We to Ba E on the 17th January 1900 and resold by Ba E to Ma Kyaw on the 22nd February 1900.

The lower Appellate Court has found on the authority of the ruling of the Privy Council in *Gokaldas* v. *Puran Mal* (1) that Ma Kyaw has not lost her lien by reason of her purchase from Ba E and this has not been disputed at the hearing. It was admitted by the parties before the lower Appellate Court that the three pieces of land, each measuring about 100 acres, were of equal value. The lower Appellate Court apportioned the charge of Ma Kyaw, which it found amounted to Rs. 7,576 between the three pieces of land and gave the plaintiff a decree against Kyaw We for Rs. 1,386-14-0 declaring the land in Site-tan *kwin* to be liable to a prior mortgage charge of Rs. 2,525 in respect of Ma Kyaw's first mortgage but ordering the sale of the land and the balance, if any, after this one-third proportion has been paid to Ma Kyaw to go to satisfy the plaintiff's second mortgage. It is against this portion of the decree that the appeal has been preferred.

The lower Appellate Court relied on the rulings marginally-noted for this order. In the first case the plaintiff was the mortgagee by purchase of three properties and he also purchased the equity of redemption on two of them and a part of the third, No. 610. The Court held that he could not sell No. 610 alone so as to save the portion of No. 610 in which he held an equity of

Maharajah Kisher Pertab v. *Lalla Nund* (25 W. R., 388) and *Ram Dhun Dhur* v. *Mohesh Chunder*, 9 Cal., 406.

(1) I. L. R. 10 Cal., 1035.

redemption from all share of the burden. Glover, J., remarks: "Property, the subject of a mortgage, may be sold in satisfaction, but it "must be sold as a whole and cannot be disposed of piece-meal at the "pleasure of the mortgagee." In the second case the plaintiff had a first mortgage of 12 pieces of land, and he deliberately abstained from executing his mortgage decree against 11 of them still remaining in the possession of the mortgagor, but sued the execution creditor and the purchaser from his debtor, his object being apparently to make every body but his debtor pay the debt due to him. In both these cases the Court directed the first mortgage lien to be apportioned among the different properties.

These cases do not seem to me to be adequate authorities for holding that a first mortgagee can be compelled to assent to such an apportionment at the instance of a suit brought by a second mortgagee to bring to sale one out of several properties over which the first mortgagee holds a lien. The only other case cited is *Kanti Ram.* v. *Kutubuddin* (1), where the Court held as a construction of sections 96 and 97 of the Transfer of Property Act that "the Court might, "in a suit where a prior incumbrancer is a party defendant, either order "that the sale of the property should be held subject to the prior mort-"gage or that it should be sold free from the incumbrance of that mort-"gage if the prior incumbrancer so consents." In *Mata Din* v. *Kazim* (2) the Allahabad High Court held that the second mortgagee had only the right of redemption as against the first mortgagee. The practice laid down by the Allahabad High Court on this point does not seem to have been followed by the other High Courts in India. The following passage quoted from Dr. Ghose's Law of Mortgage in India, 3rd edition of 1902, page 681, appears applicable to the present case: "One "thing, however, is quite clear. A paramount title cannot be drawn "into controversy in an action for foreclosure. A prior mortgagee is "not therefore a necessary party to such an action, the proper object of "which is only to cut off all rights subsequent to the mortgage. Hence "no decree made in such an action can possibly affect the rights of "persons who claim under a prior title. If, however, the plaintiff "chooses to make the prior mortgagee a party to the suit, he should be "redeemed * * * Where, however, a sale is desired (as in the "present case) prior mortgagees are sometimes made parties in order "that the property may be sold with their consent and a complete "title given to the purchaser. The prior mortgagee is required in "such cases to consent to the sale or to refuse it at once * * * If, "however, the prior mortgagee does not give his consent the mort-"gaged property can only be sold subject to his incumbrance, for he is "not bound to come in under a decree obtained by a puisne mortgagee "but may choose his own time and manner of enforcing his security "a right of which he cannot be deprived by a puisne incumbrancer "making him a party to his own action."

It is clear in this case that the appellant Ma Kyaw does not consent to the property in dispute being sold free of her incumbrance, as her

(1) I. L. R. 22 Cal., 33. | (2) I. L. R. 13 All., 432.

1902.

MA KYAW
v.
MA SHWE MA.

allegation is that she may be prejudiced by the apportionment of the lien ordered by the Divisional Judge. The appeal is therefore allowed and the decree of the Divisional Judge will be varied by setting out the whole of the lien due on the first mortgage, Rs. 7,576 instead of a one-third part only—the said Rs. 7,576, to be a first charge on the said three pieces of land. The plot in dispute in the present case in Site-tan *kwin* to be sold subject to Ma Kyaw's lien. The appellant will recover the costs of this appeal.

Civil Miscellaneous Appeal No. 237 of 1901. March 27th, 1902.

Before Mr. Justice Fox and Mr. Justice Birks.

MOOTHOO COOMARASAWMY PILLAY AND ANOTHER *v.* JANIKI AMMALL.

Bagram and *Mehta*—for appellants. | *K. B. Banurji*—for respondent

Probate or Letters of Administration—Objection to application—Caveat—Form of caveat—Probate and Administration Act, s. 71.

Opposition to an application for probate or letters of administration should be made in the form of a written statement framed, signed and verified in the manner laid down in sections 114 and 115 of the Code of Civil Procedure. No *caveat* is necessary where an application for probate or letters of administration has already been made. The form of *caveat* provided for in section 71 of the Probate and Administration Act is one which, as section 70 of the Act shows, may be lodged at any time after the death of a person by any one who claims to be interested in the estate of the deceased. The object of the provision for such form of *caveat* is to enable such person to ensure that no grant of probate of any will of the deceased or of letters of administration to his estate shall be granted without notice to him.

Fox, J.—The respondent, Janiki Ammal, applied to the District Judge for letters of administration to the estate of her late husband. Citations were ordered to issue and the present appellants filed objections to the grant of the letters.

The counsel for the applicant contended that these objections could not be received, because they were not in the form of *caveat* given in section 71 of the Probate and Administration Act, and because they were not supported by affidavit.

The District Judge held that he could not receive the objections, consequently the appellants had no opportunity of opposing the grant of letters.

In holding that in order to entitle a person to oppose the grant of probate or letters of administration that person must file a *caveat* in the form given in section 71 of the Probate and Administration Act, the District Judge was in error. Section 83 of the Act lays down that in any case in which there is contention the proceedings shall take as nearly as may be the form of a suit according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant.

Under the Code of Civil Procedure opposition to the claim made in a plaint is made by a written statement on the part of a defendant, consequently opposition to an application for probate or letters of administration should be made in the form of a written statement framed, signed and verified in the manner laid down in sections 114

1902.

MOOTHOO COOMARASAWMY PILLAY. v. JANIKI AMMAL.

and 115 of the Code of Civil Procedure. No *caveat* is necessary where an application for probate or letters of administration has already been made. The form of *caveat* provided for in section 71 of the Probate and Administration Act is one which, as section 70 of the Act shows, may be lodged at any time after the death of a person by any one who claims to be interested in the estate of the deceased. The object of the provision for such form of *caveat* is to enable such person to ensure that no grant of probate of any will of the deceased or of letters of administration to his estate shall be granted without notice to him.

The District Judge having wrongly refused to allow the appellants to oppose the application for grant of letters, I think the order granting the letters must be set aside, and that the case must be remanded to the District Court for the District Judge to hear the application *de novo* upon the appellants filing a properly signed and verified written statement.

There will be no order as to costs.

Birks, J.—I concur.

Before Mr. Justice Fox.

Criminal Revision No. 348 of 1902. April 2nd.

CROWN *v.* TUN U.

Public nuisance—"People in general," Interpretation of—Indian Penal Code, s. 268.

Leaving out of consideration acts alleged to cause common injury, &c., to the public, and acts which must necessarily cause injury, &c., to persons using public rights, and dealing only with acts alleged to cause common injury to people in general who dwell or occupy property in the vicinity, the wording of section 268 of the Indian Penal Code implies that an offence of a public nuisance can only in such case be committed in a neighbourhood which is dwelt in or occupied by people in general, that is to say, by a body or considerable number of persons.

THE accused was convicted by the Subdivisional Magistrate of an offence punishable under section 290 of the Indian Penal Code.

The act alleged to have caused a public nuisance was the erection of a bund on the accused's land, the effect of which was to prevent surplus water running off from the lands occupied by five adjoining owners or occupants, in consequence of which their crops were damaged. The reasoning by which the Subdivisional Magistrate arrived at the conclusion that the accused had committed a public nuisance is stated as follows in his judgment :—

"I hold that these five persons are the people in general who occupy property in the vicinity. The vicinity is a stretch of land much of which is uncultivated, and I take it that the number of people required to represent the people in general will vary with the nature of the vicinity, and in this case the five cultivators do represent the people in general who occupy this largely uncultivated vicinity."

Upon the same line of reasoning, a nuisance caused to two persons only might be held to be a public nuisance in case those persons were the only occupants of land in the vicinity, for, as the Magistrate puts it, they would represent the people in general occupying land in the vicinity. The reasoning is not, in my opinion, sound.

Section 268 of the Indian Penal Code contemplates acts which cause common injury, &c., to the public, or to people in general who

1902.

CROWN v. TUN U.

dwell or occupy property in the vicinity, or which must necessarily cause injury, &c., to persons using public rights.

Leaving out of consideration acts alleged to cause common injury, &c., to the public, and acts which must necessarily cause injury, &c., to persons using public rights, and dealing only with acts alleged to cause common injury to people in general who dwell or occupy property in the vicinity, it appears to me that the wording of the section implies that an offence of causing a public nuisance can only in such case be committed in a neighbourhood which is dwelt in or occupied by people in general, that is to say, by a body or a considerable number of persons.

The section is not aimed at mere private nuisances such as were in this case caused to the accused's neighbours. The remedy for such nuisances is by civil suit on the part of the injured individuals.

The conviction was, in my judgment, not justified, and I set it aside and find the accused not guilty of the offence charged against him.

The fine will be refunded.

Before Mr. Justice Fox.

CROWN v. THAN NYIN.

Criminal Revision No. 748 of 1902. May 13th.

Tari—Tapping tree—Possession of more than four quarts without license—Offence—Excise Act, ss 51, 30.

Although a person may tap and draw *tari* from his own toddy-tree without committing an offence punishable under section 45 of the Excise Act, yet the moment that a quantity of it larger than four quarts is in his possession he commits an offence punlishable under section 51 of the Act unless he has a license contemplated by section 30 of the Act.

I CANNOT agree with the view that the conviction was illegal. The accused was found guilty of having been in possession of a larger quantity of fermented liquor than a person is allowed by section 30 of the Excise Act to possess.

The Financial Commissioner's Circular No. 10 of 1892, at page 230 of the Excise Manual, points out that it is not the intention of Government to prevent a person from tapping his own toddy-tree, and it is declared that the term "manufacture" in section 5 of the Act does not include natural fermentation of *tari* unaided by any artificial process.

The circular was presumably intended to clear up doubts as to whether a person in tapping a toddy-tree did not *ipso facto* manufacture fermented liquor. The manufacture of even the smallest quantity of fermented liquor without a license is prohibited by the Act.

The circular, however, could not have been intended to alter, and could not in fact have altered, the provisions of the Act as to possession of fermented liquor. Consequently although a person may tap and draw *tari* from his own toddy-tree without committing an offence punishable under section 45 of the Act, yet the moment that a quantity of it larger than four quarts is in his possession, he commits an offence punishable under section 51 of the Act, unless he has a license contemplated by section 30 of the Act.

The proceedings will be returned.

Before Mr. Justice Copleston, Chief Judge, and Mr. Justice Birks.

Special Civil Second Appeal No. 170 of 1900. June 6th, 1901.

MAUNG PO TE AND ANOTHER *v.* MAUNG PO KYAW AND ANOTHER.

Dawson—for appellants. | *Broadbent*—for respondents.

Redemption suit—Mortgage deed containing clause for forfeiture of property—Transfer of possession—Transfer of ownership, Evidence of—Burden of proof.

Where a transaction begins as a mortgage and subsequently there has been a transfer of possession from the mortgagor to the mortgagee, although the mortgage deed provides for forfeiture of the property on failure to repay on demand the amount secured with interest due, there still must be sufficient evidence to show that the intention was to transfer the ownership of the property if this be alleged by the mortgagee—the burden of proof of such outright transfer being on the mortgagee resisting redemption.

Copleston, C. J.—This was a suit for the redemption of certain land in the possession of the defendants. The mortgage was a simple mortgage without possession. The plaintiff began by a false statement to the effect that only an unstamped document had been executed at the time of the transaction and that there was no stipulation for payment of interest on the principal sum secured. It is clear, however, that a registered deed was executed in 1890 and that interest had to be paid; and, further, there was a clause providing for the forfeiture of the property mortgaged on failure to pay the debt with interest on demand being made. Whether any interest was paid or not is not absolutely clear, but probably it was not. After a year or so the land was made over to the first defendant Nga Po Te, and subsequently about the year 1894 the land was made over by mutation of names in the Thugyi's Register No. 1X to first defendant's daughter, the second defendant Ma Shwe Gon.

The Judge of the Court of First Instance laid the burden of proof on the plaintiff, probably because the mortgage was without possession, and the land had subsequently passed in compliance with the terms of the deed as to forfeiture into the hand of the mortgagee. I do not think this transfer of possession is sufficient in itself to raise a presumption that the land has ceased to be under mortgage and has been transferred outright to the mortgagee. Such conversions of simple mortgages into usufructuary mortgages when the mortgagor cannot pay the interest due are common in this country, and evidence should be required to show that there has been a sale or transfer outright if the mortgagee in possession asserts that there has been. I think then that the Township Judge was wrong in placing the burden of proof on the plaintiff, and that the lower Appellate Judge who held that the burden of proof was on the defendants was right. We have then to consider whether the evidence offered by the defendants is sufficient to prove that there was an out and out transfer. The evidence for the plaintiff may be briefly referred to. Several witnesses are called to show that there was only a temporary transfer of possession of the land, and that there was a subsequent demand for permission to redeem followed by a promise to allow redemption in the following year. The witnesses are not very consistent, but they do to some extent support plaintiff's contention.

1901.

MAUNG PO TE
v.
MAUNG PO KYAW.

On the other hand there is on the defendants' behalf the evidence of the former thugyi. The *pyatpaing* which is on the file is written in two inks, black and red, and the original does not appear to have been produced. The Township Judge although he decreed in the defendant's favour said that he did "not much rely on this exhibit;" and I am also of opinion that it is not reliable evidence in this case. One of the witnesses for the plaintiff states that the *pyatpaing* was read out when the transfer of Ma Shwe Gon was made, but he does not say what was read out—so that that testimony is of very little weight. The Township Judge again remarks in the concluding portion of his judgment that "it is not clear for what amount the land was made "over and it is not equally clear that it was handed over temporarily." The amount of consideration for the alleged out and out transfer was an important fact; and though in the opinion of the Judge the evidence of a temporary transfer was not clear, he seems to have thought there was a certain amount of such evidence. Defendants failed at any rate to prove their contention, and as I hold that the burden of proof was on them I would confirm the decree of the lower Appellate Court

When a transaction begins as a mortgage, then, even though since the date of the mortgage there has been a transfer of possession from the mortgagor to the mortgagee, and although the mortgage deed provides for forfeiture of the property on failure to repay on demand the amount secured with interest due, there still must be sufficient evidence to show that the intention was to transfer the ownership of the property if this be alleged by the mortgagee—the burden of proof of such outright transfer being on the mortgagee resisting redemption. This appeal is dismissed with costs.

Birks, J.—I concur.

Criminal Revision No. 785 of 1902. June. 28th.

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

CROWN *v.* THA SIN. *

Murder—Sentence, normal—Extenuating circumstances—Burman tendency to the use of knife—Premeditation, Absence of—Deliberate intent to kill, Absence of—Intoxication—Indian Penal Code, ss. 302, 300, clause (4), 86—Criminal Procedure Code, s., 367 (5).

Section 367, subsection (5) of the Code of Criminal Procedure, contemplates the passing of a sentence of death as the ordinary rule in cases punishable with death and the passing of any other sentence as the exception.

On a conviction for murder a sentence of death should ordinarily be passed unless there are extenuating circumstances.

In Burma where knives are freely used on the lightest occasion, it will be unsafe to lay down as a general rule that mere absence of premeditation or deliberate intent to kill is a good ground for abstaining from passing a capital sentence in a case where a knife is used. To justify the passing of a sentence of transportation for life in cases of murder the Judge should find that there are really extenuating circumstances, not merely an absence of aggravating circumstances The extreme sentence is the normal sentence; the mitigated sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so.

Dissented from 2 L.B.R. 111.

* Explained in *Hamid* v. *King-Emperor*, 2 L. B. R., 63.

1902.

CROWN v. THA SIN.

Per Irwin, J.—When a Sessions Judge has any doubt whether a sentence of death should be passed or not, he should pass sentence of death.*

Shwe Tha U v. *Queen-Empress*, S. J. L. B., 271; *Po Aung* v. *Queen-Empress*, S. J. L. B., 459; *Pyon Cho and others* v. *Queen-Empress*, S. J. L. B., 636; *Nga U* v. *Queen-Empress*, P. J. L. B., 112; *Thet Hnin* v. *Queen-Empress*, P. J. L. B., 550; referred to

Thirkell White, C. J.—The accused, Tha Sin, has been convicted of murder and has been sentenced to transportation for life. His appeal was dismissed and he has been called upon to show cause why the sentence should not be enhanced.

The facts of the case as set forth by the Additional Sessions Judge are as follows :—

"The accused Nga Tha Sin returned to his house from his threshing floor shortly before sunset on the 23rd February drunk and abusive. He asked his mother for a knife, but she told him that he was drunk with toddy and that she would not give it to him. He thereupon pulled a toddy slicing knife out of her hand and walked along the road using abusive language, with the knife in his hand. The witness, Maung Po Tu, seeing that he was drunk went after him and asked him to give up the knife. The accused refused to do so and said that he did not intend to do any one any harm. He mentioned no names in his abuse, but Po Kyaw, accused's cousin, thought that accused was abusing him and his brother, as early in the afternoon accused had asked him to lend him a gunny bag and he had refused on the ground that the bag belonged to his brother Tha Zi.

"After accused had walked a short distance along the road he returned and sat down on the verandah of his house muttering. Po Kyaw had gone down from his house and was on the ground on the north side of it. He called out, 'you are abusing us of course because you did not succeed in borrowing that bag.' Accused replied, 'I did not borrow the bag, and I am not abusing you. Don't start a quarrel.' Po Kyaw then abused accused in filthy language telling him to have sexual intercourse with his mother. Accused replied in the same strain, jumped off the verandah, ran up to Po Kyaw and stabbed him in the back with the toddy knife. Po Kyaw called out, 'I am stabbed, brother, don't come.' Po Kyaw's brother, Tha Zi, had been lying down in the house. He left the house and ran up, saying 'What is it' and accused promptly stabbed him in the stomach and ran away.

"Tha Zi's wound was a very large one and a large portion of his intestines protruded from it. He died after three days in the hospital.'

On these facts, the Additional Sessions Judge convicted the accused of murder, but considered that the case was not one in which a capital sentence should be passed. He stated his reasons for this opinion in the following words :—

"In the first place accused was drunk when he committed the offence. Though this is no excuse, as he drank the liquor of his own accord, still the fact may be taken into consideration in passing sentence as ruled in *Nga Thet Hnin* v. *Queen-Empress*, P. J. L. B., p. 550.

"In the second place the murder was committed in the heat of passion without premeditation (*Maung U and seven others* v. *Queen-Empress*, P. J. L. B., p. 112), for though accused armed himself with a knife before walking along the road abusing, there is nothing to show that he meditated murder or that he was abusing the deceased; indeed when charged with having intended the abuse for Tha Zi and Po Kyaw, he denied it."

The accused on being called upon to show cause why the sentence should not be enhanced, repeats the statement already made in the lower Court, and found to be untrue, that Tha Zi and Po Kyaw came

*Dictum of Irwin, J., Pissented from in *Shwe Cho* v. *King-Emperor*, 3 L. B. R., 111.

1902.

CROWN v. THA SIN.

to attack him with *das*; he pleads also that he was drunk, that he had no intention to kill, that there was no premeditation, that there was serious provocation, and that he acted in self-defence.

There are several rulings of the Court of the Judicial Commissioner of Lower Burma as to the circumstances and conditions in which a sentence of death or one of transportation for life should be passed on a conviction for murder. In the case of *Shwe Tha U* (1), the accused stabbed the deceased in the course of a struggle, the deceased being unarmed. The Judicial Commissioner held that there was no premeditation, that there was grave and sudden provocation, and that there was a sudden fight. He therefore reduced the sentence to one of transportation for life.

In the case of *Po Aung* (2), where the accused, acting apparently on a sudden impulse, attacked the deceased with a sword and inflicted two dangerous and two severe wounds, the Judicial Commissioner held that sentence of death should not have been passed. The crime was held by the Sessions Judge to be murder, as coming within clause (*4*) of section 300, Indian Penal Code, and the learned Judicial Commissioner apparently held that in such cases, capital sentences should not be passed. He disapproved the infliction of the extreme penalty in a case which was so close to the dividing line between murder and culpable homicide.

In the case of *Pyon Cho and others* (3), before the Special Court, the learned Judges seem to indicate the opinion that in case of murder sentence of death should be passed unless there are extenuating circumstances.

In *Nga U* v. *Queen-Empress* (4), the Judicial Commissioner enumerated some of the reasons which appeared to be sufficient for not passing a capital sentence. The reasons specified were (1) the youth of the offender; (2) that the case fell under clause (*4*) of section 300, Indian Penal Code (*cf. Po Aung's* case cited above); (3) that the murder was committed without premeditation in the heat of passion, without special brutality; (4) that there was provocation; (5) that there was doubt as to the sanity of the accused; (6) that the accused was not the principal offender and acted under some one else's instigation. The learned Judicial Commissioner then stated the opinion that the extreme penalty should be reserved for "cases of deliberate murder, for cases where "murder is committed to facilitate the commission of some other "offence or to avoid arrest for an offence, and for other heinous "cases of murder."

In the case of *Thet Hnin* (5), the learned Judicial Commissioner suggested a doubt as to the correctness of the instructions in the case last cited, but considered that they were in accordance with the

(1) S. J., L. B., 271.
(2) S. J. L. B., 459
(3) S. J., L. B., 636.
(4) P. J., L. B., 112.
(5) P. J., L. B., 550.

practice of his Court. Finding that the murder was not a deliberate one and that the accused was probably drunk he did not confirm the death sentence. As regards the plea of intoxication, the Judicial Commissioner referred to the rulings of English Courts that this may be considered in deciding what was the intention of the accused.

I agree with the doubt expressed in the ruling last cited as to whether the instructions in the case of *Nga U* (1) are strictly in accordance with the intention of the law, and the same remark applies to the ruling in the case of *Po Aung* (2). In particular, it seems that if the Legislature had intended to recognize degrees of murder and to assign graduated penalties therefor, the intention would have been carried into effect. With special reference to the remarks about cases falling under clause (*4*) of section 300, Indian Penal Code, it would be reasonable to look for a distinct provision for a lighter penalty in those cases. It may be remarked that the illustration given to that clause is illustration (*d*) to section 300, Indian Penal Code. Yet it would hardly be contended that a capital sentence is obviously inappropriate in that case.

Section 367, sub-section (*5*) of the Code of Criminal Procedure, seems to contemplate the passing of a sentence of death, as the ordinary rule, in cases punishable with death, and the passing of any other sentence as the exception. And it seems to me that the rule, so far as a rule can be laid down, should be that indicated by the learned Judges in the case of *Pyon Cho and others* (3); and that a sentence of death should ordinarily be passed unless there are extenuating circumstances.

In considering whether there are extenuating circumstances, not only the circumstances of the particular case, but the conditions of the country and the habits of the people may fitly be taken into account. In this Province, where it is within the knowledge of all concerned in the Criminal Administration that knives are freely used on the lightest occasion, it would be unsafe to lay down as a general rule that mere absence of premeditation or deliberate intent to kill is a good ground for abstaining from passing a capital sentence in a case where a knife is used. Punishments are imposed not merely in retaliation for the crime but for the protection of society by the prevention of similar crimes. It seems to me that it does not tend to the prevention of the use of knives as weapons of offence to let it be generally understood that a man who hastily stabs another probably runs little risk of incurring the penalty of death. In such cases, mere absence of premeditation seems to me ordinarily to be an insufficient reason for not passing a capital sentence. The safe rule seems to be at any rate, in this Province, that to justify the passing of a sentence of transportation for life in cases of murder, the Judge should find that there are really extenuating circumstances, not merely an absence of aggravating circumstances. The extreme sentence is the normal sentence; the mitigated sentence is the exception. It is not for the Judge to ask

(1) P. J., L. B., 112.
(2) S. J., L. B., 459.
(3) S. J., L. B., 636.
(4) Criminal Law of India, page 392.

1902.

CROWN v. THA SIN.

himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so.

As regards the special point which relates to the plea of intoxication, reference should be made to section 86 of the Indian Penal Code. The intention of this section is thus explained by Mr. Mayne (4) :—

"Section 86 lays down no rule as to the inference of intent in cases of intoxication, but there seems no reason to suppose that the framers of the Code propose to introduce a different rule from that of the English Law. Intention is sometimes a presumption of law; sometimes it is a mere fact, to be proved like any other fact. A man is assumed to intend the natural or necessary consequences of his own act, and in the majority of cases the question of intention is merely the question of knowledge. If I strike a man on the head with a loaded club, I am assumed to know that the act will probably cause death, and, if that result follows, I am assumed to have intended that it should follow. As the drunkard is assumed to have had the knowledge, he must necessarily be assumed to have had the intention, since, assuming the knowledge the law will allow no other explanation of the act to be given."

Similarly, when as in this case a man stabs another man in the stomach, he is assumed to intend to cause his death, that being the ordinary and natural consequence of his act. And the fact that he was drunk at the time does not diminish his responsibility. Nor can I see that it should be taken into account in determining the gravity of his offence.

In the present case, I do not think that the absence of premeditation or the fact that the accused was drunk was a sufficient reason for not passing sentence of death. In view of the fact that the view taken by the Judge was not without authority, and that some time has elapsed since the case was tried, I do not think it necessary to enhance the sentence.

Fox, J.—I concur in the views expressed by the learned Chief Judge and in thinking that in the present case enhancement of the sentence is not called for.

Irwin, J.—I concur in the judgment of the learned Chief Judge. I would only add that in my opinion when a Sessions Judge has any doubt whether a sentence of death should be passed or not, he should pass sentence of death. It is often a matter of difficulty to decide whether the extenuating circumstances are sufficient to justify the omission to inflict the extreme penalty; and where there is a doubt on the point, I think it ought to be decided by the High Court and not by the Court of Session. Where a sentence of transportation for life has been passed there are manifest objections to enhancing it, even when, as in the present case, we think that a sentence of death ought to have been passed. There is no such objection to commuting a sentence of death to one of transportation for life, and such commutation should not be considered as any reflection on the way in which the Sessions Judge has exercised the discretion given him by law. The expediency of passing sentence of death in doubtful cases and leaving it to be commuted by this Court if necessary is, I think, a natural corollary of the Chief Judge's argument respecting the recklessness with which knives are used in this Province.

Before Mr. Justice Thirkell White, Chief Judge.

CROWN *v.* YA BAW.

Criminal Revision No. 4 of 1902. April 26th.

Grievous hurt—Indian Penal Code, s. 320, cl. 8.

In order that hurt may be grievous hurt under section 320, clause (*8*) of the Indian Penal Code, it is necessary that it should endanger life, or cause the sufferer to be, for 20 days, in severe bodily pain or unable to follow his ordinary pursuits.

The mere fact that an injured person is under medical treatment for twenty days does not necessarily show that he has suffered grievous hurt.

A fine is usually an inappropriate punishment for a juvenile offender.

THE accused was charged under section 325 Indian Penal Code. The Magistrate thought that the hurt was grievous hurt. In that case, as a *da* was used, the charge should have been under section 326. At the same time it should be observed that the mere fact that an injured person is under medical treatment for twenty days does not necessarily show that he has suffered grievous hurt. In order that hurt may be grievous under the 8th clause of section 320 Indian Penal Code, it is necessary that it should endanger life, or cause the sufferer to be, for 20 days, in severe bodily pain or unable to follow his ordinary pursuits. A man may continue under medical treatment long after he has ceased to be in severe bodily pain, and though he may be quite capable of following his ordinary pursuits. This is often overlooked.

The accused was sentenced to pay a fine only. He was a young boy and the sentence of fine was not very appropriate. As a rule, a fine is not a suitable punishment in the case of juvenile offenders. When a fine is imposed on a boy the sufferers are usually his parents or friends. But in this case, whether the conviction was under section 325 or section 326, Indian Penal Code, the sentence of fine only was illegal. Under either of those sections a sentence of imprisonment, or, in the case of a juvenile offender, of whipping must be passed. In the present case a sentence of whipping would have been appropriate. I am somewhat surprised that the Magistrate, who seems to have tried the case carefully and who has written a clear and intelligent judgment, overlooked the provisions of section 325 Indian Penal Code as to the punishment for the offence, and failed to see that a sound whipping would have been very beneficial to the accused.

I do not think the circumstances of the case are such as to render it desirable to revise the sentence after this lapse of time.

* * * * *

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

PO YAN *v.* CROWN.

Criminal Appeal No. 132 of 1902. May 5th.

The Assistant Government Advocate—for the Crown.

Conviction of offence other than that charged—Grievous hurt with a da*—Attempt to murder—Indian Penal Code, ss. 326, 307—Code of Criminal Procedure, ss. 236, 237, 226, 227—Indian Penal Code, s. 307.—Two scales of punishment.*

Where accused was charged with causing grievous hurt with a *da* under section 326 Indian Penal Code, but was formally acquitted of that offence and convicted of attempt to murder, under section 307 Indian Penal Code—

1902.

PO YAN
v.
CROWN.

Held,—that though sections 236 and 237, Code of Criminal Procedure, would seem to legalize the procedure taken, yet the correct course would have been to amend the charge or to add a fresh charge of attempt to murder and to call on the accused to plead to this charge.

In case of a conviction under section 307, if hurt is caused, that fact should be expressly stated in the finding, as it affects the maximum punishment.

The judgment of the Court was delivered by—

Irwin, J.—There is no doubt about the facts in this case, and the evidence is quite sufficient to support the conviction; but the appellant has been convicted of an offence with which he was not charged, and respecting which he was not called on to plead. He was charged with causing grievous hurt with a *da* under section 326. He has been formally acquitted on that charge and convicted of attempt to murder, section 307. We have to consider whether the conviction is legal under these circumstances.

Section 307 contains two scales of punishment, the higher scale being applicable when hurt is caused. In the present case the learned Judge ought to have stated expressly in the finding that hurt was caused. The higher scale of punishment under section 307 is identical with the punishment prescribed by section 326, but the practical effect of the finding seems to be that appellant has been convicted of the offence with which he was charged, *plus* the intention of causing death or the knowledge that he was likely to cause death.

Sections 236 and 237, Code of Criminal Procedure, read together seem to cover the case and to legalize the course taken by the Court of Session, but it is quite clear that the correct course would have been to amend the charge or add a fresh charge of attempt to murder and to call on the accused to plead to this charge; and although the conviction of attempt to murder did not render the prisoner liable to higher punishment, yet we think that the prisoner was prejudiced, and may fairly feel aggrieved at being convicted of an offence which involves a higher degree of criminal intent than the offence with which he was charged; the more so as he was convicted on his plea and the evidence was therefore not taken in full by the Court of Session.

The sentence being a suitable one we do not consider it necessary for the ends of justice to order a new trial. We therefore alter the conviction to one of voluntarily causing grievous hurt with a *da*, an offence punishable under section 326 Indian Penal Code, and we confirm the sentence.

Civil Miscellaneous Appeal No. 9 of 1902. May 8th.

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

WILFRED COOMBES *v.* MARY LOUISA COOMBES AND ANOTHER.

Mr. *Lowis*—for appellant.

'Reside,' Meaning of—Indian Divorce Act, s. 2.

The object of the Indian Divorce Act is to afford relief to persons who, while not technically domiciled in India, are resident there for a considerable time, even though without intention of permanent settlement.

As used in section 2 of the Indian Divorce Act, the word "reside" implies a dwelling either of a permanent nature or for some considerable time. It does not apply to a person who has a permanent abode elsewhere and who merely comes to India for the purpose of filing a suit under the Act witw the intention of returning to his permanent abode on the conclusion of the litigation. *Mahomed Shuffli* v. *Laldin Abdula*, (1879) I.L.R. 3 Bom., 227; *Shri Gosvami* v. *Shri Govardhan Lalji*, (1890) I.L.R. 14 Bom., 541; In re *de Momet*, (1894) I.L.R. 21 Cal., 634; *Everet* v. *Frere*, (1885) I.L.R. 8 Mad., 205; *Banerjee* v. *Banerjee*, 3 C. W. N. 250; *Manning* v. *Manning*, L.R., 2 P.D., 223, referred to.

The judgment of the Court was delivered by—

Thirkell White, C. J.—The sole question for determination in this appeal is the meaning of the word "resides" in section 2 of the Indian Divorce Act. The appellant is an employé of the Eastern Extension Telegraph Company, and at the time of the institution of the suit had his permanent abode at Singapore. He came to Rangoon on 8th December 1901 and instituted the suit on 12th of the same month. He continued to live in Rangoon at least till 7th January 1902, with the intention, it is admitted, of returning soon afterwards to Singapore. It is not alleged that he ever had any permanent abode in Rangoon or elsewhere in India. He lived in Rangoon temporarily for the sole purpose of instituting a suit to obtain a divorce from his wife on the ground of her adultery with the co-respondent. On these facts the learned Judge who tried the suit held that the petitioner was not residing in India within the meaning of the Indian Divorce Act, and that he had no jurisdiction to grant any relief under that Act.

Section 2 of the Indian Divorce Act provides that, in order that he may be entitled to obtain relief under the Act, the petitioner must reside in India at the time of presenting the petition. Provisions as to residence within the jurisdiction of the Court are also contained in section 3. But it is sufficient in the first place to limit the discussion to section 2, as, if it is decided that the petitioner did not reside in India within the meaning of that section, his appeal must fail.

On behalf of the appellant it is contended that, for the purpose of giving the Courts in India jurisdiction under section 2, it is sufficient that the petitioner should actually be living in India at the time of the presentation of the petition and that a temporary sojourn in this country constitutes residence for the purpose of that section. Referring to a case under the Insolvency Act, which was cited in the Court of First instance, the learned Counsel for the appellant argued that the word "reside" was not necessarily used in the same sense in various enactments, and that the Courts should endeavour to ascertain the object which the Legislature had in view, and should interpret the words of an enactment so as to give effect to the intention of the Legislature.

The meaning of the word "reside" and its derivatives has been often discussed. One conclusion which is common to all the cases is, as urged on behalf of the appellant, that, to cite the words of Sargent, J., in *Mahomed Shuffli* v. *Laldin Abdula* (1):—

"The word 'residence' may receive a larger or more restricted meaning according to what the Court believes the intention of the Legislature to have been in framing the particular provision in which the word is used."

(1) (1879) I. L. R. 3 Bom., 227.

1902.

COOMBES v. COOMBES.

Similar words were used by Farran, *J.*, in *Shri Gosvami* v. *Shri Govardhan Lalji* (1). Decisions on the meaning of the word in other enactments cannot therefore be taken as conclusive in respect of its meaning in the Divorce Act. They may, however, be of value as aids to interpretation, and some general principles may be gathered from them. Thus, in the judgment of Sale, *J.*, in the case of *de Momet* (2), which was cited in the Court of First Instance, it was held that, for the purpose of section 5 of the Insolvent Act, persons who merely come into the jurisdiction of the Court for the purpose of obtaining the benefit of the Act, and visitors, were not residents, and that a point of importance was whether the person claiming to be resident had any other residence elsewhere. In *Mahomed Shuffli* v. *Laldin Abdula* (3), where the meaning of the term "residing" as used in section 380 of the Code of Civil Procedure was discussed, it was said that the Legislature could not have intended it to mean mere presence in the country at the time of the suit, and it was held that the plaintiff, who had lived in Bombay for four months, but who had never been there before and who could not show that his stay there was to be otherwise than temporary, was not residing there within the meaning of the section.

In *Everet* v. *Frere* (4) an officer who was only staying in Madras for a few days on his way to Europe was held to reside there for the purpose of section 648 of the Code of Civil Procedure. But stress was laid on the fact that at the time he had no permanent abode elsewhere.

In *Shri Gosvami* v *Shri Govardhan Lalji* (1), the meaning of the word "dwell," which was held to be equivalent to "reside," was discussed with reference to the letters patent of the Bombay High Court. It was said by Farran, *J.*, that, in ordinary language, a man's residence meant his permanent residence; that there was no authority for the position that staying in a place with a definite object or a fixed purpose, when a man has *bonâ fide* and permanent abode elsewhere, for a short and limited period, constitutes a dwelling in that place, and that residence must be of a more or less permanent character.

In *Banerjee* v. *Banerjee* (5) the question for decision in this appeal was discussed at some length by Jenkins, *J.* The following passages from the judgment of that learned Judge may be cited:—

"Taking the word in its ordinary acceptation, it conveys, I think, the idea, if not of permanence, at any rate of some degree of continuance. * * * The degree of continuance is not capable of precise definition, but I take it that, to serve as a foundation for this important branch of the Court's jurisdiction, a jurisdiction dealing with vital interests and leading to most important consequences in a matter on which there is a conflict in the law of nations, the residence to which the Act points must be something more than occupation during the occasional and casual visits within the local limits of the Court, more especially where there is a residence outside those limits marked with a considerable degree of continuance."

A similar principle was adopted in the case of *Manning* v. *Manning* (6) in the English Divorce Court, where it was held that, in order to enable him to sue, the petitioner must be a *bonâ fide* resident within

(1) (1890) I.L.R. 14 Bom., 541.
(2) (1894) I.L.R. 21 Cal., 634.
(3) (1879) I.L.R. 3 Bom., 227.
(4) (1885) I.L.R. 8 Mad., 205.
(5) 3 C. W. N. 250.
(6) L. R., 2 P. D., 223.

the jurisdiction of the Court and could not rely merely on his presence within the jurisdiction casually or as a traveller.

The effect of the authorities seems to be that the word "reside" is an elastic term, to be construed according to the object and intention of the Act in which it occurs. But no case has been cited or traced in which, for the purposes of the Indian Divorce Act, or any other enactment, a casual visitor, a traveller or a person who comes to a place for a short and limited period and for the specific object of being within the jurisdiction of the Court, when he has a permanent abode elsewhere, has been held to reside within that jurisdiction. The ordinary meaning of the word "reside" as given in the Century Dictionary is—

"To dwell permanently or for a considerable time; have a settled abode for a time; a dwelling, a house."

A similar definition is cited in the judgment of the Court of First Instance. It is for the appellant to show that, in view of the object for which the Indian Divorce Act was enacted, the Legislature intended the word to have a looser or more extended meaning than it has in ordinary usage. But when the object of the Act is considered, there seems no justification for this view. On the contrary, it is more probable that the Legislature intended to use the word in its strictest sense. As was pointed out by Jenkins, *J.*, in the case above cited, the Indian Divorce Act has not made domicile the test of the Court's authority to grant a divorce, (1) but has constituted residence. It is unreasonable to suppose that the Legislature, while not adhering to the test of domicile which, on grounds easily understood, would be inconvenient in India, intended to go to the other extreme and adopt no other test than that of mere physical presence. It can hardly be doubted that the object of the Act is to afford relief to persons who, though not technically domiciled in India, are resident there for a considerable time though without the intention of premanent settlement. If there had been any other intention, it is to be presumed that the legislature would have explicitly stated it.

On reason, therefore, as well as on authority, we are of opinion that, as used in section 2 of the Indian Divorce Act, the word "reside" implies a dwelling either of a permanent nature or for some considerable time, and that it does not apply to a person who has a permanent abode elsewhere and who merely comes to India for the purpose of filing a suit under the Act, with the intention of returning to his permanent abode on the conclusion of the litigation. In this view the appellant was not residing in India at the time of the presentation of his petition, and his suit was rightly dismissed.

We therefore dismiss this appeal. The respondent and co-respondent have not been represented. It is unnecessary to make any order as to costs.

(1) *Cf.* Dicey's Conflict of Laws (1896), 269.

Civil Miscellaneous Appeal No. 229 of 1901. May 14th, 1902.

Before Mr. Justice Fox.

MA SHWE PON v. K. K. A. R. C. RAMEN CHETTY.

Maung Kyaw—for appellant. | Mr. *K. B. Banurjee*—for respondent.

Ex-parte *proceeding—Summons, Due service of—Time, sufficient for appearance, allowed—Civil Procedure Code, ss. 100 (a), 69.*

Section 100 (*a*) of the Code of Civil Procedure makes it incumbent on Courts before proceeding *ex-parte* to find that the summons in the case has been duly served upon the defendant proceeded against

In a case in which the process-server has not known the defendant before serving the summons, it is necessary, before proceeding with the case *ex-parte*, to have the evidence of some one who did know the defendant before the service and who can state on oath that the summons in the case had in his presence been personally served on the person for whom it was intended, or that a copy of it had been affixed to the outer door of the house in which he personally knew that the defendant ordinarily resided.

"Duly served" in section 100 (*a*) of the Code means, amongst other things, served as contemplated by section 69 of the Code, that is to say, within a time sufficient to allow of the defendant appearing on the day fixed in the summons and being able to answer on that day. It should have been considered whether service on the afternoon on the 27th January on an old woman of 65 years of age to appear and answer at a Court some distance off on the morning of the 29th January was due service.

This case affords an instance of the careless way in which *ex-parte* decrees are sometimes given.

A suit was instituted on the 21st January 1901 in the Subdivisional Court at Twante against the appellant, an old woman living at Wegyi, and her son-in-law, Maung Kyaw Thu, on a number of promissory notes alleged to have been executed by them. The old woman is illiterate.

Summonses issued for settlement of issues on the 29th January. On that day neither of the defendants was present.

The return by the process-server endorsed on the summons was to the effect that on the 27th January he had met the first defendant, who was pointed out by the plaintiff, but as he did not find the second defendant, the summons had been affixed to his house. There is a further endorsement on the summons to the effect that the process-server stated on oath that on the 27th January he had met the first defendant, who signed the summons, and that as the second defendant was not found the summons was affixed to his house. Underneath this are some undecipherable scrawls, which may or may not be the signature and designation of some Court officer.

On these materials the Judge found that the summons had been received by the first defendant, and proceeded to take evidence for the plaintiff.

The process-server's endorsement indicated that he had not known the defendants before he went to effect service, yet the Judge proceeded to hear the case without taking any evidence that the person on whom the summons was said to have been served was the first defendant; in other words, without any evidence of the identification of the first defendant.

1902.

MA SHWE PON v. K.K.A.R.C. RAMEN CHETTY.

No doubt the plaintiff's agent, towards the end of his evidence, said that the summons had been served on the first defendant, but the Judge should, even at that stage, have asked him if he had personally seen it served on her.

Section 100 (*a*) of the Code of Civil Procedure makes it incumbent upon Courts before proceeding *ex-parte* to find that the summons in the case has been duly served upon the defendant proceeded against. In a case in which the process-server has not known the defendant before serving the summons, it is necessary in the first place, before proceeding with the case *ex-parte*, to have the evidence of some one who did know him or her before the service, and who can state on oath that the summons in the case had in his presence been personally served on the person for whom it was intended, or that a copy of it had been affixed to the outer door of the house in which he personally knew that the defendant ordinarily resided. Without such evidence a Judge is not justified in proceeding to hear a case *ex-parte*.

"Duly served" in section 100 (*a*) of the Code means, amongst other things, served as contemplated by section 69 of the Code, that is to say, within a time sufficient to allow of the defendant appearing on the day fixed in the summons and being able to answer on that day. The Judge in the present case does not appear to have considered this: it must have been a question whether service on an old woman of 65 years of age on the afternoon of the 27th January was due service of a summons to appear and answer at a Court some distance off on the morning of the 29th January.

Judges cannot be too careful in making full inquiry as to due service of the summons upon a defendant before proceeding *ex-parte*. They should not be satisfied with endorsements by process-servers on the back of the summonses or endorsements that the process-server had stated on oath that the summons had been served on the defendant. They should examine the process-servers in Court when the case is called on touching his proceedings, especially as to his personal knowledge of the defendant or of his ordinary residence, and if the process-server had not such personal knowledge previous to going to serve the summons they should require the evidence of some one who had such knowledge and who went with the process-server and pointed out the person to whom the summons was to be tendered or the house to which it might be affixed.

The application by the first defendant under section 108 of the Code to have the decree set aside appears to me to have been a *bonâ fide* one. The evidence consists entirely of oaths against oaths.

According to the evidence the endorsements on the summons were far from correct: it was not the plaintiff who accompanied the process-server and pointed the defendant out, and she did not in fact sign the summons. It was the process-server himself who wrote her name in pencil on the back of the summons after she had, according to him, touched the pencil.

This shows what little reliance can be placed on such endorsements.

The defendant's application should, in my judgment, have been

1902.

MA SHWE. PON
v.
K.K.A.R.C.
RAMEN CHETTY.

allowed. I allow the appeal and set aside the *ex-parte* decree against the first defendant in Civil Regular Suit No. 3 of 1901 in the Subdivisional Court at Twante: that Court will appoint a day for proceeding with the suit and give due notice to the plaintiff and to the first defendant of the day fixed.

The plaintiff must pay the costs of the first defendant on her application in the Subdivisional Court and on this appeal, advocate's fee in this Court being allowed at Rs. 34. I may point out to the Judge that he also erred in giving a decree against the first defendant on the evidence he took.

Neither of the witnesses said that the notes had been executed by the first defendant in his presence. They were said to have been taken by Ramen Chetty, who had chosen to leave the province.

Without his evidence or the evidence of some one who could testify to the first defendant having executed the notes, no decree should have been passed against the first defendant.

Civil Miscellaneous Appeal No. 129 of 1901.
May 19th 1902.

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

MAUNG YE GYAN *v.* MA HME AND OTHERS.

Letters of Administration—Filing of valuation of property—Payment of Court fees—Court Fees Act, s. 19-I.

Section 19-I of the Court Fees Act prohibits an order entitling a petitioner to the grant of probate or letters of administration until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule to the Act, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation.

Fox, J.—This matter was remanded to the District Court to try certain issues and to return its findings thereon.

The Judge reports that the parties who objected to the grant of letters of administration to the appellant before this Court failed to appear before him notwithstanding that full opportunity was given them, and consequently he is unable to comply with the remand order.

The burden of proof on the issues remanded lay upon the objecting parties, and as they failed to offer any evidence in support of them, it should be held upon what was decided by the Bench which originally heard the case, that the applicant-appellant had a better right to letters of administration to the estate of Ma Sa Be than the objecting parties had, and that he was the nearest of kin, and, as such, entitled to such letters. There is, however, a difficulty about making an order that letters should issue to him which was not brought to the notice of the Bench which first heard the case.

The case was instituted in the District Court on the 22nd November 1900, that is, after Act XI of 1899 had come into force. By the amendments effected by that Act, section 19-I of the Court Fees Act, 1870, prohibits an order entitling a petitioner to the grant of probate or letters of administration until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule

1902.

MAUNG YE GYAN v. MA HME.

to the Act, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation.

I find no valuation in the prescribed form upon the District Court's record: consequently the Court is precluded from making an order for the grant of letters to the petitioner at once. If he, however, puts in a valuation of the estate in the prescribed form and deposits the necessary Court-fees, I think the District Judge should grant the letters to him. I would allow the appeal and order that the District Judge do issue letters of administration to the estate of Ma Sa Be to Maung Ye Gyan upon his filing a valuation of her estate in the form set forth in third schedule to the Court Fees Act, 1870, and upon his depositing Court-fees in payment of the fee mentioned in No. 11 of the first schedule to the Act. The respondents should pay the applicant's costs in this Court and in the District Court.

Thirkell White, C. J.—I concur. The affidavit and annexure (pages 4 and 5 of the record) have not been overlooked. But they do not seem sufficiently to comply with the requirements of section 19-I of the Court Fees Act, 1870. The valuation should be in the form given in Schedule III of that Act; and in Annexure A, all the details given in the form in the Schedule should be entered, although against most of the items nothing may have to be shown.

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

Civil Miscellaneous Appeal No. 269 of 1901. May 29th, 1902.

MANA PAVANNA PADYACHI *v.* ORMOGUM PADYACHI.

Messrs. *Burjorjee* and *Dantra*—for appellant.

Mr. *R. N. Banerjee*—for respondent.

Insolvency proceedings—Summary order for distribution of assets—Procedure Civil Procedure Code, ss. 350, 351, 352, 355, 356.

Under section 350 Code of Civil Procedure, the Court should examine the applicant to ascertain whether the requirements of section 351 have been fulfilled, and questions may be suggested by opposing creditors. No written objection by opposing creditors is required. Both opposing creditors and the applicant may, if necessary, produce evidence. But evidence is not in the first place required from the applicant.

Where a court after declaring the applicant to be an insolvent proceeded to pass a summary order for the distribution of the assets of the insolvent, and without any proof on the record of the existence or terms of any mortgage declared a person referred to as the mortgagee to be entitled to have his debt first satisfied out of the proceeds of the sale of the applicant's property, and then proceeded to appoint a receiver.

Held,—that the summary order, besides being made in contravention of the provisions of the Code, was clearly incorrect. Before declaring the mortgagee to be entitled to priority in the distribution of the insolvent's property, the Court was bound to have the mortgage proved and to inquire into its terms.

Thirkell White, C. J.—The respondent Ormogum applied under section 344 of the Code of Civil Procedure to be declared an insolvent. His application, though not very well drafted, seems to comply

1902.

MANA PAVANNA PADYACHI v. ORMOGUM PADYACHI.

substantially with the requirements of section 345 of the Code. But paragraph 3 seems to be inconsistent with the schedule attached to the application, for it declares that all the applicant's property was mortgaged nine years ago to Mona Paora Porachi, whereas in the schedule it is stated that the property was mortgaged to Mottapha Chetty and that Mona Paora Porachi has only a money decree against him. Notices were duly issued under section 347 of the Code of Civil Procedure, and the Court proceeded to deal with the application under section 350. The procedure of the District Court so far seems to have been in accordance with the Code. The intention of section 350 seems to be that the applicant should be examined on his application with a view to ascertaining whether the requirements of section 351 have been fulfilled. Any creditor who opposes the application may either cross-examine the applicant or suggest questions to be put to him by the Court. There is no provision in the Code for the filing of written objections to the application. Any opposing creditor may be heard, and an opportunity should be afforded him to produce evidence in support of his objections. The Code does not expressly provide for the production of evidence by the applicant. But no doubt it is within the power of the Court to allow or require him to produce evidence to rebut any evidence produced by an opposing creditor. In the first place, however, production of evidence by the applicant does not seem to be necessary. Ordinarily it seems to be assumed that the Court will have sufficient materials on which to base its decision in the examination on oath of the applicant and the statements and evidence of the opposing creditors, if any. In this case the District Court appears to have strictly followed the procedure prescribed and to have found it necessary to call upon the applicant to produce evidence.

The opposing creditor in this instance was Govindsam Pillay as agent of Mana Pavanna Padyachi. It is urged as a ground of appeal that the District Court entirely misconceived the objections taken by the appellant. These objections seem to be that the statements in the application were not substantially true because the applicant had other property, and that he had recently sold property since the institution of the suit in which the appellant obtained a decree, with intent to defraud the appellant. There is nothing to show that the District Court failed to understand this. The Judge found that it was not proved that the applicant had other property or that he had transferred his property with intent to defraud his creditors. I think these findings were justified. Two witnesses, indeed, said that besides three or four pieces of land the applicant had 25 or 30 head of cattle, but another witness said that this property might belong to his brother and parents. I think that the evidence as to the applicant's property was too vague to enable the Judge to come to a conclusion adverse to the applicant. At the same time I think that the witnesses might have been more closely examined. As regards the alleged transfer of property by sale, I cannot see that there was any evidence that this had been done with intent to defraud.

1902.

MANA PAVANNA PADYACHI v. ORMOGUM PADYACHI.

The Court thereupon declared the applicant to be an insolvent, and I think that this declaration was justified. But the Judge then proceeded to pass a summary order for the distribution of the assets of the insolvent, declaring a person referred to as "the mortgagee" to be entitled to have his debt satisfied out of the proceeds of the sale of the applicant's property. Having done this the Judge proceeded to appoint a receiver. This procedure was clearly not in accordance with the provisions of sections 351 and 352 of the Code of Civil Procedure.

After declaring the applicant to be an insolvent the Judge should then have appointed a receiver of his property. He should then, under section 352 Code of Civil Procedure, have called upon the creditors to prove the amount and particulars of their claims; he should have determined the persons who had proved themselves to be the insolvent's creditors and their respective debts, and he should have framed a schedule of such persons and debts. Further proceedings should have been regulated by sections 355 and 356 of the Code. The Judge's order, besides being made in contravention of the provisions of the Code, was clearly incorrect, for there is no proof on the record of the existence or terms of any mortgage. Before declaring the mortgagee to be entitled to priority in the distribution of the insolvent's property, the Judge was bound to have the mortgage proved and to enquire into its terms.

I would therefore set aside so much of the order of the District Court as relates to any proceedings subsequent to the declaration of the applicant's insolvency, and remand the case for disposal according to law. I think that the parties should bear their own costs in this appeal.

Fox, J.—I concur.

Before Mr. Justice Thirkell White, Chief Judge.

Criminal Revision No. 908 of 1902. June 2nd.

CROWN *v.* NGA YEIK AND OTHERS.

Setting cocks to fight—Burma Gambling Act, s. 10—Proceedings of Legislature not to be used to interpret Statute.

The mere act of setting birds or animals to fight in a street or thoroughfare, or place to which the public have access, is an offence under section 10 of the Burma Gambling Act. The section does not require that there should be any wagering on the result of the fight.

The proceedings of the Legislature which resulted in the passing of an Act cannot be referred to as an aid to the interpretation of the Act.

Administrator of Bengal v. *Premlal Mullick*, (1895) I.L.R. 22 Cal., 788, cited.

THE accused have been convicted under section 10 of the Burma Gambling Act of setting two cocks to fight in a place to which the public have access, or of being present there, aiding and abetting the public fighting of the two cocks. The accused all admitted the commission of the acts charged but urged that, as the fighting was not for money, they were not liable to punishment. The Magistrate, however, held that they had shown no cause why they should not be convicted, and accordingly convicted them and fined them each Rs. 5.

1902.

CROWN v. NGA YEIK.

The District Magistrate has referred the case with the following remarks:—

"This view of the law is clearly wrong, as if no money were on the result of the fight the act would not be called gambling and would not be included in such an Act. In the present case as the accused did not acknowledge the betting which the headman said had taken place, the Magistrate should have recorded evidence on that point. As the case stands the record does not disclose an offence under 10 (1) (*a*), Gambling Act, and the conviction should be set aside."

I am unable to adopt the view of the learned District Magistrate. Under section 10 of the Gambling Act the mere act of setting birds or animals to fight in a street or thoroughfare, or place to which the public have access, is an offence. The section does not require that there should be any wagering on the result of the fight. It is impossible to read into the clause an intention which the Legislature has not expressed, especially when in another clause of the same section, the fact of playing for money or some other valuable thing is made an essential element of the offence. If that had been the intention of clause (*b*) of section 10 of the Gambling Act, it can hardly be doubted that it would have been explicitly stated.

The Magistrate should have distinguished between the persons who set the cocks to fight and those who were present aiding and abetting. In his judgment he has referred to the Statement of Objects and Reasons published when the Bill afterwards enacted as the Burma Gambling Act, 1899, was introduced into the Legislative Council. Their Lordships of the Privy Council have ruled that the proceedings of the Legislature which resulted in the passing of an Act cannot be referred to as an aid to the interpretation of the Act. (*Administrator-General of Bengal* v. *Premlal Mullick*) (1).

The convictions in this case are not open to objection on the grounds stated by the District Magistrate.

Criminal Revision No. 916 of 1902. June 8th.

Before Mr. Justice Thirkell White, Chief Judge.

CROWN *v.* PO LON AND OTHERS.

Robbery with hurt—Indian Penal Code, s. 394—Robbery without hurt—Indian Penal Code, s. 392.

Theft may be robbery under various conditions which do not involve the causing of hurt.

In cases where the offender attempts to cause hurt, or causes wrongful restraint, or fear of death, hurt or wrongful restraint, a charge cannot be framed against him under section 394 Indian Penal Code. Section 392 would be the only section applicable. But when the fact which transmutes theft into robbery is the voluntary causing hurt, then, while section 392 still applies, insomuch that a charge under that section should be framed, a Magistrate is not justified in disregarding the application of section 394: a charge of voluntarily causing hurt in committing robbery should be added under that section. That section imposes a specific penalty for a specified act; and if there is *primâ facie* ground for believing that the accused has committed that act, he should be charged with it.

(1) (1895) I.L.R. 22 Cal., 788.

1902.

CROWN
v.
PO LON

THE accused was charged with committing robbery by causing hurt. This was a somewhat inexact expression. What was no doubt intended was to charge the accused with committing robbery, and in committing it voluntarily causing hurt. The District Magistrate is of opinion that the charge was rightly framed under section 392, Indian Penal Code. In order to see whether this is correct, it is necessary to examine the definition of robbery in section 390, Indian Penal Code. Attention may be restricted to that part of the definition which declares when theft is robbery. Theft, then, is robbery under various conditions which do not involve the causing of hurt. Thus, theft may be robbery because, in committing the theft, the offender attempts to cause hurt, or causes wrongful restraint, or fear of death, hurt, or wrongful restraint. In none of these cases could a charge be framed under section 394, Indian Penal Code. Section 392, Indian Penal Code, would be the only section applicable. But when the fact which transmutes theft into robbery is the voluntarily causing of hurt, then while section 392 still applies, insomuch that a charge under that section should be framed, the Magistrate is not justified in disregarding the application of section 394, and a charge of voluntarily causing hurt in committing robbery should be addda under that section. The section imposes a specific penalty for t specified act; and if there is *primâ facie* ground for believing tha. the accused has committed that act, he should be charged with it The offence punishable under section 394, Indian Penal Code, is more serious than that punishable under section 392 and if the previous conviction for robbery had to be considered, a Court would doubtless take a more serious view of a conviction under section 394 than of one under section 392. The fact that the hurt caused was very slight or that it was not caused by a knife, does not affect the matter in any way, as the District Magistrate seems to think. The views expressed above are not inconsistent with illustration (*m*) to section 235, Code of Criminal Procedure. In the present case there should certainly have been a charge under section 394, Indian Penal Code, and apparently the accused should have been convicted on it. Section 394, Indian Penal Code, is entirely different in character from sections 397 and 398. It imposes an enhanced penalty not imposed by the section which provides the punishment for robbery *per se*, while sections 397 and 398 merely limit the discretion of the Court in awarding punishment under other sections.

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

Criminal Appeals Nos. 183 and 185 of 1902. June 9th.

PO SEIN AND OTHERS *v.* KING-EMPEROR.

Mr. *McDonnell*—for appellants.

The Assistant Government Advocate—for respondent.

Murder—Common intention, Liability for act done in furtherance of—Acts, Probable and natural results of—Indian Penal Code, ss. 302, 34.

Section 34 of the Indian Penal Code renders punishable all persons engaged in a common criminal intent for any act done in furtherance of the common intention.

1902.

PO SEIN
v.
KING-EMPEROR.

It seems framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them.

Where three men assault another man with such violence that one blow causes extravasation of blood on the brain and fells him to the ground, while another blow fractures two of his ribs, it being a matter of common knowledge that such assaults frequently cause death;

Held,—that the assailants must be presumed *(i)* to know that they were likely by those acts to cause death, and *(ii)* to have intended to cause such bodily injury as they knew to be likely to cause the death of the person assaulted, and were consequently guilty of the offence of murder.

Per Fox, J.—If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of any one of them to allege, and perhaps prove, that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Every one must be taken to have intended the probable and natural results of the combination of facts in which he joined.

Where, therefore, the acts of the combination proved are blows causing severe bodily injury sufficient in the ordinary course of nature to cause death, each of the accused taking part in such combination is guilty of murder.

Queen-Empress v. *Mahabir Tiwari*, (1899) I. L. R. 21 All., 263; *Queen-Empress* v. *Duma Baidya*, (1896) I. L. R. 19 Mad., 483; *Queen-Empress* v. *Sheikh Choollye*, 4 W R. Cr., 35; *Reg.* v. *Govinda*, (1876-77) I. L. R. 1 Bom., 342; *Maung U* v. *Queen-Empress*, P. J. L. B., 112; *Queen-Empress* v. *Idu Beg*, (1880-81) I. L. R. 3 All., 776; referred to.

Thirkell White, C. J.—The appellants, Po Gyi, Po Ka, and Po Sein have been convicted under section 302, Indian Penal Code of the murder of one Kon Ya and have been sentenced each to transportation for life.

The facts of the case are sufficiently set forth in the judgement of the Sessions Court. Briefly, it may be said that the appellants and other villagers of Gaw came to a *pwè* at Mohinbyin, apparently with the intention of creating a disturbance. The deceased remonstrated with them and the appellants are said to have struck him with sticks, each striking one blow. Kon Ya died very soon afterwards. The *post-mortem* examination showed that he died from the effect of a blow on the side, which broke two ribs and ruptured the spleen. He had also a wound on the head from a blow which had caused slight extravasation of blood. The appeal of Po Gyi and Po Ka is based on the ground that they were not the persons who committed the assault on Kon Ya and that even if they did so they are not guilty of murder. Po Sein appeals on the ground that he took no part in the assault.

On the facts, I see no reason to differ from the finding of the Sessions Judge There is a considerable mass of evidence to show that Po Gyi, Po Ka, and Po Sein each struck the deceased. The evidence to show that the appellants could not have been the persons who assaulted Kon Ya does not seem to me to be at all convincing. It consists entirely of the evidence of people of their own village, that of Gaw; the only two witnesses from another village called for the defence, namely, Hmwe Aung and Shwe Pu, do not afford material

assistance to the appellants. On the evidence, I think there is no reasonable doubt that Po Gyi, Po Ka, and Po Sein were the persons who struck the deceased.

The only real difficulty in the case, so far as the facts are concerned is that, while three blows are said to have been struck, the medical evidence shows that only two wounds were found on the body of the deceased. I cannot help thinking that it is to be regretted that the Civil Surgeon was not called and examined at the trial with special reference to this point and also for the purpose of stating his opinion as to the amount of force with which the blows which caused the wounds were probably delivered, and of explaining more fully the cause of the rupture of the spleen, which caused death. He said that the spleen was considerably enlarged; he might have been asked whether the blow on the side was probably dealt with considerable violence and whether the spleen was so far diseased that a slight blow would have sufficed to rupture it. But notwithstanding the failure of the medical evidence to account for the fact that only two wounds were observed, I think the direct evidence is sufficient to prove that Po Gyi struck the deceased on the head and that Po Ka and Po Sein struck him or struck at him after he had fallen from the effects of that blow. Possibly one or other of these blows did not take effect, or was not of sufficient force to cause an external bruise; or possibly both blows fell so nearly on the same spot as to cause only one external mark.

As to the force which was used, I think it may be taken that the blows were dealt with considerable violence. One blow was sufficient to fell the deceased and cause some extravasation of blood on the brain; the other or others fractured two ribs and ruptured the spleen. The latter injury could, however, not have been intended or known to be likely to ensue, as it may be assumed that the spleen would not have been ruptured if it had been in a sound state and the appellants could not have known that the spleen was enlarged. It is reasonable, in the absence of medical evidence on the point, to take the view most favourable to the appellants.

The question remains for consideration of what offence the appellants were guilty. The learned Sessions Judge has applied section 34 of the Indian Penal Code and has held that the three appellants had the common intention of having a fight and that the assault on Kon Ya was done by them in furtherance of this intention. The section is very obscurely expressed and seems to be difficult to interpret. In the case of the *Queen-Empress* v. *Mahabir Tiwari* (1), Strachey, C. J., observed:—

"The evidence shows that upon Gajraj seizing the appellant while the dacoits were engaged in plundering the threshing floor, all the dacoits attacked and beat him with lathis and that the appellant similarly joined the rest in so beating him. It is thus clear that the attack on Gajraj was made by the dacoits, including the appellant, in furtherance of the common intention of all and therefore each of them was liable under section 34 of the Code in the same manner as if he were the sole assailant. If without any dacoity, the persons concerned had together attacked Gajraj, and on that attack his arm had been broken, but with no evidence as to who struck that particular blow, or even if the evidence showed that one of them

(1) (1899) I. L. R. 21 All., 263.

1902

PO SEIN.
v.
KING-EMPEROR.

other than the accused had struck it, there can be no doubt that all would, by reason of section 34, have been guilty of causing grievous hurt to him."

The concluding sentence of this extract seems to fit the case now under consideration. On the other hand, there is a ruling of the High Court at Madras to the following effect (*Queen-Empress* v. *Duma Baidya*) (1):—

"We have no reason to doubt that the appellants made an attack on the deceased * * * . The effect of the blow given by the first appellant on the head of the deceased with a thick stick or "bludgeon," was to cause his death, and we consider the first appellant was rightly convicted of murder. But the conviction of the second and third appellants for the same offence we cannot uphold. There is nothing to show that there was a common intention on the part of all the three accused to inflict such injury as would cause death; and no such intention as regards the second and third accused can be gathered from the particular acts of violence proved against them, which in no way contributed to the death of the accused. Though the object of all was no doubt to give the accused a beating, the second and third accused neither instigated nor participated in the fatal blow dealt by the first accused. They cannot therefore be held responsible for the consequences of such act * * * ."

The learned Judges do not refer to section 34 of the Penal Code with reference to this case. That section seems to render punishable all persons engaged in a common criminal intent for any act done in the furtherance of the common intention. It seems framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. In that case the view taken by the High Court at Allahabad seems to be consistent with the intention of the Legislature. I think therefore that all the appellants are responsible for the fatal blow.

As regards the offence which the appellants committed, there is even more difficulty. In order that they may be convicted of murder, it is necessary in the first place to show that their act or acts amounted to culpable homicide. Culpable homicide is committed when the person who causes death causes it by doing an act—

(1) with the intention of causing death;

(2) with the intention of causing such bodily injury as is likely to cause death;

(3) with the knowledge that he is likely by that act to cause death.

I do not think that there is anything in the present case to indicate that the appellants actually intended to cause the death of Kon Ya They intended to beat him and they did so. But I do not think that they intended to beat him to death. If that had been their intention, the blows inflicted would have been more numerous.

But I am very much disposed to think that when three men attack another man with such violence that one blow fells him to the ground and causes extravasation of blood on the brain, while another fractures two of his ribs, they must be held to know that they are likely by

1) (1896) I. L. R. 19 Mad., 483.

those acts to cause death. The assault was a very violent one, though only three blows were struck; and such an assault was, I think, likely to cause death and in fact did cause it. In this view of the case, the appellants were also guilty of murder, because the case falls also within the second clause of section 300, Indian Penal Code. Every man is presumed to know and intend the natural consequences of his acts. In the *Queen-Empress* v. *Sheikh Choollye* (1), it was held by two learned Judges, a third dissenting, that a man who struck another a blow on the head while he was asleep, fracturing his skull and causing death, was guilty of murder; as it must be presumed that the accused had a knowledge that the act was likely to cause death; and as the act was clearly done with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death. In *Reg.* v. *Govinda* (2), it was held by the Bombay High Court that a man who knocked his wife down, put one knee on her chest, and struck her two or three violent blows on the face with the closed first, producing extravasation of blood on the brain, from the effects of which she died, was guilty of culpable homicide not amounting to murder. I have also consulted cases on the point in the Court of the Judicial Commissioner, Lower Burma, of which the case of *Maung U* v. *Queen-Empress* (3) may be cited; and the case of *Queen-Empress* v. *Idu Beg* (4). After full consideration of these cases, it seems to me that, if death is caused by an act done with the intention of causing such bodily injury as is likely to cause death, it is *primâ facie* murder under the second clause of section 300, Indian Penal Code. If the injury which the accused intended to cause is as a matter of fact likely to cause death, in the absence of any explanation it seems to me that ordinarily the accused may be presumed to know the likely consequences of his own act. Clause (4) of section 300 applies, I think, to quite a different class of cases, namely, such as is described in Illustration (*d*) to that section. In my opinion, when three men assault and beat another man in this way, with such violence that one blow causes extravasation of blood on the brain and fells him to the ground, while another blow fractures two of his ribs, the assailants may very well be presumed to have intended to cause such bodily injury as they know to be likely to cause the death of the person assaulted. It is a matter of common knowledge that such assaults frequently cause death; and I think the appellants in this case should be presumed to have this common knowledge. The case is not one in which sentences of death should have been passed. I would dismiss the appeals of the three appellants.

Fox, J.—I concur in thinking that the appellants were rightly convicted of murder, and in dismissing their appeals. Although it was not proved what sort of sticks the appellants used in striking the deceased, the results upon him show that in all probability they were heavy weapons and that the blows must have been dealt with force,

(1) 4 W. R. Cr. R., 35.
(2) (1876-77) I. L. R. 1 Bom., 348.
(3) P. J. L. B., 112.
(4) (1880-81) I. L. R. 3 All., 776.

1902.

PO SEIN
v.
KING-EMPEROR.

but assuming that they were light sticks the blow which first felled the deceased, and the others or other which caused fracture of two ribs must have been most severe. If a man deals another a blow on the head with a stick with such force as to fell him, it must, in my opinion, be held that the striker intended to cause such bodily injury as is sufficient in the ordinary course of nature to cause death, and if the stricken man dies in consequence of and as a result of the blow, the striker must be held guilty of murder under the third case given in section 300 of the Indian Penal Code, for it is a matter of common knowledge that blows with sticks on the head dealt with such force as to fell a man do often result in death; and therefore the bodily injury inflicted is sufficient in the ordinary course of nature to cause death. Death in the present case, however, was primarily due to rupture of the spleen, and such rupture was the consequence of the beating generally.

The blow or blows on the side of the deceased must have been dealt with considerable force and when the deceased was on the ground. From all the facts proved, it is clear that it was the common intention of the strikers of the blows to give the deceased a very severe beating with the sticks they had, and although none of them may have actually intended to cause death by the blow he delivered, yet each one must have known that a very severe beating with sticks often results in the death of the person beaten, and that their acts might cause and probably would cause such injury as would be sufficient in the ordinary course of nature to cause death.

If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must have known that the result of such injury may be the death of the injured person, it is no answer on the part of any one of them to liability for the consequences of causing the death to allege, and perhaps prove, that his individual act did not cause the death, and that by his individual act he cannot be held to have intended death. Every one of them must be taken to have intended the probable and natural results of the combination of acts in which he joined.

In this particular case the acts of the combination proved are blows causing severe bodily injury sufficient in the ordinary course of nature to cause death: therefore each of the accused was guilty of murder.

Criminal Appeals Nos. 187—191 of 1902. June 9th.

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

CHIT TUN AND FOUR OTHERS *v.* CROWN.

The Assistant Government Advocate—for the Crown.

Trial before successive Magistrates—Right of accused to recall witness after charge—Evidence of witness, Record of—Punishment, Measure of—Retracted confessions—Criminal Procedure Code, ss. 350, 256, 356, 357.

Per Thirkell White, C. J.—In the case of accused persons who are undefended, a Magistrate who continues a trial under section 350 Criminal Procedure Code,

should inform the accused of their right under that section to have the witnesses already examined recalled and reheard and should record the fact that he has done so and the reply of the accused.

After having pleaded to the charge the accused should be asked whether they wish to cross-examine any of the witnesses for the prosecution. The record should show that this has been done.

The evidence of each witness must be recorded. It is not a sufficient compliance with the requirements of the Criminal Procedure Code, whether section 356 or 357 is applicable, to merely record that a witness corroborates another.

Per Fox, J.—An offender should not receive less punishment than he ordinarily would receive merely because in pursuance of what he considered best in his own interest he confessed his crime. Any question whether a sentence should be mitigated on the ground that the confession has helped the executive authorities upon the track of the other offenders is one for those authorities to deal with upon a memorial for the clemency of the Crown. The mere fact that a confession has been subsequently retracted will not make it inadmissible against the accused, but before a Court can act upon such a confession it must be satisfied as to its truth.

There is no absolute rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars. The use of such a confession is a matter of prudence rather than of law. If a Judge believes that such a confession contains a true account of the prisoner's connection with the crime, the Judge is bound to act on it so far as that person is concerned.

In the consideration of retracted confessions, and the weight to be attached to them, possible malpractices on the part of the police should no doubt be borne in mind. But while neither the record of the accused's confession nor that of the Magistrate's belief that the confession had been voluntarily made is conclusive proof that it was so made, it is for the accused to adduce, if not actual evidence, at least some well-founded and probable reason for believing that what the accused admitted to the Magistrate was not in reality the fact.

Queen-Empress v. *Rangi*, (1887) I. L. R. 10 Mad., 295; *Queen-Empress* v. *Bharmappa*, (1889) I. L. R. 12 Mad., 123; *Tha Maung* v. *Queen-Empress*, S. J., L. B., 497; *Queen-Empress* v. *Mahabir*, (1896) I. L. R. 18 All., 78; *Queen-Empress* v. *Jadub Das*, (1900) I. L. R. 27 Cal., 295; referred to. *Queen-Empress* v. *Raman*, (1898) I. L. R. 21 Mad., 83; *Queen-Empress*, v. *Maiku Lal*, (1898) I. L. R. 20 All., 133; *Queen-Empress* v. *Gharya*, (1895) I. L. R. 19 Bom., 728; followed.

Thirkell White, C. J.—The appeals of the five appellants who have been convicted in the same case have been heard together. Chit Tun, Abdul Karim, Nga Pyu and Nga Chet have been convicted of two separate acts of dacoity, committed on the same night, the 9th January 1902, at the village of Kawbein; and Tha Aung has been convicted of abetting those offences. The trial of the appellants and others was begun by Mr. Symns, District Magistrate, and continued and completed before Mr. Cabell, who succeeded him. The examination of all the witnesses for the prosecution was taken by Mr. Symns. The accused were examined and charged by Mr. Cabell, who also took the evidence of the witnesses for the defence. This procedure is authorized by section 350, Code of Criminal Procedure. But the accused have the right of demanding that the second Magistrate should recall and rehear all or any of the witnesses examined by his predecessor. There is nothing to show that the accused in this case exercised or waived this right. Although the law does not specifically require it, yet, in the case of accused persons who are undefended and who are probably ignorant of their strict rights, it is desirable that the Magistrate who continues a trial under section 350, Code of Criminal Procedure, should

1902

CHIT TUN. v. CROWN.

inform the accused of their right under that section and should record the fact that he has done so and the reply of the accused. In this case only one of the accused, Tha Aung, seems to have been defended. As, however, Tha Aung's pleader could have claimed the right conferred by proviso (*a*) to section 250, Code of Criminal Procedure, and apparently did not do so, the omission to note whether the accused were aware of this right is of less importance in this case. Under proviso (*b*) of the section above cited, this Court can set aside a conviction in cases tried in this way, if it is of opinion that the accused have been materially prejudiced. No objection has been taken in any of the appeals to the Magistrate's procedure; and I see no reason to think that the accused have been prejudiced thereby.

Another preliminary point which may be mentioned is that the record does not show that, after having pleaded to the charge, the accused were asked whether they wished to cross-examine any of the witnesses for the prosecution. Section 256, Code of Criminal Procedure, requires this to be done. In this case, again, the Code does not explicitly require the Magistrate to record that he has observed the provisions of this section. But it is a safe and sound rule that, when the law requires anything to be done, the fact that this thing has been done should be put on record. It has not been urged in appeal that the requirements of the law were not fulfilled in this respect; and in the absence of any express provision on the subject I am not prepared to say that the omission to record compliance with section 256, Code of Criminal Procedure, is an irregularity of procedure. But as a rule of practice I am of opinion that the fact of such compliance should always be noted on the record. As it is not alleged that the law was not observed in this case, I do not think that it can be held that there was any irregularity of procedure. Moreover, the accused had the opportunity of cross-examining the witnesses and, even if they were not given a further opportunity of doing so after pleading to the charge, it does not seem that they were materially prejudiced thereby.

The examination of the witnesses for the prosecution was not, apparently, very carefully conducted. None of the persons in the houses which were robbed seems to have been asked even what was the date of the occurrence. Statements as to the identification of exhibits were perfunctorily accepted in some instances. Among articles identified are such common objects as an umbrella and some locks of false hair. The witnesses do not seem to have been asked why or how they can identify these things. The evidence of one witness (Nga Wa) may be produced *in extenso*:—

"Ma Pyi is my sister. She has a coil of hair. I know it is the long coil as it is bound by black thread. I bound it."

The relevancy of these statements to the matter under enquiry is not apparent. It is presumed that the witness meant to identify as his sister's property a coil of hair produced as an exhibit; but there is nothing on the record to show that this is the case. Another deposition is as follows:—

"I searched Nga Kyet's house on 21st with the Head Constable.

(Corroborates last witness.)"

In the case of another witness, the sole record of his deposition is as follows :—

"(Corroborates and identifies Nankaya and Nga Kyet, 6th accused.)"

It is not sufficient compliance with the provisions of the Code of Criminal Procedure, whether section 356 or 357 is applicable, to record that a witness corroborates another. That is a deduction from a comparison of the depositions. The evidence of each witness must be recorded as it is given. The so-called depositions cited above must be excluded from consideration.

Turning to the consideration of the merits of these appeals, I shall deal separately with the case of each appellant. As to the fact that on the 9th January last dacoities were committed separately on the houses of Maung Yin and Atan Shok of Kawbein village there is no doubt. The dacoits numbered seven or eight ; they were armed with firearms ; they carried off property of considerable value ; but they do not seem to have ill-used the people in the houses.

The appellant Chit Tun was recognized and identified by Ma Pyi, one of the inmates of the first house, which was attacked. There is evidence, that of Ma Si Si, San Nyun and Maung Pe, that on the day of the dacoity and on the previous day he was, with some of the other accused who have also been convicted, at the hut of Ma Si Si, where the appellant Abdul Karim was living. Aung Kayin, one of the persons in whose company the appellant was seen, pleaded guilty and has not appealed. Abdul Karim also pleaded guilty. No doubt these two persons were among the dacoits. The appellant is also said by Aung Byu, one of the witnesses for the prosecution, to have come with the other accused in a boat. If Aung Byu's story is true there can be no doubt as to Chit Tun's guilt. But, in my opinion, Aung Byu's evidence must be received with reserve as it seems clear that he was an accomplice. He is nearly related to two of the accused who have been convicted. According to his own showing he brought them to the neighbourhood of the scene of the dacoity and took them back again. I have no doubt that he was concerned in the plan to commit the dacoities, though he did not actually take part in them. This appellant is also said by three co-accused, Tun Hlaing, Aung Kayin and Nga Pyu, in their confessions, to have been one of the dacoits. The evidence of Aung Byu and the confessions of three accused above mentioned would not be sufficient, if unsupported, to justify the conviction of Chit Tun. This appellant made no confession and none of the property taken in the dacoity was found in his possession or given up by him. But I think that the evidence of the witnesses previously mentioned, who saw Chit Tun with persons who were beyond doubt among the dacoits in the neighbourhood of the scene of the dacoities, immediately before their commission, affords sufficient corroboration of the evidence of the accomplice and of the confessions of the other accused. These confessions were full and detailed and in two cases have not been retracted. The defence of Chit Tun was an *alibi*, which he entirely failed to prove. He gave no reason why the other accused and Aung Byu

1902.

CHIN TUN v. CROWN.

should have denounced him falsely or why the other witnesses should have given false evidence concerning him. But his defence is quite inconsistent with the evidence of Ma Si Si, San Nyun and Maung Pe, who seem to be independent and respectable witnesses. Apart from the identification by Ma Pyi, whose truthfulness does not seem to have been impeached, but who may be mistaken, I think that there is sufficient material on the record to justify the conviction of Chit Tun and I would dismiss his appeal.

Abdul Karim appeals solely against the severity of the sentence. He made a full confession to which he substantially adhered at the trial and which he does not even now retract; but he says that he was forced to join and that he gave assistance to the authorities in the detection of the case and was promised that he should be made an approver. There is no evidence in support of the last statement; and there is nothing to show that he was forced to join the dacoits. It is true, however, that he confessed very soon after the commission of the dacoity and that he gave up some of the dacoited property. He is somewhat younger than the rest of the accused, except Nga Pyu.

I have considered whether there are grounds for distinguishing between Abdul Karim and the other accused as regards the measure of punishment. On the whole I concur with my learned colleague in thinking that there are not sufficient reasons for reducing the sentence on Abdul Karim and in dismissing his appeal.

Nga Pyu appeals on the merits of the case and denies that he took any part in the dacoities. He was not identified as one of the dacoits. The direct evidence against him is that of Aung Byu, the boatman an accomplice, and there are also the confessions of two co-accused, Tun Hlaing and Aung Kayin, which have not been retracted and which are consistent and credible. Nga Pyu himself made a full confession on the 23rd of January, that is, according to the police papers, three days after his arrest. This confession he retracted at the trial and said that it had been extorted from him by the police. The District Magistrate should have made some enquiries into this allegation. The only other evidence against him is that of witnesses who say that he gave up an umbrella (Exhibit 24), which is identified as part of the property taken from Maung Yin's house and that when giving it up he said it was part of that property. One of these witnesses is Nga Pyu's uncle. There is no evidence, except that of Aung Byu, that Nga Pyu was seen with the other accused before the dacoity. As to the umbrella, I think its identification is somewhat doubtful; and in Aung Kayin's statement as to the distribution of the plunder, the umbrella is said to have fallen to the lot of Nga Maung Gyi, one of the dacoits who has not been arrested. The District Magistrate I think disposed of Nga Pyu's case rather summarily, convicting him on his retracted confession and on the production of the umbrella. The only really strong point in the independent evidence against Nga Pyu is that his uncle, Maung Kin, deposes that he said the umbrella was "part of the Kawbein loot." In view of the manner in which the evidence of this witness was recorded, which seems to me to indicate a hasty and careless examination, I am not sure that this statement should be taken as conclusive against the

appellants or as sufficiently corroborating the evidence of the accomplice and the confessions of the other accused. The evidence that he showed the place where some sticks were cut seems to me of no value. But, as pointed out by Mr. Justice Fox, there is the full and detailed confession of this accused which it is difficult to believe to have been made under instructions and which there is no reason to believe to have been made under duress. After anxious consideration I have come to the conclusion that there is no reason to doubt that Nga Pyu was among the dacoits, that the materials on the record are sufficient to justify his conviction and that his appeal also should be dismissed.

Nga Chet appeals on the merits and tried to prove an *alibi*. He denied that he was present at the dacoity at all. He has made no confession. The evidence against this appellant is very strong. There is the evidence of Aung Byu, and there are the confessions of Tun Hlaing and Aung Kayin. This evidence and these confessions are strongly corroborated in a very material point as to the identity of this appellant by the testimony of witnesses, who say that Nga Chet rescued some persons who had been upset in a boat. This incident is related by Aung Byu and the confessing accused ; and is told also by witnesses who seem to be quite independent and who identify Nga Chet. This appellant was also recognized by Ma Pyi as one of the dacoits. Property identified as part of the property taken in the dacoity was found in his house. I attach no very great importance to this part of the case as the property consists of common articles and the identification does not seem to have been properly tested. But some weight may be given to it in connection with the other evidence against the appellant. There is further the evidence of San Nyun and Nga Myaing that he was seen with other of the accused before the dacoity. The evidence of Nga Myaing might have been of more value if the day on which he saw the appellant had been ascertained ; but San Nyun's evidence is sufficiently definite on this point. I thank that the evidence against this appellant, Nga Chet, is convincing and I would dismiss his appeal.

The District Magistrate, in convicting Tha Aung, remarked that the case against him was not so strong as against the other accused. It may be called to mind that Aung Kayin, Abdul Karim and Tun Hlaing are the three accused who confessed, pleaded guilty and have not appealed against the conviction though Abdul Karim has asked for mitigation of the sentence.

On the morning before the day on which the dacoity was committed, Po Lôn saw Tha Aung talking to Aung Kayin and one Po Thein, who has not been arrested, and two others and Tha Aung sent him to show these men to Ma Si Si's hut, where Abdul Karim was living. Ma Si Si saw Tha Aung with Abdul Karim and Nga Chet and others. San Nyun saw him talking with Nga Chet, Abdul Karim and Tun Hlaing at Ma Si Si's hut and later saw him with Chit Tun, Tun Hlaing, Abdul Karim and Nga Chet. Maung Pe partially corroborates San Nyun. Aung Byu says that Tha Aung came to the boat and called the accused. Abdul Karim and Aung Kayin in their confessions clearly implicate Tha Aung as having indicated the house which was

1902.

CHIT TUN v. CROWN.

to be robbed. Abdul Karim says that Tha Aung was present at the dacoity on Maung Yin's house: but this is clearly not true and this statement to a certain extent throws doubt on Abdul Karim's accuracy. But perhaps the strongest evidence against the appellant is that of Tin Shwe, in whose house Tha Aung admits that he was at the time of the dacoities. If Tin Shwe is to be believed there can be no reasonable doubt that Tha Aung was aware of the intention to commit the dacoities and had helped to plan them. There seems no reason to disbelieve Tin Shwe, who was called by Tha Aung as a witness in his defence after he had been examined as a witness for the prosecution. I think that his evidence taken in connection with the evidence of Tha Aung's communication with some of the dacoits shortly before the commission of the dacoities sufficiently corroborates the evidence of Tha Aung and the confession of Aung Kayin; and that the conviction of this appellant should be supported. I would therefore dismiss the appeal of Tha Aung.

Fox, J.—I concur in thinking that all these appeals should be dismissed. I will only add some remarks on the cases of Abdul Karim (Du Karim) and Nga Pyu.

Abdul Karim appeals against the sentence only and asked for mitigation of it.

In his petition of appeal he professes to give a true version of his connection with the dacoits and the dacoities. In this, as well as in his recorded confession, he says that he was forced into joining the gang by the threats of the principal members of it. On the other hand the confessions of some of his co-accused point to his having taken a very active part in the actual dacoities, and his recorded confession, his petition of appeal and the evidence of the young woman Mi Pyi tend to confirm the belief that there was, during the commission of the offences, no sign of his being an unwilling participator in them.

I do not think that the punishment on him should be less than that awarded to his fellows on the ground that he was forced into joining the gang, for I do not believe that he was so forced.

Another ground on which he asks for clemency is that the *ywathugyi* told him that he would make him a witness for the Crown. This promise, however, is alleged to have been made after he had already confessed to the *ywathugyi*; moveover he did not ask the *ywathugyi* anything about such promise in the Magistrate's Court. In his petition of appeal he admits that at the first of the dacoities he caught hold of a woman: he says that he did so in order to obtain her help in order to get out of the hands of the dacoits.

Then he says that this woman must have denouneed him as having been one of the dacoits, so when the *ywathugyi* two days after accused him of having been one, he told him the whole story. This points to his confession having been made as a result of belief on his part that he had been recognised, and in the hope that he would escape punishment.

Spontaneous confessions are often induced by such belief and hope: self-interest is the source from which the act comes, and I do not

think that such being the case an offender should receive a less punishment than he ordinarily would receive, merely because in pursuance of what he considered best in his own interest he confessed his crime. Abdul Karim's prompt confession may no doubt have been of use to the authorities, and he may also have been of use in putting the police upon the track of, and in helping them to find the other offenders, but in my view the executive authorities have much better means of knowing what aid an accused has in fact given than the Courts have, and any question whether a sentence should be mitigated on such ground is one for such authorities to deal with upon an appeal for the clemency of the Crown.

As regards Nga Pyu it is true that there is very little satisfactory evidence apart from his confession which was made soon after his arrest but was subsequently retracted. Practically his conviction, if upheld at all, must be upheld upon the ground that the confession is to be believed as true, and as having been voluntarily made.

Some decisions of High Courts in India have thrown doubt upon whether a conviction based merely upon a confession subsequently retracted is justifiable. In the case of *Queen-Empress* v. *Rangi* (1) Kernan, J., said that as the appellant had withdrawn all his confessional statements, it was necessary, according to the rulings of the Madras High Court, to examine the evidence, and see if there was reliable independent evidence to corroborate to a material extent, and in material particulars, the statements in the withdrawn confessional statements; and if no such corroborative statements existed, then the confessional statements could not be safely relied on against the prisoner.

The same rule was adopted in *Queen-Empress* v. *Bharmappa* (2). This case was followed by the Judicial Commissioner, Lower Burma, in the case of *Nga Tha Maung* v. *Queen-Empress* (3). In *Queen-Empress* v. *Mahabir* (4), Banerji, J., said: "The mere fact that a "confession has been subsequently retracted will not make it inad- "missible against the accused: but before a Court can act upon such a "confession it must be satisfied as to its truth. Having regard to "the fact that it not unoften happens that an accused person is forced "or cajoled by the police into making confessions, it is the more neces- "sary that a Court should be satisfied beyond reasonable doubt that "the statements made in the confessions of the accused are true. This "necessity is, in my opinion, the greater where the confessions have "been subsequently withdrawn. * * * It seems to me there- "fore to be unsafe in the majority of cases to found a conviction on "retracted confessions which are not corroborated by credible inde- "pendent evidence."

Most of the above remarks are no doubt well founded, but in the last-quoted sentence the learned Judge appears to me to lay down a rule for the majority of cases which is possibly uncalled for and might, if too closely followed, lead to grave miscarriages of justice.

(1) (1887) I. L. R. 10 Mad., 295.
(2) (1889) I. L. R. 12 Mad., 123.
(3) S. J., L. B., 497.
(4) (1896) I. L. R. 18 All., 78.

1902.

CHIT TUN v. CROWN.

Some passages in the judgment in *Queen-Empress* v. *Jadub Das* (1) are also to the effect that it is not safe to convict upon a confession which has been retracted unless it is corroborated by some evidence to show that it is true.

The subject has been further considered by the Madras and Allahabad High Courts in judgments later than the judgments of those Courts previously referred to.

In *Queen-Empress* v. *Raman* (2) the learned Judges say: "It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted cannot be accepted as evidence of guilt without independent corroborative evidence. The weight to be given to such a confession must, it is clear, depend upon the circumstances under which the confession was originally given, and the circumstances under which it was retracted, including the reasons given by the prisoner for his retractation." They say further that the question which should have been put to the jury in that case was not whether the confessions were corroborated by independent evidence, but whether, having regard to all the circumstances connected with the confessions, it was more probable that the original confessions or the statements retracting them were true.

In *Queen-Empress* v. *Maiku Lal* (3) the learned Judges say: "It appears to us that every case of this kind must be decided upon its own circumstances and not upon the amount of credibility which was attached in other cases to confessions made. If a Judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that prisoner's connection with the crime, the Judge in our opinion is bound to act, as far as that prisoner is concerned, on that confession, which he believes to be true. Where a confession is not supported by the evidence of witnesses, a Judge must examine very carefully to see whether it gives those details which indicate that it is a natural narrative of what took place in the presence of the man making it, and is not at variance with any evidence in the case which is believed, and is not merely a parrot-like repetition of a story put into the man's mouth."

In *Queen-Empress* v. *Gharya* (4) a Bench of the Bombay High Court also held that there was no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars, and said that the use to be made of such a confession is a matter of prudence rather than of law.

In my opinion the three judgments last referred to contain correct statements of the law, and afford safe and sound rules to be followed in the consideration of retracted confessions, and the weight to be attached to them.

The possible malpractices on the part of the police adverted to by Mr. Justice Banerji should no doubt be borne in mind, still more should they be borne in mind by Magistrates before whom accused persons are brought with a view to having their confessions recorded;

(1) (1900) I. L. R. 27 Cal., 295.
(2) (1898) I. L. R. 21 Mad., 83.
(3) (1898) I. L. R. 20 All., 133.
(4) (1895) I. L. R. 19 Bom., 782.

possibly abuses of the kind might be rendered ineffectual if such Magistrates exercised more care than is sometimes the case in ascertaining whether the accused persons coming before them has been in reality the outcome of their own desire, and has not been the result of inducement or compulsion on the part of the police.

Applying what I consider to be safe rules to the confession of the appellant Nga Pyu, I cannot but believe that that confession is true in so far as he admitted that he was one of the gang of dacoits who committed the two dacoities in respect of which he and his fellow-accused were convicted.

According to the police final report he was arrested on the 20th January: his confession was recorded by the 1st class Magistrate on the 23rd January. The record of it in Burmese covers eight sheets and a page of foolscap paper. He described in minute detail events leading up to the gathering of the gang, events which happened when a portion of the gang had gathered, events which happened when they were on their way to the village intended to be dacoited, and the actual occurrences at the dacoities. The main detals which he gave of the latter are in accord with details given (1) by the people who lived in the dacoited house, (2) in the confessions of some of his co-accused, (3) in the evidence of the accomplice, and (4) in the evidence of other witnesses.

His reference to some of the gang having, when on the way, saved from drowning two people whose boat had capsized is especially noticeable. This fact, which had nothing to do with the dacoity, is confirmed by evidence for the prosecution which there is no reason to suspect.

A stranger to the various occurrences spoken to in the confession could scarcely have learnt of the events so fully as to be able to give such a long account of them, which in detail fitted in with the evidence of separate sets of witnesses living at different places, and unknown to one another, and also fitted in with the confessions of other men who admitted being present at the occurrences. The appellant when he retracted his confession represented that he was a stranger to those occurrences, and that he had said what he did say because he had been beaten by the Head Constable. This implied that he had been tutored by the police. Only one Head Constable appears in the case, and he said that he did not come across the appellant until the day before his confession was made to the Magistrate.

It appears to me to be almost impossibe that any policeman could have tutored the appellant in 24 hours, or even in the three days during which he was in custody before he made his confession, so well and to such an extent that he, an ordinary cultivator, was able to repeat a long story of events of which he, according to his later statement, knew nothing except from tutoring. The story as given in his confession was in fact one which no one but an actor and participator in the events spoken to could have detailed without making statements at variance with facts either proved by evidence, or spoken to

1902.

CHIT TUN v. CROWN.

by admitted participators. For these reasons there is no doubt in my mind that Nga Pyu's confession of guilt on his own part was true.

The other question as to whether it was voluntary remains to be considered. The record of it shows that he stated before the Magistrate that he had come before him to make a voluntary statement; therefore *primâ facie* it must be taken that what he stated at the time was true.

No doubt neither that statement nor the record of the Magistrate's belief that the confession had been voluntarily made is conclusive proof that it was so made, but, having made the admission that it was so made, it lay upon the accused to adduce if not actual evidence at least some well-founded and probable reason for the Court's coming to the conclusion that what he admitted was not in reality the fact.

He alleged that he had been beaten by the Head Constable in the headman's house, yet he did not ask the Head Constable or the headman who were called as witnesses any questions about the alleged ill-treatment, and he could not name any other Head Constable who had ill-treated him.

There could have been no signs of the beating on him when he was brought before the 1st class Magistrate. He said he did not mention anything about the beating to that Magistrate because he was still afraid of the Head Constable. The reason appears to me to be altogether inadequate explanation of his admission that he confessed voluntarily.

No doubt when an accused against whom there afterwards turns out to be very little evidence confesses, one is inclined to ask oneself why he should have confessed. The answer is often a difficult one, for the real reason lies possibly in the mind of the confessing man alone.

The following remarks of a learned English Judge are often quoted: "For my part I always suspect these confessions which are supposed "to be the offspring of penitence and remorse, and which nevertheless "are repudiated by the prisoner at the trial. It is remarkable that it is "of very rare occurrence for evidence of a confession to be given when "the proof of the prisoner's guilt is otherwise clear and satisfactory, "but when it is not clear and satisfactory the prisoner is not infrequently "alleged to have been seized with desire born of penitence and remorse "to supplement it with a confession, a desire which vanishes as soon as "he appears in a court of justice."

It must be remembered, however, that confessions are not necessarily the outcome of repentance: self-interest is a very powerful spring of human action, and the hope of obtaining less severe punishment may operate strongly towards inducing a criminal to confess.

Moreover, uncivilized cultivators are not likely to be aware of the cautious measures which the law prescribes before any man can be deprived of his liberty when he does not admit his guilt, and it is not improbable that such a person when under arrest may think that his fate is certain, and that the only hope for him lies in either obtaining pardon or a less severe punishment by confessing and implicating his fellow criminals.

1902.

CHIT TUN v. CROWN.

However this may be, Courts cannot hold that a confession which the confessing man has stated was voluntarily made was not so made without some substantial ground for so holding. I find no such grounds in the case of the appellant Nga Pyu, and, in my opinion, his confession alone justified his conviction.

I will add that I concur with the learned Chief Judge in thinking that the District Magistrate should have made inquiry into the accused's allegation that he had been beaten by the Head Constable however unfounded that allegation appeared to be. If an allegation of ill-treatment has been made against a police officer, it is only jus that he should be given an opportunity of disproving it.

In *Padan Byu* v. *Queen-Empress* (1) the Judicial Commissioner, Lower Burma, forcibly pointed out the possible results of not making such inquiry.

I would say further that inquiries into how confessions came to be made should in my opinion be full and exhaustive, for although ignorant uneducated men who have no legal assistance in their defence may at first assign manifestly false reasons for their having confessed, it sometimes happens that the real occurrences leading up to the confessions, and the real reasons for them are disclosed during the course of the close inquiry and it is then for the Court to consider whether such occurrences affect the admissibility of the confessions as evidence.

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

Civil First Appeal No. 23 of 1902. June 13th, 1902.

MAUNG CHIT U *v.* OFFICIAL ASSIGNEE.

Mr. *Villa*—for appellant.

Final discharge—Postponement of hearing—Maintenance—Practice—Indian Insolvency Act, 1848, ss. 36, 37, 47, 59, 60.

The benefits of the "Act for the relief of insolvent debtors in India" are intended for persons who place such property as they have in the hands of the Court with the object of such property being collected and distributed amongst the insolvent's creditors. The whole object of the Act implies that the insolvent must render every assistance in his power to enable the Court and its officer, the Official Assignee, to realize the property.

Where, therefore, the applicant merely informs the Court in his schedule that he has certain debts owing to him but does nothing more,

Held,—that the Court is justified in adjourning the hearing of the petition until the applicant has taken the steps which it is his duty to take before the benefits of the Act can be extended to him.

The Act contemplates, and as a fact the vesting order vests in the Official Assignee, not only all the property which the insolvent possesses or is entitled to at the time the order is made, but also all property which he may thereafter become entitled to until he obtains a certificate of final discharge either, under section 59 or 60 of the Act. Consequently, as an effect of the vesting order, the Official Assignee is entitled to receive the whole of the salary which the insolvent was at the time earning or might thereafter earn, until he obtains the certificate of final

(1) S. J., L.B., 423.

1902.

MAUNG CHIT U v. OFFICIAL ASSIGNEE.

discharge. The Court is, however, empowered by section 47 of the Act to direct that the Official Assignee shall make a reasonable allowance for maintenance of the insolvent until final order.

Where, therefore, the Court ordered the applicant to pay a certain sum per mensem out of his salary towards payment of his debts to the Official Assignee.

Held,—that such an order, while not strictly covered by any section of the Act, was in conformity with the practice of the late Court of the Recorder of Rangoon and of the High Court, Calcutta, and in effect carried out the provisions of section 47 of the Act.

Fox, J.—The appellant applied for the benefit of the Act for the relief of insolvent debtors in India on the 23rd of January last. The 3rd March was fixed as the day for hearing of the matters of the petition under section 35 of the Act. In the meantime he obtained an *ad interim* protection order. On the day of hearing none of his creditors appeared. The learned Judge, however, examined the applicant as to his petition and schedule and generally. This is a course contemplated by the Act. He found that the applicant had not been to the Official Assignee to give any information regarding the debts entered in the schedule as due to the applicant. He adjourned the hearing for six months and ordered the petitioner to pay Rs. 30 per mensem from his pay to the Official Assignee.

The petitioner appeals on the following grounds:—

(1) That the order of the learned Judge is bad in law, inasmuch as no grounds whatever were shown why the appellant's personal discharge was postponed.

(2) That the order of the learned Judge ordering the insolvent to pay Rs. 30 a month to the Official Assignee is bad in law, inasmuch as the salary of Rs. 70 which the insolvent is in receipt of is barely sufficient to support himself and his family.

(3) That the learned Judge erred in withholding the appellant's personal discharge, inasmuch as none of the creditors had availed themselves of the opportunity of opposing his discharge.

The first and third grounds of appeal may be considered together.

The contention before us has been that, as no grounds covered by section 50 and section 51 of the Act appeared on the proceedings, the appellant was entitled to an order for his personal discharge.

There is no foundation in the Act for such a contention. Section 50 of the Act contains provisions enabling the Court to award a term of imprisonment for certain acts proved against an insolvent. Section 51 of the Act enables the Court, when certain other acts on the part of the insolvent are proved, to adjudge that the insolvent shall be personally discharged from all his debts inserted in his schedule or established in the Court, excepting as to any debts, &c., to be specially mentioned in the order; and as to such debts, &c., to adjudge that the insolvent shall be so discharged as soon as he shall have been in custody at the suit of his creditor or creditors in respect of such excepted debts for such period or periods not exceeding two years in the whole

as the Court directs. These sections are penal sections: both contain provisions for adjourning the personal discharge, but there is nothing in them to limit the powers of the Court under the 36th and 47th sections, which enable the Court to adjourn the hearing of the insolvent's petition to a future day. This is what the learned Judge did in this case, and I fail to see how it can be said that he did not exercise a sound and judicial discretion in so doing.

The appellant came to the Court asking for certain benefits: it was for him to satisfy the Court, whether his creditors opposed him or not, that he was a person to whom those benefits should be extended, and it was for the Court itself to see that such benefits were not extended to a person who did not deserve them.

The benefits are intended for persons who place such property as they have in the hands of the Court with the object of such property being collected and distributed amongst the insolvent's creditors. The whole object of the Act implies that the insolvent must render every assistance in his power to enable the Court and its officer, the Official Assignee, to realize the property.

To extend the benefits of the Act to a person who merely informs the Court in his schedule that he has certain debts owing to him, but does nothing more, would be an abuse of the powers of the Court and contrary to the intention and scheme of this Act and of every other Act regarding bankrupts.

I think the learned Judge was quite right in the course he adopted in adjourning the hearing of the petition until the insolvent had taken steps which it was his duty to take before the benefits of the Act could properly be extended to him.

Regarding the order for the payment of Rs. 30 per memsem out of the insolvent's salary towards payment of his debts, I would say that such an order may not strictly be covered by any section in the Act. The Act, however, contemplates, and as a fact the vesting order vests in the Official Assignee, not only all the property which the insolvent possesses or is entitled to at the time the order is made, but also all property which he may thereafter become entitled to until he obtains a certificate of final discharge either under section 59 or section 60 of the Act. Consequently, as an effect of the vesting order the Official Assignee is entitled to receive the whole of the salary which the insolvent is now or may hereafter earn until, in this insolvent's case, he obtains a certificate under section 59 of the Act, after the property realized has been sufficient to pay one-third of his debts or a majority in number and value of his creditors have consented to his receiving the certificate.

The Court is, however, empowered by section 47 of the Act to direct that the Assignee shall make a reasonable allowance for maintenance of the insolvent until final order.

I believe it has been the practice of the late Recorder's Court and also of the High Court, Calcutta, to carry out the effect of the section in regard to maintenance by such an order as the learned Judge made in this case, and that the restriction of such maintenance to five

1902.

MAUNG CHIT U v. OFFICIAL ASSIGNEE.

Company's rupees per week as expressed in the section has been regarded as obsolete, possibly owing to their not being any such coin current at the present time.

The objection to the order of the learned Judge is in essence an objection to the form of the order only: if it were set aside the insolvent would, under the vesting order, be bound to hand over the whole of his salary to the Official Assignee monthly. It may be taken that he does not desire such a result of his objection being allowed. I would dismiss the appeal.

Thirkell White, C. J.—I concur.

Special Civil Second Appeal No. 246 of 1901. June 19th, 1902.

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

MAUNG TUN WA *v.* MAUNG THA KADO.

Ah Yain—for appellant (plaintiff). | Mr. *Hamlyn*—for respondent (defendant).

Contract—Specific performance—Power to add parties—Plaint, Amendment of—Practice—Court of First Instance—Appellate Court—Civil Procedure Code, ss. 32, 33, 50 (d), 582—Specific Relief Act, s. 27 (b).

A claim for specific performance of a contract for sale of land may be enforced not only against the vendor but, under certain circumstances mentioned in section 27 (*b*) of the Specific Relief Act, against a subsequent purchaser also.

It is open to a Court to make the subsequent purchaser a party to the suit under section 32 of the Civil procedure Code, upon which, under sections 33 and 50 (*d*), any necessary amendment of the plaint in consequence of his being added would be obligatory.

The general rule as to parties is that all persons having an interest in the object of the suit, and in whose absence the subject-matter of the suit cannot be fully investigated and disposed of, ought to be made parties, so that the questions raised in it shall not be raised again between the parties to the suit or any of them, and third parties.

An Appellate Court has power, under sections 582 and 32 of the Code, to order that a party shall be added to a suit.

When an Appellate Court is of opinion that a person not a party to the suit should be made a party, the proper course is to remand the case to the Court of First Instance, and to direct that Court to bring on the particular person as a defendant or as a plaintiff (if he consents); give him time to file his written statement and opportunity to produce his evidence, and try the issues raised between him and the opposite side.

Vydianadayyan v. *Sitaramayyan*, (1882) I. L. R. 5 Mad., 52; *Vasudev* v. *Salubai*, (1886) I. L. R. 10 Bom., 227; *Mihin Lal* v. *Imtiaz Ali*, (1896) I. L. R. 18 All., 332; followed.

THE case was referred by Mr. Justice Irwin to the Bench in the following terms:—

Plaintiff-appellant on 7th *Tagu* agreed to buy certain land from defendant-respondent for Rs. 350 and paid Rs. 50, and promised to pay the balance on the 8th. He did not pay on the 8th but went to pay on the 10th, when respondent informed him that he had sold the land to Maung Thaw Ka, and that the earnest-money, Rs. 50, was forfeitep But in point of fact defendant did not sell the land to Thaw Ka

1902.

MAUNG TUN WA v. MAUNG THA KADO.

until 11th. These are the admitted facts. The original Court found, as a fact, that plaintiff had not agreed on the 7th that the earnest-money would be forfeited if he did not pay on the 8th, and I think that finding is correct. The Lower Appellate Court has not given any convincing reasons for finding otherwise. As defendant had not yet sold the land to any body else when plaintiff came to pay the balance of the purchase-money, it would be merely putting a premium on chicanery to permit him then to cancel the contract and retain the earnest-money. I would therefore set aside the decree of the Lower Appellate Court.

But the plaint seems to be defective on the face of it, because it is not evident how the defendant-respondent can possibly comply with the decree of the original Court, the land not being now in his possession or power. The plaintiff might have sued for damages for breach of contract or for refund of the earnest-money, but he has not done so. It seems to me that the agreement to sell cannot be enforced without making Maung Thaw Ka a party to the suit.

I therefore refer to a Bench the following questions:—

(1) Ought the original decree for specific performance to be restored, having regard to the fact that the land is not now in the power or possession of the defendant?

(2) Ought the plaint to be amended and the second purchaser, Maung Thaw Ka, made a party to the suit now?

Fox, J.—Counsel for the plaintiff has not contended that the decree of the original Court against the vendor should be restored upon the state of facts set out in the reference order. I agree with him because a decree ordering such vendor to specifically perform a contract of sale with the plaintiff would order him to do what it is out of his power to do in full if he has already sold and delivered the subject-matter of the sale to another party.

Counsel, however, has stated that he is instructed that the land is still in the possession of the vendor, and has asked that the case be remanded for trial of an issue as to who is in possession. With that this Bench is not the proper tribunal to deal.

I will treat the second question referred as if it were "Has this Court in appeal power to direct that Maung Thaw Ka, the second purchaser, should now be made a party to the suit, and to direct that the plaint should be amended?" because the answer to the question as it is put in the reference appears to me might involve consideration of the whole case, and the exercise of a discretion which is solely within the province of the Judge dealing with the appeal.

The plaintiff's claim being for the specific performance of a contract for sale of land, section 27 (*b*) of the Specific Relief Act makes it clear that such claim might be enforced not only against the vendor, but under certain circumstances against the second or subsequent purchaser also; therefore, on a properly framed plaint containing the necessary allegations against both parties, and on those allegations being made out, there would have been no objection to the Court

1902:

MAUNG TUN WA v. MAUNG THA KADO.

ordering specific performance of the contract as against both defendants, and ordering each defendant to do such acts as might be within his power to do to convey the land to the plaintiff and to put him in possession of it.

It would certainly have been open to the original Court to have made the subsequent purchaser a party to the suit under section 32 of the Code, upon which, under section 33, any necessary amendment in consequence of his being added would have been obligatory unless the Court otherwise directed. In the present case amendment would have been necessary as a matter of course, for the necessary allegations to support the claim as against the subsequent purchaser would have had to have been set out as required by section 50 (*d*) of the Code.

I cannot conceive how the introduction of such allegations as against the subsequent purchaser would have infringed upon the provisions of the proviso to section 53, which forbid any amendment which converts a suit of one character into a suit of another and inconsistent character. The suit would have remained a suit for the specific performance of a contract; the only change made would have been that it became a suit against two persons against whom the law permits such a suit to be brought instead of having been against one such person.

The original Court, it appears to me, would have exercised a wise discretion in making the subsequent purchaser a party, because the general rule as to parties is that all persons having an interest in the object of the suit, and in whose absence the subject-matter of the suit cannot be fully investigated and disposed of, ought to be made parties, so that questions raised in it shall not be raised again between the parties to the suit, or any of them, and third parties—*Vydianadayyan* v. *Sataramayyan* (1).

As to the power of an Appellate Court to order that a party shall be added to a suit, the learned Judges who decided the case of *Vasudev* v. *Salubai* (2) did not question that the Court had such power under section 582 and section 32 of the Code.

In *Mihin Lal* v. *Imtiaz Ali* (3) the learned Judges point out what the proper course to be adopted is when an Appellate Court is of opinion that a person not a party to the suit should be made a party, and say that that course is to remand the case to the Court of First Instance, and to direct that Court to bring on the particular person as a defendant or as a plaintiff if he consents; give him time to file his written statement and opportunity to produce his evidence, and try the issues raised between him and the opposite side.

I would answer the second question referred to the Bench by saying that this Court has power to order that Maung Thaw Ka be added as a party to the suit, and that the plaint be amended.

Thirkell White, C. J.—I concur.

(1) (1882) I. L. R. 5 Mad., 52. (2) (1886) I. L. R. 10 Bom., 227.
(3) (1896) I. L. R. 18 All., 332.

Before Mr. Justice Fox.

Civil Regular Appeal No. 76 of 1902. June 20th, 1902.

MA SHWE YU AND EIGHT OTHERS v. K. K. N. K. RAMEN CHETTY.

Mr. *Hla Baw*—for appellants (defendants). | Messrs. *Eddis, Connell* and *Lentaigne*—for respondent (plaintiff).

Promissory Note—Addition of names—Material alteration—Negotiable Instruments Act, s. 87.

To certain promissory notes which ran as follows:—"We the undersigned U Thein and his wife Ma Waing * * * on demand * * * jointly and severally promise, &c., &c.," and which were executed by U Thein and Ma Waing, the signature of Ko Po Tu and the cross mark of Ma Pu were added on a date subsequent to the dates of execution of the notes.

Held,—that the addition of the names of Ko Po Tu and Ma Pu to the notes was not a material alteration of them. By the bodies of the notes U Thein and Ma Waing were the only promisors and, according to the terms of those bodies, no one else could be a promisor unless his name was also added in the bodies of the notes, and the addition of Ko Po Tu's and Ma Pu's names had no effect as regards making them liable. *U Pa* v. *Ma Myaing*, P. J., L. B., 343, distinguished.

The first eight appellants were sued as legal representatives of their father U Thein, and the ninth appellant, Ma Waing, was sued as another of such representatives, and also personally upon three promissory notes executed originally by U Thein and Ma Waing. The body of each note is in the Tamil language, partly printed and partly written. The wording was practically identical in all; the translation of it runs as follows:—

"We the undersigined U Thein and his wife, Ma Waing, Burmese, * * * by reason of having borrowed cash from Nattukotai K. K. N. K. Ramen Chattiar Avergal owe rupees * * * These rupees * * * together with interest thereon at Rs. * * * per cent. per mensem on demand we jointly and severally promise to pay both principal and interest to the said K. K. N. K. Ramen Chettiar Avergal or to his order—so consenting to pay we put our signatures hereunder."

Underneath the body in each case is a note or memorandum written in Burmese, the translation of which is as follows —

"Amount borrowed by U Thein and Ma Waing residing at Theingyaung village, Hmawbi township, on the (date of note) Rs. * * * interest at Rs. * * * per cent. per month.

Uppermost across the stamp is a signature "U Thein," then under that the words "Ma Waing" and a cross mark; next underneath is a signature "Ko Po Tu" and in a line with that, but to the left of it, are the words "5th waxing of *Tazaungmon*;" underneath the stamp are the words "Ma Pu" and cross mark. The dates of the notes were the 6th waxing of *Tagoo* 1261, the 9th waxing of *Tawthalin* 1262 and the 1st waning of *Tawthalin* 1262. On one note, opposite the signature "Ko Po Tu," the year 1262 is written.

It is common ground that Ko Po Tu wrote not only his own name but also that of Ma Pu, and put a cross mark against her name two or three days after the death of U Thein in *Tazaungmon* 1262. Ko Po Tu said he did so under threats that the corpse of his father would be attached by the plaintiff Chetty's agent if he did not do so. In another part of his evidence, however, he said that he signed the notes because

1902.

MA SHWE YU v. K. K. N. K. RAMEN CHETTY.

he promised to pay the money due on them, and he so promised because, at the time, he thought it was his duty to pay his father's debts.

The Chetty plaintiff said that Ko Po Tu and Ma Pu signed of their own accord. It may be noted that these two defendants were not sued personally: a personal decree, however, has been given against all the defendants.

The chief contention in appeal has been that the Chetty plaintiff could not recover against any of the defendants by reason of the notes having been materially altered by the addition of the signatures of Ko Po Tu and Ma Pu after the notes had been issued.

Gardner v. *Walsh* (1) which was followed in *U Pa* v. *Ma Myaing* (2) is relied on as authority for the proposition that any addition of a name to a promissory note after it had been made and issued constitutes a material alteration of the note which vitiates it, unless, as provided by section 87 of the Negotiable Instruments Act, the addition was made with the consent of the parties to the note at the time the alteration was made, and unless it was made in order to carry out the common intention of the original parties.

The decision in *Gardner* v. *Walsh*, if closely examined, does not go so far as to support such proposition. The exact terms of the note in that case are not given in the report of the case, but the plea was that the note at the time when it was first made was intended by the defendant Walsh to be, and was in fact, made by him and the defendant Barton only, but it had been altered without Walsh's consent after it had been completely issued and negotiated by the addition of another person's signature as maker.

It is clear from the report that on the face of the note the 3rd person, Clarke, became liable as a maker of the note. It must then have been in form somewhat as follows:—"We the undersigned "jointly and severally promise to pay to R. C. Gardner the sum of "* * *": so that any one who signed beneath the signatures for the original makers would, on the face of the note, appear to be also a maker.

Gardner v. *Walsh* came under review in *Aldous* v. *Cornwell* (3) and in that case the learned Judges said: "We are certainly not disposed to lay down as a rule of law that the addition of words which "cannot prejudice any one, destroys the validity of the note."

The alteration in the note in that case had been by the addition of the words "on demand" to the words "I promise to pay to Mr. Edward Aldous the sum of £125."

As to this their Lordships say: "It seems to us repugnant to justice "and common sense to hold that the maker of a promissory note is "discharged from his obligation to pay it, because the holder has put "in writing on the note what the law would have supplied if the words "had not been written."

(1) (1856) 5 E. and B., 83. (2) P. J., L. B., 343.
(3) (1867—8) L. R., 3 Q. B., 573.

1902.

MA SHWE YU v. K.K.N.K. RAMEN CHETTY.

They say further that in *Gardner* v. *Walsh* the Court overruled the decision in *Catton* v. *Simpson* (1) not on the ground that an immaterial alteration vacated the instrument, but on the ground that the alteration was a material one.

Applying the remarks quoted above to the present case, I fail to see how the addition of Ko Po Tu's and Ma Pu's names to the notes in the present case can be held to be a material alteration of them, for by the bodies of the notes U Thein and Ma Waing were the only promisors, and, according to the terms of those bodies, no one else could be promisor unless his name was also added in the bodies of the notes. If that had been done, no doubt *Gardner and Walsh* would have applied, but on the ground that the addition of Ko Po Tu's and Ma Pu's names had no effect as regards making them liable, I hold that the plaintiff could recover on the notes from the persons liable thereon. These were the representatives of U Thein and Ma Waing personally. The appeal then fails on the main ground, but the decree must be modified, as it orders all the defendants personally to pay the amount due. The decree of this Court will order all the defendants as legal representatives of U Thein, deceased, to pay to the plaintiff (Rs. 771-8-0) rupees seven hundred and seventy-one and annas eight only, and the costs of the suit out of the property of the deceased U Thein which has come to their possession respectively, and will order the defendant Ma Waing personally to pay the said sum and costs to the plaintiff.

Ma Waing personally and all the defendants as such legal representatives will be similarly ordered to pay to the plaintiff his costs on this appeal.

Before Mr. Justice Fox.

Civil Second Appeal No. 260 of 1901. June 20th, 1902.

VERAPPA UDIAN AND ANOTHER v. MA ZAN AND OTHERS.

Mr. *Connell*—for appellants. | Messrs. *Agabeg* and *Chan Toon*—for respondents.

Sale—Mortgage—Contract to re-sell—Specific performance—Specific Relief Act, s. 23, clause (b).

Where land is sold with an agreement to re-purchase the same within a certain number of years,

Held,—that such agreement does not operate to constitute a mortgage of such land.

Although such agreement may not contain an express reservation of the right of re-purchase to the vendor's heirs, yet in the case of the vendor's death his representatives in interest can claim specific performance of the contract to re-sell under section 23, clause (*b*), of the Specific Relief Act.

Situl Purshad v. *Luchmi Purshad*, (1884) I. L. R. 10 Cal., 30, distinguished.

The plaintiffs in the case sued as representatives of Maung Shwe Hmôn, deceased, for a re-conveyance to them of certain lands upon payment by them of Rs. 1,300.

(1) (1838) 8 A. and E., 136.

1902.

VERAPPA UDIAN v. MA ZAN.

Maung Shwe Hmôn had sold the land to the defendants, but they had executed a registered document containing words which the Judge of the Subdivisional Court translates as follows :—

"We two husband and wife (the defendant), bought for Rs. 1,300 a paddy-land situated in Kamakyan *kwin*, Mukya circle, belonging to Maung Shwe Hmôn and measuring acres 44·95 under a conveyance dated the 7th waning of *Tagu* 1256. We undertake to resell it to the original owner for the same price on the expiration of six years from date of execution of the agreement, should he want to re-purchase it."

I agree with the learned Counsel for the appellant that the document evidences a sale with an agreement to re-purchase, and that it did not operate to constitute a mortgage of the land.

Maung Shwe Hmôn died within the six years. The defendants contend that the right to re-purchase was confined to Maung Shwe Hmôn personally, and rely on the decision in *Situl Purshad* v. *Luchmi Purshad*. (1)

In that case, however, the claim to a re-conveyance was not made by the heirs or legal representatives of the original seller, but by a stranger who had purchased an interest in part of the estate, and who claimed also as a decree-holder who had attached another part. Their Lordships of the Privy Council held that such stranger had no right to enforce a re-sale.

That case, however, is no authority for holding that the heirs and legal representatives of the original seller could have no right to enforce a re-sale. The question did not and could not arise in the case, because the right to re-purchase was expressly reserved to the seller and his heirs.

In the present case there is no express reservation of the right to the heirs of Maung Shwe Hmôn, and the question is whether without it his heirs and legal representatives had the right which he would have had if he had lived up to and beyond the six years mentioned in the document.

The matter must be judged entirely by the terms of the document and the law applicable, without consideration of the oral evidence by which it was attempted to show that the right to re-purchase was intended to be confined to Maung Shwe Hmon personally. Although the plaint contained quite unnecessary allegations as to the intention of the parties to treat the transaction as a mortgage, what the plaintiff sued for was in reality specific performance of the contract to re-sell, and the relief which they claimed was such as they would obtain under a decree for specific performance.

Section 23 of the Specific Relief Act provides for those who may obtain a decree for specific perfomance, and clause (*b*) of the section meets the present case: the plaintiffs are the representatives in interest of Maung Shwe Hmon, and none of the circumstances mentioned in the provisos exist in the case.

The suit was brought well within the time allowed by Article 113 of the second schedule to the Limitation Act for bringing a suit for specific performance, and there has been no such delay on the part of the plaintiffs as would make it inequitable that their right to obtain the land back should be enforced.

The appeal is dismissed with costs.

(1) (1884) I. L. R. 10 Cal., 30.

Before Mr. Justice Irwin.

CROWN *v.* SAN PE.

Criminal Revision No. 741 of 1902: June 20th.

Death caused by act criminal in itself—Indian Penal Code, section 304A.

When death is caused by an act which is criminal in itself irrespective of its consequences, the degree of guilt of the offender depends on the intention or knowledge with which he did the act, and the sections under which he may be convicted are 302, 304, 325, 323 and 352, with variations on account of the weapon or means used, the provocation, and so forth. Sections 304A, 338, 337 and 336 apply only to acts done without any criminal intent.—*Empress* v. *Ketabdi Mundal*, (1879) I. L. R. 4 Cal., 764, followed.

Nga San Pe, a boy of 11 years of age, hit Nga Po Kin, a boy of 14, on the head with a stick. Po Kin subsequently died from the effects of the blow. The words of the judgment are—

"Accused San Pe being provoked by the blow he had received at his calf, gave two hits to deceased in return. The first one hit deceased's head, and the second one on the hips as he stooped down."

There were no external marks of injury, but a large clot of blood was found on the surface of the brain under the skull. The Magistrate found that "death was due to the injury of the brain, the result of the blow on the head." His conclusion is as follows:—

"From the facts disclosed above, the offence surely does not come under section 302 or 304, I. P. C., as there was clearly no intention of causing death nor intention of causing such bodily injury as is likely to cause death, nor with the knowledge that he is likely by such act to cause death, on the part of the accused. It was simply rashness or negligent act which caused the death of deceased Nga Po Kin."

San Pe was convicted under section 304A and sentenced to whipping.

The finding that the act of San Pe did not amount to culpable homicide is apparently correct, but the further finding that death was caused by a rash or negligent act is not at all correct. Section 304A does not apply to any act done with the intention of causing hurt. The following is an extract from a judgment of the High Court of Calcutta in the case of *Empress* v. *Ketabdi Mundal* (1).

"Section 304A of the Penal Code does not apply to a case in which there has been the voluntary commission of an offence against the person. If a man intentionally commits such an offence and consequences beyond his immediate purpose result, it is for the Court determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness, because its consequences have been unfortunate. Acts probably or possibly involving danger to others, but which in themselves are not offences, may be offences, under section 336, 337, 338 or 304A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves, must be judged with regard to the knowledge or means of knowledge of the offender, and placed in their appropriate place in the class of offences of the same character."

In the present case the accused obviously struck Po Kin with the intention of causing hurt to him, and he ought to have been convictee of voluntarily causing hurt. The hurt actually caused was grievousd

(1) (1879) I. L. R. 4 Cal., 764.

1902.

CROWN v. SAN PE.

and if, on considering the weight of the stick and other facts in evidence, it could be reasonably inferred that accused knew that by striking the blow he was likely to cause grievous hurt, he ought to have been convicted of voluntarily causing grievous hurt.

To sum up, when death is caused by an act which is criminal in itself irrespective of its consequences, the degree of guilt of the offender depends on the intention or knowledge with which he did the act, and the sections under which he may be convicted are 302, 304, 325, 323 and 352, with variations on account of the weapon or means used, the provocation and so forth, but section 304A does not come into the list at all, and sections 304A, 338, 337 and 336 apply only to acts done without any criminal intent.

As a rule a Subordinate Magistrate ought not to try any case in which death is caused without first obtaining the orders of the District Magistrate to do so. When there is any doubt whether the intention or knowledge of the accused was such that the offence would be culpable homicide the case should not be tried by any Magistrate, but should be committed to the Court of Session.

In the present case the punishment is suitable, and has been suffered. It is therefore not necessary to pass any further orders.

Special Civil Second Appeal No. 262 of 1901. June 20th, 1902.

Before Mr. Justice Irwin.

MAUNG CHEIK *v.* MAUNG THA HMAT.

Mr. *Kastgir*—for appellant (defendant). | *Maung Thin*—for respondent (plaintiff).

"Pyatpaing"—Certificate of report of transfer of interest in a revenue holding—Revenue Register IX, foil and counterfoil.

The counterfoil of Revenue Register IX is a report of a fact affecting an agricultural holding and should be signed by the owner of the land. When so signed it is admissible in evidence. The foil, commonly known as the *pyatpaing*, is merely a certificate, signed by the thugyi, that such report has been made. It is not usually signed by the owner of the land, and is then not admissible in evidence to prove the report.

THE plaintiff respondent sued for redemption of 7·78 acres of paddy-land, which he alleged that he had mortgaged orally to defendant (appellant) for Rs. 65 in *Tagu* 1257. Appellant pleaded that the land was not mortgaged, but was sold to him outright for Rs. 65 on 17th February 1897. This date was 1st waning *Tabodwè* 1258.

The Court of First Instance found that the transaction was a sale and dismissed the suit. The District Court on appeal reversed the decree and gave a decree for redemption.

The judgment of the Township Court is based chiefly on the evidence of the *taiksaye*, Maung Pyu, who says the parties came and reported an outright sale of the land, which he (Maung Pyu) then and there entered in Register IX. The *pyatpaing* was produced by defendant. It is dated 17th February 1897 and purports to be signed by the thugyi.

1902.

MAUNG CHEIK
v.
MAUNG THA HMAT,

The Additional Judge of the District Court did not believe the *pyatpaing* to be genuine because it purports to bear the signature of the thugyi, who was not present when the report was made to the *taiksaye*, and because the purchase-money is entered as Rs. 66, instead of Rs. 65. For this reason, and because the land is still entered in plaintiff's name in the revenue register, he gave a decree for redemption.

Both the Judges failed to notice that Maung Pyu said the transaction took place on 17th May 1897. The *pyatpaing* is dated the 17th February 1897, and the *taiksaye* evidently took his date from this, but mistook the figure "2" for "5." The date in the written statement, being an English date, is obviously taken from the *pyatpaing*. Nobody seems to have noticed the fact that it is 11 months later than the date of mortgage alleged by the plaintiff. The witnesses ought to have been cross-examined about this.

I think the *pyatpaing* was rightly regarded with suspicion, as it is admitted that the thugyi was not present when it was written, and the thugyi was not examined at all. Apart from this the *pyatpaing* is not admissible in evidence to prove the report. It is merely a statement in writing made by the thugyi that a report of sale had been made to him by the parties. It is not direct evidence that a report had been made. It can only prove that the thugyi stated that a report had been made, and the fact that the thugyi made such a statement out of Court is not admissible. The counterfoil of Register IX ought to be signed by the parties or at least by the seller. If so signed it is itself the report, and is admissible in evidence.

But the weakness of the defence is not a sufficient reason for giving plaintiff a decree. Defendant was in possession, and the burden of proving that the transaction was a mortgage and not a sale lay on plaintiff. This is clearly laid down in *Maung Shwe Tha* v. *Maung Thu Daw* (1) and elsewhere. The fact that defendant's name had not been entered in the revenue register is not, I think, of much force, for mutation is often not effected when it ought to be effected.

The evidence of the oral mortgage is very weak. The only corroboration of plaintiff's statement is the statement of his brother-in-law Maung Po, who is contradicted by the *taiksaye*.

Plaintiff says Maung Ni and Tha Dun Pyu were present when defendant admitted, in 1259, his right to redeem. Nga Ni says this occurred in 1259; Tha Dun Pyu says about two years ago, which would be about *Wazo* 1261.

I find that plaintiff (respondent) has not proved the mortgage. I therefore reverse the decree of the District Court and restore that of the Township Court, with costs in all Courts.

(1) P. J., L. B., 461.

Criminal Revision No 738 of 1902. June 26th.

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

CROWN *v.* WET TAUNG.

Security to keep the peace on conviction—Insult—Criminal Procedure Code, s. 106—Indian Penal Code, s. 504.

The conviction of an accused of an offence punisbable under section 504 of the Indian Penal Code does not render him liable to be put on security under section 106 Code of Criminal Procedure.

Thirkell White, C. J.—The accused was convicted of insulting Mi Hnya, intending or knowing it to be likely that he would thereby cause Mi Hnya to break the public peace. The Magistrate fined him for the offence and, under section 106, Code of Criminal Procedure, ordered him to furnish security to keep the peace for one year. The question for consideration is whether the order under section 106, Code of Criminal Procedure, is justifiable. That section enables certain Magistrates to order an accused to furnish security to keep the peace on conviction of rioting, assault, or other offence involving a breach of the peace, or of abetting the same, or of commiting criminal intimidation. Other offences are specified in the section, but they need not be referred to. The only question is whether the offence punishable under section 504, Indian Penal Code, is an offence involving a breach of the peace. There seems to be no ruling on the point. But I think there can be no doubt that the offence under section 504, Indian Penal Code, does not come within the scope of section 106, Code of Criminal Procedure. That offence may, but does not necessarily involve a breach of the peace. And even if a breach if the peace occurs, it is not the person accused under section 504, Indian Penal Code, who is guilty of it. I think that insult, under the section quoted, is not an offence involving a breach of the peace and that conviction under section 504, Indian Penal Code, does not render the accused liable to be put on security under section 106, Code of Criminal Procedure. I would therefore set aside the order demanding security and direct that the security bond be cancelled.

Irwin, J.—I concur.

Civil Revision No. 18 of 1902. July 1st.

Before Mr. Justice Fox.

KHOO SEIN KHOO *v.* ELIAS A. MANASSEH.

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

Messrs. *Eddis, Connell* and *Lentaigne*—for respondent (plaintiff).

Contract, Breach of—Market rate, Evidence of—Damages, Computation of.

Defendants contracted to deliver "ex-hopper" from one or other of ten firms of "large millers" a quantity of "usual Straits quality" rice in "all November 1901." They failed to deliver any rice under the contract.

No rice was milled on 30th November 1901 by any of the large firms of rice-millers named in the contract. Consequently there was no market rate on that day for rice to be delivered according to the terms of the contract.

1902.

KHOO SEIN KHOO v. ELIAS A. MANASSEH.

An open auction sale of two lots of ready-milled rice, which had been milled by two of the large firms of millers, took place on the 30th November 1901. The quality of the rice was the same as that contracted for,

Held,—that the provision for delivery "ex-hopper" was merely an incident of the delivery not affecting the quality or description of the article contracted for.

Held also—that where there was no suggestion that the rice sold at the auction was not such as any willing buyer would have taken as "usual quality Straits cleaned rice" and if he had made an open contract to buy would have been bound to take under that description, the auction sale was a fair test of the general market value of the particular description of rice on the day of breach and should be taken as evidence of the market rate on that day in calculating damages.

THE suit in this case was for damages for non-delivery of "usual "Straits quality rice in all November 1901." The contract provided for delivery ex-hopper from one of the mills of ten firms of rice-millers who were referred to in the argument as the "large millers." The contract price was Rs. 227-8-0 per 100 baskets. The learned Judge has awarded damages calculated upon the difference between that rate and a rate of Rs. 247-8-0 on the ground that "if the defend-"ant had gone into the market on the 29th of November he could have "bought nothing below Rs. 247-8-0 at least, if not Rs. 250." It is not clear why he adopted this method of computation: possibly he did so in order to meet a difficulty which arose upon his ruling that the only market rate to be considered was the market-rate of Straits quality rice to be milled by the large millers. The market-rate on the day of breach is what has to be considered, and no rice to be milled on the 30th November by any large firm was on the market on that day, consequently there was and could be no market-rate on that day for rice to be delivered exactly according to the terms of the contract.

However, an open auction sale of two lots of ready-milled rice, which had been milled by two of the "large millers," took place on the 30th November. The quality of it was the same as that contracted for.

The learned Judge did not take this sale into consideration, and from his ruling upon another matter, which, as far as I can see, did not arise in the case, it may be taken that he purposely did not take the highest rate offered for this ready-milled rice into consideration. That rate, however, was the only evidence of what buyers were willing to give for rice of the quality contracted for, which was in being and could have been delivered on the 30th November. It affords as good a test as any of what a person who really wanted rice, and not a "difference," could have obtained the rice for in the market on that day.

It has been argued that to take the market price of ready-milled rice, or that of rice milled by a "small miller" into consideration in computing the damages would be taking into consideration the market-rate of rice which the plaintiff was not bound to accept. That is so, no doubt, but on the breach of any similar contract the buyer does not get exactly what he bargained for and in the way in which he contemplated getting it, yet the damages are calculated upon what he might have obtained goods of the same description for elsewhere.

1902.

KHOO SEIN KHOO v. A. MANASSEH.

In the present contract the provision for delivery ex-hopper is merely an incident of the delivery not affecting the quality or description of the article contracted for. Rice which is and can be sold as "usual Straits quality cleaned rice" is such after it comes out of the hopper as well as at the time it is actually coming out. No doubt if it were shown that any particular lot of ready-milled rice fetched a low price owing to the rice being old or damaged, such a sale would not be a fair test of the general market value of the particular description of rice on the day in question, but in the present case there was no suggestion that the rice sold at the auction was not such as any willing buyer would have taken, and if he had made an open contract to buy would have been bound to take, under the description "usual Straits quality."

The only evidence as to the market rate of "usual Straits quality cleaned rice" on the market on the 30th November showing that such rate was Rs. 220 and the contract price being Rs. 227-8-0 per 100 baskets, it follows that the plaintiff was not entitled to any compensation for the defendant's breach.

The decree of the Court of Small Causes is reversed, and the plaintiff's suit will be dismissed with costs.

The plaintiff will pay the defendant's costs of this application, two gold mohurs being allowed as Advocate's fee.

Before Mr. Justice Irwin.

Criminal Revision No. 1117 of 1902. July, 2nd.

CROWN v. THA DO HLA AND TWO OTHERS.

Attempt to cause hurt with a knife—Indian Penal Code, ss. 324, 511.

In order to constitute an attempt punishable under section 511 of the Indian Penal Code some act towards the commission of the offence must be done.

Where the accused raised his knife in a threatening manner manifesting an intention to stab, but did not actually try to stab the complainant,—*held* that the act fell short of an attempt to stab.

Empress v. Riasat Ali, (1882) I. L. R. 7 Cal., 352, followed.

THA DO HLA and Hla Baw Zan were convicted of attempting to cause hurt with a *dalwè* and a clasp knife respectively.

The evidence is recorded in very vague terms, so that it is difficult to ascertain what really were the acts which the Magistrate considered amounted to attempts to cause hurt. It is perhaps impossible to define in general terms the point where preparation to commit an offence passes into an attempt to commit, but it should be remembered that the definition in section 511 is "attempts * * * and in such attempt does any act towards the commission of the offence." The subject is treated at length in Chapter XV of Mayne's Criminal Law of India. Mr. Mayne says: "A man is not punished for an attempt which, in the language of the Code, seems to mean nothing "more than trying to commit a crime; but when he has done something "definite in pursuance of his design, he is punished, not for what he has "done but in regard to what he would have done if he had succeeded.'

(page 854). "A party may purchase a loaded gun, with the declared "intention to shoot his neighbour; but until some movement is made "to use the weapon on the person of his intended victim there is only "preparation and not an attempt" (page 853). "It was held that a "woman could not be convicted of attempt to commit suicide on proof "that she ran towards a well, saying that she would fall in to it, but "was caught before she reached it" (*ibid*). To constitute an attempt "there must be an intention to commit a particular crime, a commence-"ment of the commission, and an act done towards the commission" (page 862). In I. L. R., 7 Cal., 356, is quoted a dictum of Cockburn, C. J., that "an attempt must be to do that which, if successful, would "amount to the felony charged."

The complainant's account of the present case is that after both accused had struck him with their fists he raised an alarm. He proceeds: "On this the first accused, who was armed with the *dalwè* now "before the Court, threatened to cut me. The second accused attempt-"ed to stab me with the clasp-knife now before the Court. I struggled "with the second accused and we both fell to the ground. On this the "first accused attempted to cut me with the *dalwè* when he was arrest-"ed by Mr. Best." Witness Usman Ali uses almost exactly the same words, omitting first accused's threat. Abdool Jahar also omits the threat and adds that complainant caught hold of the second accused's hand which held the clasp knife. Mr. Best says: "I rushed out and saw "Tha Do Hla with the *dalwè* now before the Court in his hand. "Several others ran away. I am not aware if any blows were struck. " * * * Abdul Rahman (complainant) brought me the clasp-knife."

The words "attempted to cut" do not convey any clear idea to my mind. The witnesses ought to have been asked to explain exactly what sort of act constituted the attempt to cut. It is clear that Tha Do Hla did not cut at anybody after Mr. Best came in sight and as the other witnesses make it appear that it was only by Mr. Best's intervention that he was prevented from cutting complainant, the only possible conclusion is that he did not make any attempt to cut, though he may have held the *da* in a threatening attitude. It is not shown that he "did any act towards the commission of the offence of causing hurt." He did not "do an act which, if successful, would have amounted to" causing hurt.

The evidence against Hla Baw Zan is not quite of the same nature. If, as one witness says, complainant caught hold of the hand which held the knife (and this is corroborated by the fact that he got hold of the knife and gave it to Mr. Best) it is very probable that Hla Baw Zan actually stabbed at complainant, and the fact might have been clearly established if the witnesses had been properly examined. But nobody said that Hla Baw Zan stabbed at complainant. We have only the vague words "attempted to stab," the same word as that used to describe the act of Hla Baw Zan, who did not cut at complainant. If Hla Baw Zan merely raised the knife in a threatening

1902.

CROWN
v.
THA DO HLA.

manner, complainant would be right in seizing his hand without waiting for any actual attempt to be made; but to raise the knife in a threatening manner, manifesting an intention to stab, seems to just fall short of "doing that which, if successful, would amount to" stabbing. It exactly fits the definition of assault in section 351 of the Penal Code; and in my opinion the evidence does not prove that Hla Baw Zan's act amounted to anything more than assault.

I have remarked above that Tha Do Hla may have held the *dalwè* in a threatening attitude. I am not satisfied from the evidence that he did even this, or committed any assault after complainant had closed with Hla Baw Zan, but it is proved that he struck complainant in the face with his fist. This is criminal force, punishable under the same section as assault.

I therefore alter the conviction of Tha Do Hla to criminal force under section 352, and that of Hla Baw Zan to assult under section 352.

The Magistrate dealt with both under section 562 Code of Criminal Procedure, on account of "the youth, character and antecedents of the offenders, and the trivial nature of the offence." Hla Baw Zan stated his age as 16, but Tha Do Hla admitted 25, and if he had really attempted to cut complainant with the *da*, the offence would be quite the reverse of trivial. On the facts which I have found I do not think it necessary to interfere with the order, but it is not apparent why Tha Do Hla was not prosecuted under the Arms Act for going armed with a *dalwè*.

Criminal Revision No. 42 of 1902. July 6th.

Before Mr. Justice Thirkell White, Chief Judge.

CROWN *v.* PO HLAING AND FOUR OTHERS.

Cheating—Indian Penal Code, ss. 417, 420.

A person can cheat in various ways other than by inducing the person deceived to deliver any property or to do any of the acts specified in section 420 Indian Penal Code.

When a person is convicted of cheating by inducing the persons deceived to do any of the acts described in section 415 but not specified in section 420, the offence is punishable under section 417. When the person deceived is induced to do any of the acts specified in section 420, then that section must be applied, and the Court is not entitled to charge under section 417, which relates to a less serious offence.

THE accused, Mi Hnit, was convicted under section 417 Indian Penal Code of cheating and sentenced to rigorous imprisonment for two months. It appears that she cheated the complainant by selling her brass for gold, and thereby inducing her to pay Rs. 5. In these circumstances the charge and conviction should have been under section 420 Indian Penal Code.

Section 415 Indian Penal Code defines the word "cheat," and from the definition it will be seen that a person can cheat in various ways other than by inducing the person deceived to deliver any property or to do any of the other acts specified in section 420 Indian

1902.

CROWN v. PO HLAING.

Penal Code. When a person is convicted of cheating by inducing the person deceived to do any of the acts described in section 415 but not specified in section 420, Indian Penal Code, the offence is punishable under section 417 Indian Penal Code. When the person deceived is induced to do any of the acts specified in section 420, Indian Penal Code, then that section must be applied and the Court is not entitled to charge under section 417 Indian Penal Code, which relates to a less serious offence. In this case as the person deceived was induced to deliver money, which is included in the word "property," to the accused, section 420, Indian Penal Code, was the appropriate section.

Before Mr. Justice Thirkell White, Chief Judge.

Criminal Revision No. 656 of 1902. July 6th, 1902.

CROWN *v.* THADUN AND ANOTHER.

Gambling in public place—Limitation of power of police officer to arrest without warrant—Gambling Act, s. 5

An *ayatôk* reported to the police that the accused had gambled in a public place on the previous day. The officer in charge of the police-station thereupon arrested the accused without warrant.

Held,—that the procedure of the police officer was illegal.

If a police officer finds people gambling in a public place he may arrest them He has no power to arrest without warrant people who are reported to him to have so played when he himself has not come upon them in the act.

The sentence of rigorous imprisonment for a term of 25 days was excessive. An appropriate fine with an appropriate term of imprisonment in default should have been imposed.

The accused were prosecuted for playing for money in a place to which the public had access. It appears that the *ayatôk* reported to the police that the accused and others had gambled in a public place on the previous day. The officer in charge of the police-station thereupon arrested the accused and sent them up for trial. It seems necessary to point out that this procedure was quite illegal. The power of a police officer to arrest without warrant persons playing for money in a public place is limited to the occasion when the playing is within the view of the said police-officer. Section 5 of the Gambling Act is clear on this point. The meaning of the law is that if a police officer finds people gambling in a public place he may arrest them. He has no power to arrest without warrant people who are reported to him to have so played, when he himself has not come upon them in the act. This is the second time within the last few weeks that I have noticed an illegal arrest of this kind.

The sentence was unduly severe. The Magistrate should have imposed an appropriate fine with an appropriate term of imprisonment in default of payment, even though the accused may have intimated their inability to pay. If a fine had been imposed they might have found means to pay it or it might have been levied on their property. Even if imprisonment without the option of a fine was awarded, the term was, in my opinion, excessive.

Criminal Revision No. 585 of 1902. July 7th, 1902.

Before Mr. Justice Thirkell White, Chief Judge.

CROWN *v.* MI SHWE KE.

False evidence—Certified copy of deposition—Charge—Indian Penal Code, s. 193—Criminal Procedure Code, ss. 356, 357, 223, illustration (c)—Evidence Act, ss. 91, 66, clause (e), 74, 80.

In the trial of an offence under section 193 Indian Penal Code, where the false evidence is alleged to have been given in a deposition in a case in which the law requires the evidence to be taken down in writing, a certified copy of the deposition must be placed on the record. Oral evidence of the substance of the deposition is excluded.

The Court presumes certain facts concerning a document purporting to be a record of evidence. But it must purport to be signed by a Judge or Magistrate, and where the person taking the deposition omits to claim the position of a Judge or Magistrate the presumption that he is so does not arise. The defect may be supplied by oral evidence. The certified copy should also show on the face of it that it is a copy of part of the record in a specified proceeding.

The mere production of a certified copy is not sufficient to show that the accused is the person who made the statement. There must be oral evidence of some one who heard the deposition given, that the accused is the person whose evidence is therein recorded.

The charge in such cases should set out in direct oration the exact words alleged to constitute the false statement and not a paraphrase.

Queen-Empress v. Boodhun Ahir, (1872) 17 W. R., C. R., 32, followed.

THE case presents many points for notice.

In the first place there was no evidence that the accused made the statement alleged to be false, or that it was made in a judicial proceeding or that otherwise it was made under the circumstances specified in section 191, Indian Penal Code. There is no doubt on record a document headed "Form of deposition" certified as a true copy of a statement made by the accused and signed "* * * *." There is nothing to show on what occasion this statement was made or who "* * * *" may be. There is no evidence to show that Mi Shwe Ke, who made this statement, was the accused in this case. It is true that the accused admitted making a statement. But as there was no evidence that she made it, the question could not legally be asked.

It may be convenient to explain the manner in which cases under section 193, Indian Penal Code, should be tried. Where the false evidence is alleged to have been given in a deposition in a case in which the law requires the evidence to be taken down in writing, as, for instance, in trials regulated for this purpose by section 356 or section 357, Code of Criminal Procedure, a certified copy of the deposition must be placed on the record as evidence. Section 91 of the Evidence Act, read with section 66, clause (*e*), and section 74 of the same Act (which dispense with the production of the original record), render this necessary. Oral evidence of the substance of the deposition is excluded by section 91 of the Evidence Act. Under section 80 of that Act the Court presumes certain facts concerning a document purporting to be a record of evidence. But it must purport to be signed by a Judge or Magistrate and where the person taking the deposition

omits to claim the position of a Judge or Magistrate the presumption that he is so does not arise. The defect may be supplied by oral evidence. The certified copy should also show on the face of it that it is a copy of part of the record in a specified proceeding.

But the mere production of a certified copy is not sufficient to show that the accused is the person who made the statement. On this point there must be the oral evidence of some one who heard the deposition given. The natural procedure would be to call a clerk or other officer of the Court in which the evidence was given to read the certified copy and for him to depose that the accused was the person whose evidence is therein recorded. The witness must, of course, be some one who heard the evidence given.

The deposition having been thus proved and the accused's connection with it established, evidence as to the falsity of some statement or statements in the deposition would then be taken. After the close of the case for the prosecution, the accused would be examined under section 342, Code of Criminal Procedure, and would naturally be asked whether he gave the evidence which he is said to have given and so on.

If the Court considers that a *primâ facie* case is made out, the charge should then be framed; and in the charge should be set out in direct oration the actual words alleged to constitute the false statement. Thus, in the present case, the charge should have recited that the accused stated as follows: "I do not know the accused. I did not "know him before the present case. * * * I have never had "conversation with him. My age is 13. * * * I never sent "cigars to the accused." That the exact words recorded to have been spoken by the accused should be set forth and not a paraphrase was laid down by the High Court at Calcutta in the case of the *Queen* v. *Boodhun Ahir* (1); and this seems to be the intention of section 223, Code of Criminal Procedure, as explained by illustration (*c*) to that section. Some doubt has been expressed as to whether it is necessary to set out the exact words, the form of charge given in Schedule V [No. XXVIII (I) (5) and (II) (4)] of the Code of Criminal Procedure seeming to contemplate the use of the indirect oration. But although the form runs "that you stated in evidence that," the last word is followed by marks of quotation indicating that an extract from the deposition should be cited. I do not think that the form is necessarily inconsistent with the plain wording of the illustration cited above. Certainly it is safer to quote the actual words of the accused as they are recorded to have been spoken. And as there is no difficulty in doing so, this rule should be followed.

In the present case the witnesses for the defence appear to have been examined before the charge was framed. There is no authority for this procedure in the trial of a warrant case. The accused cannot be called upon to defend himself or to produce evidence till after he has been charged. (Section 256, Code of Criminal Procedure.)

(1) (1872) 17 W. R. Cr R., 32.

1902.

CROWN
v.
MI SHWE KE.

Apart from the fact that there is no evidence to show that the accused made the statement alleged to be false, on the merits I do not think that the charge was established. The only witnesses called were Maung Kala and his wife Ma Bok Tok. Most of the evidence of the former consisted of a repetition of what Po Thin (the accused in the case in which the false evidence was given) told him. None of this could possibly be relevant. Maung Kala also refers to former statements made by himself which cannot be admissible in the present case. The only part of Maung Kala's evidence which can possibly be relevant as against Mi Shwe Ke is the following: "Po Thin showed me a "letter with cigars. * * * As I saw on the envelope the name "of Mi Shwe Ke I took it that they came from her. * * * Once "I was passing the street and saw her in her father's house speaking "to Po Thin." Maung Kala admitted that he was a friend of Nga Po Thin and also that he was undergoing imprisonment for theft. His wife Mi Bok Tok says that she saw Shwe Ke write a letter to Po Thin in her house which the witness delivered to Po Thin. The only corroboration of this statement is the evidence of her husband that he saw in Po Thin's possession an envelope with Shwe Ke's name on it. She also said that she had seen Po Thin and Shwe Ke talking together. There is no corroboration of this statement. Po Thin himself was not called as a witness. Some reference was made to the evidence of two other witnesses given at the former trial, of whom one was dead and the other, Nga Pyan, was said to be keeping out of the way with Po Thin.

It seems to me that the evidence of the convict Nga Kala, Po Thin's friend, and of his wife was quite insufficient to justify the framing of a charge against Mi Shwe Ke. It may be quite true that she gave false evidence. But the fact does not seem to be established in any way.

The sentence of a fine of Rs. 150 on a girl of 13 was quite inappropriate, unless Mi Shwe Ke had property of her own, which does not seem to be the case. If the conviction were sustainable, the proper course would obviously have been to proceed under section 31 of the Reformatory Schools Act and to discharge the accused after due admonition.

The conviction and sentence are reversed and the fine, which has been paid, will be refunded.

Criminal Revision No. 914 of 1902. July 9th, 1902.

Before Mr. Justice Irwin.

TAUNG BO AND ANOTHER v. CROWN.

Mr. *Palit*—for applicant.

Appeal—Summary dismissal—Judgment.

Trial—Postponement of—Commencement of—Time for engagement of Advocate—Criminal Procedure Code, ss. 344, 421, 424.

A Sessions Judge or Magistrate dismissing an appeal summarily need not write a judgment. The commencement of a criminal trial before a Magistrate should not ordinarily be postponed to give the accused time to engage an advocate. Postponement may sometimes be right in complicated and difficult cases.

THE Sessions Judge dismissed the appeal summarily under section 421 Code of Criminal Procedure. He was not under any obligation

1902.

TAUNG BO v. CROWN.

to write a judgment or to give any reasons. Section 424 applies only to decisions under section 423 after hearing the appeal.

In the application for revision the petitioners say they were struck and arrested because they resisted the attempt of some persons to take away their weaving combs. This is quite a new allegation: it was not mentioned at all when the applicants were examined at the trial.

They also complain that they were not given time to communicate with their friends and engage counsel before the trial. The crime was committed and the accused arrested on the 2nd March. The police final report is dated 5th March, and was submitted to the Magistrate on the 6th. The trial was held and concluded the same day, the accused saying that they could not call any witnesses. Under sections 171 and 173, Code of Criminal Procedure, the police are required to complete their investigation without unnecessary delay, and, as soon as it is completed, to forward their final report and the accused to the Magistrate. Under section 252, when the accused is brought before a Magistrate, such Magistrate "shall proceed to hear the complainant and take the evidence," &c. Chapter XXI contains no provision for postponement. Under section 344 the Magistrate has power to postpone the commencement of a trial "from the absence of a witness or other reasonable cause," but giving time to prepare the defence is not specifically mentioned as a reasonable cause. It may sometimes be right, in complicated and difficult cases, to postpone a trial in order to enable the accused to engage an advocate, if he applies for such postponement, but in ordinary cases and as a general rule this should not be done. The object of the trial is to ascertain the truth; examining the witnesses as early as possible is a far more likely way of attaining that end than postponing the trial to engage an advocate. In the present case the record does not show that any application for postponement was made, nor is there any allegation to that effect in the application for revision. The application is dismissed.

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

Criminal Revision No. 458 of 1902.
July 14th, 1902.

CROWN *v.* HMAT KYAN.*

The Government Advocate—for the Crown.

Going armed—Clasp-knife—Indian Arms Act, ss. 4, 19 (e).

A weapon not included within the term "arms" in section 4 of the Indian Arms Act cannot be held to be an "arm" unless it is a weapon which would ordinarily be spoken of as an "arm." The purpose for which an implement is primarily intended regulates whether it would in ordinary parlance be spoken of as an arm, and if it is not designed for use as a weapon of offence and defence, although it may be used as such, then it is not an arm.

A clasp-knife does not fall within the ordinary natural meaning of the word "arm."

Queen-Empress v. *Ne U*, P. J., L. B., 416, and *Queen-Empress* v. *Po Thin*, P. J., L. B., 487; commented on.

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* See also *Ebrahim* v. *King-Emperor*, 3 L. B. R., 1.

1902.

CROWN v. HMAT KYAN.

Fox, J.—The Magistrate convicted the accused of an offence punishable under clause (*e*) of section 19 of the Arms Act, for that he went armed with a large clasp-knife.

The Magistrate thought that, although a clasp-knife was not an arm within the meaning of the Arms Act, still as there was ground for believing on the evidence that the accused was carrying the knife with the object of resisting any one who might attempt to arrest him, a conviction under the Arms Act was justifiable.

The Magistrate was evidently led to his conclusion by consideration of the Local Government's Circular No. 68 of 1897, and possibly of Circular No. 75 of the same year.

Magistrates, however, must be guided by the interpretation which the highest Judicial authorities have placed upon the meaning of an enactment.

The offence punishable under section 19 (*e*) of the Indian Arms Act, 1898, consists in going armed with a weapon which falls under the meaning and definition of the term "arms" as used in the Act, without having a license for the weapon, or contrary to or not in accordance with the terms of a license.

In the case of the *Queeen-Empress v. Nga Ne U* (1), the Judicial Commissioner, Mr. Hosking, held that except so far as the definition in section 4 of the Arms Act expressly includes other weapons, the word "arms" must be understood to mean weapons of offence suitable for warfare. He observed that the word "arms" is usually understood in the military sense, and the preamble to the Act tended to show that it was the intention of the Legislature to use the word in that sens in the Act. In the case of *Queen-Empress* v. *Nga Po Thin* (2), Mr. Copleston, when Judicial Commissioner, expressly held that a clasp-knife did not come within the definition in the Act of "arms." He observed that if in any particular case the prosecution wishes to show that a particular implement not obviously within the definition of "arms" is yet an arm, evidence should be produced to prove that the implement is by the nature of the thing a weapon of offence suitable for warfare.

It may be that the learned Judges went unnecessarily far in holding that no weapon not included in the interpretation clause within the term "arms" can be an arm, unless it is intended and is suitable for warfare, but apart from the weapons expressly included in that clause, I think that no weapon can be held to be an "arm" within the Act, unless it is a weapon which would ordinarily be spoken of as an "arm."

It appears to me that the purpose for which an implement is primarily intended regulates whether it would in ordinary parlance be spoken of as an arm, and if it is not designed for use as a weapon of offence and defence, although it may be used as such then it is not an "arm."

However this may be, I do not think that a clasp-knife falls within the ordinary natural meaning of the word "arm."

(1) (1897) P. J., L. B., 416. | (2) (1898) P. J., L. B., 487.

1902.

CROWN
v.
HMAT KYAW.

For this reason the accused was not, in my opinion, guilty of an offence punishable under the Arms Act in going possessed of a clasp-knife. The conviction was therefore erroneous, and it and the sentence should be set aside, and the release of the accused should be directed.

Thirkell White, C. J.—I concur.

Before Mr. Justice Fox and Mr. Justice Irwin.

Civil Second Appeal No. 183 of 1902. July 15th.

MA PWA *v.* MA THE THE AND SEVEN OTHERS.

Buddhist Law—Adoption—Proof.

Adoption among Buddhists is a mixed question of fact and law. Courts are bound to insist upon strict proof thereof. An essential part is publicity of the relationship, and of the intentions of the adoptive parents in regard to the inheritance of their estate by the adoptive child. Residence together in one house is not sufficient indication of the relation of the parties being that of adopted child and adoptive parent.

Ma Gun v. *Ma Gun*, S. J., L. B., 25, cited; *Maung Aing* v. *Ma Kin*, Chan Toon 157, and *Ma Mein Gale* v. *Ma Kin*, Chan Toon, 168, approved.

Fox, J.—The decision of this case rested upon whether the plaintiff had been given in adoption by her father Maung Tha E to Maung San Byu and Ma Min Ya, and adopted by the latter as their "kittima" child.

Adoption is, as stated by Mr. Burgess, Judicial Commissioner of Upper Burma, in *Maung Aing* v. *Ma Kin* (1), a mixed question of fact and law.

There are concurrent findings of the Lower Courts that the plaintiff was the adopted child of Maung San Byu and Ma Min Ya. If those Courts have not erred in the statement or application of the law of adoption the decision of the Divisional Court is final, as there is no appeal to this Court upon facts.

In the case of *Ma Gun* v. *Ma Gun* (2) Mr. Sandford, Judicial Commissioner, ruled that no ceremony or document is required to constitute an adoption, but there must be a request from parents and a notorious and public taking and bringing up, in order that, or with the understanding that, they, *i.e.*, the children, may inherit.

In *Maung Aing* v. *Ma Kin* (1) Mr. Burgess, Judicial Commissioner, Upper Burma, remarking on Mr. Sandford's decision said:—

"Of course if parents are dead, the requirement as to request could not be complied with; but though such request is mentioned at page 319 of the *Manukye*, it is not referred to at page 314, which only speaks of the children of others."

The law as to how adoption is constituted is perhaps best stated in Mr. Burgess' judgment in *Ma Mein Gale* v. *Ma Kin* (3). He says: "There can be no doubt that an essential part of adoption is publicity of the relationship, and of the intention of the adoptive parents in

(1) Chan Toon's Leading Cases, 157. (2) S. J., L. B., 25.
(3) Chan Toon's Leading Cases, 168.

1902.

MA PWA v. MA THE THE.

regard to the inheritance of their estate by the adoptive child * * * * the law thus most properly requires that adoption shall not be a hole-and-corner matter, but a matter of publicity and notoriety, so that there may be no room for questions to be raised and disputes to be encouraged."

The Divisional Judge has referred to a passage in the judgment in *Ma Gun* v. *Ma Gun* (2), which runs as follows: "Just as an open living together is amongst Burmans presumptive proof of marriage, so I should hold that the open bringing up of a child, and supporting her for many years, is presumptive proof of adoption, especially where the parents are childless and the child is a niece." These remarks do not appear to have been necessary for the decision of that particular case, for a formal asking for the child and a formal consent to the child's being taken in adoption was held proved.

In my opinion these remarks went too far, and Mr. Burgess' judgment in *Ma Mein Gale* v. *Ma Kin* (3) affords much safer rules for deciding whether an alleged adoption has been proved or not. He says at page 171 of the report: "It is suggested for the respondents that the residence together in one house was sufficient indication of the relation of the parties, but it would be a dangerous thing to infer from the fact of one person living in another person's house that the former had adopted the children of the latter as his own;" later on, on page 173 of the report, he says: "The principle (requiring publicity and notoriety) is of great importance for the protection of the interests of the next of kin among a people to whom the only form of succession known in practice is intestate. The Courts are therefore bound to insist upon strict proof when questions of the sort come before them."

In the present case, the Additional Judge of the District Court says: "It seems undoubtedly to have been a matter of common notoriety that plaintiff and been really adopted into the family of Maung San Byu and Ma Min Ya." This was one of the reasons which led to his holding that the plaintiff had been so adopted. The Divisional Judge held that there was good ground for the original Court's finding as to the adoption, but he based his reasons mainly on the decision in *Ma Gun* v. *Ma Gun* (2).

I do not understand, however, that he in any way dissented from the District Court's finding that the adoption of the plaintiff was a matter of public notoriety.

Under the circumstances the decision of the Divisional Court on the fact of adoption must be considered final; and that being so, she, from the time of her adoption, lost all right she might otherwise have had to succeed to her natural father's estate.

The second, third, and fourth grounds of appeal allege that the lower Courts were wrong in awarding to the plaintiff a share in her natural mother's estate.

The District Court found that she had received her share in such estate. In the grounds of appeal to the Divisional Court no objection was taken to this finding, and in any case the plaintiff in her plaint

had made no claim to any property except property which she alleged belonged to her natural father.

The second issue in the case was: has plaintiff received any, and, if so, what, share in her mother Ma Taung's estate? But it did not really arise, and should not have been fixed upon the pleadings as they stood.

In my opinion the appeal must be dismissed with costs.

Irwin, J.—I concur.

1902

MA PWA
v.
MA THE THE.

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

CROWN *v.* R. J. CHAPMAN.

Criminal Miscellaneous No. 20 of 1902. July 15th.

The Assistant Government Advocate—for the Crown.

Security proceedings—European British subject—Commitment—Court of Session—Criminal Procedure Code, s. 107.

A Magistrate proceeding under section 107 Criminal Procedure Code against an European British subject has no power to commit him to the Court of Session. A Sessions Court has no power to proceed on such commitment.

Thirkell White, C. J.—The Subdivisional Magistrate of Moulmein instituted proceedings against the respondent under section 107, Code of Criminal Procedure, requiring the respondent to show cause why he should not execute a bond, with two sureties, for keeping the peace for one year. The order framed under section 112, Code of Criminal Procedure, contained a careless mistake, of a kind which is too frequently committed even by Magistrates of experience; for it required the respondent to show cause why he should not give security for his good behaviour, instead of for keeping the peace. The Magistrate proceeded to enquire into the truth of the information on which action had been taken. He finished recording evidence on 24th February 1902, and then adjourned the case for further evidence to 10th March. On that date, the respondent, Chapman, applied to be tried as a European British subject. After some further adjournments, without examining the respondent or hearing any evidence he might wish to adduce, the Magistrate committed the respondent to the Court of Session under section 447, Code of Criminal Procedure. The Additional Sessions Judge has reported the case for the orders of this Court, with a view to the commitment being quashed under section 215, Code of Criminal Procedure.

The grounds on which the learned Sessions Judge has based his recommendation are, briefly, that section 443, Code of Criminal Procedure, and other sections in Chapter XXXIII of the Code of Criminal Procedure do not apply to proceedings under Chapter VIII of that Code. An attempt was made, without success, to serve the respondent with notice of these proceedings in case an order to his prejudice should be passed. But it was held that it was not absolutely necessary that he should have such notice.

1902.

CROWN.
v.
R. J. CHAPMAN.

The point for consideration seems to be whether the commitment is valid; and this point can be decided without any reference to the question whether Chapter XXXIII of the Code of Criminal Procedure does, or does not, apply to proceedings under Chapter VIII of that Code.

It seems to me that the commitment is invalid and must be quashed for the following reasons. The proceedings are taken under Chapter VIII of the Code of Criminal Procedure. There is nothing in that Chapter which enables a Court of Session to act under its provisions except, under section 106, after conviction at a trial, or, under section 123, sub-section (3), after a reference by a Magistrate under sub-section (2) of that section. The Sessions Court could not frame an order under section 112, inquire under section 117, or make an order under section 118. All these acts, essential elements of proceedings under Chapter VIII of the Code, are to be done by the Magistrate. The Court of Session is without power to take any action on this commitment. It can proceed only in accordance with Chapter XXXIII of the Code of Criminal Procedure, which, under section 463, save as otherwise expressly provided, regulates proceedings in trials of European British subjects as of other persons. That chapter contains no provisions which would enable the Sessions Court to deal with a case of this kind.

Again, a commitment must be made in accordance with the provisions of Chapter XVIII of the Code of Criminal Procedure. The opening words of section 206 indicate what would otherwise be sufficiently apparent, that the procedure in that chapter applies in the case of European British subjects. Section 214 affords a similar indication, if one were necessary. Section 447, on which some reliance has been placed, prescribes the circumstances under which, and the Courts to which, an European British subject should be committed for trial. But the procedure preparatory to commitment is not regulated by that section or by any other section in Chapter XXXIII. It must be regulated by Chapter XVIII. Under section 210 of the Code, before committing an accused person for trial, the Magistrate must frame a charge. In this case no charge has been framed. It is true that section 226 provides for a case in which a person is committed for trial without a charge. But in that case, the Court must supply the omission. In this case, no charge has been or can be framed. It is clear therefore that there can be no commitment.

I do not think it necessary in this case to express an opinion on the question whether Chapter XXXIII of the Code of Criminal Procedure applies to proceedings under Chapter VIII of the Code. Whether it applies or not, it seems clear that it does not authorize a commitment to the Court of Session.

I would therefore quash the commitment in this case on the ground that the Magistrate had no power to commit and that the Sessions Court has no power to proceed on the commitment.

Fox, J.—I concur.

Irwin, J.—I concur.

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

Civil Regular Appeal No. 49 of 1901. July 17th, 1902

MAUNG SAN PAING AND ANOTHER v. SHWE HLAING AND TWO OTHERS.

Maung Thin—for appellants. | Mr. *Agabeg*—for respondents.

Sale—Mortgage—Defective title—Jurisdiction of Civil Court, Objection to—Burma Land and Revenue Act, ss. 19, 56, 55, proviso 1 (b), 17.

Plaintiffs sued to redeem certain agricultural land alleged to have been mortgaged to defendants. Defendants pleaded that plaintiffs sold the lands to them outright. It appeared in evidence that part of the land was cleared about 13 years before the institution of the suit, and part less than 12 years before that date.

Held,—that if it appears at the hearing that plaintiffs have neither a grant nor the status of a landholder their claim falls under section 19, Lower Burma Land and Revenue Act, and the jurisdiction of the Civil Court is ousted by section 56 read with section 55, proviso 1 (*b*) of that Act. When an issue arises on such question it should be referred to the Revenue Officer under section 17 of that Act.

Overruled by Civil Reg 2 of 1915.

Held also—that an objection to jurisdiction may be taken at any time and cannot be met by section 578 Civil Procedure Code. *Minakshi Naidu* v. *Subramaniya Sastri*, (1888) I. L. R. 11 Mad., 26, followed.

Irwin, J.—The plaintiffs, San Paing and Ma E Bwa, sued to redeem two holdings of paddy-land alleged to have been mortgaged by San Paing to Shwe Hlaing for Rs. 380. Shwe Hlaing pleaded that the lands had been conveyed to him outright. It is not necessary at this stage to examine in detail the pleadings and the depositions of the parties. The land or part of it was cleared by one Shwe Waing, who sold it to San Paing about ten years ago.

The Subdivisional Court gave a decree for plaintiffs, allowing them to redeem the lands for Rs. 720. Both parties have appealed, plaintiffs because they say they should be allowed to redeem for Rs. 380, defendants because they say plaintiffs have no right to redeem.

At the hearing of the appeals defendants have raised the point whether a Civil Court has any jurisdiction to try the suit. This objection does not appear in the pleadings or in the memorandum of appeal but it is a point which may be taken at any time, and which cannot be cured by section 578, Code of Civil Procedure. This view is in accordance with the ruling of their Lordships of the Privy Council in *Minakshi Naidu* v. *Subramaniya Sastri* (1).

The objection to the jurisdiction of the Civil Court is taken under section 56 (*a*) read with section 55, proviso 1 (*b*), of the Burma Land and Revenue Act, 1876. It reads thus: "No Civil Court shall exercise "jurisdiction as to . . . . claims to occupy or resort to lands under "sections 19, 20 and 21, and disputes as to the use or enjoyment of such "lands as between persons permitted to occupy or resort to the same." If the plaintiff has neither a grant nor the status of a landholder, his claim must come under section 19. It is argued that he has the status of a landholder. In order to have the status of landholder he must have been in possession for 12 years continuously and have paid the revenue

(1) 1898, I. L. R., 11 Mad., 26.

* [*Saya Hlaing* v. *Maung Lu Gyi*, P. J., L. B., 436, not referred to; *Maung Yat* v. *Maung Tarok*, L. B. R., 16, followed.]

1902.

MAUNG SAN PAING v. SHWE HLAING.

due thereon during that period unless he was expressly exempted from paying revenue. Under section 3, the plaintiff is in possession if the land is occupied by his mortgagee, and under the second explanation to section 7 if the revenue has been paid by the mortgagee holding under the plaintiff the revenue shall be deemed to have been paid by the plaintiff. Again, under the first explanation to section 7 the plaintiff, in reckoning the length of his possession, is entitled to add the time during which the person from whom he purchased the land was in possession.

Therefore, if Shwe Waing was in possession continuously from 1st June 1889 to the time when he sold to plaintiff, if the revenue has been paid for the twelve years, commencing 1st June 1889, by Shwe Waing, by plaintiffs and by defendants in turn, and if defendants hold the land on mortgage from plaintiffs, the suit is cognizable by the Civil Court.

It is obvious that the jurisdiction of the Civil Court depends in the first instance on the allegations made by plaintiff in the plaint and in his examination. If the plaintiff alleges a mortgage, and plaintiff's possession including the term of the alleged mortgage extends to twelve years, the Civil Court has jurisdiction to try the issue, and if the transaction be found to be a sale and not a mortgage, the plaintiff fails on the merits and not by reason of want of jurisdiction in the Court. But if it appear at the hearing that plaintiff's possession including the possession of his alleged mortgage was less than twelve years, or that the revenue was not paid for the whole twelve years and no express exemption was obtained, then the plaintiff's suit would fail through want of jurisdiction in the Civil Court.

In this case the plaintiff's title to the land is not stated in the plaint, but from his own evidence and from that of Shwe Waing it appears that Shwe Waing began to cultivate part of the plaint land about 1888, only about half of it was cultivated when he sold it to plaintiff in or about 1891, and no revenue had been paid except on that part which was cultivated.

There are no precise dates given: the years are only approximate. Neither the area nor the situation of the part cultivated in each year is defined; it was probably larger each year than in the preceding year. There is not even any definite statement that any revenue was paid by Shwe Waing for more than one year.

It is clear that the "possession" of about half of the plaint land does not date from any earlier period than ten years before the institution of the suit, and with respect to the other half, which is undefined, there is no proof that it dated from 12 years before the institution of the suit.

I think the burden of proving that the conditions of section 7 have been fulfilled lies on the plaintiff, and if there should be any doubt on this point it may be useful to consider the reason why the jurisdiction of the Civil Courts is barred in this class of cases. The reason obviously is, in my opinion, to prevent an unseemly conflict of orders. If a Civil Court decided a dispute between two parties, neither of whom has any right to the land in dispute, the decree of the Civil Court could at once be rendered nugatory by a Revenue Officer ejecting the decree-

1902.

MAUNG SAN PAING v. SHWE HLAING

holder from the land. Now, suppose that a Revenue Officer had occasion to resume possession of the plaint land, neither plaintiff nor defendant could resist the ejectment without proving that one or other of them had the status of a landholder. So long as they fail to prove it the land must be deemed to be at the disposal of Government, and the jurisdiction of the Civil Court is barred. The burden of proof therefore lies on the plaintiff. He has failed to discharge it and therefore on the record as it stands the Civil Court has no jurisdiction.

But, as the question of jurisdiction was not raised in either of the Courts below, and it seems possible that by reference to the land records plaintiff may be able to prove that the possession of his vendor in respect of part at any rate of the plaint land began twelve years before the institution of the suit, I think the suit should be remanded to the Lower Court, with instructions to refer to the Revenue Officer, under section 17, Land and Revenue Act, the question whether the status of a landholder had been acquired on or before the date of institution of the suit in respect of the whole or any part of the land in suit.

The Revenue Officer to whom the question should be referred is the Subdivisional Officer, Insein (Revenue Department Notification No. 212, dated 17th June 1897, pages 95, 96, Land Revenue Manual). He should be asked to define clearly by an extract from the cadastral map the area in respect of which the status of a landholder has been acquired if he finds that it has been acquired in respect of a part, but not the whole, of the land in suit.

Thirkell White, C. J.—I concur in remanding the case for a reference to the Revenue Officer.

Before Mr. Justice Thirkell White, Chief Judge.

Criminal Revision No. 572 of 1902. July 18th.

CROWN v. ÔN BU.

House-trespass and insult—Double conviction—Cumulative sentence—Order requiring security for good behaviour—Indian Penal Code, ss. 452, 504—Reformatory Schools Act, s. 31.

Accused entered into complainant's house with intention to intimidate and insult compiainant and carried his intention into effect. He was fined Rs. 20 under section 504 Indian Penal Code, and ordered, under section 31 of the Reformatory Schools Act, to furnish security for his good behaviour for one year.

Held—that while he might be tried and convicted of house-trespass and of insult he could not be punished separately for the two offences under sections 452 and 504 of the Indian Penal Code.

Held also—that in this case an order under section 31, Reformatory Schools Act, requiring the accused to furnish security for his good behaviour has the effect of a sentence and cannot be combined with a sentence under section 504 Indian Penal Code.

Queen-Empress v. *Aw Wa*, 1 L. B. R., 33, and *Queen-Empress* v. *Malu*, (1899) 23 Bom., 706, followed.

THE accused was charged with entering the house of the complainant armed with a *da*, abusing him and threatening his life; and then with following him in the street and insulting him by an obscene act. But apparently the Magistrate confined his attention to hat occurred

1902.

CROWN v. ON BU.

in the house and did not convict the accused of the insult after the complainant had left the house to report to the headman.

The accused was a boy of 13. Obviously the case ought not to have come into Court at all. The headman or the complainant ought to have gone to the boy's father and insisted on his giving the boy a sound whipping. If he refused, or neglected to do this, then the case might have been brought into Court.

Having tried this youthful ruffian, I cannot understand why the Magistrate did not give him a wholesome whipping and let him go, instead of fining his father Rs. 20. Clearly a whipping was desirable and 20 or 30 stripes in the way of school discipline would probably have effected a reformation. The Magistrate seems to me not to have exercised a wise discretion in this case.

Apart from the insult outside the house, the double punishment was illegal. The case is precisely analogous to that in the illustration to section 35, Code of Criminal Procedure. The accused committed house-trespass because he entered into the complainant's house with intent to intimidate and insult the complainant. He carried his intention into effect and committed the offence punishable under section 504, Indian Penal Code. In so doing he acted in the same way as a man who breaks into a house with intent to commit theft and steals property therefrom. The illustration cited above shows that the accused has not, in so doing, committed distinct offences. So far as the conviction under 504, Indian Penal Code, referred to the conduct of the accused in the house, a double sentence is not sustainable. The law as laid down in the illustration to section 35, Code of Criminal Procedure, is that a man who commits house-trespass with intent to commit an offence and commits that offence can be punished either for the house-trespass or for the offence, but not separately for both. He may be tried for and convicted of the offence of house-trespass and the offence which he intended to commit [section 235, sub-section (1), Code of Criminal Procedure]. But he cannot, apparently, be punished separately for the two offences. This view is in accordance with the law laid down by a Full Bench of this Court in *Queen-Empress* v. *Aw Wa* (1). The case of *Queen-Empress* v. *Malu* (2) may also be consulted. The insult in the street was a separate matter and constituted a distinct offence of which the accused might have been convicted and for which he could have been separately sentenced. But as the Magistrate has not recorded a finding on this point the sentence passed under section 504, Indian Penal Code, cannot be maintained on the ground that the accused might have been separately convicted under that section.

Although no sentence was actually passed under section 452, Indian Penal Code, the order under section 31 of the Reformatory Schools Act, requiring the accused to furnish security for his good behaviour, has the effect of a sentence and cannot, I think, be combined with a sentence under section 504, Indian Penal Code, in this case.

(1) 1 L. B. R., 33. | (2) (1899) I. L. R. 23 Bom 1

1902.

CROWN v. ON BU.

But the Magistrate's order concerning the security, and the manner in which it was carried into effect, was incorrect. He required the accused to enter into his own bond in the sum of Rs. 25, with his father and two relations as sureties, to be of good behavour for one year. Section 31 of the Reformatory Schools Act does not authorize the Magistrate to require the accused to execute a bond. The accused, in a case dealt with under that section, being *ex hypothesi* a minor his bond would be worthless and could not be enforced. What the section enables the Magistrate to do is to require the parent, guardian or nearest adult relative of the accused to execute a bond with or without sureties, to be responsible for the good behaviour of the accused for a period not exceeding one year. Even in the execution of his erroneous order the Magistrate went astray, for the sureties were the father and one other person, presumably a relative, not two other relatives as in the order.

I reverse the sentence under section 504, Indian Penal Code, and direct the refund of the fine. I also cancel the bond executed by the accused; and require his father to execute a bond in the sum of Rs. 25 with two sureties to be responsible for the good behaviour of the accused On Bu for one year from the 30th January 1902. As no form of bond under section 31 of the Reformatory Schools Act has been prescribed a form may be attached to this order for use on this occasion.

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

Civil Reference No. 4 of 1902. July 21st.

IN THE MATTER OF A REFERENCE FROM THE FINANCIAL COMMISSIONER, BURMA.

Receipted bill bearing uncancelled adhesive stamp—Stamp duty chargeable—Stamp Act, s. 2, cls. (12), (23), Article 53, 1st Schedule, ss. 17, 12, 63.

At the foot of a bill for Rs. 89-13-9 were printed the words, "received payment" beneath which words was written the signature of the firm by which the bill was presented.

The money due by the debtor had not been paid, and the document had not been delivered to the debtor.

Held,—that the document was a "receipt," and as such chargeable with stamp duty of one anna.

Queen-Empress v. *Rahat Ali Khan*, (1887) I. L. R. 9 All., 210; *Millen* v. *Dent*, (1847) Q. B., 846, followed.

Fox, J.—I understand that the question on which the officiating Financial Commissioner desires the opinion of this Court is whether a document which, on the face of it, purports to be a bill or account of monies due for goods supplied, and contains the words "received payment," and the signature of the persons to whom the money was due, is a document chargeable with stamp duty.

There can, in my opinion, be no question that the document was so chargeable.

The document must be taken to be what, on its face, it purports to be.

1902.

IN THE MATTER OF A REFERENCE FROM THE FINANCIAL COMMISSIONER, BURMA.

The signature of the creditors under the words "received payment" constituted a "receipt" within the definition of the term in clause 23 of section 2 of the Indian Stamp Act, 1899; on the face of the document it purported to be a receipt for money paid for consideration; the amount, the receipt of which was acknowledged, exceeded Rs. 20 consequently Article 53 of the 1st Schedule to the Act applied, and a stamp of one anna upon it was obligatory. The facts that the money due by the debtor had not been paid and the document had not been delivered to the debtor cannot alter the nature of the document. In the natural order of things a document which is a receipt must be executed before it is delivered to the debtor. Delivery to the debtor is a separate act which renders the receipt effective so far as the debtor is concerned, but the document is none the less a receipt whilst it remains in the creditor's possession.

The moment the creditor has affixed his signature to a statement that monies exceeding twenty rupees have been received from his debtors, that document becomes a receipt.

By section 17 of the Act all instruments chargeable with duty and executed by any person in British India must be stamped before or at the time of the execution.

By section 12 of the Act whoever executes any instrument on any paper bearing an adhesive stamp shall at the time of the execution cancel the same so that it cannot be used again, unless such stamp has already been so cancelled.

Under clause (12) of section 2 the signing of a document constitute its execution. A provision which was adopted for the first time in the Act of 1899 indicates that the writing of the name or initials of the executant or those of his firm, together with the date of his writing them, affords an effectual method of cancelling an adhesive stamp in the manner required by the Act.

It is not within the province of this Court to decide whether the person who put the signature under the words "received payment" on the document in question in this case committed an offence punishable under section 63 of the Act with fine which may extend to one hundred rupees.

The decision of such question would rest with another Court exercising the powers of a High Court, if an appeal were made to it against the order of the Subdivisional Magistrate.

I have commented perhaps more fully than it was necessary to do upon the question referred, because it is stated in the reference that it is a common practice amongst persons in trade to send out receipted bills bearing uncancelled adhesive stamps, and it is as well that the attention of the public should be called to the illegality of such practice.

Thirkell White, C. J.—The Financial Commissioner has referred under section 57 of the Indian Stamp Act, 1899, the question whether a certain instrument is chargeable with stamp duty. The instrument in question is a bill for Rs. 89-13-9, at the foot of which are printed

1902.

IN THE MATTER OF A REFERENCE FROM THE FINANCIAL COMMISSIONER, BURMA.

the words "received payment," beneath which words is written the signature of the firm by which the bill was presented. The question is whether this instrument is chargeable with stamp duty. I agree in thinking that it is a receipt, within the meaning of the definition in section 23, sub-section (2) of the Stamp Act; and that it is chargeable with stamp duty of one anna under Article 53 of Schedule I of that Act. From the papers before us, it appears that this document was not delivered to the person from whom the amount was alleged to be due; and that as a matter of fact the amount specified was not paid by the alleged debtor or received by the firm which attached its signature to the document. The question of delivery to the person making or expected to make the payment does not seem to be material. The only point on which there seems room for argument is whether the fact that no money exceeding Rs. 20 was actually paid though a sum in excess of that amount was acknowledged to have been received, affects the question whether the document is a receipt or not. It does at first sight, seem anomalous that an instrument should be held to be a receipt when as a matter of fact nothing has been received. The ordinary course would seem to be for money to be paid and then for the receipt to be executed. But looking at the words of section 2, sub-section (23) of the Stamp Act, I cannot see that the definition of receipt implies that the money acknowledged to have been received must actually have been received. By Article 7 of the Second Schedule of the General Stamp Act, 1869, the instrument made chargeable was a "receipt or discharge given for or upon the payment of money, or delivery of goods, in satisfaction of a debt, the amount or value of which in money or goods exceeds twenty rupees." In section 3, sub-section (17), of the Indian Stamp Act, 1879, "Receipt" was defined, the effect being apparently to extend the definition of instruments chargeable with duty as receipts. The definition in the Stamp Act of 1899 is similar to that in the Act of 1879. It seems probable that the intention of the Legislature was to include instruments of the kind under consideration in the definition. I have been unable to find any case bearing on the point in the Indian reports, except that of *Queen-Empress* v. *Rahat Ali Khan* (1) cited by the Financial Commissioner, where the view taken by the Court is consistent with the answer which it is proposed to return to this reference. The only English case I can find which has any bearing on the question is *Millen* v. *Dent* (2), where, though it was not expressly decided, it seems to have been assumed that an instrument of the kind under consideration was a receipt and required to be stamped, though no payment was actually made.

I would say, in answer to the Financial Commissioner's reference, that the instrument in question is chargeable with stamp duty of one anna as a receipt.

Irwin, J.—I concur in the answer to the reference.

(1) (1888) I. L. R. 9 All., 210. | (2) (1847) 10 Q. B., 846.

Civil Miscellaneous No. 13 of 1902. July 14th.

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

MA THI *v.* SHWE HLWA.

Letters of Administration—Rival claimants—Probate and Administration Act, ss. 23, 41.

Under section 23 of the Probate and Administration Act, administration of the estate of an intestate may be granted to any person who would be entitled to the whole or any part of the deceased's estate. When proceeding under this section the Court is bound to ascertain whether the person who asks for letters of administration is so entitled.

It is not sufficient that the applicant may possibly have an interest in the estate.

Narendra Nath Pahari v. *Ram Gobind Pahari*, (1902) L. R., 29 I. A. 17, and *Kaminey Money Bewah*, (1894) I. L. R. 21 Cal., 697, cited.

The judgment of the Court was delivered by—

Thirkell White, C. J.—In this case, there are rival claimants to the right to administer the estate of the late Ma Ye. The claimants are the appellant, Ma Thi, the younger sister of Ma Ye, and Shwe Hlwa, who is admitted to be the nephew and who claims to be the adopted son of the deceased.

In the proceedings of the District Court, the relatives of Ma Ye are described as Chinese and of the Chinese religion. The case, however, was tried on the assumption that the deceased was a Buddhist, that the rights to inherit her estate are governed by Burmese Buddhist law, and that the Probate and Administration Act, 1881, and not the Indian Succession Act, 1865, is applicable. No objection on these points was taken by the appellants. And we do not think it necessary to raise the question at this stage.

The District Judge declined to decide the question whether the applicant, Shwe Hlwa, was the adopted son of the deceased. A good deal of evidence was given in support of his claim to be so. But it is said that all the evidence on this point that might have been produced was not laid before the Court. From the record it appears that this reticence was allowed at the suggestion of the advocate for the present respondent. But we have been informed in the argument in this appeal that this was not exactly the case.

There was no reason why the question of the adoption of the claimant, Shwe Hlwa, should not have been tried in this case. Under section 23 of the Probate and Administration Act, administration of the estate of an intestate may be granted to any person who would be entitled to the whole or any part of the deceased's estate. When proceeding under this section, the District Judge is bound to ascertain whether the person who asks for letters of administration is so entitled. The fullest enquiry into this question may be necessary if, as in the present case, there is a dispute as to who is entitled to inherit the estate. Only recently, in a case which went to the Privy Council (*Narendra Nath Pahari* v. *Ram Gobind Pahari*) (1) the

(1) (1902) L. R. 29 I. A. 17.

question of the legitimacy of a person who claimed to be the son of the deceased was contested and decided in a suit to have letters of administration granted. The District Judge refrained from deciding which of the parties was the legal heir, saying that it was not incumbent on a Court when granting letters of administration to decide this. But, under section 23 of the Probate and Administration Act, it is incumbent on the Court, before granting letters of administration, to find that the person to whom he grants the letters is entitled to the whole or part of the deceased's estate. Until this is ascertained, the Court has no power under that section to grant letters to a person who claims to be so entitled. It would have been not only lawful but expedient if the question of the relative rights of the contesting parties had been determined in these proceedings. Under section 23 of the Probate and Administration Act, the District Judge had no power to grant letters of administration to Shwe Hlwa because he might turn out to be the adopted son of Ma Ye. It may not have been absolutely necessary to determine the question of adoption, although that was the basis of the respondent's claim. He might be entitled to a share of the estate as a nephew. This point has not been considered: but we hardly think it can be settled merely by a reference to an isolated text in the *Manukye Dhammathat*. But in any case, the one point that is clear is that in order to entitle a person to letters of administration under section 23 of the Probate and Administration Act, he must be shown to have an interest in the estate. It is not sufficient that he may possibly have an interest.

But besides section 23 of the above Act, section 41 provides for the appointment as administrator of a person who would not ordinarily be entitled to be appointed. As was said by Sale, J., in the case of *Kaminey Money Bewah* (1) grants under that section are made for the protection and preservation of the estates of deceased persons, in the exercise of the discretionary powers of the Court, and not as recognizing any legal interest of the grantees in the estate of the deceased. It has been urged on behalf of the appellant that a grant should not be made under this section to a person who has, or claims to have, an interest adverse to a person ordinarily entitled to the grant. But the case above cited, which was referred to in support of this proposition, does not seem to contain any mention of it. We think that the District Judge should have ascertained the relative rights of the claimants and granted letters of administration under section 23 of the Probate and Administration Act. But as he did not do so, we think that the appointment of Shwe Hlwa may be taken as having been made under section 41 of the Act. The District Judge gave good reasons for considering Ma Thi not to be a suitable person to be appointed to administer the estate; and for thinking that Shwe Hlwa was a fit person for the appointment. The limitations imposed under section 40 of the Act, to which Shwe Hlwa has taken no exception, are sufficient to safeguard the estate. We are of opinion that it is for the interest of the estate and of the heirs

(1) (1894) I. L. R. 21 Cal., 697.

1902

MA THI
v.
SHWE HLWA.

that the arrangement made by the District Judge should not be disturbed; and we think that there is no legal objection to the grant of letters of administration to Shwe Hlwa as explained above.

For these reasons we dismiss this appeal with costs.

Letters of administration do not seem actually to have issued to Shwe Hlwa. They should not be issued till he has fully complied with the provisions of section 19-I of the Court Fees Act. The annexures to the affidavit should be in the forms given in Schedule III to that Act with such additions, if any, as may be necessary.

We allow Rs. 85 as Advocate's fees.

Criminal Revision No. 797 of 1902. July 22nd.

Before Mr. Justice Irwin

MOKUN MAISTRY *v.* VALOO MAISTRY.

Sanction to prosecute—Duty of judicial officer granting sanction—Duty of Magistrate entertaining complaint—Criminal Procedure Code ss. 195, 200.

A judicial officer to whom an application is made for sanction to prosecute for the making of a false charge should consider, "If I were prosecuting this case myself am I in a position to produce such evidence as if unrebutted would support a conviction?"

A Magistrate to whom a complaint is presented after sanction to prosecute has been granted under section 195 of the Criminal Procedure Code, is bound to examine the complainant under section 200 of that Code and should not issue process until the complainant satisfies him that there is sufficient ground for proceeding.

The main ground on which this application is made is that the record does not disclose a strong *primâ facie* case against the applicant. The Magistrate in dismissing the case of breach of contract said, "There are grave doubts of the genuineness of the accused's signature to the document," which would seem to imply that the Magistrate did not think the document was proved to be false, but that he merely thought it was not proved to be true. The Magistrate, however, was not trying the case of forgery; his opinion was expressed in terms sufficiently strong for disposing of the case then before him, and he may well have held a more decided opinion on the question of forgery. Let us see what evidence he had to consider.

The Magistrate observed that the signatures on the bail bond and power of attorney were in a different hand-writing from that on the document, and this fact was patent to the most casual observer. The complainant's evidence was vague and unsatisfactory, and did not agree with the evidence of the writer of the document. Valoo himself will, of course, be the principal witness; he has not yet been cross-examined.

A judicial officer to whom an application for sanction is made should put himself into the place of the applicant, and consider, "If I were prosecuting this case myself, am I in a position to produce such evidence as, if unrebutted, would support a conviction?" The offence is primarily one against public justice, rather than against the

1902.

MOKUN MAISTRY v. VALOO MAISTRY.

individual. For the private wrong the individual has generally another remedy by civil suit, and section 195 was enacted chiefly to prevent private persons from wreaking vengeance on their enemies by getting them arrested on mere suspicion. In the present case the Magistrate would have done well to ask the applicant what evidence he proposed to adduce in support of the charges, and review that evidence before granting sanction. But I do not think it is at all expedient that I should express an opinion on the cogency of the evidence on which the sanction was granted. There undoubtedly is evidence that the signature is false, and even if it be doubtful whether it constitutes strong *primâ facie* proof, the Chief Court ought not to prejudice the trial by discussing the question whether the evidence, or part of it, is credible before it has been submitted to the test of cross-examination. It should also be remembered that process cannot be issued on the sanction alone. The Magistrate to whom the complaint is presented is bound to examine the complainant under section 200, Code of Criminal Procedure, and should not issue process unless the complainant satisfies him that there is sufficient ground for proceeding. This stage had already been reached, and process had been issued by the District Magistrate before his application was made, as appears from the application itself.

The other ground of this application is that the record does not disclose the commission of all three offences mentioned in the sanction, namely, offences under sections 211, 465 and 471, Indian Penal Code. It does not appear that there is any direct evidence of forgery on the record of the trial for breach of contract, and it is urged that section 221 cannot apply because a proceeding under section 2 of Act XIII of 1859 is not a criminal proceeding. The ruling quoted (I. L. R., 27 Cal., 131) leaves this last point a little doubtful, but in any case the ground is entirely cut from under this objection by sub-sections (4) and (5) of section 195. If section 211 does not apply section 209 does, and the addition of forgery does not invalidate the sanction to prosecute for using a false document and making a false charge or false claim. It is the duty of the Magistrate, under section 254, Code of Criminal Procedure, to frame the charge in accordance with the evidence, although a different section of the Penal Code may have been specified in the complaint.

For these reasons I do not think there is any sufficient ground for interfering with the order of the Cantonment Magistrate granting sanction to prosecute. The application is dismissed.

Before Mr. Justice Thirkell White, Chief Judge.

CROWN *v.* CHIT TE.

Criminal Revision No. 987 of 1902. July 22nd.

Assault—Assault on a woman with intent to outrage her modesty—Charge under minor offence—Conviction of graver offence—Indian Penal Code, ss. 354, 352—Transfer of part-heard case to another Magistrate—Right of accused to have witnesses re-called and re-heard—Criminal Procedure Code, s. 350—Practice.

The accused was sent for trial under section 354 Indian Penal Code before the subdivisional Magistrate. This Magistrate, after recording evidence, examining

1902.

CROWN
v.
CHIT TE.

the accused and charging him with an offence under section 352 Indian Penal Code, transferred the case for trial to another Magistrate. The second Magistrate without recalling or re-hearing the witnesses gave judgment convicting the accused under section 354 Indian Penal Code.

Held,—that the Magistrate's procedure in passing orders without recording the evidence of the witnesses for the prosecution was irregular, as section 350 Criminal Procedure Code did not apply. That section relates to cases in which a Magistrate ceases to exercise jurisdiction and is succeeded by another Magistrate and not to cases of transfer from one Magistrate to another. In the latter case the Magistrate must begin the trial afresh.

In any case when a Magistrate purports to act under section 350 Criminal Procedure Code, he should inform the accused of his option to have the witnesses re-heard under proviso (*a*) and should record that he has done so.

Held also—that while on a charge under section 354 the accused might be convicted of the minor offence under section 352 he could not, when charged with the lighter offence under section 352, be convicted of the graver offence under section 354 Indian Penal Code.

IN this case the complaint was that the accused pulled the hand of the complainant, a girl of 14, and kissed her. The accused was sent for trial under section 354 Indian Penal Code. After recording evidence, the Subdivisional Magistrate examined the accused and charged him under section 352 Indian Penal Code. He then, owing to pressure of other work, transferred the case for trial to another Magistrate. The second Magistrate, without recalling or re-hearing the witnesses, gave judgment convicting the accused under section 354.

As regards the procedure in passing orders without recalling the witnesses for the prosecution, the Magistrate doubtless thought that he acted under section 350 Code of Criminal Procedure. But that section refers to cases in which a Magistrate ceases to exercise jurisdiction and is succeeded by another Magistrate. It seems to me clearly to relate to cases in which a Magistrate is succeeded in the same office by another Magistrate; and not to cases of transfer from one Magistrate to another. In the latter case, the second Magistrate must begin the trial afresh. In any case, when acting under section 350, Code of Criminal Procedure, the second Magistrate should inform the accused of his option to have the witnesses re-heard, under proviso (*a*) of that section, and should record that he has done so. The law does not absolutely require this to be done. But as a matter of practice this procedure should be followed.

As regards the conviction under section 354 Indian Penal Code, on a charge under section 352 of that Code, section 238 of the Code of Criminal Procedure is the section which applies. On a charge under section 354 Indian Penal Code, the accused might be convicted of an offence under section 352. As between assault or use of criminal force, by itself, which is punishable under section 352, and assault or use of criminal force to a woman with intent to outrage her modesty, punishable under section 354, the former is the minor offence. The latter is the offence punishable under section 352, with additional circumstances. It is obviously unjust to convict an accused under section 354 Indian Penal Code, without calling upon him for his de-

1902.

CROWN v. CHIT TE

fence in respect of the particulars which differentiate the offence for that stated in the charge under section 352.

For the reason that the Magistrate had no power to decide the case on evidence recorded by another Magistrate and also that the accused could not be convicted under section 354 Indian Penal Code on the charge as framed, I set aside the conviction and sentence in the case of Chit Te and I direct that the fine be refunded to him and that he be re-tried.

Before Mr. Justice Thirkell White, Chief Judge.

Criminal Revisio No. 819 of 1902. July 21st.

CROWN *v.* TUN WA AND 12 OTHERS.

Gambling—Information and grounds of belief, Record of—Warrant—Search—Articles liable to seizure—Burma Gambling Act, s. 6 (1), (2), (3).

The accused were convicted under sections 11 and 12 of the Gambling Act and fined.

The record must show that the provisions of section 6 of the Gambling Act have been strictly observed before the presumption under section 7 can be drawn. The record of the information and the grounds of belief made under section 6 should be filed on the trial record. Only articles specified in section 6 can be seized in execution of a warrant under that section.

ACCORDING to the evidence of the first witness, Police Sergeant Maung Ba, he went to the house of the first accused, Tun Wa, armed with a warrant issued by the District Superintendent of Police. The warrant is dated March 1902. It was executed on the 16th March 1902. There is nothing on the record to show that it was executed within seven days from the date on which it was issued. There is nothing to show that the formalities prescribed by section 6 of the Gambling Act were observed. Before issuing a warrant under that section, the Magistrate or Superintendent of Police is bound to record in writing the substance of the information and the grounds of his belief that the house to be searched is a common gaming house. This record should be filed at the trial. It need not contain the name of the informer. But, unless it is filed with the proceedings, it is impossible to know whether the warrant was duly issued.

The witness was accompanied by another Sergeant, two Police constables, and three mounted military policemen. Under sub-section (3) of section 6 of the Gambling Act, searches under sub-section (1) of that section must be made in accordance with section 102, sub-section (3), and section 103 of the Code of Criminal Procedure. Under section 103, before making a search, the officer about to make it is required to call two or more respectable inhabitants of the locality in which the place to be searched is situated to attend and witness the search. A list of things found must be prepared and signed by these witnesses. It does not appear that either of these provisions of the law was observed.

1902.

CROWN v. TUN WA.

The warrant must be addressed to a police officer not below the rank of Sergeant or officer in charge of a police-station. Maung Ba is described in the warrant as a 1st grade Constable, in the deposition form as a Sergeant, in the judgment again as a Constable. The warrant does not show that he was in charge of a police-station, if he was not a Sergeant.

According to Maung Ba's evidence, on proceeding to execute the warrant he found several persons playing at cards for money in Tun Wa's compound. Most of them ran away; but he managed to arrest the 13 accused before the Court. Whether he arrested them there and then or whether he identified some of them and arrested them afterwards (as appears from the evidence for the defence) is not stated. One Shwe Nge is said to have run away taking the cards with him. All the articles found on the spot, except the cards, which were taken away, were three mats and Rs. 6-7-0. Four bullocks and two carts were found close by and apparently seized. It is not clear how the carts and bullocks can be held to come within the terms of section 6, sub-section (*1*), clause (*c*), of the Gambling Act, or why they were supposed to be liable to seizure.

The next witness is Nga U Gaing, who says that he went to gamble, and that there were about 100 people present, including all the accused before the Court. They played at cards for money and commission was taken by either Shwe Nge or Tun Wa.

The remaining witness is the headman of a neighbouring village, who says that on the day of the arrest in Tun Wa's compound he and constable Po Yin found several persons, that is about 100, including the accused before the Court, playing at cards for money and Tun Wa and Shwe Nge taking commission. I do not understand that this man was present at the search.

All the accused denied the offences of which they were accused. But the first accused, Tun Wa, admitted that gambling did go on in his compound.

The accused were not examined after the evidence for the prosecution had been taken. The Magistrate was bound to examine them by section 342 Criminal Procedure Code, if he thought there were any circumstances appearing in the evidence against them.

Now, it is clear that no presumption can be drawn under section 7 of the Gambling Act. The proceedings under section 6 were quite irregular, so far as appears from the record; and it is only when the procedure under section 6 is strictly observed that the presumption under section 7 arises. Of course the mere fact that one of the gamblers ran off with the instruments of gaming would not destroy the presumption under that section. But even if the procedure under section 6 had been properly observed, there is only the unsupported evidence of the Sergeant or Constable to prove that any cards were seen at all at the time of the search or entry.

The case must therefore rest on the oral evidence. The admission of Tun Wa does not implicate any of the other accused; nor would it be of any value, if it did so, as it does not amount to a confession.

1902.

CROWN v. TUN WA.

The evidence to show that any of the accused were playing for money in a common gaming house seems to me extremely weak. There is the evidence of the sergeant or constable, Maung Ba; but he could have seen very little of what was taking place. At any rate he does not explain that he had more than a momentary glance as he came to make the entry. The witness, U Gaing, is clearly an accomplice, if he is to be believed; as he says he went to the place (which he does not describe further than as being in the village of Kangyi) to gamble. He says in a general way that all the accused were present. His statement was not tested in any way. Similarly, the headman, Maung Pu, does not give any particulars nor does he explain at what time or under what circumstances he and Constable Po Yin witnessed the gambling. It is remarkable that a Constable and a headman should have watched a large gambling party without, apparently, exciting any misgiving in the minds of the gamblers.

I have no doubt that there was a large gambling party in Tun Wa's compound; and it is to be regretted that the proper steps were not taken to bring the gamblers to justice, if, as is most probable, the place in question was used as a common gaming house. It is precisely these large gambling assemblies which are aimed at by the Gambling Act, which are a public nuisance and cause of crime, and which should be severely repressed. But legal measures must be taken for this purpose. The provisions of the Gambling Act must be duly observed. There must be reasonable proof that the accused are really guilty.

In the present case, the evidence of the police sergeant, or constable, of the accomplice and of the headman, in view of the considerations which I have noted above, is not sufficient to show that any of the accused, other than Tun Wa, the first accused, was guilty of an offence under section 11 of the Gambling Act. The evidence was not tested in any way; and vague statements of the kind recorded in this case cannot amount to proof of the guilt of any of the accused. The failure of the Magistrate to give the accused an opportunity of explaining the circumstances appearing in evidence against them must also be taken into consideration. Although no doubt many persons were gathered in Tun Wa's compound for the purpose of gambling, I do not think there is any sufficient proof that the accused were among the number.

Tun Wa's admission that gambling was going on in his compound is a sufficient corroboration of the evidence against him. His conviction will not be interfered with. The convictions of the other accused, Po Pan, Kyaw Zan, Nga Kaung, Kyaw Shin, Po Tan, San Bwin, Tun Win, Yan Gyi, Shwe Lôk, Yan Hmu, Pan Bu, and Po Kyaw, cannot be sustained. They are reversed and the fines paid will be refunded.

If the guilt of the accused had been made out, I should not have considered the sentences excessive.

Criminal Appeal No. 360 of 1902. August 6th.

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

THA ZAN *v.* CROWN.

Examination of accused—Transportation instead of imprisonment, Sentence of.

Accused may be examined only for the purpose specified in section 342 Code of Criminal Procedure, not to supplement deficiencies in the evidence.

Under section 59 of the Indian Penal Code a sentence of transportation instead of imprisonment can be passed in cases to which section 75 Indian Penal Code applies. The proper procedure under section 59 Indian Penal Code is to pass a sentence of transportation instead of a sentence of imprisonment, not to commute a sentence of imprisonment to one of transportation.

Shwe Lan v. *Queen-Empress*, P. J., L. B., 482, overruled.

Thirkell White, C. J.—In my opinion this appeal should be summarily dismissed. I have no doubt that the appellant was rightly convicted. The loss of a bullock from a grazing ground occurred in circumstances which justify the presumption that the bullock was stolen. Two days later the animal was seen in the appellant's possession, and he hinted to the owner that it might be recovered on payment of Rs. 20. The statements which he made to the headman are quite inconsistent with his statements in Court and in the petition of appeal.

I wish to add one or two remarks on incidental points. In an examination by a Magistrate on 16th May 1902, the accused was asked whether he had been in jail before. If this examination was read out at the trial, the object of section 310 Code of Criminal Procedure was to some extent defeated. The question was an improper one and should not have been asked; and the Magistrate should be so informed. The object of the examination of the accused is to enable him to explain circumstances appearing in the evidence against him, not to supply defects in the evidence.

I think that the Sessions Judge might have sentenced the accused to transportation for 10 years. Section 59 of the Indian Penal Code provides that where an offender is punishable with imprisonment for seven years or more, the Court, instead of awarding sentence of imprisonment, may sentence him to transportation for a term not less than seven years and not exceeding the term for which he is liable to imprisonment. In this case, under section 75 of the Indian Penal Code, the accused was punishable with imprisonment for a term not exceeding 10 years. He was thus an offender punishable with imprisonment for more than seven years; and under section 59, instead of awarding sentence of imprisonment the Sessions Judge might have sentenced him to transportation for a term not less than seven or more than 10 years. It is true that under section 75 Indian Penal Code, without reference to section 59, a sentence of transportation for a term of years could not be passed. But this does not affect the operation of section 59.

1902.

THA ZAN v. CROWN.

I take the opportunity of noting that, in my opinion, the common practice to which the Sessions Judge refers, of passing a sentence of imprisonment and commuting it to one of transportation, is not authorized by section 59 Indian Penal Code. That section enables the Court, instead of awarding sentence of imprisonment, to sentence the offender to transportation; and the form of the order should be in accordance with the section, due reference being made to it. I think that the Judicial Commissioner's ruling in *Shwe Lan* v. *Queen-Empress* (1) which countenances the common practice should be overruled.

Fox, J.—I concur.

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

Civil second Appeal No. 149 of 1901. August 7th, 1902.

MAUNG MYAT THU AND ONE v. MAUNG THA ZAN AND ONE.

Messrs. *Chan Toon* and *Darwood*—for appellants.

Messrs. *Burjorjee* and *Dantra*—for respondents.

Registration—Competing registered documents—Priority—Delay in effecting registration—Notice—Registration Act, ss. 47, 49, 50.

As between two innocent purchasers, both under registered documents of which registration is compulsory, the one whose conveyance was first executed has the prior right without regard to the dates on which the two documents were registered.

Delay in effecting registration, when registration is effected within the period allowed by law, does not of itself amount to negligence.

There is no authority for the proposition that if the subsequent purchaser has no notice of the prior purchase his title will prevail over that of the prior purchaser.

Lalubhai v. *Bai Amrit*, 2 Bom., 343; *Santaya Mangarsaya* v. *Narayan*, 8 Bom., 182; *Dinonath Ghose* v. *Auluck Moni Dabee*, 7 Cal., 753; *Krishnamma* v. *Suranna*, 6 Mad., 148; *Dandaya* v. *Chenbasapa*, 9 Bom., 427; *Nani Bibee* v. *Hafizullah*, 10 Cal., 1073; *Nallappa Reddi* v. *Ramalingachi Reddi*, 20 Mad., 250; referred to.

Thirkell White, C. J.—The facts as found by the lower Courts, in this case, are that one Lu Gaung sold the land in suit, on 5th April 1900, by a written conveyance, to the defendant-respondent, Tha Zan, for Rs. 500. The conveyance was not registered till 19th July 1900. On 2nd May 1900, by a deed of conveyance executed and registered on that date, Lu Gaung purported to sell the same land to the plaintiff-appellants Myat Thu and Ma Shwe Pon for Rs. 750. The Court of First Instance found that the appellants had notice of the previous sale to the respondent at the time when they bought the land. The lower Appellate Court has recorded no finding on this point. The lower Appellate Court has found that the respondent obtained possession before the appellant. The Court of First Instance did not find on that point.

The appellants' case is that on the 2nd May 1900 they obtained a clear unimpeachable title to the land in suit under their registered

(1) P. J., L. B., 482.

1902.

MAUNG MYAT THU. v. MAUNG THA ZAN.

deed; that at that time the respondent had no title to the land as his deed was not then registered; that they had no notice of the previous sale; and that subsequent registration of the respondent's deed could not invalidate and render void their already perfected title.

The first respondent, Tha Zan, relies on section 47 of the Registration Act; and also, to some extent, on the finding of the Court of First Instance that the appellants had notice of his purchase of the land, and on the finding of the Court of First Appeal that he had prior possession. The second respondent is merely a tenant under Tha Zan.

Section 47 of the Registration Act runs as follows:—

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration."

On the interpretation of this section there are some remarks in rulings of the Bombay High Court which may be cited. In the case *Lalubhai* v. *Bai Amrit* (1), in which, as in the present case, there were competing registered documents, it was said with reference to the effect of section 47 of the Registration Act—

"The registered instrument takes effect as if registered on the day of its execution; and no bare title which has not then ripened into complete ownership can subsequently do so, except subject to the registered instrument. * * * The priority as between two instruments, such as those in the present case, is thus referred to their time of operation, apart from the Registration Act."

In *Santaya Mangarsaya* v. *Narayan* (2) it was said:

"As both deeds of sale were registered according to law, they would operate from their respective dates of execution as provided by section 47."

The meaning and intention of the section seems to be clear. Under the earlier Registration Acts registered instruments took effect from the date of registration. Under the later Acts the law has been altered, and a registered document takes effect from the date of execution without regard to the date of registration. There are, however, two points which require consideration. The first arises under section 49 of the Registration Act; the second concerns the doctrine or notice.

Section 49 of the Registration Act provides that no document which requires to be registered shall affect any immoveable property comprised therein unless it has been registered in accordance with the provisions of the Act. The contention of the learned Counsel for the appellants is that when the appellants' conveyance was executed and registered there was no document in existence which could affect the land in suit; and that under their registered deed they acquired a perfect title which could not be affected by the subsequent

(1) (1878) 2 Bom., 343. | (2) (1884) 8 Bom., 182.

registration of the respondent's deed. The case presents itself to me in a different light. A document may be registered under section 23 of the Registration Act within four months from the date of its execution. If it is so registered, it takes effect, under section 47 of the Act, as if it had been registered at the time of execution. On the registration of the respondent's deed, it took effect from 5th April 1900, that is, from a date prior to the date of execution of the plaintiffs' deed. Until it was registered, the respondent's title was inchoate, not only as against third parties but as against the vendor. The deed could not, while unregistered, affect the land comprised in it. But as soon as it was duly registered, then it did affect the land, and under section 47 of the Registration Act it did so from the date of its execution. The effect of the existence of the respondent's deed taken in conjunction with the provisions of section 47, was to render the appellants' title incomplete until the registration of the respondent's deed became impossible. So long as the respondent's deed could be registered, it cannot be said that the appellant's title was complete. To hold otherwise would be to ignore or render nugatory the express provisions of section 47. I can find no authority for the appellants' contention and no support for that contention in any section of the Registration Act.

The second point is that the appellants' deed cannot be impugned if they had no notice of the prior conveyance. As was said in *Dinonath Ghose* v. *Auluck Moni Dabee* (1) "however strict the language of the Registration Act may be, they will not be construed so as to enable their provisions to subserve fraud. * * * The object of the new Registration Act is to prevent fraud. It ought to be construed so as to promote this object." The cases which deal with notice in connection with registered documents are almost exclusively under section 50 of the Act. Their general effect is that, notwithstanding the wide terms of that section, a subsequent registered document will not take effect as against a prior unregistered document, of which the registration is optional when the person claiming under the later document executed it after notice of the prior document. To this effect may be cited the ruling of the Madras High Court in *Krishnamma* v. *Suranna* (2); of the Bombay High Court in *Dundaya* v. *Chenbasapa* (3); of the Calcutta High Court in *Nani Bibee* v. *Hafizullah* (4).

These rulings are in accord with the principle cited above. They are authorities for the position that, if a subsequent purchaser has notice of the existence of a title previously created, section 50 of the Registration Act will not enable his title to prevail over that of the prior purchaser, in fraud of the latter. But this is no authority for the proposition that, when there are two purchasers under equally valid titles, if the subsequent purchaser has no notice of the prior purchase, his title, in spite of section 47 of the Act, will prevail over that of the

(1) (1882) 7 Cal., 753.
(2) (1893) 16 Mad., 148.
(3) (1885) 9 Bom., 427.
(4) (1884) 10 Cal., 1073.

1902.

MAUNG MYAT THU v. MAUNG THA ZAN.

prior purchaser. To suppose that the second proposition is a legitimate deduction from the first involves a logical fallacy.

The only case which at all gives colour to the contention put forward on behalf of the appellants on this point is that of *Nallappa Reddi* v. *Ramalingachi Reddi* (1), in which the question whether the second purchaser had notice was considered essential. But in that case the earlier conveyance was lost before it was registered; and the case is therefore not on all-fours with the present case.

There may be cases in which the prior purchaser would be estopped from asserting his title. If the respondent had been aware of the intention of his vendor to sell the property to the appellants, and if he had stood by and allowed the vendor to effect the fraudulent sale, he might have been estopped. If he had been guilty of positive fraud, of concealment, of even of negligence, and had thus led the appellants to buy the land in the belief that the vendor had the right to sell it, the same rule might apply. But this would be quite apart from the provisions of the Registration Act. In this case, it is not suggested that the respondent knew of the intention of his vendor to sell the land to the appellants. It was not within his power to inform the appellants and it would be most inequitable to make him suffer for not having done so. The only suggestion of negligence on the part of the respondent arises from his omission immediately to register the conveyance. I do not think that delay in effecting registration, when registration was effected within the period allowed by law, can possibly be held to amount to negligence so as to bring the case within the rule of estoppel. The question of notice therefore does not arise in this case. The appellants have no more equitable right to assert their title against the respondent than an innocent purchaser of stolen property would have against the real owner.

The question of possession was not raised in the memorandum of appeal, and I do not think it affects the relative rights of the parties. It is not suggested that delivery of possession is necessary to complete the title of the purchaser of land. The transaction was complete on the registration of the document, and section 47 of the Registration Act refers the operation of the document to the date of its execution. It is immaterial, in this case, whether the finding of the Divisional Court on this point is correct or not.

The conclusion is that, as between two innocent purchasers both under registered documents, the one whose conveyance was first executed has the prior right without regard to the dates on which the two documents were registered. This is the sole point for decision.

I would therefore dismiss this appeal with costs.

(1 (1897) 20 Mad., 250.

Irwin, J.—I concur in this judgment.

1902.

MAUNG MYAT THU v. MAUNG THA ZAN.

I wish to say a few words more about two of the main propositions which the learned Advocate for the appellant put before us. He opened his argument by saying that section 47 of the Registration Act applies only as between the parties to a deed and not as against the world at large. I find it difficult to imagine any circumstances under which a question as to the date from which a deed takes effect could arise as between the parties, and the words of the section itself afford no grounds for limiting its meaning in this way. It is hardly conceivable that such a section should have been enacted, contrary to the corresponding section in the earlier Acts, without any express limitation or explanation, if it were intended that the earlier rule by which a deed took effect from the date of registration should continue to apply as against other registered documents.

It was also urged that of two innocent purchasers the one who should suffer is the one who has, by his negligence, enabled the vendor to commit a fraud. If this argument were allowed the second purchaser would profit (innocently it may be) by a fraud; for the second sale was undoubtedly fraudulent on the part of the vendor, the first sale was not. I entirely agree with the learned Chief Judge that the mere omission to present the conveyance for registration immediately after its execution is not sufficient to make the later deed prevail over the earlier one under the doctrine of notice.

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

Criminal Reference No. 2 of 1902. August 12th, 1902.

CROWN *v.* CHAN MYA.

Kidnapping a girl under 16—Intention of minor girl to cohabit of her own free will with her kidnapper—Indian Penal Code, section 366.

Section 366 of the Indian Penal Code is not applicable where a girl between the ages of 12 and 16 at the time of the kidnapping from lawful guardianship intends to cohabit of her own free will with the kidnapper.

Queen-Empress v. *Koordan Sing*, (1865) 3 W. R., 15; *Fateh Din* v. *The Emperor*, (1902) P. R., 10, referred to.

THE reference was made by Mr. Justice Irwin in the following terms:—

I admitted this appeal because it seemed doubtful whether there was proof of an intention to seduce the minor to illicit sexual intercourse.

Mi The The is found to have been about 14 years of age when the offence was committed. She left her parents' house on 29th March, met her lover, Nga Chan Mya, somewhere in the neighbourhood, and went away with him. On 4th April they were found living together at Dedaye. She said she had been in love with appellant for months, and had been discussing an elopement with him for two

1902.

CROWN v. CHAN MYA.

months. She stated in Court that if he were imprisoned she would commit suicide. He has been convicted under section 366 and sentenced to three years' rigorous imprisonment.

The questions arise whether the intercourse was illicit, and whether appellant kidnapped her in order to seduce her to such intercourse. The Special Court in *Queen-Empress* v. *Nga Ne U* (1) considered the former question and decided it in the affirmative, but the second question is not touched on at all in the judgment in that case.

The ground of the decision was a ruling that the accused could not validly contract marriage with the minor girl without the consent of her father. The ruling followed Civil Miscellaneous Appeal No. 3 of 1878, and *Manukye*, VI, 21, 22 and 23, and *Wunnana*, sections 133 and 134. Appeal No. 3 was in the Special Court. It was held to be laid down in the Dhammathat that a marriage of a girl under 20 without consent of her guardian is absolutely null and void, and that this was recognized as the true exposition of the law by all classes of Burmans as binding at the present day. No particular passages in the Dhammathat are quoted. It seems quite open to argument whether the sections of the *Manukye* above quoted do not prove the exact contrary, namely, that a valid marriage without the consent of the guardian may, under certain circumstances, be contracted. A good deal may be said on this point, but it is not necessary to say any more now.

From the words of the section it would seem that an intention to seduce, subsequent to elopement, is an essential part of the offence. In the present case there is, I think, no direct evidence of seduction at all, and if seduction is to be presumed it would rather be presumed to have occurred before the elopement, though it would not be presumed that it reached its consummation in actual sexual intercourse until afterwards. Mayne says (page 646) that section 366 seems to apply to cases where at the time of the abduction the woman has no intention of marriage or illicit intercourse, but it is contemplated that her marriage, or illicit intercourse with her, will be accomplished by force or seduction brought to bear upon her afterwards.

I therefore refer for the decision of a Full Bench, under section 11, Lower Burma Courts Act, the questions—

(1) Can a Burmese Buddhist minor girl under any circumstances contract a valid marriage without the consent of her guardian?

(2) If a Burmese Buddhist girl under 16 years of age elopes with a lover of her own free will intending to cohabit with him, is the resulting sexual intercourse necessarily illicit?

(3) Does section 366 of the Indian Penal Code apply to a case in which a minor girl, at the time of the kidnapping from lawful guardianship, intends to cohabit of her own free will with the kidnapper?

(1) (1883) S. J., L. B., 202.

1902.

CROWN v. CHAN MYA.

These questions were not considered in Criminal Reference No. 1 of 1902.

The opinion of the Bench was as follows:—

Irwin, J.—Of the three questions which I put in this reference the third alone is really necessary to the decision of the appeal. I put the other two because if No. (3) is found in favour of the prisoner the result will be to over-rule a decision of the Special Court which proceeded on grounds peculiar to Burmese Buddhists, while question (3) is one which makes no distinction of race or faith.

The Special Court held that the marriage of a Burmese girl under 20 without consent of her parent or guardian was absolutely null and void, and this is based on *Manukye* Dhammathat, Book VI, sections 21, 22 and 23. I am unable to follow the reasoning by which such an absolute and unqualified conclusion is drawn from these sections. Section 23 reads thus: "If a young woman shall be taken away from her parents with her own consent let the young man restore her three times: as the young woman is consenting . . . . . If the Judge decide that they are to live together, and they do so, let them be considered as man and wife." Even section 22 contains the saving clause, "If he offer to live with her, he shall not retain her if she does not consent; let her be released from all obligation as *his wife*."

The rules in the Dhammathats are not definite propositions stated in logical terms. Any attempt to construe them like English statutes would at once result in numerous flat contradictions. They correspond to the illustrations in an English Code rather than to the text. What the Courts have to do is to construct a text, as best they can, from the illustrations. Sections 21, 22 and 23 must be read together, and the true interpretation seems to be that a test of the real intentions of the parties is necessary, and that if the girl is steadfastly determined to marry her lover, and he continues of the same mind, the rights of the guardian must give way before accomplished facts. The proposition that the three elopements must be literally carried out, and that a marriage of this nature must necessarily be preceded by a probationary period of cohabitation which is essentially illicit, is not, in my opinion, a correct deduction from the language of the Dhammathat.

For these reasons I would answer question (1) in the affirmative and question (2) in the negative, that is to say, I hold that a Burmese Buddhist girl, even though she be a minor, and even though she be under 16, can in some circumstances contract a valid marriage without the consent of her guardian. If this be so, it follows that the grounds on which the Special Court decided that kidnapping a girl under 16 for the purpose of cohabiting with her must necessarily be punishable under section 366, are unsound and insufficient. Besides this, the Special Court in that case took no account at all of the question of seduction, and this brings me to question (3). The words of section

1902.

CROWN
v.
CHAN MYA.

366 are: "in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse."

I have already in my reference quoted the opinion of Mr. Mayne at page 646 of his Criminal Law of India. It may be noted that in a case like the present in which the girl admittedly went with the accused of her own free will for the purpose of cohabitation, that part of the section which relates to forcing her could not possibly apply, and this gives greater force to the argument that the intention of the section is that the seduction must necessarily be committed after and not before the kidnapping. The learned Government Advocate at once admitted that this view of the case must be correct in the case of an adult woman, and he also admitted that it must be correct in the case of a girl under 16, if she is legally capable of giving her consent to sexual intercourse. There is no law which prevents a girl over 12 years of age from legally consenting to sexual intercourse, and it was therefore ultimately admitted that section 366 does not apply in the case of a girl over 12 who goes with a lover of her own free will for the purpose of cohabitation.

In *Queen-Empress* v. *Koordan Sing* (1) the prisoner said that the girl came with him willingly and that she ultimately consented to cohabit with him. The girl said that, though solicited to cohabit with him, she refused. On this it was held that, whichever version were true, accused was rightly convicted under section 366. The ground of that decision seems clearly to be that the girl was seduced subsequent to the kidnapping.

In *Fateh Din* v. *The Emperor* (2) Mr. Justice Chatterji, in referring the question to a Bench, said: "The section (366) evidently relates to a case where force has been employed or deceitful means have been used for the abduction, and where the taking away is without the consent of the person who is the subject of the offence. Here, however, though the girl Begam was made to leave her home on a deceitful message she was persuaded to go away with the accused. Her subsequent movements were not against her will, but with her consent, though due to the persuasions of the accused." On this the Full Bench found that section 366 covered the case, merely remarking, "The girl was a minor; and the finding is, and the evidence proves, that the intention was to seduce her to illicit intercourse." Here the Court clearly found that the kidnapping was committed by means of fraud and that the seduction was subsequent to the kidnapping.

I have been unable to find any other rulings bearing on the point. The authorities, such as they are, support Mr. Mayne's view that section 366 applies only where the woman or girl, at the time of kidnapping or abduction, has no intention of cohabitation, and I think the Government Advocate's admission is correct.

I would therefore answer the third question in the negative.

(1) (1865) 3 W. R., 15. | (2) Punjab Records, 1902, No. 4, page 10.

1902.

CROWN v. CHAN MYA.

Fox, J.—I concur in the views expressed in Mr. Justice Irwin's judgment.

Thirkell White, C. J.—I concur in the answer to the third question. As that is sufficient to dispose of the reference, I do not think it necessary to express an opinion on the first and second questions. These questions have not been fully argued and the proposed answer rests mainly on a consideration of three texts from the *Manukye* Dhammathat. I should not like to commit myself to an opinion on the important question of Buddhist Law involved without hearing argument on both sides and without a full examination of all the texts bearing on the point.

Conviction altered to section 363 Indian Penal Code.

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

Criminal Revision No. 1050 of 1902. August 14th, 1902.

CROWN *v.* TA LOK.

Trial begun by one Magistrate—Transfer of case to another Magistrate—Recalling of witnesses already examined—Criminal Procedure Code, ss. 192 (2), 350.

Where a trial has been begun by one Magistrate and the case is transferred to another Magistrate under section 192, sub-section (2), of the Criminal Procedure Code, the second Magistrate cannot proceed with the trial without recalling the witness already examined: he must begin the case *de novo*.

U Waradama v. *Crown*, 1 L.B.R. 139; *Angua and others*, All. W.N. (1889) 130; *Queen-Empress* v. *Radhe*, I.L.R. 12 All., 66; referred to.

The following reference was made to the Full Bench by Mr. Justice Thirkell White, Chief Judge, under section 11 of the Lower Burma Courts Act, 1900:—

The trial was commenced by the Headquarters Magistrate and by him transferred to the Township Magistrate. The latter Magistrate proceeded with the trial without recalling the witnesses and convicted the accused. In my opinion the case does not fall under section 350 Code of Criminal Procedure, and there should be a new trial. The Headquarters Magistrate was not succeeded by the Township Magistrate within the meaning of section 350 Code of Criminal Procedure. But as the point may not be free from doubt, I think it desirable to refer the question for decision by a Bench. The question referred is as follows:—

When after a trial has been begun by one Magistrate, and the case is transferred to another Magistrate under section 192, sub-section (2), can the second Magistrate proceed with the trial without recalling the witnesses already examined, or must he begin the case *de novo*?

The opinion of the Bench was as follows:—

Thirkell White, C. J.—In my opinion, section 350 Code of Criminal Procedure does not refer to cases in which, after a trial or enquiry has commenced, the case is transferred to another Magistrate, under section 192, section 526, or section 528, Code of Criminal Procedure. I think that it refers only to cases in which, in the course of an enquiry or trial, the Magistrate dies, retires, or is transferred, and is

1902.

CROWN v. TA LOK.

succeeded in the same office by another Magistrate. In those cases the Magistrate may rightly be said to cease to exercise jurisdiction in the case and to be succeeded by another Magistrate. Where a case is transferred, though the first Magistrate may rightly be held to have ceased to exercise jurisdiction therein, I do not think it can be held that he is succeeded by another Magistrate. That seems to me an unnatural extension of the words of the section. The section seems to have been enacted for the purpose of providing that where one Magistrate succeeds another in the same Court the second Magistrate need not, as a matter of course, begin afresh all the pending cases which he finds left for disposal. The reference to the first Magistrate as the predecessor of the second Magistrate indicates that this is the intention of the section. Where a case is transferred, the second Magistrate would not naturally regard the first Magistrate as his predecessor. I think if the Legislature had intended the section to apply to cases transferred from one Court to another, it would have made its intention clear.

There is very little authority on the subject. In the case of *U Waradama* v. *Crown* (1), it seems to have been assumed that section 350 of the Code of Criminal Procedure applies to a case withdrawn by the District Magistrate from a Subordinate Magistrate and continued by himself. But the point was not specially considered. On the other hand, a case is cited in Sir Henry Prinsep's edition of the Code of Criminal Procedure in which the High Court at Allahabad held that "where in the middle of a trial a case has been transferred under section 528 to another Magistrate * * * the trial must be *de novo*. A distinction was drawn between such a case and a case dealt with under section 350" [*Angua and others* (2)].

The only difficulty that occurs to me arises out of the presence of sub-section (2) of the section, which explicitly declares that the section does not apply to cases in which proceedings have been stayed under section 346. That is practically a case of a transfer from one Court to another; and it may be held that, if the section did not apply to transferred cases at all, this sub-section was not required.

Notwithstanding this consideration I think that, for the reasons previously set forth, the natural and ordinary construction of the section should be adopted and that the section should not be held to apply to cases transferred from one Court to another. I would answer the reference by saying that the second Magistrate must begin the trial *de novo*.

Bigge, J.—I agree with the views of the Chief Judge, which are supported in *Queen-Empress* v. *Radhe* (3).

Irwin, J.—I concur.

I think sub-section (2) of section 350 may be explained in this way. Provision for transfer of cases under different circumstances

(1) 1 L. B. R., 139.—(2) All. W. N., 1889, p. 130, cited in Prinsep's C. of C. P., p. 344.—(3) I. L. R. 12 All., 66.

1902.

CROWN v. TA LOK.

is made in sections 192, 346, 348, 349, 526, and 528. Under all these sections the order of transfer may be made after the recording of evidence has commenced, but the only sections that deal with cases in which evidence is *necessarily* taken before the order of transfer is made are 346 and 349. Under section 349 the ordinary course is for the superior Magistrate to adjudicate on the evidence recorded by the inferior, and this seems to be the reason why a special caution against applying the same rule with modifications to section 346 was appended to section 350. I do not say it was a sufficient reason for enacting clause (2) and omitting to mention the other transfer sections in it, but it affords a plausible explanation of why the other sections are not mentioned.

The final order was passed by—

Thirkell White, C. J.—In accordance with the decision of the Full Bench, it is ordered that the conviction and sentence of Nga Ta Lok be reversed and that he be retried by a competent Magistrate who will take up the case from the beginning.

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

Civil Reference No. 5 of 1902. August 14th.

MAHOMED EBRAHIM SAHIB KHATEEB *v.* BHYMEAH A. ISMAILJI.

Ejectment, Suit for—Court-fee leviable on plaint—Court Fees Act, section 7, clause v.

A plaint in which the remedy asked for is the ejectment of a tenant from premises for non-payment of rent, or for the breach of any covenant contained in the lease, or for holding over after his tenancy has expired is not properly stamped with a court-fee of Rs. 10 under Article 17, clause 6, of Schedule II of the Court Fees Act.

The suit being one for possession of immoveable property the plaint should be stamped according to the value of the subject matter. Under clause v of section 7 of the Court Fees Act such value is to be ascertained by reference to sub-clause (*e*) of the same clause.

Bibi Nurjahan v. *Morfan Mundul*, 11 C. L. R., 91, and *Ram Raj Tewari* v. *Girnandan Bhagat*, I. L. R. 15 All., 63., dissented from.

The following reference was made by Mr. Justice Bigge under section 11 of the Lower Burma Courts Act.

This reference arises in consequence of doubts having arisen whether the accompanying plaint is sufficiently stamped with a court-fee of Rs. 10.

It sets out that by an indenture of lease, dated the 15th July 1899, the plaintiff leased to the defendant the third room of house No. 254 in Dalhousie Street for a period of six years in consideration of a rent and performance of the covenants and conditions therein reserved and contained.

I find on reference to a certified copy of the lease filed with the plaint that the defendant paid a bonus of Rs. 2,000 at the time of execution which was not to be claimable or recoverable by him under any circumstances and covenanted to pay a monthly rent of Rs. 100.

1902.

MAHOMED EBRAHIM SAHIB KHATEEB v. BHYMEAH A. ISMAILJI.

The lease contains *inter alia* a condition that the lessee shall not assign or underlet the said premises without first having obtained the consent in writing of the lessor, and the plaint charges that in breach of such provision he has sublet for the residue of the term granted by his lease and the plaintiff asks for a declaration that the lease has in consequence been duly and legally cancelled and determined as from the 1st August 1901, being the date of such alleged subletting and for judgment against the defendant that he do give up quiet and peaceable possession of the said room and that on his failing to do so he be ejected therefrom.

The plaint is stamped with a court-fee of Rs. 10 under the provisions of Article 17 (*6*) of the Second Schedule of the Court Fees Act, which prescribes a court-fee of that amount in a suit where it is not possible to estimate at a money-value the subject-matter in dispute, and which is not otherwise provided for by the Act.

In a suit for possession of a house or garden, a plaintiff must, under section 7 (v) (*e*), value the relief sought according to the market value of the house or garden, and I suppose it may be argued that he must follow the same procedure in suing to obtain possession of a room.

The practice in the Recorder's Court was, from the 28th of April, 1884, at all events, regulated by the decision of the officiating Recorder in Civil Regular No. 29 of 1884, *Edwin Darlington* v. *U Min*, in which the learned Judge, after distinguishing between suits where the plaintiff's title was involved and those against a tenant or occupier for holding over merely and referring to the difficulty which would arise in such a case as this, where the tenant or occupier is in occupation of a room only and not of the whole house, decided that clause 6 of Article 17 of the Second Schedule applied to such cases as the one before him which was the ordinary case of a tenant holding over and held that in suits where the plaintiff's title was not in issue, but immediate possession was all that was asked for, the plaint was rightly stamped with a court-fee of Rs. 10.

Under the orders that were passed by the learned Judges of this Court on the 1st December 1900, by which the practice of the Original Side of this Court is now regulated, it was laid down that if the title of the landlord is not put in issue the plaint should bear a Rs. 10 court-fee stamp, but where the title is put in issue the plaint should bear an *ad valorem* court-fee stamp. I confess that on considering the terms of that order and endeavouring to apply them to the facts of the present case, I am met with some difficulty, for it appears to me that it is only when a written statement has been filed that the Court is in a position to say whether the title of the landlord has been put in issue or not, and the question of court-fee has to be dealt with at the time of admission of the plaint.

The point, however, is fortunately not without authority for in *Bibi Nurjahan* v. *Morfan Mundul* (1), though the facts were not the same as those now before me, it seems to me that the learned Chief Justice laid down a general principle. Suits have been

(1) (1882) C. J. R. 91.

1902.

MAHOMED EBRAHIM SAHIB KHATEEB v. BHYMBAH A. ISMAILJI.

brought for possession of land held from the plaintiff by the defendant or his tenants at will and the court-fees affixed to the memoranda of appeal were calculated on one year's rental of the holding under section 7, clause xi (*d*), of the Court Fees Act. A reference was submitted by the Registrar of the High Court, Appellate Side, under section 5 of the Court Fees Act, in which after setting out the sections and clauses of the Court Fees Act, which he thought might apply, he fell back on clause 17 (*6*) of the Second Schedule, though he expressed an opinion inclining to clause 5 of the Second Schedule and to a court-fee of 8 annas. The learned Chief Justice after holding that section 7, clause xi (*d*), only applied to suits brought by a tenant to dispute the validity of his landlord's notice to quit, said: "There is "more reason in the argument that the suit is brought to recover posses-"sion of land under clause iv of section 7. But it hardly comes within "the true meaning of that clause; because the landlord is already in "possession in one sense through his tenant, the defendant, and the "object of the suit is merely to put an end to that tenant's interest. "The value of the suit would therefore be the difference between the "value of the landlord's interest whilst the tenancy continues and "its value when the tenant's interest has been terminated. It would "certainly be very difficult to estimate the value of that difference "and if it were necessary to do so I would say that Rs. 10 would be "the proper court-fee."

Applying that reasoning to the present case, it would appear that if the court-fee be paid upon the value of the suit it would be on the difference between the value of the interest of the landlord while the tenancy continues and its value when the tenant's interest has been terminated, a matter which would be difficult to assess in this case as it was in the case before the learned Chief Justice of Bengal, and I think that in this case, as in other cases where no question of title arises on the face of the plaint but where the relief asked for is to get rid of a tenant, who by the circumstances of his holding is not in a position to put in issue his landlord's title, the plaint will be properly stamped with a court-fee of Rs. 10. The point, however, is one which is not free from difficulty and affects all the Courts subordinate to the Chief Court and therefore is one which I think I should properly refer under section 11 of the Lower Burma Courts Act. I therefore refer this question:—

Is a plaint in which the remedy asked is the ejectment of a tenant, for non-payment of rent or the breach of any covenant contained in the lease or for holding over after his tenancy has expired in which the plaintiff's title on the face of the plaint is complete, and cannot be questioned by the defendant, properly stamped under Article 17, clause (vi), of the Court Fees Act with a court-fee of Rs. 10?

The opinion of the Court was as follows:—

Fox, J.—In my judgment the answer to this reference should be that the plaint in question is *not* properly stamped by reason of its being on a court-fee of the value given in Article 17, clause (vi), of the Second Schedule of the Court Fees Act, 1870.

1902.

MAHOMED EBRAHIM SAHIB KHATEEB v. BHYMEAH A. ISMAILJI

In the suit the plaintiff claims, and he must claim, possession of the premises which are the subject-matter of the suit. The only way in which the Court can aid him to recover what he wants is by giving a decree as contemplated by section 263 of the Code of Civil Procedure. The suit being one for possession of immoveable property, it falls *primâ facie* under clause v of section 7 of the Act. It is true that it is not for possession of a whole house, but on the principle that the greater includes the less, I think it should be held that a suit for possession of part of a house must be included in the clause in question. The plaint then should be on a court-fee according to the value of the subject-matter, and under sub-clause (*e*) of the same clause, the market value of the house possession of which is sued for regulates that value. Possession of only part of a house being sued for, I take it that the proportionate value that such part bears to the value of the whole house would be the value on which a court-fee must be paid.

It is argued that the suit being by a landlord against a tenant is not one for possession, but is only to eject or remove the tenant.

I have not been able to discover that there is, or ever has been, a form of suit in which a decree could be given merely to eject a tenant without also decreeing possession of the premises to the plaintiff.

A passage in the judgment of Chief Justice Garth in *Bibi Nurjahan* v. *Morfan Mundul* (1) has been relied upon by the plaintiff's advocate. In that case the landlord sought to eject tenants on the ground that they were mere tenants at will: the tenants resisted the suit on the plea that they had occupancy rights, and that they were not liable to ejectment. The actual decision in the case was that the suit fell under Article 5 of Schedule II of the Court Fees Act, that is to say, that it was a suit to disprove a right of occupancy. The Chief Justice, however, made the following remarks:—

"There is more reason in the argument that the suit is brought "to recover possession of land under clause iv of section 7. But it "hardly comes within the true meaning of that clause; because the "landlord is already in possession in one sense through his tenant, "the defendant, and the object of the suit is merely to put an end to that "tenant's interest. The value of the suit would therefore be, the "difference between the value of the landlord's interest whilst the "tenancy continues, and its value when the tenant's interest has been "terminated. It would certainly be very difficult to estimate the value "of that difference; and if it were necessary to do so I would say that "Rs. 10 would be the proper stamp fee."

In view of the actual decision in the case, the above remarks were on the face of them *obiter dicta*.

The decision in *Ran Raj Tewari* v. *Girnandan Bhagat* (2) has also been referred to. In that case the plaintiff sued to eject tenants who held at fixed rates. The learned Judges remark:—"As the Court "Fees Act, 1870, was undoubtedly enacted with the object of specifying "the court-fees to be paid in every class of suit, we must, if we can, so

(1) (1882) 11 C.L.R. (Henderson's), 91. (2) (1892) I. L. R. 15 All., 63.

"read it as to make it include the suit in question here. It was a suit "by a landlord to eject his tenants, and to recover from them that "possession of the land which they were entitled to as tenants at fixed "rates. We have carefully gone through the Court Fees Act of 1870, "and we are unable to find, either in the body of the Act, or in the "Schedules, any provision which would apply to a suit of this kind, "unless it is to be found in the opening portion of paragraph v of "section 7."

Paragraphs (*a*), (*b*), (*c*), or (*d*) of clause v of section 7 of the Act were not applicable to the land in question in that suit. After remarking on this the learned Judges proceeded to say:—

"We are accordingly of opinion that we must apply the words "which we have just quoted from praragraph v (namely, 'In suits for the "possession of land, houses, and gardens—according to the value of "the subject-matter') to this case in preference to holding that the "Court Fees Act makes no provision for court-fees in suits of this "description."

They then say—"The subject-matter here cannot be treated as "the land itself, as the landlord-plaintiff has, through his tenants, "proprietary possession, and what is really sought is to free the land "from the possession of the tenants holding as tenants at fixed rates, "that is, to get rid of the tenants and their tenant rights, and that is a "relief, the value of which is easily ascertainable."

These last remarks as well as those of Garth, Chief Justice, quoted above, would seem to show that the learned Judges considered that in a suit by a landlord against a tenant to recover the property leased or tenanted, the value of the subject-matter of the suit is not the value of the property, possession of which is sought.

I fail to follow the reasoning on which this proposition is based.

It assumes that when the Legislature empolyed the terms "In suits for possession of land, houses, and gardens" it meant "in suits for possession by any one who has not possession, either actual or constructive."

That is an assumption which appears to me to be unwarranted by the words, and one which cannot be implied from any other provisions of the Act.

In clause xi of section 7 provision is made for certain descriptions of suits between landlord and tenant: among the provisions is none for a suit by a landlord against a tenant for possession. It must have been known to the Legislature that no description of suit is more common than such a suit. The natural inference appears to be that the Legislature considered that such suits would fall under the general provision in clause v of section 7 for suits for possession of immoveable property. If then they fall under that clause, the provisions of paragraphs (*a*), (*b*), (*c*), (*d*) and (*e*) must be applied to cases falling within them respectively, and the value of the land, house, or garden, possession of which is sought for must be calculated on the basis given. The fact that the landlord is already in constructive possession could not on the wording of the clause be taken into consideration. It is unnecessary to deal with how property not falling

1902.

MAHOMED EBRAHIM SAHIB KHATEEB v. BHYMEAH A. ISMAILJI.

within any of the paragraphs of the clause should be dealt with, for in the case under reference the subject-matter is a house, and consequently the case is provided for by paragraph (*e*) of clause v of section 7 of the Act.

As regards another contention addressed to us by the plaintiff's advocate that the present suit might fall under Article 5 of the Second Schedule as being a suit to disprove a right of occupancy, I will only say that, in my opinion, that clause could not possibly apply to the present case. A " right of occupancy " is a right well known in Indian land systems and is something beyond a mere tenancy. In Lower Burma a landholder's right under section 8 of the Burma Land and Revenue Act, 1876, is a "right of occupancy." The clause in question appears to me to refer to suits to establish or disprove a right of occupancy which may be acquired by tenants against landlords under such Acts as Act X of 1859 or Bengal Act VIII of 1869, or by custom.

Irwin, J.—I concur in the opinion of Mr. Justice Fox. It appears from the ruling of 28th April 1884, which is quoted in the reference, that previous to that date the practice in the Recorder's Court was to treat suits of this nature as falling under clause v of section 7, and it was on Mr. VanSomeren raising an objection to that practice that the learned Recorder ruled that such plaints should be stamped under Schedule II, Article 17, clause vi. The order of 1st December 1900 is a necessary corollary of that ruling, because it cannot be decided whether the landlord's title is in issue until the defendant pleads.

I cannot think the Legislature ever contemplated the valuation of a suit for the purpose of court-fees depending on anything outside the four corners of the plaint. This is an additional reason for holding that the practice which prevailed before 1884 was correct and should now be restored.

Thirkell White, C. J.—I concur.
Bigge, J.—I concur.

Criminal Revision No. 1477 of 1902. August 22nd.

Before Mr. Justice Thirkell White, Chief Judge.

CROWN *v.* LA PYU AND SIX OTHERS.

Jurisdiction—Township Magistrate—Offence committed in another Township—Subdivisional Magistrate, power of, to transfer case—Criminal Procedure Code, s. 346 (2), Summons and Warrant Case—Practice—Criminal Procedure Code, s. 242—Causing disappearance of evidence of offence committed—Excise Act, breaches of—"Offence"—Indian Penal Code, ss. 40, 201.

A Subdivisional Magistrate can transfer to a Magistrate in charge of one township in the subdivision a case in which an offence is alleged to have been committed in another township in the same subdivision.

When a case has begun as a warrant case it must be continued as such; and if there is *primâ facie* reason for thinking that the accused has committed an offence a charge should be framed.

1902.

CROWN v. LA PYU.

A breach of the provisions of the Excise Act not being punishable with imprisonment for a term of six months or upwards is not an "offence" within the meaning of section 201 Indian Penal Code.

In order to a conviction under section 201 Indian Penal Code the commission of the offence of which the evidence was caused to disappear must be proved or admitted.

The Subdivisional Magistrate, proceeding under section 346 Code of Criminal Procedure, transferred the case for trial to the Township Magistrate of Pa-an, the offence having been committed in the Hlaingbwe township. The District Magistrate doubts whether he has power to do this in view of the provisions of section 177 Code of Criminal Procedure. That section provides that every offence shall ordinarily be tried by a Court within the local limits of whose jurisdiction it was committed. The Code of Criminal Procedure does not recognize a township as a local area for the purpose of territorial jurisdiction. The territorial subdivisions recognized by the Code outside the presidency towns are sessions divisions, districts and subdivisions. Moreover, under section 12, sub-section (2) of the Code, except as otherwise provided by express definition by the Local Government, the jurisdiction and powers of persons appointed to be Magistrates extends throughout the district in which they are appointed. In view of these provisions, I think that the Magistrate of Pa-an had jurisdiction to try this case, although the offence was alleged to have been committed in another township; and as he was subordinate to the Subdivisional Magistrate, that Magistrate had power to transfer the case to him under section 346, sub-section (2) of the Code of Criminal Procedure.

There are, however, other points requiring notice. The case was sent up under sections 224 and 143 of the Indian Penal Code; and for that reason no doubt the Magistrate began to try it as a warrant case. He did not therefore state to the accused the particulars of the offence under section 242 Code of Criminal Procedure. But when he had finished the case for the prosecution and examined the accused, he came to the conclusion that the case was a summons-case and proceeded to give judgment. This procedure cannot be justified. The case having been begun as a warrant-case should have been continued as such; a charge should have been framed; and the accused should have had an opportunity of pleading and defending themselves. It is obvious that this course must be adopted whenever a Magistrate begins a case as a warrant-case; for having done so he cannot comply with the provisions of section 242 Code of Criminal Procedure. Unless this course is adopted, the accused may be tried and convicted, as happened in this case, without from first to last having the offence of which they are accused explained to them.

There is another point which the Magistrate may perhaps be excused for having overlooked. Section 201 Indian Penal Code renders punishable the act of causing the disappearance of evidence of an "offence." In section 40 of the Code the word "offence" is defined, and from the third paragraph of section it appears that in section 201 the word "offence" includes a thing punishable under a

1902.

CROWN
v.
LA PYU.

special or local law only when that thing is punishable with imprisonment for a term of six months or upwards. In this case, the thing punishable under the Excise Act in respect of which the accused were convicted of causing the disappearance of evidence, whatever section of the Excise Act may be considered applicable, is not punishable with so much as six months' imprisonment. It is not therefore an offence within the meaning of section 201 Indian Penal Code, and a charge under that section will not lie in respect of it. I may also remark that in order to a conviction under section 201 Indian Penal Code the fact that the commission of the offence of which the evidence was caused to disappear must be proved or admitted. If it is held to be proved in this case that the three women who were accused were engaged in the illegal manufacture of exciseable liquor, they should have been convicted. If this is not held to be true, it is difficult to see how the other accused can be held guilty of causing evidence of that offence to disappear.

But for the reasons stated above, namely, that section 201 Indian Penal Code does not apply to this case, the convictions and sentences of the accused Ein Da, Pan San, Nga Gyi, Nga Pe, Pan Byu and Ya Pe are reversed and it is directed that the fines, which have been paid, be refunded to them.

Civil Revision No. 33 of 1902. August 26th, 1902.

Before Mr. Justice Thirkell White, Chief Judge.

N. PANNU THAVEN *v.* SATHAPPA CHETTY.

Palit—for applicant.

Attachment before judgment—Property outside jurisdiction of Court—Civil Procedure Code, s. 648—Rulings of Special Court binding.

Section 648 of the Code of Civil Procedure does not prescribe the circumstances under which attachment before judgment may be ordered of property situated outside the jurisdiction of the Court, but merely prescribes the procedure to be adopted when property outside the jurisdiction of the Court is to be attached.

Rulings of the Special Court are binding on the Courts of Lower Burma unless or until they are overruled by the Chief Court.

Krishna Sami v. *Engel*, (1885) I. L. R. 8 Mad., 20.

Dawood v. *Moona Abdul Kassim*, P. J. L. B., 56, referred to.

THIS is an application to revise an order of the Judge of the Court of Small Causes, Rangoon, granting leave to attach before judgment certain property of the defendant in the Hanthawaddy district. The application purported to be made under section 648 Code of Civil Procedure. But that section merely prescribes the procedure to be adopted when property outside the jurisdiction of the Court is to be attached under any provision of the Code. It does not prescribe the circumstances under which attachment may be ordered. To ascertain the conditions under which property may be attached recourse must be had to the provision of the Code under which the attachment

1902.

PANNU THAYEN v. SATHAPPA CHETTY.

is sought. In this case, the sections applicable are those contained in section 483, and the following sections. These explicitly refer to property within the jurisdiction of the Court. Section 648 can therefore have no application to this case. This view was taken in *Krishna Sami* v. *Engel* (1), a case in the High Court at Madras, which was followed by the Special Court in *Dawood* v. *Moona Abdul Kassim* (2). I may remark that rulings of the Special Court are binding on the Courts of Lower Burma unless or until they are overruled by the Chief Court. The learned Judge of the Court of Small Causes should not have disregarded the ruling of the Special Court last cited.

The application for revision is allowed. The order of the Court of Small Causes, dated the 3rd of March 1902, in Civil Miscellaneous Case No. 850 of 1902, is set aside and the attachment of the property therein referred to is removed. The respondent will pay the costs of this application; advocate's fee one gold mohur.

94

Criminal Revision No. 1419 of 1902. August 28th.

Before Mr. Justice Irwin.

PO WIN *v.* CROWN.

Nicol—for the applicant. | *The Government Advocate*—for the Crown.

Sessions Judge or District Magistrate, Powers of—Reconsideration of evidence by Magistrate who discharged the accused—New inquiry before another Magistrate—Criminal Procedure Code, s. 437.

A Court of Session or District Magistrate has jurisdiction to direct a reconsideration of the evidence by the same Magistrate who discharged the accused or a new inquiry before another Magistrate on the grounds, *inter alia*, of mistake of law or incorrectness of the first finding. If the Sessions Judge or District Magistrate is satisfied that on the evidence there is a clear case for charging and trying the accused and there is no reason for desiring further magisterial investigation it is ordinarily the Judge or Magistrate's duty to refer the case to the High Court.

The High Court will not set aside an order made by a District Magistrate merely on the ground that the most proper course would have been to refer the case to the High Court if it cannot be shown that the order made by the District Magistrate was not a fit and proper one for the High Court to make.

Hari Dass Sanyal v. *Saritulla*, (1888) I. L. R. 15 Cal., 608, and *Crown* v. *Nga Po Ka*, 1 L. B. R., 100, followed.

THE application purports to give reasons why the District Magistrate should not have ordered a new trial. The District Magistrate did not order a new trial; he ordered further inquiry. He obviously could not order a new trial as no trial has yet been held. Trial of a warrant case commences after the charge is framed.

I may notice here an objection which was not taken in the application but only at the hearing, that the prosecution was not sanctioned under section 197 Code of Criminal Procedure. The applicant is or was a public servant, appointed by the Local Government, but the present charge is made against him in his capacity, not as such public servant, but as President of a Private School Committee. He admits that he was appointed President by the Committee. Section

(1) (1885) I. L. R. 8 Mad., 20. | (2) P. J., L. B., 56.

1902.

PO WIN v. CROWN.

197 therefore does not apply. The learned Advocate said he was about to be charged under section 409. To that it is sufficient to say that he has not been charged, and when he is charged, if he is ever charged, it ought to be under section 406.

The reasons that the District Magistrate gave for ordering a further inquiry were that most of the evidence had been recorded by the predecessor of the Magistrate who discharged the accused, and that accused had admitted receiving certain moneys which he had not accounted for. The arguments addressed to me were to show that the order which has been made was one which the District Magistrate had no authority to make; but it was not contended that such an order could not be made by the High Court, nor was it shown that such an order would be an improper one for the High Court to make in this particular case.

The applicant relies on the case of *Queen-Empress* v. *Amir Khan*, (1) but that has been overruled in *Queen-Empress* v. *Balasinnaambi* (2) and the leading case now is *Hari Dass Sanyal* v. *Saritulla* (3), which has been followed by both the Calcutta and the Bombay Courts, and by the Chief Judge of this Court in *Crown* v. *Nga Po Ka* (4). It was a judgment concurred in by six Judges, and it is to the effect that the Court of Session or District Magistrate has jurisdiction to direct a reconsideration of the evidence by the same Magistrate who discharged the accused or a new inquiry before another Magistrate, on the grounds, *inter alia*, of mistake of law or incorrectness of the first finding. To this is added a rider that if the Sessions Judge or District Magistrate is satisfied that on the evidence taken there is a clear case for charging and trying the accused, and there is no reason for desiring further magisterial investigation it is ordinarily the Magistrate's duty to refer the case to the High Court.

It is clear from this, that if in such a case the District Magistrate ordered further inquiry, though his order might not be the most proper one to make, it would not be illegal. In the present case not only has the District Magistrate given good reasons for reconsideration of the finding on the evidence recorded, but for a fresh inquiry also, because the Magistrate who recorded most of the evidence has left the District. It is perfectly useless for any person to ask this Court to set aside an order made by a District Magistrate merely on the ground that the most proper course would have been to refer the case to the High Court, if he cannot show that the order made by the District Magistrate would not be a fit and proper one for the High Court to make. I am very much of the opinion of Mr. Justice Prinsep, who, in the leading case I have first referred to, said: "It seems contrary to the system prescribed by the Code that every warrant case, *e.g.*, a case of petty theft, tried by an inexperienced Magistrate (it may be the first he has ever tried) should of necessity be referred for the orders of the High Court that justice may be done,

(1) (1885) I. L. R. 8 Mad., 336.
(2) (1891) I. L. R. 14 Mad., 334.
(3) I. L. R. 15 Cal., 608.
(4) 1 L. B. R., 100.

1902.

PO WIN v. CROWN.

because perverse or ignorant finding on the evidence has been come to. * * * It is sought to make such an order of discharge of the same force as an acquittal: to declare that it can be set aside only by the High Court. * * * In many cases this must operate as a denial of justice." I would therefore give Sessions Judges and District Magistrates very great latitude in applying the *dictum* that where there is no need to take any further evidence the proper course is to refer the case to the High Court.

The application is dismissed.

I think it necessary to notice an order of the District Magistrate on the diary to the effect that the fresh inquiry is to be confined to one sum of Rs. 50. The Magistrate's duty is to take the evidence produced (section 252) and to frame a charge in respect of such sum as may be *primâ facie* proved to have been embezzled (section 254). He should also refer to section 222 (2) Code of Criminal Procedure. The District Magistrate's order of 28th June is therefore set aside. I think it would not in any case be binding on the Magistrate as it is *ultra vires*. The Magistrate ought not to have asked for orders at this point.

Special Civil Second Appeal No. 162 1901. July 9th, 1902.

Before Mr. Justice Irwin.

MAUNG PO LU *v.* MAUNG KYIN.

Hamlyn—for appellant (plaintiff).

Agabeg and *Maung Kin*—for respondent (defendant).

Application for review, Time occupied in—Admission of appeal after time—Limitation—Discretion of Court when liable to review or appeal.

The fact that an application for review of judgment has been made is not good cause for admitting an appeal after time, if the application for review was not made on reasonable grounds.

The discretion of a Court is liable to review or appeal where the Court has acted through caprice or prejudice, or where the discretion has been exercised without any proper legal material to support it.

U Pyinnya v. *Maung Tun*, P. J. L. B., 515, and *Brojender Coomar Roy Chowdry*, 7 W R., 529, cited; *Balwant Singh* v. *Gumani Ram*, (1883) I. L. R. 5 All., 591; *Raghunath Gopal* v. *Nilu Nathaji*, (1885) I. L. R. 9 Bom., 452; *Govinda* v. *Bhandari*, (1891) I L.R 14 Mad., 81; *Pundlik* v. *Achut*, (1894) I L.R. 18. Bom., 84; *Ashanulla* v. *Collector of Dacca*, (1888) I.L.R. 15 Cal., 242; *Karm Bakhsh* v. *Daulat Ram*, (1888) P. R., 183; followed.

APPELLANT PO LU sued Maung Kyin for damages for defamation and obtained a decree. Maung Kyin applied for review of judgment on the allegation that new and important evidence had been discovered. The evidence was that of one Power, and the application was dismissed on the ground that it could not possibly have been a new discovery. The Judge's words are: "From the very beginning it was apparent that Power's evidence would settle everything." Maung Kyin then appealed to the Divisional Court, and the question of limitation was considered. The appeal was presented after expiry of the period of limitation, but it would be within time if the time occupied by the lower Court in disposing of the application for review were excluded.

1902.

MAUNG POL U v. MAUNG KYIN.

The Judge was unable to find any ruling except a note in O'Kinealy's Civil Procedure Code, and he acted on an opinion expressed in that note and admitted the appeal on the ground that the mere existence of an application for review was sufficient cause.

The learned Judge continued: "I think the Judge was right in rejecting the application for review. * * * For the same reasons that rendered appropriate the rejection of the application for review, I do not think Power's evidence should be admitted in appeal. Both parties must have known that Power's evidence was of the greatest importance in the case." The decree of the lower Court was then reversed on the merits.

I have been referred to a number of decisions on the point whether the existence of the application for review constitutes a sufficient cause under section 5 of the Limitation Act. First in point of time, I think, come the rulings of 14 Judges of the Calcutta High Court, quoted by the present Chief Judge of this Court in *U Pyinnya* v. *Maung Tun* (1): "If a party presents an application for review of judgment within the time limited for appealing, the period occupied by the Court in disposing of such application will not be reckoned among the number of days limited for appealing." This was quoted from an earlier ruling of the Madras Court and adopted by the 14 Judges. It was a ruling, not under the present Act, but under Rule 34. The following year (1867) this ruling (2) was followed (with reluctance apparently) by another Full Bench in Calcutta. In *Balwant Singh* v. *Gumani Ram* (3) the Allahabad Court, in a very brief and somewhat vague judgment, held that "the circumstances contemplated in section 13 might, and ordinarily would, constitute a sufficient cause in the sense of section 5," and then, without discussing the question whether the facts in the case before the Court did or did not constitute such cause, admitted the appeal.

The Bombay Court in *Raghunath Gopal* v. *Nilu Nathaji* (4) held that an application for revision "might, under proper circumstances, constitute a sufficient cause"; and as the District Judge had given no resons for holding the appeal barred, sent back the case for a new decision. In the case reported at I. L. R. 14 Mad., 81, the appeal was held to be barred because the grounds of review were grounds which had already been argued and decided against in appeal, and because the Judge in review had found that documents alleged to have been newly discovered were not newly discovered. In I. L. R. 18 Bom., 84, the District Judge had rejected an application for review because no sufficient reason was shown why the evidence was not adduced at the original hearing, and the High Court held that, under those circumstances, there was not "sufficient cause" for extension of time, and the appeal was barred. In 15 Cal., 242, the grounds of application for review were all found to be grounds of appeal and none of them grounds for review, and the presentation of the application for review

(1) P. J. L. B., 515.
(2) 7 W. R., 529.
(3) (1883) I. L. R. 5 All., 591.
(4) (1885) I. L. R. 9 Bom., 452.

was not sufficient ground for not presenting the appeal within time. "It is impossible to hold that the presentation of every application for review, whether it were groundless or unreasonable in itself, extends the time for presenting an appeal." This ruling was concurred in by the Punjab Chief Court in 1888 (Punjab Record, 183).

On the whole then the respondent has in his favour the two Calcutta Full Bench Rulings passed before the Limitation Act was enacted, but they have not been followed in late years by the same Court; and all the other rulings except the Allahabad one, which is doubtful, affirmed the principle that the fact of an application for review having been made is not good cause for admitting an appeal after time, if the application for review was not made on reasonable grounds. In the present case both Courts have found that there was no good ground at all for making the application for review. I think the Divisional Court ought to have held that the appeal was barred.

It remains to consider whether this Court ought to interfere with the decision of the Divisional Court on the question of limitation even if that decision be wrong, seeing that the decision is a matter for the discretion of the Court under section 5. On this point the learned advocate for the respondent quoted *Ranchodji and others* v. *Lallu and others* (1). In that case the petition of first appeal was presented one day late, and the appellant put in affidavits to show that he was prevented by an unforeseen accident from catching a train. The Judge found on the facts that the appellant did not use reasonable diligence either before or after the accident to catch the train, and he rejected the appeal. The judgment of the High Court on second appeal contains the following passages: "Had such an application based on such affidavits been made to this Court, I have little doubt that the result would have been different; but we have to consider whether this Court has any power to interfere with the discretion of the Court below." The other cases cited to me only go to this, "that the discretion of a Court is liable to review or appeal where such Court is acting through caprice or prejudice, or where the discretion is exercised without any proper legal material to support it. I am not aware of any single authority for the proposition that a sound and reasonable exercise of the jurisdiction given by law to a Court is open in any way to revision, though there are decisions to the contrary. I think it is impossible to hold that the Judge in the present case has exercised his discretion capriciously or without sufficient material in law to satisfy himself whether or no there was sufficient cause for delay." The order of the District Judge was affirmed.

In the present case the learned Judge of the Divisional Court certainly did not decide the point capriciously. It is not quite so clear that he had sufficient proper legal material. The case is not quite on all fours with the Bombay case. There the question was one of mixed law and fact—I think I may say more fact than law. In the present case there is no doubt at all about the facts, and the question is one of pure law. It is not impossible that if the learned Judge had

(1) (1882) I. L. R. 6 Bom., 304.

1902.

MAUNG PO LU v. MAUNG KYIN.

had before him all the rulings which I have referred to, he might have held that the appeal was barred. On the whole I think I ought not to interfere with the finding of the Divisional Court as the rulings are not all in harmony, although there is a very strong consensus of opinion among the later ones. My conclusion is that though I should have held the first appeal to be barred if it had come before me, yet the decision to the contrary of the learned Judge of the Divisional Court should not be set aside by this Court, because it was a matter of judicial discretion.

Criminal Appeal No. 243 of 1902. July 15th, 1902.

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

AUNG KYAW ZAN *v.* CROWN.

Causing disappearance of evidence of an offence—Indian Penal Code, s. 201.

While section 201 of the Indian Penal Code does not apply to a person who is proved or admitted to be the principal offender, the mere fact that the accused is probably or possibly the principal offender does not prevent his conviction under section 201 for causing disappearance of evidence of the offence.

Section 201 does not refer exclusively to causing the disappearance of the *corpus delicti*, but to causing the disappearance of any evidence of the commission of the offence.

King-Emperor v. *Limbya*, Ratanlal 799, and *Nazru* v. *Emperor*, (1902) P. R. C. J. No. 6 followed.

THE appeal was in the first instance heard by a Bench of the Court, the Judges of which delivered the following judgments.

Fox, J.—The material facts proved in this case were as follows:—

On some date between the 16th June and the 14th July 1901, four men, (1) Maung Lu Gyi, (2) Maung Po U, (3) Maung Tha Hmwe, and (4) Nga Aung Kyaw Zan, the accused, started from Kanyin-ngu village in a boat which belonged to Nga Tha Hmwè, and which was laden with a particular kind of tobacco, the property of Maung Lu Gyi. The latter was taking the tobacco away for sale. The four men and the boat and tobacco were seen in Rangoon some time between the 16th July and 14th August. Whilst they were in Rangoon one of the witnesses, San Hla Baw, bought a piece of cloth for Maung Po U, who wanted a coat. Maung Lu Gyi and Maung Po U were never seen again by any of the witnesses in the case.

In the latter part of August a villager of Thetkè chaung village saw the corpse of a man floating near the entrance of the *chaung*. The body was that of a male aged about 40: it had one cut on the head, one on the neck, one on the shoulder, and one on the small of the back. Towards the end of August Nga Tha Hmwè and the present accused appeared at Thèbyu village with a boat laden with tobacco which Nga Tha Hmwè proceeded to sell. The accused helped in carrying the tobacco from the boat to the houses of the people to whom it was sold or with whom it was left. Nga Tha Hmwè also left a coat with one witness to be stitched. The tobacco was of the same description as that taken away by Maung Lu Gyi from Kanyin-ngu village, and the

cloth of the coat was like the cloth bought in Rangoon for Maung Po U.

Nga Tha Hmwè also left with a relation of his four small tables. Both men are said to have remained in Thèbyu for eight days.

On the 3rd September they appeared at Ngetpauk village and reported there that on the 30th August their boat had drifted owing to the rope which held it having broken; that it had come into collision with a tree, and that they had been swept off the boat by the tree. They said that two men had been left in the boat and asked for assistance.

A search was made but nothing was found till two days afterwards, when the boat was found below Kyauktaga on a bank at the entrance to the Paunggyi creek. The boat was in a disabled condition; in it were found a small *da* and a few other things of no value or importance.

Tha Hmwè at this village represented the accused to be his hired man. The boat was brought to Ngetpauk village. Tha Hmwè then sent the accused with a letter to inform Maung Lu Gyi's relations in Kanyin-ngu village of what had happened. He himself went off to another village.

On the 14th September the accused appeared at Kanyin-ngu and informed Maung Yôn Hmi, who was Maung Lu Gyi's son-in-law, that on the 2nd September, during a storm, whilst they were at or near Kyauktaga, the rope of the boat had broken and the boat had drifted against a tree, and that he and Tha Hmwè, in fending off the boat, had been thrown into the water, and then the boat had drifted out to the sea, implying that Maung Lu Gyi and Maung Po U had been carried away in it. He also said that the boat had been found by Nga Tha Hmwè and Nga Chit Po at Ngetpauk.

Six days after this Maung Lu Gyi's son-in-law, accompanied by the accused and others, went to Ngetpauk and saw the boat. He was told that there had been no violent storm in the vicinity. He subsequently reported what he had heard at a police-station.

The Head Constable at Ngathainggyaung received information about the case on the 9th October, and began making inquiries. He examined the accused, and in consequence of what the latter said he went to Thèbyu and found there some of the tobacco which was an exhibit in the case; a *da* which was identified as Tha Hmwè's, a coat, and four small tables.

On the 16th October he took the accused to the place where the latter told him the murders of Maung Lu Gyi and Maung Po U had been committed, and he discovered in the jungle the bones of a man and also a *paso*, which was identified as belonging to Maung Lu Gyi.

He arrested the accused, and 11 days later he arrested Nga Tha Hmwè. The latter committed suicide on the 5th November, whilst under detention. On the 22nd October the accused had made a full statement of facts relating to Maung Lu Gyi's and Maung Po U's deaths before a Magistrate, and this statement was recorded as a confession. It was not, however, a confession of guilt on his part.

1902

AUNG KYAW ZAN v. CROWN.

He represented that, on the 21st August, during the night, he woke up and heard voices uttering some exclamation.

He got up, looked, and saw Tha Hmwè come out with a long *da*, and cut Maung Po U on the neck. Through fear he himself jumped into the water. Tha Hmwè told him not to run away or he would die, so he held on to the helm. Then, on Tha Hmwè's telling him to come up on to the boat he got up and saw the bodies of Maung Lu Gyi and Po U. Tha Hmwè then threw the bodies into the water and told him not to tell any body, and that he must follow him wherever he went.

Tha Hmwe informed him that he was going to Thebyu, where he would make over the property in the boat to his relations. They went to Thebyu, where some of the property was sold and the rest made over to Maung Gyi and Ma Gun; amongst the property made over were (1) a long *da*, (2) four round tables, (3) a piece of tweed cloth which was to be made into a jacket.

Tha Hmwè and he left Thèbyu in the boat after a stay there of six days, and Tha Hmwè told him he must pretend that the boat has been lost. They arrived near Kyauktaga on the 2nd September, and there Tha Hmwè cut the rope by which the boat was tied and let it drift. The rest of his story accords with what the witnesses said had happened at Kyauktaga and Ngetpauk.

He said he had posted the letter given him by Tha Hmwè, and he did not say anything about having told the Kanyin-ngu villagers anything.

He gave various other details of what had occurred, which showed that he must certainly have been at least an eye-witness of what he was speaking of.

The committing Magistrate committed the accused for trial to the Court of Session on charges of (1) murder, (2) an offence punishable under section 201 of the Indian Penal Code, and (3) of abetting an offence punishable under section 404 of that Code.

The Additional Sessions Judge acquitted the accused on the charge of murder, but convicted him on the other charges.

His reasons for acquitting of the charge of murder are not stated at length. He says: "On the evidence which exists in the case, it is of course impossible to charge the accused either with the murder or abetment of the murder of Maung Lu Gyi, and I am inclined to think that accused may have had nothing to do with the murder."

He was of opinion that accused was merely a subordinate of Tha Hmwe's, and it was not possible to say how far he was responsible for the murders. He thought that the suicide of Tha Hmwè pointed to the truth of the accused's story that Tha Hmwè was alone responsible for the murders. The question whether the acquittal on the charge of murder is right is not now before this Court, and I therefore do not wish to say more than is necessary about it. On the evidence and the statement of the accused, there was certainly good ground for the committal order on the charge of the murder; in other words, there was certainly ground for believing that the accused had participated in the murders. The details of the accused's story have not been reviewed

by the Additional Sessions Judge by the light of the probability of one man alone having murdered two other men in a boat and having thrown their bodies out of the boat unaided by the fourth man in the boat. The Judge has not stated explicitly that he accepted the accused's version of what occurred at the time when the murders were committed, nor has he held that the accused's conduct subsequent to the murder was indicative of this innocence of the actual murders. These matters, however, must, in my opinion, be taken into consideration when deciding as to whether the accused was rightly convicted upon the second charge, for a number of decisions of three High Courts in India referred to in the case of *Torap Ali* v. *Queen-Empress* (1) are to the effect that an actual offender and participator in a crime is not subject to conviction under that section. In one of the cases—the *Empress* v. *Behala Bibi* (2)—the learned Judges say: "We think that section 201 of the Penal Code was not intended to apply to a case in which the person, who is the possible or probable offender, makes statements exculpating himself by inculpating another."

I am not prepared to dissent from the correctness of a long course of decisions upon the meaning and effect of the section in question. The interpretation adopted appears to me to be the natural meaning of the words used. The offence punishable under the section consists in knowingly doing certain acts with the intention of screening a person who has committed the crime: the acts are (1) causing any evidence of the commission of an offence to disappear, or (2) giving false information respecting an offence. The words, in my opinion, imply that the person who commits such an offence must be some one other than the person who committed the original crime.

There can be no question that the accused was a possible participator in the murders of Maung Lu Gyi and Maung Po U. If his statement to the Magistrate and his subsequent conduct are considered, I think it must be held that he was at least a probable participator in the murders. If he was a participator in them, then the acts and words of his on which the charge under section 201 is founded must have been done and spoken with the intention of screening himself as well as Tha Hmwè. No distinction can be drawn between this case and the decisions I have referred to on the ground that two persons were involved in this case, and one may not have actually been guilty of taking part in the murders. Under the circumstances I would acquit the accused of the offence punishable under section 201 of the Penal Code on the ground that he was not liable to conviction under that section.

But even if he were so liable, it appears to me doubtful whether the facts would justify a conviction.

The precise acts on which the charge was based are not set out in the charge as they should have been. It merely charges him in general terms with having caused evidence of the commission of a capital offence to disappear, and with having wilfully given false information as to such offence.

(1) (1895) I. L. R. 22 Cal., 638. | (2) (1881) I. L. R. 6 Cal., 789.

1902.

AUNG KYAW ZAN v. CROWN.

The Additional Sessions Judge says, however, that the accused's offence consists in causing the disappearance of the boat in which the murdered couple had travelled, and in giving information respecting the offence which he knew was false when he arrived at Kanyin-ngu, and also in Ngetpauk.

These acts were separate acts. I find it difficult to hold that the boat itself, or the disappearance of it, were *evidence of the murders*.

No doubt upon a trial for murder the facts that the four men went off in a boat and that after the murder the boat was sent adrift and was subsequently found in a disabled condition would have been proveable in evidence as relevant facts under one or other of the provisions of the Evidence Act permitting evidence of relevant facts, but the boat, the disappearance of it, and the condition in which it was found are scarcely in themselves evidence of the murders.

The evidence of the murders would have been the hacked corpses of the murdered men, and the causing of the disappearance of evidence of the murders consisted in throwing the corpses into the stream.

Even if the causing of the disappearing of the boat could be held to fall within the section, then there is nothing to show that the accused did this. According to the accused's statement Tha Hmwè alone caused the boat to disappear, and the accused had nothing to do with it. The Additional Sessions Judge has not said that he rejected this part of the accused's statement. If, however, he thought that this was untrue, it is difficult to see why he thought that this part alone was untrue, and why he should hold the accused responsible for the boat's disappearance but not responsible for the murders.

There would be some difficulty also as regards holding the accused guilty in consequence of the false information he gave at the two villages. The information he gave was not *respecting any offence;* it was information regarding an alleged accident. Some passages in the judgment in *Empress* v. *Behala Bibi* (1) indicate that, in the opinion of the learned Judges who tried that case, such statements as the accused made would not constitute offences under section 201.

I have no doubt that the accused was rightly convicted on the third charge of abetting an offence punishable under section 404 of the Indian Penal Code.

According to his own account and from the evidence, it is manifest that he knew that the tobacco in the boat belonged to Maung Lu Gyi. It was in Maung Lu Gyi's possession at the time of his death. The accused, although he may not have taken part in the sale and disposal of it, assisted Tha Hmwè in misappropriating it and converting it to his own use.

I would confirm the conviction and sentence on this charge.

Irwin, J.—The conviction under section 201 is for two separate acts, namely, "causing disappearance of the boat in which the murdered people travelled," and "giving false information with regard to their disappearance," *i.e.*, the disappearance of the murdered people.

(1) (1881) I. L. R. 6 Cal., 789.

I may say at once that if the false information stood alone I do not think that a conviction under this section could be maintained, because giving false information about the disappearance of two persons who have been murdered is not quite the same thing as giving false information about the murder. What is proved is that accused was present at the murder of two persons, and possibly or probably assisted Tha Hmwè in committing the murder, that Tha Hmwè, with appellant's assistance, disposed of the property belonging to the murdered persons, and then the boat was sent adrift with the intention of making it appear that she had been driven out to sea with the murdered persons alive on board of her, and that accused subsequently stated that she had been driven out to sea in a storm. The fact that the boat in which the murdered persons had travelled with Tha Hmwè and appellant continued in the possession of the latter two after the murdered men had disappeared was most important evidence of the murder (the word used in section 201 is "evidence," not "proof"). That fact was caused to disappear by the wrecking of the boat. This seems to me sufficient to bring the act within the terms of section 201.

According to appellant's statement the boat was cast adrift by Tha Hmwè, and he (appellant) was present: he had continued to work the boat with Tha Hmwè ever since the murder, and after Tha Hmwè had declared his intention of causing it to appear that the boat had been wrecked appellant assisted him to take the boat to the place where it was sent adrift. Having regard to all these facts I think it is proper to presume, under section 114, Evidence Act, that appellant assisted in wrecking the boat. The presumption is strengthened by appellant's subsequent false statements that the boat had been wrecked.

It may be that the act of wrecking the boat would more properly constitute an offence under section 193 Indian Penal Code, namely, causing a circumstance (the abandonment of the boat) to exist, intending that that circumstance should appear in evidence in a judicial proceeding (an enquiry or investigation into the murder of the two men) and should cause the Magistrate or the Police Officer to entertain the erroneous opinion that the two men had not been murdered at all but had been driven out to sea by a storm. The facts seem to fit section 193 very well, but for the reasons above given I cannot hold that they do not constitute an offence under section 201 also.

My learned colleague, Mr. Justice Fox, had raised the point that a possible or probable participator in the murder cannot be convicted of causing disappearance of evidence of the murder under the ruling in *Torap Ali* v. *Queen-Empress* (1) in which several previous rulings are referred to. In the first of these, *Queen* v. *Ramsoondar Shootar* (2) the accused had been convicted for both causing hurt and causing disappearance of the evidence of that offence; the Judges' ruling was that he could not be *punished* on both heads of the charge. In *Empress of India* v. *Kishna* (3) the facts and the ruling are the same. In *Regina* v. *Kashinath Dinkar* (4), on which the Judges in the

(1) (1895) I. L. R. 22 Cal., 638.
(2) 7 W. R., Cr., 52.
(3) (1880) I. L. R. 2 All., 713.
(4) (1871) 8 Bom. H. C. R., Cr., 216.

1902.

AUNG KYAW ZAN v. CROWN.

case of *Torap Ali* relied most, the reasoning seems to me to be very loose. The learned Judges say that sections 202 and 203 could not apply to the person who had committed the principal offence, because there is no law which obliges a criminal to give information which would convict himself. It is difficult to see how this argument can apply to section 203. There is a great difference between punishing a man for not giving information which would convict himself, and punishing him for causing evidence of his offence to disappear. They then say that section 201 should be construed in a similar manner, apparently because all three sections begin with the words "whoever knowing or having reason to believe that an offence has been committed." I fail to see the logical sequence. Then, the single illustration to the section is made use of to draw the inference (to my mind, unwarrantably) that the law was intended to apply exclusively to "another," and this introduces the conclusion that "the connection of the accused as accessories to an offence, known *or believed* to have been committed by themselves, is illegal." This seems to be the first ruling that the conviction of a person "believed" to have committed the principal offence is illegal, and (with great respect to the learned Judges) the reasoning is, to my mind, unsound from beginning to end. *Queen-Empress* v. *Lali* (1) and *Queen-Empress* v. *Dungar* (2) are distinct enough and similar to the present case. In the former, the opinion of the Judges is given without any reasons: the latter is by one of the Judges who concurred in the former. These are all the cases relied on in *Torap Ali* v. *Queen-Empress* (3). The first two differ widely from the present case. The case principally relied on is, as I think I have shown, based on faulty reasoning. If it is correct, what degree of probability or suspicion of an accused person having committed a murder is sufficient to shield him from conviction for causing evidence of the murder to disappear? The line must be drawn somewhere, but where can it be drawn? In the case of *Queen-Empress* v. *Dungar* (2) quoted above, the law was, I think, correctly expounded by the Sessions Judges. If the Legislature had meant that the section should not apply to a possible or probable principal offender, the words "by another person" would (it may reasonably be presumed) have been inserted after "offence."

Although for the purposes of the present case it is not at all necessary that a criminal should be legally bound to give information of his own crime, yet I think it desirable to say a few words on that point, as it has been made one of the chief grounds of the ruling in the Bombay case, *Reg.* v. *Kashinath Dinkar* (4) At the time of that ruling section 44 Code of Criminal Procedure was not in existence, nor any law, I believe, which required any person to report the intention to commit the offences specified therein. Now section 44 lays that obligation on any person aware of the intention of *any other person* to commit such offence, but in the case of offences actually committed the obligation to give information is not limited to offences committed by other

(1) (1885) I. L. R. 7 All., 749.
(2) (1886) I. L. R. 8 All., 252.
(3) (1895) I. L. R. 22 Cal., 638.
(4) (1871) 8 Bom. H. C. R. Cr., 126.

persons. This distinction seems to me to prove that any person committing one of the offences specified in that section is required by law to give information of his own offence. It does not follow that if he is convicted of the principal offence he should be punished for not giving information. The law seems to me to be designed expressly to meet cases like the present.

Mr. Aston, J. C., went further in the case of *Queen-Empress* v. *Nga Tun Byu* (1) and held that a thief may be convicted both of theft and of failing to use all means in his power to cause himself to be convicted of the theft, sections 379 and 215, Indian Penal Code. Without committing myself to concurrence with the whole of Mr. Aston's judgment, I am convinced that a possibility or probability of a person being guilty of murder does not shield him from punishment for causing disappearance of evidence of the murder. Any such exemption is not warranted by the words of the Penal Code. If the questions were one of evidence the accused should have the benefit of the doubt, but it is not such. It is a question of substantive law, and I do not think that exceptions which do not exist should be read into any section of the Penal Code.

I would therefore maintain the conviction under section 201, but strike out the words about giving false information.

I concur in confirming the conviction and sentence under section 404.

The case having been laid before the Chief Judge under the provisions of section 429 of the Code of Criminal Procedure, he delivered the following judgment :—

Thirkell White, C. J.—The question on which the Judges composing the Court of Appeal in this case are divided is whether the conviction of the appellant under section 201 Indian Penal Code should be sustained.

The facts are fully set out in the opinion recorded by Mr. Justice Fox. Two men, Lu Gyi and Po U, who were on a trading expedition with the appellant and a man named Tha Hmwè disappeared; Tha Hmwè and the appellant reported that they had gone adrift in their boat and presumably had been drowned. Subsequently the boat was found, having been sent adrift. The appellant was arrested. He made a statement exculpating himself and accusing Tha Hmwè of having murdered Lu Gyi and Po U and having sent the boat adrift. After this Tha Hmwè was arrested. He committed suicide while in the custody of the police. The appellant was charged under section 302, section 201, and sections 404—109 of the Indian Penal Code. He adhered throughout to his original statement. He was acquitted of the charge of murder or abetment of murder and convicted under section 201 Indian Penal Code of having caused the disappearance of the boat in which the murdered people travelled, and of having given false information with regard to their disappearance. The Judges who composed the Court of Appeal are agreed that the conviction, so

(1) P. J. L. B., 226.

1902.

AUNG KYAW ZAN v. CROWN.

far as it relates to the giving of false information with regard to the disappearance of Lu Gyi and Po U, cannot be sustained. The question for determination is whether, in the circumstances stated, the conviction of having caused the disappearance of the boat and having thereby committed an offence punishable under section 201 Indian Penal Code should be affirmed.

The first point that may be considered is whether, on the assumption that the appellant has rightly been found to have caused evidence of the commission of an offence to disappear, he can be convicted in this case where he himself possibly or probably committed the offence. It will be convenient to examine, in order, the cases bearing on the point.

In *Queen* v. *Ramsoondar Shootar* (1) it was held that section 201 "refers to prisoners other than the actual criminals who, by their causing evidence to disappear, assist the principals to escape the consequences of their offences," and that the principal offender could not be convicted under that section of causing evidence of his guilt to disappear.

The next case is that of *Kashinath Dinkar* (2) which is the leading case and which has been followed for many years. It was held in the words of *Lloyd*, J., who delivered the judgment of the Court, that the conviction of the accused as accessories to an offence known or believed to have been committed by themselves, was illegal. It may be remarked that this was not a case in which it was doubtful whether the accused were the principal offenders or whether some one else had committed the principal offence. If the principal offence had been committed, the accused were the offenders. The Court seems to have used the words "known or believed to have been committed by themselves" to indicate the fact that the commission of the main offence was a matter of knowledge or belief, not the guilt of the accused if the offence had been committed. I think that this distinction is of some importance.

In the case of *Empress* v. *Kishna* (3) it was held that the appellant could not be punished for what he might have done to screen himself from punishment. The ruling was given on the authority of previous decision or decisions not specifically cited.

Empress of India v. *Abdul Kadir* (4) deals with a different point, namely, that, in order to obtain a conviction under section 201 Indian Penal Code it is necessary that an offence for which some person has been convicted or is criminally responsible should have been committed.

In *Empress* v. *Behala Bibi* (5) it was held that section 201 does not apply to a case in which the person who is the possible or probable offender makes statements exculpating himself by inculpating another. No reasons are given for this opinion, which relates, moreover, to the giving of false information, not the causing of the disappearance of evidence.

(1) 7 W. R., Cr., 52.
(2) (1871) 8 Bom. H. C. R., Cr., 126.
(3) (1880) I. L. R. 2 All., 713.
(4) (1880) I. L. R. 3 All., 279.
(5) (1881) I. L. R. 6 Cal., 789.

Matuki Misser v. *Queen-Empress* (1) relates to the same point as the case of *Abdul Kadir* cited above.

In *Queen-Empress* v. *Lalli* (2) it was held that the person who is concerned as a principal cannot be convicted of the secondary offence of concealing evidence of the crime. The reasons for this construction of the section are not given.

In *Queen-Empress* v. *Dungar* (3) it was held on the authority of five previous cases, and for reasons stated in *Reg.* v. *Kashinath Dinkar* (4) that the section applies merely to the person who screens the principal or actual offender, apparently some one other than himself.

In *Torap Ali* v. *Queen-Empress* (5) the previous rulings were followed. There were two accused, one or other of whom must apparently have committed a murder, but neither of whom could be proved to have done so They were acquitted of the charge of murder but convicted under section 201 Indian Penal Code. It was held that they could not be convicted under that section.

The next case is that of *Queen-Empress* v. *Limbya* (6) decided by *Jardine* and *Ranade*, J. J., in 1895. The learned Judges distinguished the case from that of *Torap Ali* above cited, as the accused was not tried for and acquitted of a charge of murder. They expressed doubt whether the ruling in *Torap Ali* (5) should be followed, pointing out that, in England, if a man be indicted as principal and acquitted, he may be indicted as accessory after the fact. After remarking on the case cited above, the Judges observed:—

"It appears to us that in the cases of *Torap* and *Dungar* and *Lalli* the learned Judges have extended Mr. Justice Lloyd's views so as to acquit of the offences to which section 201 applies not only the person found by the judgment or the verdict to be the principal offender, but also the person not so found to be a principal offender, but even acquitted of being such, or about whom the judgment goes no further than to say that either he or some body else is the principal offender. This appears to us not a right interpretation of the section, but to amount to legislation by creating a new exception to the Indian Penal Code, which would enable any person who denies that he is the principal offender, or who may have been acquitted of the principal offence, or never charged therewith to commit acts to screen the offender, and then gain immunity by suggesting or pleading a surmise, a suspicion, a possibility, or a probability that he was after all a principal offender. The question arises how far is the declaration of a Court about probability to be a plea against conviction under section 201. Is a declaration that the prisoner was one out of three or ten or twenty by some one or more of whom, the Court being unable to say which, the principal offence was committed to avail the prisoner, especially after his acquittal, so as to require the High Court to set aside his conviction for the accessory offence? We incline to say "No." In the present case we think we ought not to act on a surmise or a conjecture that Limbya, who said he was present when Antu killed the woman and that he afterwards helped Antu to conceal the body, was concerned in a guilty manner in the killing."

(1) (1885) I. L. R. 11 Cal., 619.
(2) (1885) I. L. R., 7 All., 749.
(3) (1880) I. L. R. 8 All., 252.
(4) (1871) 8 Bom. H. C. R., Cr., 126.
(5) (1895) I. L. R. 22 Cal., 638.
(6) Ratanlal's Unreported Cr. Cases, 79.

1902.

AUNG KYAW ZAN v. CROWN.

Finally, there is the recent case of *Nazru* v. *The Emperor* (1) decided by the Chief Court of the Punjab. After referring to the authorities, the learned Judges proceed to say:—

"We are not prepared to propound the extreme view that mere suspicion that an individual is the actual murderer would prevent his conviction under section 201 Indian Penal Code on proof that he had made away with evidence of murder, and we do not think that the rulings, all of which deal with the special circumstances of particular cases, go so far as that. We think that if there is clear independent proof that any person has caused evidence to disappear in order to screen some "person or persons unknown" the mere fact that he had been suspected or even tried and acquitted of the crime itself would not in itself prevent his conviction under section 201. A person who has been acquitted of a crime is in the eye of the law not the principal offender who, if no one has been convicted, would be some person unknown. But we quite concur in the view that it is not safe or proper to convict an accused under section 201 merely upon his own confession made while under a charge of murder, and exculpating himself from, and inculpating others in, that charge of murder."

The authorities are therefore not quite unanimous on the point and the latest rulings throw some doubt on the more restricted construction adopted in some of the earlier cases. There seems to be a consensus of authority that section 201 Indian Penal Code cannot refer to the principal offender. That is really, I think, the extent of the ruling in *Kashinath Dinkar's* (2) case, on which so much reliance has been placed in later cases. I do not think that there is sufficient authority for the proposition that the section does not apply to a person who is a possible or probable offender, to one who is merely suspected of being the principal offender, still less to one who has been acquitted of the principal offence. The reasons given in the Bombay and Punjab rulings last cited seem to me sufficient to support this view. Looking at the words of the section I am not prepared to dissent from the unanimous opinion that the section does not apply to a person who is proved or admitted to be the principal offender. But I think that the mere fact that the accused is probably or possibly the principal offender does not prevent his conviction under section 201. In this view, as the appellant has been acquitted of the principal offence, I think that he may be convicted under section 201 of the Indian Penal Code of causing evidence of the offence to disappear.

I think also that by setting the boat adrift with the intention of causing it to disappear (even though it was afterwards found) the person or persons who set it adrift may rightly be held to have caused some evidence of the commission of the murder to disappear. The fact that after the disappearance of their two companions the appellant and Tha Hmwè were in possession of the boat in which they had all travelled together, seems to me to be evidence of the murder of their companions. The section refers to any evidence. I do not think it refers exclusively to causing the disappearance of the *corpus delicti*. A man who should conceal a bloodstained knife with which a murder has been committed would be causing evidence to disappear as much as if he were to bury the body of the victim.

(1) (1902) P. R., C. J., No. 6.

(2) (1871) 8 Bom. H. C. R., Cr., 126.

As regards the facts, it is true that the appellant did not confess that he had helped to set the boat adrift. He exculpated himself and inculpated Tha Hmwè. The Sessions Court had perhaps even stronger grounds for believing that the appellant took part in the murder of Po U and Lu Gyi than that he set the boat adrift. It is not clear why the Additional Sessions Judge believed one part of the appellant's statement and not the other. But I do not think the fact that the Additional Sessions Judge came to an illogical conclusion renders it necessary that this Court should adopt the logical inference from the acquittal of the appellant of the charge of murder. We are not in any way bound by the opinion of the Additional Sessions Judge. The question whether the appellant was rightly acquitted of the charge under section 302 is not under consideration. On the facts established, namely, that the appellant and Tha Hmwè were together with Po U and Lu Gyi in the boat, that afterwards they appeared with the boat without Po U and Lu Gyi, that the boat was afterwards said to have gone adrift and was found wrecked, and that the appellant gave what was clearly a false account of the boat's disappearance, I think that it is a reasonable presumption that he took part in setting the boat adrift. The fact that he assisted Tha Hmwè in disposing of the cargo of the boat also supports this presumption.

For these reasons I concur in the opinion of Mr. Justice Irwin and think that the conviction of Aung Kyaw Zan under section 201 Indian Penal Code should be sustained.

The result is that the appeal of Aung Kyaw Zan will be dismissed.

[The full judgment in the case cited above is appended for convenient reference.]

QUEEN-EMPRESS *v.* LIMBYA.*

Penal Code (Act XLV of 1860), section 201—Principal offence—Accessory offence—Conviction.

A conviction of the accessory offence under section 201 of the Indian Penal Code is not illegal merely because it is suspected, but not proved or admitted, that the accused committed or was one of several persons who committed, the principal offence.—*Reg.* v. *Kashinath*, (1871) 8 Bom. H. C. R., 126, considered.

Per Curiam.—The assessors as well as the Sessions Judge held the prisoners to be guilty, and we think that there is not sufficient reason to disturb the convictions on the merits. But Mr. Bhat urges on behalf of the prisoners that they are wrongly convicted under section 201, they having been concerned as principals in the murder of Daribai, and he cites as authority *Torap* v. *Queen-Empress* (1). There the two prisoners were, at the same trial, both acquitted of a charge of murder and both convicted under section 201. The learned Judges held that such convictions cannot stand. They took note of the following circumstances: "The evidence for the prosecution pointed conclusively to one or the other of them being the actual murderer, but it was impossible upon the evidence to say which of them caused the death." In the case before us there is no admission nor evidence that either prisoner caused the death. The prisoner Limbya had pleaded not guilty

* Criminal Ruling 56 of 1895, Criminal Appeal No. 255 of 1895.
(1) (1895) I. L. R. 22 Cal., 638.

1902.

AUNG KYAW v. CROWN.

to a charge of murder, but before any evidence was taken the Sessions Judge struck out that charge and the trial related only to the offence under section 201. The case of *Torap* v. *Queen-Empress* (1) may, therefore, be distinguished. Whether that case should be followed is, we think, with all respect for the learned Judges who decided it, open to some doubt. In England, if a man be indicted as principal and acquitted, he may be indicted as accessory after the fact (1 Hale, 626). Turning to the law of India, the accepted interpretation of section 201 is that set forth by Mr. Justice Lloyd in *Reg.* v. *Kashinath* (2). Section 201 and the two following sections commenced with precisely the same words, thus: "Whoever knowing or having reason to believe that an offence has been committed." Now, as there is no law which obliges a criminal to give information which could convict himself, it is evident that sections 202 and 203 could not apply to the person who committed that offence, *i.e.*, the offence which he knew had been committed, and section 201 should, we think, be construed in a similar manner; and looking at the only illustration which follows section 201, it would appear that the law was intended to apply exclusively to "another," and we are therefore of opinion that the conviction of the accused as accessories to an offence known or believed to have been committed by themselves is "illegal." The next case quoted by the learned Judges is *Queen-Empress* v. *Lalli* (3) where the only charges tried were under sections 201 and 202, but the prisoner had at one time asserted, like the prisoner Limbya, that he was present at the murder. The report does not show that any cases were cited. The learned Judges say: "In our opinion, on the construction of section 201, the person who is concerned as a principal cannot be convicted of the secondary offence of concealing evidence of the crime." The next case cited is *Queen-Empress* v. *Dungar* (4) which resembles *Torap's* case in regard to the charges tried, the results and the finding of the Sessions Judge that one or other of the prisoners had committed the murder, but he could not say which. Here Mr. Justice Brodhurst, without expressing any other opinion on the facts, set aside the convictions under section 201, citing, with approval, the view of Mr. Justice Lloyd and referring to *Queen-Empress* v. *Lalli* (3) and other four cases. Three of them go no further than did that learned Judge. But in *Queen-Empress* v. *Behala* (5) the learned Judges say: "We think that section 201 of the Penal Code was not intended to apply to such a case, that is, in which the person who is the possible or probable offender makes statements exculpating himself by inculpating another." It appears to us that in the case of *Torap* and *Dungar* and *Lalli* the learned Judges have extended Mr. Justice Lloyd's views so as to acquit of the offences to which section 201 applies not only the person found by the judgment or the verdict to be the principal offender, but also the person not so found to be a principal offender, but even acquitted of being such, or about whom the judgment goes no further than to say that either he or somebody

(1) (1895) I. L. R. 22 Cal., 638.
(2) (1871) 8 Bom. H. C. R., 126.
(3) (1885) I. L. R. 7 All., 749.
(4) (1886) I. L. R. 8 All., 252
(5) (1881) I. L. R. 6 Cal., 789.

1902.

AUNG KYAW ZAN v. CROWN.

else is the principal offender. This appears to us not a right interpretation of the section, but to amount to legislation by creating a new exception to the Indian Penal Code, which would enable any person who denied that he is the principal offender, or who may have been acquitted of the principal offence, or never charged therewith to commit acts to screen the offender, and then gain immunity by suggesting or pleading a surmise, a suspicion, a possibility, or a probability that he was after all a principal offender. The question arises how far is the declaration of a Court about probability to be a plea against conviction under section 201. Is a declaration that the prisoner was one out of three or ten or twenty by some one or more of whom, the Court being unable to say which, the principal offence was committed to avail the prisoner, especially after his acquittal, so as to require the High Court to set aside his conviction for the accessory offence? We incline to say "No." In the present case we think we ought not to act on a surmise or a conjecture that Limbya, who said he was present when Antu killed the woman and that he afterwards helped Antu to conceal the body, was concerned in a guilty manner in the killing. There is nothing to show that Yeshwant had anything to do with it.

The Court dismisses the appeal.

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

Civil Miscellaneous Application No. 438 of 1901. August 4th, 1902.

MA ME GALE *v.* MA SA YI.

Messrs. *Cowasjee* and *Cowasjee*—for the applicant.

Messrs. *Chan Toon* and *Darwood*—for the respondent.

Appeal to His Majesty in Council—Application for admission—Restoration to file of an appeal struck off for default—Time limits, extension of, for security and deposit—Civil Procedure Code, ss. 596, 602.

While the Court has power to restore to the file an application for admission of an appeal to His Majesty in Council which has been struck off for default and to extend the time-limits specified in section 602 of the Code for the furnishing of security and the deposit of expenses, those limits are not to be departed from without cogent reason *Burjore* v. *Bhagana*, I. L. R 10 Cal., 557, followed.

THE judgment of the Court was delivered by—

Fox, J.—The application for decision is an application to restore to the file of pending cases an application for admission of an appeal to His Majesty in Council against a decree of this Court in its appellate jurisdiction.

The Court is also asked to admit the appeal on the applicant depositing Rs. 6,000 in Court as security for the respondent's costs of the appeal. It may be taken that the applicant desires firstly that her petition under section 598 of the Code of Civil Procedure, which was struck off the pending file for default, may be restored; secondly, that the time for furnishing the security required by section 602 (*a*) may be extended; thirdly that, on her depositing Rs. 6,000 in Court within the extended time, the Court may declare the appeal admitted and otherwise carry out the provisions of section 603 of the Code.

1902.

MA ME GALE v. MA SA YI.

Nothing is said in the petition in connection with the deposit of the expenses mentioned in clause (*b*) of section 602, nor is extension of time for such deposit asked for.

Counsel, however, at the hearing asked that time might be allowed for this deposit also.

Undoubtedly the Court has power to restore to the file an application under section 598 of the Code which has been struck off for default. In *Burjore* v. *Bhagana* (1) their Lordships of the Privy Council held that the time-limits specified in section 602 of the Code were directory only, but they also held that those limits were not to be departed from without cogent reason.

The question upon this application appears to be whether the applicant has shown cogent reason for not having given the security and made the deposit required by section 602 within the time specified in the section, and for granting an extension of time upon an application filed more than four months after that time. The history of the case is as follows:—

The decree sought to be appealed against is a decree of this Court, dated the 8th August 1901, reversing the decree of the District Court of Amherst.

The application by the would-be appellant under section 598 of the Code was filed on the 30th September 1901.

A certificate was granted on the 2nd October.

No further steps appear to have been taken by or on behalf of the petitioner towards prosecuting the appeal until the 16th December 1901. From an affidavit by Mr. Robert Sidney Giles, one of the petitioner's then Advocates, filed in Civil Miscellaneous Application No. 49 of 1902, it appears that on that day he made enquiry of the Assistant Registrar of this Court whether immoveable property would be accepted as security for costs of the appeal, and he was informed that the Assistant Registrar could accept nothing but cas hor Government promissory notes.

On the 3rd January 1902 a petition was presented on behalf of the petitioner praying that she might be allowed to give immoveable property as security for costs, and that it might be referred to the District Court of Amherst to report upon such security.

No specific security, however, was tendered or mentioned in the petition or affidavit.

Notice of the application was given to the opposite party in order to give the opponent an opportunity of being heard before any order was made.

Upon the hearing on the 13th February 1902 it was found that no rules had been made by this Court regulating the form in which security under section 602 of the Code should be given.

The Bench which decided the application considered that, in the absence of such rules, the practice of the Calcutta and Bombay High Courts, which permitted of security in the shape of a mortgage of immoveable property, might be followed, and expressed an opinion as to the proper course to be followed if security in such form were ten-

(1) (1884) I. L. R. 10 Cal., 557.

dered by the applicant, and on other matters connected with such form of security. It was apparently not noticed at the time that the time specified in section 602 of the Code had expired before the date of the order.

On the 17th February the applicant for the first time tendered a specific form of security; this was a mortgage of three undivided fifth shares in certain land and buildings in Moulmein. The applicant on the same date applied for an extension of time for furnishing the security. It was referred to the District Court to report upon the value of the property, and it was ordered that, upon the receipt of the report, the case should be set down for hearing of the application for extension of time as well as upon any questions arising as to whether the particular form of security offered should be accepted. The case was heard on the 27th March 1902, and the Bench decided that the security offered should not be accepted.

It considered that the case should be set down for hearing as to whether the appeal should be declared admitted or not.

On the 19th May 1902 the Bench before which the case came considered that the application for leave to appeal should be struck off the file of pending cases for default.

On the 17th June 1902 the present application for restoration of the case was presented. Section 602 of the Code requires a would-be appellant to do two definite acts within a specified time. Both acts are capable of being complied with in a very simple manner.

The deposit of the amount required for printing and other expenses must naturally be made in cash.

This deposit the petitioner never made within the time allowed.

No explanation or excuse for her not having done so is offered in any of her petitions.

It was stated at the Bar, however, that she had lodged the amount for these expenses with her then advocates on the 15th January 1902.

If this is so, the failure to make the deposit may have been due to neglect or oversight on the part of her advocates. In the case of *Aghore Nath Chatterji* v. *Damodar Dass Burman* (1), the Calcutta High Court, in a somewhat similar case of oversight on the part of attornies and vakils, appears to have held that such oversight was not a sufficient ground for extending the time for making the deposit, and their Lordships of the Privy Council refused an application for special leave to appeal. The requirement of giving security for costs of the respondent was also capable of being fulfilled in one of two very simple methods, namely, either by depositing cash for the amount required or by depositing Government securities for the amount.

When four months of the six months allowed for completion of the security had already expired, some step was for the first time taken by the petitioner towards furnishing the security.

Even then no definite security over immoveable property was tendered. In the affidavit filed with the petition presented on the

(1) (1897) 2 Cal., W.N., XLVI.

1902.

MA ME GALE v. MA SA YI.

3rd January 1902, the petitioner's husband stated that he and his wife had not sufficient cash available to deposit in Court the amount required as security for costs and for expenses of printing, but that certain of their relations were "willing to go surety for the said amount and to give landed property in, or in the neighbourhood of, Moulmein as security."

The petitioner and her advisers had no right to count upon the Court departing from the practice which had theretofore prevailed, but even if they did so it was all the more incumbent upon them to tender some definite form of the description of security they wished to be accepted without delay in view of the facts that the time allowed for furnishing security was then drawing to a close, and that tender of a security over immoveable property would necessarily entail enquiry as to the value of the property and consideration of the propriety of accepting the particular form of security.

It was within the petitioner and her husband's power to borrow money, and although they may have had to pay high interest as the husband says in his affidavit of the 21st December, still when a plain provision of the Code had to be complied with the inconvenience and loss were to be faced, and the proper and reasonable course which should have been adopted was to borrow the money and pay it into Court, and afterwards to move the Court to accept other security in substitution of the cash deposited, or to ask that the cash might be invested in Government securities.

Instead of taking such a course the petitioner waited till nearly the end of the time allowed by the Code, and even then only put a hypothetical case before the Court before the time had actually expired.

Under all the circumstances of the case we do not think that there are any cogent grounds for departing from the rule as to time contained in section 602 of the Code or for granting the present application. It is dismissed with costs, Rs. 34 being allowed as advocate's fee.

Criminal Appeal No. 318 of 1902. August 13th, 1902.

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

DON BE *v.* CROWN.

Possession of stolen property—Presumptive evidence—Evidence Act, s. 114.

A bullock was stolen from a pen underneath a house during the night. On the following day the accused offered to find it if he were given Rs. 8. On receipt of the money the accused told the complainant where the bullock was to be found. The bullock was just tied up in the place indicated by the accused.

Held,—that in the circumstances described the accused was rightly presumed to have been in possession of the bullock.

Fox, J.—The accused has been convicted of theft in a building after five previous convictions of offences punishable under Chapter XVII of the Indian Penal Code, and has been sentenced to transportation for ten years.

There was evidence, which the Additional Sessions Judge believed, to the effect that on the 3rd February 1902 a bullock was stolen from

a pen underneath the complainant's house where it had been tied up on the previous evening.

Search was made for it from morning till night in the day time following, but without finding it. Some tracks of an animal and of one man were seen, but did not lead to the discovery of either the animal or the man.

About dusk the complainant met the accused in a field near the village in which they both lived. The accused is the complainant's brother-in-law. The accused, after enquiring whether the bullock had been found, said that if the complainant would give him Rs. 8 he would find the bullock. The complainant borrowed Rs. 8 and went off with two others to a place appointed by the accused as the place where the money was to be paid. The complainant's companions concealed themselves, and the complainant went forward and gave the accused the money. The accused then told the complainant that the bullock was in a named jungle near a certain description of tree, and then went off in another direction. The complainant and his companions went to the jungle indicated, and found the bullock tied up amongst some bushes in the jungle near a tree of the description mentioned by the accused.

The Additional Sessions Judge believed the story of the complainant and of his corroborating witnesses, although there were many discrepancies in their versions of different details. It must have been either true in the main or wholly concocted, in order to get rid of an inconvenient relation of the complainant.

There does not appear to be sufficient reason for holding that it was a concocted story.

The question remains whether the circumstances spoken to were sufficient to justify the conviction of the accused of having stolen the bullock. No one saw him steal it, and it was not seen in his possession.

In arriving at the conclusion that the accused was the actual thief, a presumption beyond that contemplated by illustration (*a*) to section 114 of the Evidence Act must be made, and in fact it must, from the circumstances spoken to, be presumed that the accused was in possession of the bullock when it was tied up in the jungle, from which possession it might undoubtedly be presumed that he was the person who stole the animal.

Is the first presumption legitimate? Under the particular circumstances spoken to, I think it is. In the first place, the illustrations to section 114 of the Evidence Act are not exhaustive. Next, if anyone other than the accused had stolen the animal, it is not likely that he would have left it tied up for any length of time in the place where it was found. Again, the accused offered no explanation of how he came to know where and under what circumstances it would be found. Again he parted with his information only on payment of money under secrecy as he thought. Such conduct was not the conduct of an honest man.

Taking all the circumstances spoken to as a whole, it appears to me legitimate to infer that the accused put and tied up the bullock in the

1902.

DON BE v. CROWN.

place where it was found, and that it was and had been in his possession. The ordinary presumption contemplated by illustration (*a*) to section 114 of the Evidence Act follows. I consider the conviction was justified and would dismiss the appeal.

Thirkell White, C. J.—I concur.

Criminal Revision No. 1498 of 1902. August 15th.

Before Mr. Justice Irwin.

CROWN *v.* MAUNG PO AND TWO OTHERS.

Theft—Taking of property to which the taker has title—Indian Penal Code, s. 379.

A had in her possession 40 baskets of paddy out of which *B* was entitled, under a decree of a Civil Court, to 35 baskets. The decree awarded her this specific paddy as being the produce of a specified farm. *B* took the 35 baskets of paddy out of *A*'s possession without *A*'s consent.

Held,—that the act of *B*, though irregular and improper, did not amount to theft. *Queen-Empress* v. *Agha Muhammad Yusuf*, I. L. R. 18 All., 88; *Queen-Empress* v. *Sri Churn Chungo*, I. L. R. 22 Cal., 1017; *Queen-Empress* v. *Nagappa*, I. L. R. 15 Bom., 344; *Queen-Empress* v. *Nga Shwe Meik*, 1 U. B. R. (1897—01) 339; distinguished.

MA SHWE SIN had in her possession 40 baskets of paddy out of which Ma Min The was entitled, under a decree of a Civil Court, to 35 baskets. The decree awarded her this specific paddy as being the produce of a specified farm. Ma Min The took the 35 baskets of paddy out of Ma Shwe Sin's possession without her consent. She was prosecuted for theft, and the Magistrate, after considering the cases of *Queen-Empress* v. *Agha Muhammad Yusuf* (1) and *Queen-Empress* v. *Sri Churn Chungo* (2), discharged her on the ground that the paddy taken was the paddy specifically awarded to Ma Min The by the decree, and therefore the taking could not cause wrongful gain or wrongful loss.

I do not quite understand the grounds of the District Magistrate's opinion to the contrary. It is true that the decree was subsequently set aside, but the District Magistrate does not base his opinion on that fact (which is clearly irrelevant) for he says that even if the decree had been correct it may be reasonably argued that the taking of the property was actually carried out with the intention of causing wrongful loss. I do not follow this reasoning, for I do not see how any wrongful loss could be caused by taking paddy to which Ma Min The was lawfully entitled and Ma Shwe Sin was not. The District Magistrate says that the two rulings quoted are briefly to the effect that a taking the law into one's own hands in the enforcement of a decree constitutes a theft. This, I think, is a misdescription of the rulings. They do not go so far as the District Magistrate states, and they proceed on grounds which have no special reference to taking the law into one's own hands. I have examined also the cases of *Queen-Empress* v. *Nagappa* (3) and *Queen-Empress* v. *Nga Shwe Meik* (4). The basis of all four is that the particular property taken was property to which the taker had no sort of title.

(1) (1896) I. L. R. 18 All., 88.
(2) (1895) I. L. R. 22 Cal., 1017.
(3) (1891) I. L. R. 15 Bom., 344.
(4) 1 U. B. Rulings (1897—01) 339.

1902.

CROWN
v.
MAUNG PO.

I think, therefore, that the distinction drawn by the Additional Township Magistrate is correct, and that Ma Min The's act, though irregular and improper, did not amount to theft.

Before Mr. Justice Irwin.

MA KA *v.* MA WIN BYU.

Civil Second Appeal No. 240 of 1901. August 19th, 1902.

Mr. *Hamlyn*—for appellant (defendant).

Messrs. *Wilkins* and *Israel Khan*—for respondent (plaintiff).

Second Appeal—Small Cause suit—Suit for money received by defendant for plaintiff's use.

Plaintiff, alleging that she and the defendant jointly let certain land and shared the rent equally, that defendant received the whole of the rent and refused to pay plaintiff her share, sued to recover her share. Plaintiff's title to the land was denied.

Held,—that the suit was of a nature cognizable by a Court of Small Causes and a second appeal was barred by section 586 Civil Procedure Code.

Sit Le v. *Shwe Thwin*, 7 Bur. L. R. 98, and *Soundaram Ayyar* v. *Sennia Naickan*, I. L. R. 23 Mad., 547, distinguished; *Rango Roy* v. *Holloway*, I. L. R. 26 Cal., 842; *Narayan Bhaskar Khot* v. *Balaji Bapuji Khot*, I. L. R. 27 Bom 248; *Damodar Gopal Dikshit* v. *Chintaman Balkrishna Karve*, I. L. R. 17 Bom., 42, followed.

RESPONDENT-PLAINTIFF alleged that she and appellant jointly let certain paddy land and shared the rent equally, and that defendant-appellant received the whole of the rent for the year 1262 and refused to pay respondent her share. Respondent sued to recover her share, Rs. 116-1-7½. Plaintiff's title was denied. A preliminary objection is taken that the suit is of a nature cognizable by a Court of Small Causes, and a second appeal is barred by section 586 Civil Procedure Code.

Respondent cited first the judgment of Mr. Justice Birks in *Maung Sit Le* v. *Maung Shwe Thin* (1), in which it was held that a suit for rent was of a nature cognizable by a Court of Small Causes, following the Madras High Court in *Soundaram Ayyar* v. *Sennia Naickan* (2), but that decision depended on the fact that a notification under Article 8 of the Second Schedule to the Provincial Small Cause Courts Act has been issued in Madras. There is no such notification in force in Burma so far as I am aware, and suits for rent are expressly excluded from the jurisdiction of a Court of Small Causes by Article 8.

But it seems to me that this is not a suit for rent. A suit for rent is essentially a suit by a landlord against a tenant. Here the tenant is not a party. The present suit seems to be exactly described in Article 62 of the Second Schedule to the Limitation Act, namely, "For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use." On this view the second case cited by respondent, namely, *Rango Roy* v. *Holloway* (3), though not exactly similar, bears a close analogy to the present case It was a suit under the Bengal Tenancy Act to recover rent taken in excess

(1) Bur. L. R., 98 (2) (1900) I. L. R. 23 Mad., 547.
(3) (1899) I. L. R. 26 Cal., 842.

1902.

MA KA
v.
MA WIN BYU.

by the landlord. The question directly in issue does not concern Burma at all, but the Judges incidentally held that there was no doubt that a suit of this nature was ordinarily cognizable by a Court of Small Causes. The next case, *Narayan Bhaskar Khot* v. *Balaji Bapuji Khot* (1) is almost undistinguishable from the present case. Plaintiffs sued the manager of immoveable property for their share of the profits. Defendant denied plaintiff's claim in respect of some of the properties. Questions of title arose. The learned Judges, following *Damodar Gopal Dikshit* v. *Chintaman Balkrishna Karve* (2), held that it was a Small Cause suit and no second appeal lay, In that case the plaintiffs, while suing for a specific sum, prayed in the alternative for any sum that might be found due on taking an account. It was held that this alternative prayer did not bring the case within Article 31 of the Second Schedule to Act IX of 1887. It was also noted that the profits were not alleged to have been wrongfully received. In the latter point the present suit is on all fours with the Bombay one, and there is here no question of an account. Therefore *á fortiori*, Article 31 does not apply here.

Articles 4 and 29 have also been suggested by the learned Advocate for the appellant, and he contends that plaintiff cannot succeed at all without proving her title to the land. No authority is cited to support this argument, and I cannot agree that Article 4 can apply in the face of the Bombay ruling above quoted, with which I concur. Article 29 is out of the question.

I find that the suit is of a nature cognizable by a Court of Small Causes, and that a second appeal is therefore barred by section 586 Civil Procedure Code.

The appeal is dismissed with costs.

Criminal Revision No 1411 of 1902. August 21st.

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

SHWE YI *v.* CROWN.

Messrs. *Bagram* and *Mehta*—for applicant.

Abuse of powers by village headman—Act constituting an offence under the Indian Penal Code or other law also punishable departmentally—Sanction of Deputy Commissioner to prosecute—Lower Burma Village Act, s. 19.

Section 19 of the Lower Burma Village Act refers to a complaint of an act which constitutes an offence under the Indian Penal Code or any other law if such act is also punishable departmentally under section 8 of the Lower Burma Village Act.

Queen-Empress v. *Cheik To*, P. J. L. B., 397, followed.

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

This application was argued before me as if the facts were the same as in Criminal Revision No. 344 of 1902, in which the same person was applicant and the conviction was reversed. The facts are by no means the same. In the present case the learned Additional Sessions Judge found that "Complainant was handcuffed by order of

(1) (1897) I. L. R. 21 Bom., 248. | (2) (1893) I. L. R. 17 Bom., 42.

the headman-appellant and assaulted by Po Sein, and there is a natural presumption that as the assault by beating of Po Kan was done in the presence of the headman without his attempting to interfere . . . . appellant sanctioned by his presence and non-interference the assault."

He further held expressly that the headman was not acting in good faith. I do not consider it to be the duty of this Court in revision to re-open any questions of fact especially after they have been considered by the Court of Session on appeal, and on the facts found by the Court of Session the appellant was not protected by section 77 Penal Code.

But section 19 of the Lower Burma Village Act remains to be considered. In Revision No. 344 Mr. Justice Birks held that the meaning of this section is that "A Magistrate has no power to entertain a complaint of any abuse of a headman's powers under section 8 without the sanction of the Deputy Commissioner."

The learned Judge seemed to think that there was no difficulty at all about the construction of section 19, for his ruling consists of the single sentence I have quoted and nothing more. He no doubt had in his mind Mr. Hosking's judgment in *Queen-Empress* v. *Nga Cheik To*, (1) which was as follows :—

"Section 19 does not refer to a prosecution under section 8, but to a prosecution for an offence punishable under any other Act. Section 8 empowers a Deputy Commissioner to punish a village headman . . . . . departmentally and not magisterially. Section 19 protects a village headman . . from a prosecution under any Act for an offence for which he might be departmentally punished by the Deputy Commissioner under section 8, unless the prosecution has been sanctioned by the Deputy Commissioner."

This construction requires that section 19 should be paraphrased as follows : "No complaint against a headman . . . . for an offence under the Penal Code, if such offence constitutes also an act punishable departmentally under section 8 of this Act, shall be entertained, &c." Mr. Hosking was probably driven to this construction by the fact that no act of a headman or rural policeman as such is punishable under the Lower Burma Village Act by a Criminal Court, and therefore, if Mr. Hosking's construction is not correct, section 19 is inoperative and is mere surplusage. This undoubtedly makes the ruling very plausible; but it takes very great liberties with the text, and I doubt whether any such meaning can properly be assigned to the words "any act or omission punishable under this Act."

Section 18 of Act II of 1880 made certain acts and omissions of a headman as such punishable by a Criminal Court [section 29 (2), Code of Criminal Procedure], and the last clause of the section contained a provision for sanction to prosecutions. When that Act was superseded by Act III of 1889, the jurisdiction to punish headmen was transferred from the Criminal Courts to the Deputy Commissioner as an executive officer, but the clause about sanction has been produced word for word in section 19. The clause as it

(1) J. P. L. B., 397.

1902.

SHWE YI v. CROWN.

stood in Act II of 1880 obviously had no reference to offences under any other Act, and I think the obvious inference is that it was re-enacted through inadvertence, the fact that there were no offences to which it could refer not being noticed. Legislatures are not infallible, and difficulties in reconciling different clauses of the same Act come to notice frequently. I cannot think that the legislature could have intended to transfer the action of the clause from offences under the District Cesses and Rural Police Act to offences under the Penal Code without altering the language of the clause, which is very plain.

I therefore, under section 11 of the Lower Burma Courts Act, refer for the decision of a Full Bench the question—

> Does section 19 of Act III of 1889 refer to a prosecution for an offence punishable under any Act other than Act III of 1889?

The opinion of the Bench was as follows :—

Thirkell White, C. J.—The question referred in this case is whether section 19 of the Lower Burma Village Act, 1889, refers to a prosecution for an offence punishable under any Act other than the Act above mentioned. The section is as follows :—

"No complaint against a headman or rural policeman of any act or omission punishable under this Act shall be entertained by any Court unless the prosecution is instituted by order of, or under authority from, the Deputy Commissioner."

The only acts or omissions punishable under the Lower Burma Village Act, where a headman or rural policeman is the offender, are neglect to perform a duty imposed, and abuse of any power conferred, by or under the said Act. In such cases a headman or rural policeman is punishable by order of the Deputy Commissioner. In no case is any act or omission of a headman or rural policeman made punishable under the Village Act on conviction by a Criminal Court. But it is conceivable that an act or omission may not only be punishable by executive order of the Deputy Commissioner, but may also constitute an offence under the Penal Code or some other enactment cognizable by the Criminal Courts. The question is whether, in such cases, the Criminal Courts are competent to take cognizance of a complaint unless, to put it briefly, with the sanction of the Deputy Commissioner.

The late learned Judicial Commissioner (Mr. Hosking) considered the point in the *Queen-Empress* v. *Cheik To* (1) and held that section 19 does not refer to a prosecution under section 8 but to a prosecution for an offence punishable under any other Act. It seems to me that this is the plain meaning of the section, and that we are precluded from construing it in any other way. To hold otherwise would be to hold that the section has no meaning at all. I do not think that any recognized rules of construction enable us to interpret a provision in a Statute in a way which would deprive it of all use and effect, when there is a possible and not unnatural interpretation which gives effect to what may have been the intention of the Legislature. In *Maxwell on the Interpretation of Statutes* (2) there is the following passage :—

(1) P. J. L. B., 397. (2) Third Edition, p. 7.

"In short, when the words admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature and to construe them on its own notions of what ought to be enacted. Nothing could be more dangerous than to make such considerations the ground of construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views, is in truth not to construe the Act but to alter it. But the business of the interpreter is not to improve the Statute; it is to expound it. The question for him is not what the Legislature meant, but what its language means; what it has said it meant. To give a construction contrary to or different from what which the words import or can possibly import, is not to interpret law but to make it and Judges are to remember that their office is *jus dicere* not *jus dare*."

A fortiori, it seems to me that a construction which would make the words of a section inapplicable to any case that could arise cannot be adopted when another construction gives the section an intelligible meaning.

Even if it were permissible to speculate on the possible intention of the Legislature, I see no difficulty in believing that it was the intention to protect village headman from prosecutions instituted by private persons in respect of acts done in the execution of their official duties, although it might be alleged that offences punishable under the Penal Code or some other law had been thereby committed. As was pointed out in argument, analogous protection is afforded to judges and other public servants by section 197 of the Code of Criminal Procedure. Nor is it clear that the corresponding section 18 of the Burma District Cesses and Rural Police Act, 1880, had not the meaning assigned to section 19 of the Village Act in the judgment in the case of *Cheik To* (1). It may be remarked incidentally, though as a matter with which this reference is not directly concerned, that the section does not protect headmen and rural policemen from all prosecutions, without sanction, in respect of acts done in execution of their duty. It merely forbids the Courts in such cases and in such conditions to entertain a complaint. This consideration may perhaps tend to lessen a difficulty which has been felt in applying this section in the case of very heinous offences.

Concurring with the ruling in the case of *Cheik To* (1) above cited, I would answer the question referred to us in the affirmative.

Bigge, J.—I am of the same opinion.

Irwin, J.—I cannot say that my doubts about the proper construction of section 19 are altogether removed by the arguments addressed to us or by the judgment of the learned Chief Judge, but they are greatly lessened, and I am not prepared to dissent from the construction which has been adopted by three Judges of this Court as well as by a late Judicial Commissioner.

The final order was passed by—

Irwin, J.—It has now been ruled by the Full Bench that section 19 of the Lower Burma Village Act refers to a complaint of an act which constitutes an offence under the Penal Code if such act is also punishable departmentally under section 8 of the Lower Burma Village Act. The present case, I think, was clearly an abuse of the power conferred on headmen by the Act, and it was instituted by complaint. It was

(1) P. J. L. B., 397.

1902.

SHWE YI v. CROWN.

not sanctioned by the Deputy Commissioner, and therefore the Magistrate had no jurisdiction to take cognizance of the complaint.

In Chapter XV "of irregular proceedings" there is no special provision made for a case like the present. It might be argued that the defect is cured by section 529 (*e*), but that is very doubtful. Section 537 is the only section that deals specially with sanctions, and cases of offences against public justice alone are not vitiated merely by want of sanction.

I therefore set aside the conviction and sentence passed on Shwe Yi; but following the precedent set by the Punjab Chief Court in *Shamal Khan* v. *Queen-Empress* (1) I cannot acquit him, as the trial was illegal for want of jurisdiction. I direct that the fine, if paid, be refunded.

Criminal Appeal No. 355 of 1902. August 23rd, 1902.

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

SAN BAW AND NINE OTHERS *v.* CROWN.

The Government Advocate—for the Crown. | Mr. *Villa*—for the respondents.

Previous acquittal—Subsequent trial on same facts—Collecting men to wage war against the King—Preparation to commit dacoity—Court of competent jurisdiction—Indian Penal Code, sections 399, 122—Criminal Procedure Code, section 403—Confession, record of, in form of question and answer—Evidence Act, ss. 80, 25.

An acquittal for preparation to commit dacoity is no bar to a subsequent trial on the same facts for collecting men to wage war against the King, when authority for the prosecution under Chapter VI, Indian Penal Code, had not been accorded at the time of the first trial.

The fact that questions are put to an accused person making a confession does not render that confession inadmissible on the ground that it was not duly taken.

THE following reference was made to the Full Bench by Mr. Justice Irwin, under section 11 of the Lower Burma Courts Act, 1900:—

The appellants have been convicted of collecting men and arms with the intention of waging war against the King, an offence punishable under section 122 of the Penal Code. The first ground of appeal is a previous acquittal, which is said to bar the present trial under section 403 Code of Criminal Procedure. The appellants were tried by the District Magistrate of Tharrawaddy on the same facts in Trial No. 1 of 1902, and convicted of preparation to commit dacoity under section 399 of the Penal Code. On appeal to this Court they were (all except three) acquitted and discharged on the ground that on the face of the judgment there was nothing to support a conviction of any of the appellants under section 399. The three who did not appeal were acquitted and discharged in revision for the same reason. The learned Chief Judge who heard the appeal obviously had in his mind, when passing judgment, the probability—I might say certainty—that a fresh prosecution on the same facts would be instituted with the sanction of the Local Government. He said: "It is only necessary to consider the

(1) Punjab Record, 1890, 33.

nature of the order setting aside these convictions that should be passed. A retrial cannot be ordered because there is not before this Court any sanction for a charge under Chapter VI of the Indian Penal Code, and such an order is, moreover, not asked for by either Mr. Broadbent or the Government Advocate. Mr. Broadbent for the appellant does not ask for an order declaring the proceeding altogether void, and merely now desires that his clients shall be acquitted and discharged in respect of the offence of which they have been convicted, namely, under section 399 Indian Penal Code. This appears to me to be a suitable order." The convictions and sentences were then set aside and the appellants "acquitted and discharged so far as this trial is concerned."

I think it is hardly necessary to consider whether the words "so far as this trial is concerned" can operate to allow a new trial which would otherwise be barred. The appellants were tried for preparation to commit dacoity by a competent Court, and acquitted of that offence on appeal, and, in my opinion, the words I have quoted cannot in any way modify the legal effect of the acquittal, whatever that effect may be.

An offence under section 122 is not punishable with death, and can therefore be tried by a District Magistrate in this Province under section 30 Code of Criminal Procedure. Clause (*4*) of section 403 Code of Criminal Procedure does not apply. The decision of the point now in issue depends on the construction of clauses (*1*) and (*2*) of that section.

In the former trial the only charge framed was under section 399. Could a charge under section 122 have been framed and tried in the same trial under section 236 Code of Criminal Procedure, or could the appellants, under section 237 Code of Criminal Procedure, have been convicted of collecting men to wage war, at a trial on the charge of preparation to commit dacoity? No question of sanction can arise on this point. It must be decided as it would have to be decided at the original trial if sanction had been given and the prosecution duly instituted. It seems to me that if at the commencement of the trial there had been any doubt whether the intention of the accused was to wage war or merely to commit dacoity, section 236 would apply, and the appellants could have been tried at one and the same trial on charges under sections 399 and 122 of the Penal Code. But in the present case the Magistrate seems to have had no justification for framing a charge under section 399. There was no doubt at all that the facts alleged would constitute an offence under section 122, and the finding of a different intent was entirely based on surmises or theory and contrary to the evidence. Under these circumstances, I have some doubt whether it can be said that it was doubtful which of the two offences the facts which could be proved would constitute.

Clause (*2*) of section 403 provides for new trial in a case where more offences than one are committed in the same transaction, but the accused is not tried for all those offences at the first trial. All the illustrations to section 235 (*1*) exhibit the separate offences as consisting of separate acts. In the present case there are no such separate acts. It is the very same acts which the District Magistrate held to

1902.

SAN BAW v. CROWN.

constitute preparation to commit dacoity that the Court of Session has held to constitute the offence of collecting men and arms to wage war. If separate charges of the two offences were triable at one trial, they at any rate would not be so under section 235 (*1*), and therefore a new trial cannot he held under section 403 (*2*).

In the case of *Shamal Khan* v. *Queen-Empress* (1) the appellant who had been convicted of waging war against the Queen, had his conviction and sentence set aside because the prosecution was not instituted by complaint, but he was not acquitted, as the Court had no authority to try him without a complaint. This precedent is not of much assistance in the present case.

The point which has been raised is one of great importance, and seems to me a difficult one to decide. The Government Advocate did not appear. I do not know why he was not instructed. I think he ought to be heard. I therefore refer to a Full Bench under section 11 of the Lower Burma Courts Act the question—Is the acquittal of the appellants for preparation to commit dacoity a bar to the subsequent trial on the same facts for collecting men and arms to wage war against the King, under section 403 (*1*) of the Code of Criminal Procedure?

If this question is answered in the negative there is another point to be decided, on which I have some doubt. Among the evidence on which the appellants have been convicted is a confession of San Baw (appellant No. 1) recorded by the District Magistrate in the police station on 29th December 1901. This document is exactly of the kind commented on by the Calcutta High Court in *Gya Singh* v. *Mohamed Suliman* (2); it was an examination by question and answer, and took rather the shape of cross-examination. It was undoubtedly an improper examination. Under section 164 Code of Criminal Procedure the Magistrate is "entitled to record any voluntary statement made by the accused person, but he is not entitled to examine him in respect of the facts of the case." The confession is properly certified, and there appear to be no circumstances which would make it inadmissible under section 24 Evidence Act, but it is not very clear whether it can be said to have been taken "in accordance with law," and if not so taken it would not prove itself by mere production under section 80 Evidence Act. The Magistrate was not called as a witness. I therefore refer to the same Bench this second question—

Was the confession of Nga San Baw properly admitted in evidence under section 80 of the Evidence Act?

The opinion of the Bench was as follows:—

Thirkell White, C. J.—The circumstances of this case are fully set out in the order of reference. The appellants have been acquitted on appeal after having been convicted under section 399 Indian Penal Code of preparing to commit dacoity. They have now been charged and convicted of preparing to wage war against the King—an offence punishable under section 122 Indian Penal Code. When they were tried under section 399 Indian Penal Code, no sanction to their prosecution under section 122 Indian Penal Code had been granted. This

(1) Punjab Records, 1890, 33. | (2) 5 C. W. N., 864.

sanction was subsequently accorded before the commencement of the second trial. The first question which has been referred to us is whether, under section 403 Code of Criminal Procedure, the acquittal at the first trial is a bar to the trial out of which this appeal arises.

Section 403 Code of Criminal Procedure, sub-section (*1*), provides that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237. Sub-section (*4*) of the same section provides that a person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he was subsequently charged. Sub-section (*4*) does not introduce any new rule not implicitly contained in sub-section (*1*).

Section 196 of the Code of Criminal Procedure directs in effect that, except with the sanction of Government (to use a convenient abbreviation), no Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code (subject to an exception which does not concern this case). Section 122 is one of the sections in respect of which sanction is required under section 196 of the Code of Criminal Procedure. Section 196 occurs in Chapter XV of the Code which relates to the jurisdiction of the Criminal Courts in inquiries and trials. It seems to me that want of sanction in a case where sanction is requisite goes to the root of the jurisdiction of the Court, and that it affects the competency of the Court. In the circumstances stated, the District Magistrate could not have framed a charge against the accused under section 122 Indian Penal Code. If he had done so, whether he had acquitted or convicted the accused, his proceedings would have been void under section 530, clause (*p*), of the Code of Criminal Procedure. In my opinion it is impossible to hold that the District Magistrate was competent to try the offence, when owing to the want of sanction he had no power to take cognizance of it. If that is so, it must be held in the words of sub-section (*4*) of section 403 Code of Criminal Procedure, that the Court by which the accused were first tried was not competent to try the offence with which they were subsequently charged. It would have been competent to do so if the conditions necessary to give it jurisdiction had been present. As one of these conditions was not fulfilled, it was not competent. I would therefore answer the first question in the negative.

As regards the second question in the reference, so far as section 80 of the Evidence Act is concerned, it seems to me that the Court was bound to make the presumptions specified in that section in respect of the document purporting to be the confession of the accused San Baw. Section 164 of the Code of Criminal Procedure refers to section 364 of that Code, and the latter section explicitly requires

1902.

SAN BAW v. CROWN.

questions and answers to be recorded. The fact that questions are put to an accused person making a confession does not render that confession inadmissible on the ground that it was not duly taken. But while thinking that the so-called confession is on the face of it admissible, I think that the Court had full power to consider whether the questions were such as might properly be put to the accused in the circumstances, and to exclude it from consideration if it was of opinion that the questions were improper. For the purposes of this reference I would answer the second question in the affirmative, strictly limiting the answer to the question so far as relates to the admissibility of the document under section 80 of the Evidence Act.

Bigge, J.—I concur.

Irwin, J.—When I made this reference I had not the advantage of having heard the learned Government Advocate, and I did not sufficiently consider the meaning of the word "competent" in section 403 (*4*).

I concur with the judgment of the learned Chief Judge.

The final order was passed by—

Irwin, J.—First appellant San Baw had been for six or seven years a *pôngyi*, occupying the north *kyaung* at Kainggyi village in Tharrawaddy District. The facts proved are that on 15th December 1901, in the presence of a large number of persons assembled at his *kyaung*, he declared he was Bodaw Thagya Setkya Min, and he intended to abandon the yellow robe and set up his throne at Mandalay.

Thereupon the people subscribed money for his journey to Mandalay, Rs. 73 in all, and a list of subscribers was made. He then set out with about nine persons, went to Mandalay, returned to Kainggyi, and on 23rd December at Ma Win's house he stated he had come back because he found the throne not finished and had destroyed it. He again claimed to be king, and said next day he would cause rice to be cooked into gold, and would then set up his throne at Letpadan. He added that police would come while they were cooking gold, but that he would shake his head and cause them to fall down and die. Next day a number of persons assembled at his *kyaung* to cook rice into gold with about 60 pots, and the following day the police arrived and arrested him at the scene of the cooking. Only one *da* was found at the place. San Baw was very violent and resisted arrest. He afterwards said he permitted the police to arrest him, otherwise they must have failed.

San Baw and 11 others have been convicted of collecting men to wage war against the King. San Baw's defence is that he was mad, and did not collect men or arms to wage war.

The defence of the others is generally that they subscribed as San Baw's pilgrimage to worship at Mandalay as they were accustomed to do every year; that they knew he was mad and humoured him by cooking for gold, thinking that, when the experiment failed, he would resume the yellow robe. Shwe Baw and Nga Tin say they did not subscribe, and Shwe Baw did not return with San Baw from Mandalay.

1902.

SAN BAW v. CROWN.

There is a good deal of evidence that San Baw was eccentric some years ago before he became a *pôngyi*, but the witnesses are agreed that so long as he was a *pôngyi* he was perfectly sane, and there is no doubt that he was sane after his arrest. His acts between 15th and 24th December are not those of a mad man. After carefully considering the evidence I have no doubt that he perfectly understood what he was doing and the nature of the claims he made. The assertion that he could boil rice into gold was no doubt made to impress the people with his miraculous powers, and when it failed he would be sure to have some plausible explanation of the failure corresponding to his statement that he permitted the police to arrest him.

I cannot regard the gold-cooking party as collecting men to wage war, especially as no attempt was made to collect weapons. I do not believe the people who say they did it to humour the *pôngyi* and get him to resume the yellow robe. The large number of pots points to a belief that the experiment would succeed; but I think the only justifiable inference is that they assembled in order to obtain gold and not for the purpose of waging war.

When San Baw returned in peace from Mandalay after his boastful declaration that he would reign there, he was bound to do something startling or confess himself an impostor. He invented the gold miracle, but there is nothing to show that his followers thought at that time that he would do anything more than make gold.

The events of the 15th December stand on a different footing. When San Baw declared that he was going to set up his throne at Mandalay and started with a following of nine men, that was a distinct act of collecting men to wage war, and all those persons who started with him, and those who subscribed money when he declared his purpose, must be held to have abetted him. And though their hearts seem to have failed them and they returned without making any attempt on Mandalay, any hair-brained escapade of this kind most certainly constitutes a grave danger to the public peace in this Province, and must be severely punished. Shwe Baw assisted in recording the subscriptions on 15th December, and went with San Baw to Mandalay. Nga Mo subscribed and went to Mandalay. Kyaw Gale was the Treasurer of the party, and went to Mandalay. Nga Tin apparently was not present when the declaration was made and subscriptions collected, but he went to Mandalay with San Baw. All the other appellants subscribed except Po Kun. Therefore I think that, even if San Baw's confession be left out of consideration, all except Po Kun were rightly convicted.

It remains to notice some technical objections that have been taken in appeal. The question of previous acquittal has been disposed of by a Full Bench. It is next said that the sanction has not been properly proved, but the case cited in support of this argument is one in which the sanction on the record was a copy of a copy of a copy, and the name in the sanction differed from the name of the accused. This has no bearing on the present case, in which the sanction bears the original signature of the Chief Secretary to Government; the accused

1902.

SAN BAW v. CROWN.

are properly named and the father's name of each is given, and no question of identity has been raised.

The admission of San Baw's confession under section 80 of the Evidence Act was challenged. The Full Bench has ruled that it was rightly admitted, though the propriety of excluding it from consideration remains an open question. I have excluded it, as I hold that the proof of the appellant's guilt is complete without it.

The learned Additional Sessions Judge has not stated his reasons for the various sentences imposed. I see no reason to interfere with the sentences passed on San Baw and those who accompanied him to Mandalay; of the rest I reduce the sentences of Aung Dun, Sein Dôn, Kya Gyi and Ne Dun to one year's rigorous imprisonment, the same as the sentences passed on Po Mya and Po Maung. I reverse the conviction and sentence of Po Kun, and direct that he be acquitted and released.

Civil Revision No 25 of 1902. August 26th.

Before Mr. Justice Thirkell White, Chief Judge.

COOVERJEE LADHA *v.* VISHRAM EBRAHIM & Co.

Messrs. *Bagram* and *Mehta*—for appellant.

Messrs. *Eddis*, *Connell* and *Lentaigne*—for respondent.

Principal and Agent—Advocates not necessarily Agents of clients in mercantile transactions.

Advocates who act as solicitors are not thereby, without special appointment, constituted the agents of their clients in mercantile transactions.

THE facts of this case are not disputed. In order to the completion of a contract for the sale of rice, the plaintiffs who carry on business as Cooverjee Ladha and Company sent to the defendants, the firm of Vishram Ebrahim and Company, two milling notices, each for 1,000 bags of rice. The defendants, on 21st January, declined to accept the rice on the ground that it was not of contract quality, and they asked for fresh milling notices. On the same date they wrote suggesting a joint-survey of the rice. Apparently no further communication passed between the parties till January 28th, when the plaintiffs' advocates wrote to the defendants informing them that the millers had demanded payment of the price of the rice milled under the above notices. The defendants' advocates replied on the same day, merely drawing attention to the previous correspondence and to the request for a survey. On the 29th January the plaintiffs' advocates wrote to the defendants' advocates enclosing two fresh milling notices and asking that they might be sent on to their clients without delay as the milling was to begin on the night of the 29th. The advocates returned the notices pointing out that they were not agents for the receipt of milling notices. The rice was subsequently sold at the plaintiffs' risk and they suffered a small loss, to recover the amount of which they sued the defendants.

The contention of the plaintiffs, which the learned Judge of the Court below has not accepted, is that in the transaction relating to the sale of the rice in question the defendants' advocates were their agents, and that delivery of the milling notices to them was effectual as against the defendants. In support of this proposition passages from text-books

have been cited to show that notice to a solicitor is notice to his client; and generally, that a principal is bound by the acts of his agent within the scope of the agent's authority. The doctrine of notice as pointed out by the learned Judge of the lower Court does not affect this case at all. The question is whether the advocates for the defendants were the agents of the defendants for the purpose of receiving milling notices and otherwise acting in connection with the contract for the sale of rice. If they were agents in the transaction, no doubt the delivery to them of milling notices was a good delivery.

In Smith's *Mercantile Law* (1) it is said, as regards the agent's authority, "the general rule is that the extent of the agent's authority "is (as between his principal and third parties) to be measured by the "extent of his usual employment." Again, it is said (2): "As the "employment is the measure of the authority, an employment in one "line of business affords no inference of authority to act in another, and "the authority must be inferred from facts which have occurred during "a course of such employment, not from mere argument as to the uti- "lity or propriety of the agent's possessing it." Again "A general "agent is a person whom a man puts in his place to transact all business "of a particular kind. Thus, a man usually retains a *factor* to buy and "sell all goods, a *broker* to negotiate all contracts of a certain descrip- "tion, a *solicitor* to transact all his legal business, a *master* to perform "all things relating to the usual employment of his ship, and so in "other instances."

In Evans on *Principal and Agent*, from which many citations have been made by the learned counsel for the applicants, there is a section (3) dealing with the authority of solicitors. There is no indication throughout the ten pages or so on this subject that a solicitor has an implied authority to act as the agent of his client in mercantile transactions. It is not disputed that, as was said in *Tate* v. *Hyslop* (4), a solicitor is not a standing agent in respect of mercantile business. But it is said that the defendants' advocates were constituted their agents in respect of this particular transaction. I think it is obvious that this is not the case. All that the defendants' advocates did was to answer a letter addressed to their clients by the advocates for the plaintiffs. There is nothing in this letter to afford the slightest indication that further action in connection with the completion of the contract for the sale of rice was to be carried on by correspondence between the advocates of the parties.

The view taken by the learned Judge of the Court below is beyond doubt correct. Advocates who act as solicitors are not thereby, without special appointment, constituted the agents of their clients for carrying out mercantile transactions.

The application for revision is therefore dismissed.

(1) Tenth Edition, p. 136.
(2) Tenth Edition, p. 138.
(3) P. 152, *et seq.*
(4)(1884-85) 15 Q. B. D., 368.

Criminal Revision No. 1283 of 1902. August 26th.

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

CROWN *v.* PO NYAN.

Committal proceedings—Sufficient ground for committal—Criminal Procedure Code, section 213 (2).

Section 213 (2) of the Criminal Procedure Code is intended to provide for cases in which the evidence recorded after charge so changes the aspect of the case as to leave no reasonable doubt that a conviction is not sustainable. But that clause does not apply when the evidence for defence merely casts some doubt on the case. "Sufficient ground" for committal is a *primâ facie* case, and it still remains a sufficient ground even if to some extent weakened—but not proved beyond reasonable doubt to be false—by the evidence for the defence.

The duty of a committing Magistrate pointed out.

THE judgment of the Court was delivered by—

Irwin, J.—The evidence discloses a strong *primâ facie* case of murder against Po Nyan, and the evidence for the defence is purely negative. We do not think it is necessary to refer to any precedents in this case. The judgment on the face of it shows that the Magistrate usurped the functions of the Court of Session. He says: "To consider who inflicted this wound. Now, was it the accused Nga Nyan? This question is very difficult to decide." If this is true, if there was any difficulty about deciding the question, it was undoubtedly the Magistrate's duty to commit the prisoner for trial. He had no authority to decide the question himself.

Although Mr. * * * has been a Magistrate for eleven years it seems that he has not yet learned the duties of a committing Magistrate. Under section 208 it is his duty in the first place to take all evidence tendered on both sides before framing a charge: he gave the accused no opportunity of producing evidence until after framing the charge. Then he took the accused's plea, a thing which he had no jurisdiction to do. He states in his judgment that he heard accused's defence. If this merely means that he examined the accused's witnesses named after being charged, it was within the Magistrate's discretion to do so, under section 212, but the phrase is an indication of the Magistrate not understanding the nature of his duties. It was this misunderstanding that led him to adjudicate on the evidence instead of leaving it to the Court of Session to do so. Section 213 (2) is intended to provide for cases in which the evidence recorded after charge so changes the aspect of the case as to leave no reasonable doubt that a conviction is not sustainable. To take an extreme case, suppose the prisoner is charged on strong circumstantial evidence with murdering a person whose body is not found, and after charge the person supposed to have been murdered is brought into Court alive. The administration of justice would be defective if provision were not made for such cases by section 213 (2), but that clause does not apply when the evidence for defence merely casts some doubt on the case. "Sufficient ground" for committal is a *primâ facie* case, and it still remains a sufficient ground even if to some extent weakened (but not proved beyond reasonable doubt to be false) by evidence for the defence.

1902.

CROWN v. PO NYAN

This is eminently a case in which the District Magistrate might, under section 436, have ordered the accused to be committed for trial, and it is not apparent why he did not do so.

Under section 439 Code of Criminal Procedure, we direct that the accused Nga Po Nyan be committed to the Court of Session for trial on a charge of murder.

Before Mr. Justice Thirkell White, Chief Judge.

Criminal Appeal No. 340 of 1902. September 1st.

CROWN *v.* KONOO MEAH AND THREE OTHERS.

Government Advocate—for the Crown. | Mr. *Kastgir*—for the second respondent.

Compounding of offence, sanction to—Grievous hurt—Practice—Hurt with dangerous weapon—Indian Penal Code, sections 324, 325—Criminal Procedure Code, section 345 (2).

Before allowing composition of an offence alleged to fall under section 325 Indian Penal Code, a Magistrate should take sufficient evidence to satisfy himself that the offence really falls under that section and that the case is one in which composition may fitly be allowed.

When allowing composition under section 345 (2) of the Code of Criminal Procedure, the Magistrate should briefly state his reasons for granting sanction.

Certain circumstances which should be considered in determining whether composition should or should not be allowed in a case falling under section 324 or 325 Indian Penal Code pointed out.

Queen-Empress v. *Naran* (Ratanlal, 699), referred to.

I AM not prepared to say that a Magistrate cannot allow a case to be compounded under section 345, sub-section (2), of the Code of Criminal Procedure, until a charge has been framed against him. This is not the view taken by the Bombay High Court in *Queen-Empress* v. *Naran* (1) where the learned Judges said that the Magistrate should find upon the facts and "determine whether the accused should be "discharged or whether he should be charged with an offence; and that "he should make up his mind that only a compoundable offence is prov-"ed before he allows a compounding." But I think that a Magistrate does not exercise a sound judicial discretion when he allows composition of a offence alleged to fall under section 325 Indian Penal Code, before he has taken sufficient evidence to satisfy himself that the offence really falls under that section, and that the case is one in which composition may fitly be allowed. In particular, medical evidence of the nature and extent of the injury caused to the complainant should always be recorded in such cases before composition is sanctioned. The Magistrate should also consider the nature of the weapon or instrument with which the hurt was caused. If the offence seems likely to fall under section 326 Indian Penal Code, it cannot be compounded.

I think, also, that when allowing composition under this sub-section, the Magistrate should briefly state his reasons for granting sanction, in order that, if any appeal is preferred, this Court may be in a position to judge whether discretion has been properly exercised.

In a case falling under section 324 or 325 Indian Penal Code, the Magistrate should take into consideration all the circumstances of the

(1) Ratanlal's Unreported Cases, page 699.

1902.

CROWN
v.
KONOO MEAH.

case, and should bear in mind that such an offence is punishable not only for the satisfaction of the injured person but also to protect society by deterring others from committing similar offences. The degree of prevalence of such offences at any particular place or time may fitly be considered in determining whether composition should or should not be allowed.

In this case, for the reasons indicated above, I am of opinion that the order allowing composition was premature. I reverse the acquittal of all the accused, Konoo Meah, Abdul Hakim, Abdul Latif (or Azziz), and Majum Ali, and direct that they be retried. This order will not preclude the Magistrate from allowing composition, if he thinks fit, at a later stage of the case, after he has taken the evidence for the prosecution and on consideration of the several points indicated above.

Civil Second Appeal No. 279 of 1901. September 9th 1902.

Before Mr. Justice Irwin.

CHOKALINGAM CHETTY *v.* MAUNG AUNG BAW AND FOUR OTHERS.

Messrs *Lowis, Giles* and *Thornton*—for appellant.

Messrs. *Bagram* and *Mehta*—for first and second respondents.

Messrs. *Chan Toon* and *Das*—for third respondent.

Substitution of parties—Court of Second Appeal, power of—Civil Procedure Code, s. 32.

A Court of Second Appeal cannot substitute one defendant for another in the plaint or record of the original suit, nor one appellant for another in the record of the first appeal.

RESPONDENTS sued Subramanian Chetty of Kyaiklat, money-lender, to recover some paddy of which they said they had been unlawfully dispossessed. Subramanian Chetty defended the suit, and made no allegation that he was agent for anybody else. A decree was passed against him, and he appealed, heading his appeal with his name "Subramanian Chetty, money-lender, Kyaiklat, appellant." His appeal was dismissed.

A second appeal is now presented, in which the appellant at first described himself as "A.R.M.M.R.M. Chokalingam Chetty, residing in Rangoon and carrying on business at Kyaiklat by his duly constituted agent, Subramanian Chetty." No exception was taken to this by the respondent, but it seemed to me doubtful whether this person Chokalingam had any *locus standi*, and the learned advocate for appellant was given an opportunity of showing that he has. He has eventually amended the name and description of the appellant to "Chokalingam Chetty, residing in Rangoon, and carrying on business at Kyaiklat under the style of A.R.M.M.R.M. Subramanian Chetty," and he seeks to give his client *locus standi* by praying that the records of both the lower Courts may be amended by describing the defendant and the appellant in the terms just quoted. The application is supported by a joint affidavit of Chokalingam and Subramanian, declaring that it is the practice of Chetty firms to carry on business under the style or firm (*sic*) of the mark of their firm with the

1901.

CHOKALINGAM CHETTY v. MAUNG AUNG BAW.

name of their agent for the time being added thereto; that Chokalingam's mark is A.R.M.M.R.M.; that he was carrying on business in Kyaiklat by his agent Subramanian Chetty; that the transactions in this suit were all entered into by the said Subramanian Chetty on behalf of Chokalingam's firm; that the firm was misdescribed in the plaint, and waiving such misdescription the agent defended the suit on the merits on behalf of the firm.

The learned advocate argues that under the second paragraph of section 32 Civil Procedure Code, a Court of second appeal can substitute one defendant for another in the plaint and one appellant for another in the first appeal. No authority has been cited for this proposition. The section quoted deals with adding parties, not substituting, and even if it did authorize substitution, I do not think its operation could be extended to Courts of appeal in respect of the record of the original suit. If no second appeal had been presented in the present case, Chokalingam would not be liable for the costs decreed against Subramanian, and if Subramanian left the country, plaintiffs would be left without their costs.

Chokalingam cannot be allowed to intervene now in a suit in which there is no decree against him in existence. His agent made a mistake in the first Court in not pleading that he was merely an agent. Chokalingam made a mistake in not instructing Subramanian to present the second appeal in his own name. He will have to take the consequences.

I direct that the memorandum of appeal be returned to Chokalingam.

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

Civil First Appeal No. 27 of 1902. September 9th.

AFAZULLA CHOWDRY *v.* SAKINA BI.

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

Mahomedan Law—Ante-nuptial agreement—Husband undertaking to allow wife to live with her parents.

A written agreement whereby, in consideration of marriage, the husband undertakes to allow his wife, so long as she is a minor, to live with her parents, or other suitable relation, such as an elder sister, is valid under Mahomedan Law.

Hamidunnessa Bibi v. *Zohiruddin Sheik*, (1890) I.L.R. 17 Cal., 670; *Bazar Ali* v. *Appuzunbee*, 6 Bur. L. R., 144; *Tekait Monmohini Jemadai* v. *Basanta Kumar Singh*, (1901) I.L.R. 28 Cal., 751, referred to.

Thirkell White, C. J.—The appellant, Afazulla Chowdry, sues his wife, the respondent, Sakina Bi, for restitution of conjugal rights. It is admitted that before the marriage the appellant executed a written agreement whereby he pledged himself to let her live with her sister while she remained a minor. The only question for decision is whether the appellant is bound by this agreement or whether it is invalid according to Mahomedan Law. It was at one time alleged that the defendant-respondent had waived her rights under the agreement, but this was abandoned at the hearing of the appeal. On the other hand, it was stated in argument by the advocate of the

1902.

AFAZULLA CHOWDRY v. SAKINA BI.

respondent that there had been serious quarrels between the parties and that it would be against public policy to require the wife to live with her husband. But it was not alleged in the written statement tendered by the defendant at the trial that the appellant had treated her with cruelty or that she declined to live with him because they could not agree.

There is no doubt that the case must be decided in accordance with the provisions of Mahomedan Law. The difficulty is to ascertain the provisions of that law which are applicable. The only reported case which has any direct bearing is that of *Hamidunnessa Bibi* v. *Zohiruddin Sheik* (1). In that case there was a written agreement whereby the plaintiff agreed to live with his wife in the house of her father. There was also a stipulation that he should allow his wife to see her parents. In view of this stipulation the Court held that the former stipulation was not intended to be absolutely binding. It also appeared that the wife for a time lived in the plaintiff's house. Having regard to the terms of the deed and the subsequent conduct of the parties, the Court held that the agreement was not a sufficient answer to the suit for the restoration of conjugal rights. The learned Judges did not, however, go to the length of deciding that such an agreement as was pleaded was not valid under Mahomedan Law. In *Bazar Ali* v. *Appuzunbee* (2) the above decision was followed. The case does not seem to have any bearing on the present case unless it is held to interpret the ruling of the Calcutta High Court as meaning that a stipulation of the kind under reference is in itself invalid. I do not think that the remarks of the learned Judge go to this length or that that interpretation would be correct. The other cases cited do not seem to apply to the case under consideration.

As regards the authorities in the text-books reliance has been placed by the appellants on the statements of the law as to the effects of marriage in Sir William Macnaghten's Principles and Precedents of Mahomedan Law, Chapter 7, paragraph 7 (3) in connection with which may be cited Baillie's Digest (4) in respect of the general rights of the husband when the status of marriage has been created. Special reference has also been made to another passage in Macnaghten's work (5) in which the law as to an ante-nuptial agreement of this kind is laid down, and to Sir Roland Wilson's Mahomedan Law (6) in which the last cited precedent of Sir William Macnaghten is followed. On the other hand, the respondent cites a passage directly bearing on the question from Mr. Justice Amir Ali's learned work on Mahomedan Law (7) and this last is the authority adopted by the learned Judge who tried the case.

As regards the general principles laid down in the passages first cited above, all that can be said is that the former declares the effect of a contract of marriage to be "to place the wife under this dominion of the husband." The latter does not even go to this extent, the husband's power of restraint over the wife being more specially limited. In neither passage is there any specific reference to the power

(1) (1890) I. L. R. 17 Cal., 670. | (2) (1900) 6 Bur. L.R., 144.
(3) Page 57. | (4) Page 13. | (5) Page 236. | (6) Page 56. | (7) Volume 2, page 137.

of the husband to require his wife to live in her husband's house Ordinarily, however, it would be one of the incidents of marriage that the wife should do so.

As regards the specific agreement admitted by the appellant, all that Sir William Macnaghten's Precedent decides is that a *verbal* agreement that the wife shall be allowed to live in her parent's house is invalid. Sir Roland Wilson in citing this Precedent, omits to notice that it refers solely to a *verbal* agreement. Mr. Justice Amir Ali distinguishes between the case of a written agreement and a verbal understanding. He agrees with Sir William Macnaghten that the latter is not binding, but he regards the former as valid. The whole passage from his book may be cited with advantage :—

"The law recognizes circumstances which justify her refusal to live with him. For instance, if he has habitually ill-treated her, if he has deserted her for a long time, or if he has directed her to leave his house or even connived at her doing so, he cannot require her to re-enter the conjugal domicile or ask the assistance of a Court of Justice to compel her to live with him. The bad conduct or gross neglect of the husband is, under the Mussulman Law, a good defence to a suit brought by him for restitution of conjugal rights.

"In the absence of any conduct on the husband's part justifying an apprehension that if the wife accompanied him to the place chosen by him for his residence she would be at his mercy and exposed to his violence, she is bound by law to accompany him wherever he goes. At the same time, the law recognizes the validity of express stipulations entered into at the time of marriage respecting the conjugal domicile. If it be agreed that the husband shall allow his wife to live always with her parents, he cannot afterwards force her to leave her father's house for his own. Such stipulation, in order to be practically carried into effect, must be express or entered in the deed of marriage, if any; a mere verbal understanding is not sufficient in the eye of the law.

"If the wife, however, once consent to leave the place of residence agreed upon at the time of marriage, she would be presumed to have waived the right acquired under the express stipulation and to have adopted the domicile chosen by the husband. If a special place be indicated in the deed of marriage as the place where the husband should allow the wife to live, and it appears subsequently it is not suited for the abode of a respectable woman, or that some injury was likely to accrue to the wife if she were to remain there, or that the wife's parents were not of good character, the husband may compel the wife to remove from such place or from the house of such parents.

"The husband may also insist upon his wife accompanying him from one place to another, if the change is occasioned by the requirements of his duty."

There is then no conflict of authority. All that Sir William Macnaghten says is that a *verbal* agreement that the wife shall live in her parent's house cannot be enforced. Mr. Justice Amir Ali admits that a verbal understanding is not sufficient, but declares that a stipulation to this effect entered in the deed of marriage is binding. The latter statement is the only specific declaration of the law on the subject that I have been able to discover in the text-books or in the cases. It is true that no authority for his position is cited by the learned author. But the fact that Sir William Macnaghten explicitly refers to a verbal agreement tends to support his view of the law.

In another part of Mr. Justice Amir Ali's work (1) several conditions are specified as valid in ante-nuptial agreements made in consideration of marriage. I have been unable to discover reference to these or similar conditions in other text-books. But I cannot find anything

(1) Volume 2, page 312.

1902.

AFAZULLA CHOWDRY v. SAKINA BI.

to show that ante-nuptial agreements as such are expressly declared to be invalid or are contrary to the spirit of Mahomedan Law. All contracts relating to dower are of the nature of ante-nuptial agreements, and there seems no reason why other conditions in such agreements should not be recognized by law. It is reasonable to hold that *primâ facie* an agreement made in consideration of marriage is valid, and that it is for the party affirming it to show by authority or on other grounds the invalidity of such an agreement as that relied on in the present case. No specific authority except that in Sir Roland Wilson's work, which seems to be too comprehensively stated, has been cited on behalf of the appellant. It is said that such a stipulation is contrary to public policy, which requires that a wife should live in her husband's house if he wishes her to do so. It does not seem to me to be more consistent with public policy to enforce the husband's authority in this matter than to uphold generally the binding nature of voluntary engagements.

For these reasons I concur with the learned Judge of the Original Side in thinking that the authority of Mr. Justice Amir Ali's work should be followed in this case, and that a written agreement whereby, in consideration of marriage, the husband undertakes to allow his wife to live with her parents or other suitable relation, such as, in this case, her elder sister, is valid under Mahomedan Law. It is for the prospective husband to consider whether such an engagement is prudent. But when a man has voluntarily made this promise and has thereby obtained all the advantages of a marriage which he desired, I fail to see on what equitable ground he can repudiate his engagement, and I have not discovered any rule of Mahomedan Law which enables him to do so.

For these reasons I would dismiss this appeal with costs.

Irwin, J.—I concur in the conclusion at which the learned Chief Judge has arrived, that this appeal should be dismissed. I wish to say a few words on the argument which was addressed to us that the agreement now in question is contrary to public policy. The case which was cited by the learned advocate for the appellant is *Tekait Mon Mohini Jemadai* v. *Basanto Kumar Singh* (1); and although that was a Hindu case I think it is very much to the point, because it was decided partly on grounds which are common to all systems of marriage law. Mr. Justice Ghose, after considering an enactment in force in Bengal, the wording of which is identical with section 13 of the Burma Laws Act, 1898, said: "The question raised between the parties in the present case has to be determined by the particular law, that is, the Hindu Law, which governs them." Having examined the Hindu Law he decided that the duty of a Hindu wife to reside with her husband wherever he may choose to reside is a rule of Hindu Law. He then quoted section 23 of the Contract Act, and found the promise made by the plaintiff to live for ever in his father-in-law's house and never take his wife to any other place was contrary to public policy, and this was one of the grounds of his decision. The plaintiff had lived for 15 years in his father-in-law's house

(1) (1901) I. L. R. 28 Cal., 751.

1902.

AFAZULLA CHOWDRY v. SAKINA BI.

before quarrels arose, and he had actually been forbidden by the Collector, on complaint made, to enter that house again, so that he could not get access to his wife. Mr. Justice Stevens, in concurring, said: "The objection to such an agreement lies in its permanent and unconditional character." Neither Judge seems to have had any hesitation in applying section 23 of the Contract Act, notwithstanding that the rule of decision must be "the Hindu Law except so far as it has been altered or abolished by enactment."

Mr. Justice Amir Ali, without mentioning the Contract Act, lays down almost the same rule at page 311 of Volume II, where he says: "Conditions opposed to public morality are illegal and void without touching the validity of the marriage . . . . If a woman should forego her right to maintenance, or contract that she will not be entitled to any dower, the stipulation is of no effect in law, and is equally void."

Therefore, I am not prepared to say that I should uphold the antenuptial stipulation if the facts were at all similar to those in the Hindu case just cited, notwithstanding the passage at page 371 of Syed Amir Ali's work. But in the present case the agreement being to let the wife reside with her sister only so long as she is a minor, it does not seem to be in any way opposed to either public morality or public policy, and I agree in the finding that the weight of authority is in favour of its validity under Mahomedan Law.

Before Mr. Justice Thirkell White, Chief Judge.

Criminal Appeal No. 420 of 1902. September 18th.

PO KIN *v.* CROWN.

Messrs. *Bagram* and *Mehta*—for appellant.

House-trespass—Intent of accused—Indian Penal Code, section 456.

Where a man comes secretly to a house at the invitation of one of its inmates, and solely for the purpose of keeping an assignation—

Held,—that the offence of criminal house-trespass is not committed.

Queen-Empress v. *Tun Bye*, 1 U. B. R. (1897—01) 354, and *Queen-Empress* v. *Rayapadayachi*, (1896) I. L. R. 19 Mad., 240, followed.

THE appellant Po Kin has been convicted under section 456 Indian Penal Code of lurking house-trespass by night. All that is proved is that he was found under a bed in a room in the house of one Tun Tha at about 8-30 or 11 P.M. The times are variously stated. There was a suggestion that the accused entered the house with intent to commit theft. But the Magistrate has not found that this is proved or that it can be presumed. On behalf of the appellant it is alleged that he went to the house to keep an assignation with one of the daughters of the house who was his sweetheart. This is denied by the girl, as is not unnatural. There is evidence in support of the allegation which the Magistrate seems to have believed at least to some extent. So far as I can gather, the Magistrate was disposed to think that the appellant came to see the girl Ma Yi, though he did not find it conclusively proved that he came at Ma Yi's explicit

1902.

PO KIN v. CROWN.

invitation. But he considered himself bound by the ruling of this Court in the case of *Crown* v. *Zachariah* (1) in which it was held that a man who, in the middle of the night, entered by a ladder a room where three women were sleeping, must, in the absence of any circumstances pointing to an innocent intent, be held to have committed the trespass with some one of the criminal intents mentioned in section 441 Indian Penal Code. He therefore convicted the appellant without finding precisely what was his intent. I think that the ruling in the *Crown* v. *Zachariah* (1) must be held to be restricted to the special circumstances of that case. The present case is distinguishable from it on the facts which are very different.

If it is shown that the appellant came secretly to the house at the invitation of a girl and for the sole purpose of meeting her, I should follow my own ruling in *Queen-Empress* v. *Tun Bye* (2) and the ruling of the Madras High Court in *Queen-Empress* v. *Rayapadayachi* (3) and hold that the offence of criminal trespass was not made out. In the present case the Magistrate certainly thought, and I agree with him, that though the appellant's intent was not clearly proved to be merely to meet Ma Yi, it was quite probable that that was his intention. In these circumstances I think there is a reasonable doubt whether the offence of house-trespass was committed, and the appellant is entitled to the benefit of it.

The conviction and sentence are reversed, and it is ordered that Po Kin be acquitted and released.

Criminal Revision No. 1496 of October 1902. 5th.

Before Mr. Justice Thirkell White, Chief Judge.

CROWN *v.* PO LU AND ANOTHER.

Cheating by personation—Cheating and thereby inducing delivery of property—Indian Penal Code, ss. 416, 419, 420.

A goes to an opium shop with *B's* ticket and explicitly or by implication represents himself to be *B* and thereby induces the shopkeeper to deliver to him a certain quantity of opium.

Held,—that *A* commits the offence of cheating by personation; and as opium was actually delivered in consequence of the cheating, he should be convicted under section 420 of the Indian Penal Code.

The accused have been convicted—Po Lu of cheating by personation and So Gyi of abetting the same offence.

The case was imperfectly tried. There is no clear evidence that the accused committed the offence of which they have been convicted. All the evidence recorded is as follows. A head constable says that he was told that the accused Po Lu came to buy opium with some one else's ticket; that he arrested Po Lu, who said he was Nga Pu; and that So Gyi backed him up in this statement. A witness Sit Kaung says that he met the two accused, who were going to buy opium; the head constable then came; when Po Lu's name was asked he said that he was Nga Pu; when they bought opium they presented an opium-ticket; at that time So Gyi said that Nga Pu

(1) C. A. No. 347 of 1902. | (2) (1900) 1 U. B. R. (1897—01) 354.
(3) (1896) I. L. R. 19 Mad., 240.

was really the accused Po Lu. A third witness Nga Pu identifies the accused as Po Lu, and the ticket as his own. An irrelevant statement by this witness of what happened when he was absent was also recorded. No witness was called from the opium shop to prove that the accused bought or attempted to buy opium. It is impossible to understand from the evidence of the witness Sit Kaung whether he was present at the opium shop when the accused bought or tried to buy opium, or whether he is merely relating what happened when the accused were challenged by the constable. If the Excise Officer or the opium shopman had been called, the matter would have been made clear.

In the absence of evidence as to what happened at the shop (unless Sit Kaung's evidence relates to that), the examination of the accused was illegal. Until there was evidence that they went to the shop and bought or tried to buy opium, evidence, that is to say, of some one who was present and could describe from personal knowledge what happened, the accused could not be called upon to explain the matter. However, they were examined, and Po Lu says that he tried to buy opium with Nga Pu's ticket and representing himself to be Nga Pu, but that the shop-keeper being suspicious refused to sell to him. So Gyi apparently admits that he said at the shop that Po Lu was Nga Pu.

It is probable that the facts admitted by the accused could have been proved by independent evidence, as should certainly have been done. If Po Lu went to the opium shop with Nga Pu's ticket and explicitly or by implication represented himself to be Nga Pu, and if he thereby induced the shop-keeper to deliver to him a certain quantity of opium, it seems to me that he, by deceiving the shop-keeper, fraudulently induced him to deliver certain property, namely, opium, and that he cheated within the meaning of section 415 Indian Penal Code. The part of that section which relates to damage or harm to a person in body, mind, reputation or property, which the District Magistrate quotes, does not refer to the first part of the definition, which has to do with fraudulent or dishonest inducement by deceit to deliver or retain property. It refers to the second part of the definition, which has to do with inducement to acts or omissions other than the delivery or retention of property.

If the accused Po Lu tried to get opium in the manner described but failed to do so owing to the description of the shop-keeper, then he was guilty of an attempt to cheat.

If So Gyi went with other accused and backed him up in his false representation, then no doubt he abetted the cheating or the attempt as the case may be, for he aided in the doing of the thing which constituted the offence.

The offence of cheating being constituted by the acts alleged against the accused Po Lu, it is hardly necessary to say that those acts constituted the offence of cheating by personation and that sections 416 and 419 Indian Penal Code, were applicable. If opium was actually delivered in consequence of the cheating, the conviction should have been under section 420 Indian Penal Code.

1902.

CROWN
v.
PO LU.

In the present case, although it was very badly tried, and though the procedure was of doubtful legality, the accused pleaded guilty and have already undergone their sentences. It is not necessary to pass further orders.

Criminal Revision No. 1922 of 1902. November 22nd.

Before Mr. Justice Thirkell White, Chief Judge.

CROWN *v.* MYA ZAN AND TWO OTHERS.

Criminal Trespass—Indian Penal Code, section 447.

A is in peaceable possession of land which he claims to hold in mortgage from *B*. *C* enters on the land and ploughs it, ousting *A*, on the ground that he had bought the land from *B*.

Held,—that although *C* may have entered upon the land in assertion of the right alleged to have been acquired by him by purchase from the owner, *A* was not liable to be ousted from the land save in due course of law, and *C* renders himself liable to a conviction under section 447 of the Indian Penal Code of criminal trespass. *Maung Kado v. Queen-Empress*, (1892—96) 1 U. B. R., 264, followed.

THIS case has been referred by the learned Sessions Judge on the ground that the conviction is not sustainable.

So far as can be gathered from the record, the complainant was in possession of certain land which he claimed to hold under mortgage from one Mi Robanu. The accused entered on the land and ploughed it, ousting the complainant, on the ground that the first accused Mya Zan had bought the land from Mi Robanu. The Magistrate found it proved that the complainant had enjoyed the land for three years before the accused entered upon it. The accused may have entered upon the land in assertion of the right alleged to have been acquired by the first accused by purchase from the owner. But if, as was found to be the case, the complainant was in peaceable possession, they have no right to oust him or to enter on the land except in due course of law. The following passage from the judgment of Mr. Burgess, Judicial Commissioner of Upper Burma, in *Maung Kado* v. *Queen-Empress* (1) seems to be applicable:—

"Cases of trespass are very common in this Province, and there is a prevalent disposition on the part of persons who are not in possession of land to take matters into their own hands and assert their claims by entering on the land. Their claims are often *bonâ fide* enough in the sense that they have a genuine belief in the justice of their own title. But that is not enough. There must also be reasonable grounds for believing that there is a legal right to immediate possession, and in the great majority of instances this is not so. The person who is in possession is generally in peaceful possession under some claim of his own, and is not liable to be ousted save in due course of law, and the person who attempts to take the law into his own hands and to deprive the holder of the land of possession, must run the risk of being convicted under section 447 of the Penal Code of criminal trespass. * * *

"The natural inference from such conduct must generally be that there was an intent to commit an offence, or to intimidate, insult, or annoy the person in possession of the property, unless the contrary can be proved, which, under such circumstances, it must be a difficult thing to do."

(1) (1892–96) 1 U. B. R., 264.

I think the principles of this decision should be adopted, and that they are applicable to the present case. That being so, I do not think that the accused have been wrongly convicted, and I see no ground for interference.

1902.

CROWN
v.
MYA ZAN.

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

NGA PYAN *v.* CROWN.

Criminal Appeal No. 537 of 1902. November 24th.

Clemency—Prerogative of the Crown—Sentence of death—Murder—Indian Penal Code, section 302.

To refrain from passing or confirming a sentence of death on account of the criminal's youth is an act of pure mercy, the exercise of which is the prerogative of the Crown.

Maung U v. *Queen-Empress*, P.J., L.B., 112, dissented from.

Fox, J.—The appellant Nga Pyan has been found guilty of having murdered one of his fellow labourers in the employ of Maung Ye Bo on the 13th July 1902 at a field hut in Ye Bo's fields, where the two and other labourers of Ye Bo's lived whilst cultivating his lands.

The chief evidence to prove that the appellant committed the offence is that of two of the other labourers living at the hut named Tet To and San Shwe. They say that the murder was committed in their presence, and that they each of them saw the appellant strike at least two of the ten blows inflicted on Lu Tha with a *dah*.

There is also evidence that the appellant admitted to the first village headman, to whom he was taken, that he had cut Lu Tha with a *dah*, and that on the day following the occurrence he confessed to a 3rd class Magistrate that he had done so. About a fortnight later, when examined by the committing Magistrate, he retracted the confession and said that he had been led to make it through fright at and ill-treatment by the police. It may be said at once that there is not the slightest ground for believing that the appellant was at any time ill-treated by the police, or for believing that the confession to the 3rd class Magistrate was other than voluntary.

In that confession he implicated Tet To and San Shwe as having taken part in the crime as well as himself, but he admitted having given the first blow.

Tet To and San Shwe represent that whilst they, Lu Tha and the appellant, were sitting down after meal chatting and smoking, the appellant suddenly and without any warning got up, and, reaching over Tet To, struck at Lu Tha with a *dah*, whereupon the two witnesses rushed out of the house, and when at a safe distance saw the appellant again strike Lu Tha, who had succeeded in getting just outside of the hut. They did not venture near until, in the course of the appellant's striking, the blade of the *dah* came away from the handle. On this they rushed in and seized the accused, and taking the blade with them they brought him before the village headman of Kyannigan, to whom they related what had happened.

This village headman bears them out, and says the two witnesses said in the appellant's presence that the appellant had cut Lu Tha;

1902.

NGA PYAN
v.
CROWN.

and on his asking the appellant if this was true, he said it was, and that he had given several cuts, but he did not know how many.

The Additional Judge of the Sessions Court was asked, and this Court is asked, to discredit these witnesses because the appellant in his confession implicated Tet To and San Shwe in the crime, and in his latter statement suggested that they must have committed it, and also because there are some discrepancies between their statements of what happened before the actual occurrence. Tet To was also an unsatisfactory witness in his demeanour when before the Sessions Court. The Additional Sessions Judge noted this at the end of the record of Tet To's evidence, and in his judgment he considers it and all the other points put before him in connection with these witnesses.

The discrepancies between them are such as are only natural, seeing that, according to them, nothing had occurred previous to the appellant's attack which could have led them or any reasonable being to think that the appellant had been specially angered by anything Lu Tha had done, or that he meditated an attack on Lu Tha.

No adequate reason has been given for in any way doubting the village headman's evidence as to what happened when Tet To, San Shwe and the appellant were before him; and if his evidence is true it is strongly in favour of the truth of Tet To's and San Shwe's version of what occurred.

There seems to be no possible room for doubt that the appellant did strike Lu Tha with a *dah* as stated by these witnesses, and under the circumstances he was rightly convicted of murder.

A strong appeal has been made to this Court to reduce the sentence upon the appellant on account of his youth. His exact age is uncertain; in one statement he gave it as being 19 years, in another as 14 years. His parents' evidence is of the most indefinite character. From his appearance the Additional Sessions Judge took him to be not more than 17 years, and possibly 16 years.

In the case of *Maung U and others* v. *Queen-Empress* (1) Mr. Hosking, Judicial Commissioner, gave as one of the reasons which would under ordinary circumstances be sufficient, in his opinion, to justify the lesser sentence upon a conviction for murder, the fact that the offender was under 18 years of age. I cannot find that this opinion was based upon or justified by any provision of law. The passing and the confirming of a sentence of death on a fellow creature is in all cases a most painful duty, more especially so in the case of a youth or woman, and human inclination naturally impels a Judge to take a more merciful course if it can be justified.

The present case is one in which a youth must have silently brooded for a considerable time over chidings and abuse addressed to him by the man he subsequently murdered, but in the end his act was deliberate, previously meditated, done in cold blood, and was accompanied by great ferocity.

To refrain from confirming a sentence of death in such a case on account of the criminal's youth would, in my opinion, be an act of

(1) P.J., L.B., 112.

1902.

NGA PYAN v. CROWN.

pure mercy. The exercise of mercy is the prerogative of the Crown to be exercised in this countryby the very highest authorities, and, if mercy is exercised towards a criminal, he and the public should understand that the mitigation of the sentence passed upon him by the Court of Justice is due to the exercise of the power of clemency which is an attribute of the King-Emperor alone.

There were, in my opinion, no sufficiently extenuating circumstances in the case to justify a Court of Justice in abstaining from passing or confirming a sentence of death as the proper punishment according to law for the crime committed by the appellant.

I would therefore dismiss the appeal and would confirm the sentence of death on the appellant.

Thirkell White, C. J.—I concur in all that has been said by my learned colleague, both as to the merits of the case and as to the reasons why the capital sentence should be confirmed. The result is that the appeal of Nga Pyan is dismissed and the sentence of death will be confirmed.

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

Criminal Appeal No. 539 of 1902. November 24th.

SAN DAIK *v.* CROWN.

The Government Advocate—for the Crown.

Misjoinder of charges—Kidnapping and murder—Distinct offence—Indian Penal Code, ss. 366, 302—Criminal Procedure Code, ss. 233, 235 (1).

Mere proximity in time between two acts does not necessarily constitute them parts of the same transaction.

Where, therefore, the offences of kidnapping and of murder did not constitute a series of acts forming the same transaction, but were two distinct offences not falling within the scope of section 235, sub-section (1)—

Held,—that section 233 of the Code applies: the charges of kidnapping and murder should have been tried separately, and the effect of the misjoinder of charges was to make the trial altogether illegal.

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

Thirkell White, C. J.—The appellant, San Daik, has been tried for, and convicted of the offence of kidnapping a minor and the offence of murder. The Additional Sessions Judge has found that the appellant kidnapped from lawful guardianship a minor named Mi On Kin, and that he murdered his wife because she gave information which led to his discovery with the girl by her parents.

The first question for consideration is whether the joinder of charges in this trial is legal. Now, the provisions of section 233 Code of Criminal Procedure are clear and strict. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in certain specified cases. The only exception which can possibly apply to this case is that provided for by section 235, sub-section (1), of the Code. Under that sub-section, if in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence. I do not think that by any stretch of interpretation the kidnapping and the murder in this

1902.

S N DAIK v. CROWN.

case can be said to constitute a series of acts forming the same transaction. On the assumption that the case for the prosecution has been made out, as to which I do not express an opinion, the kidnapping was completed. The parents of the girl, on information furnished by the deceased, followed and recovered her. So far that transaction was at an end. Then, it may be admitted very soon afterwards, the appellant is said to have killed his wife in revenge for her action. I cannot see how the murder can be regarded as part of the same transaction as the kidnapping. Mere proximity in time between two acts does not necessarily constitute them parts of the same transaction. It would be easy to imagine cases in which kidnaping might be connected with other acts in the same transaction. Suppose, in taking away a minor, the kidnapper were opposed by her father and killed him in order to effect his purpose of carrying away the minor; suppose having carried her away, he then committed rape on her: in that case, the kidnapping, murder, and rape would all be parts of the same transaction and could be tried together. The distinction between this imaginary case and the concrete case under consideration is obvious. In my opinion there is no doubt that the kidnapping and murder in this case were distinct offences and did not fall within the scope of section 235, sub-section (*1*), Code of Criminal Procedure. It follows that section 233 of the Code applies, and that the charges of kidnapping and murder should have been tried separately.

As to the effect of the misjoinder of the charges in this case, there is decisive authority in the recent case of *Subrahmani Aiyyar* v. *King-Emperor* (1) I am unable to distinguish the present case from that case, in which their Lordships of the Privy Council held that, in a trial conducted in a manner prohibited by section 234 of the Code of Criminal Procedure, the conviction must be set aside.

I would therefore reverse the convictions and sentences in this case and direct that the accused San Daik be retried on the charge of murder, and, if acquitted on that charge, separately on the charge of kidnapping. If he is convicted of murder, it will not be necessary to re-try him on the charge of kidnapping.

Fox, J.—I concur.

Criminal Revision No. 1014 of 1902. November 28th.

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

CROWN *v.* PO MAUNG.

Illegal double sentence—Imprisonment and whipping—Practice in revision.

Where a combined sentence of imprisonment and of whipping cannot legally be passed, and it is found that the sentence of whipping which by itself might have been legally passed has been executed, the proper course to adopt in revision is to set aside the imprisonment as a matter of course.

Crown v. Skan Byu, 1 L. B. R., 149, *Queen-Empress* v. *Hamza*, 1 L. B. R., 55, referred to. *Queen-Empress* v. *Po Sin*, S. J., L. B., 336, followed

Thirkell White, C. J.—The accused, Po Maung, has been convicted of theft in a house, and of having been previously convicted under section 457 Indian Penal Code. He has been sentenced, ac-

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

cording to the Magistrate's judgment, under section 380-75, Indian Penal Code, to suffer rigorous imprisonment for two years and to receive 30 stripes. The sentence should have been under section 380 Indian Penal Code and section 3 of the Whipping Act. The sentence of whipping has been executed.

It has been held in the case of *Crown* v. *Shan Byu* (1) that on a conviction under section 457 Indian Penal Code after a previous conviction under section 380 Indian Penal Code a sentence of whipping and of imprisonment cannot be passed. The ruling applies to the present case and is no doubt correct. A similar view was taken in *Queen-Empress* v. *Hamza* (2). But in neither of these cases was it thought necessary to interfere with the illegal sentence of imprisonment. In the case of *Hamza* (2) no formal orders were passed. In the other case the sentence of whipping was formally set aside.

With great respect to the learned Judges who dealt with those cases, it seems to me that, when an illegal sentence has been passed, the illegality should, as far as possible, be corrected when the case comes to the notice of this Court. In the present case a sentence of whipping or a sentence of imprisonment might legally have been passed, but not one of imprisonment and whipping. On appeal the Sessions Court had the opportunity of correcting the illegality by reversing the sentence of whipping, leaving the sentence of imprisonment to its operation. By an oversight this was not done and the sentence of whipping has been executed. As soon as the sentence of whipping had been executed, the accused remained in prison under a sentence which could not legally be passed. It seems to me clear that, as a legal sentence has been executed, the accused cannot lawfully be detained under an illegal sentence. I think therefore that the only possible method of remedying the wrong should be adopted and that the sentence of imprisonment should be reversed.

If the sentence of whipping was one which could not legally be passed, the position would be different. In that case the prisoner would be undergoing a legal sentence and there would be no ground for interference by this Court. The fact that he had suffered an illegal sentence as well might be ground for compensating the prisoner or for extending to him the clemency of the Crown.

I would reverse the sentence of imprisonment and direct the release of Po Maung.

Fox, *J.*—I concur in the views expressed in the learned Chief Judge's judgment.

Irwin, *J.*—I concur with the learned Chief Judge. Mr. Meres, Judicial Commissioner, in *Queen-Empress* v. *Nga Po Sin* (3) set aside the imprisonment as a matter of course when the double sentence was illegal and the whipping had been inflicted, and in my opinion that is the correct order to pass. I do not think this Court can lawfully permit an illegal sentence to be executed when it is in its power to put a stop to the execution.

(1) (1902) 1 L. B. R., 149. (2) (1901) 1 L. B. R., 55.
(3) S. J. L. B., 336.

INDEX.

A

Page.

E

EJECTMENT, SUIT FOR—*Court fee leviable on plaint—Court Fees Act, section 7, clause v.*—A plaint in which the remedy asked for is the ejectment of a tenant from premises for non-payment of rent, or for the breach of any covenant contained in the lease, or for holding over after his tenancy has expired is not properly stamped with a court fee of Rs. 10 under Article 17, clause 6 of Schedule II of the Court Fees Act.

The suit being one for possession of immoveable property, the plaint should be stamped according to the value of the subject-matter. Under clause *v* of section 7 of the Court Fees Act, such value is to be ascertained by reference to sub-clause (*c*) of the same clause. *Bibi Nurjahan* v. *Morfan Mundul*, 11 C. L. R., 91, and *Ram Raj Tewari* v. *Girnandan Bhadat*, I. L. R. 15 All., 63, dissented from.

G

Page.

to execute a bond for his good behaviour, and in default to be rigorously imprisoned for one year. He failed to give security and was consequently imprisoned. On the 3rd May 1900 Nga Kyôn was sentenced to undergo rigorous imprisonment for one year for an offence under section 451 Indian Penal Code, committed on the 27th December 1899. The Magistrate ordered that "the unexpired portion of the award under section 110 Criminal Procedure Code will, under section 120 (1) Criminal Procedure Code, be resumed on the expiry of the present sentence.

Held,—that section 120 (1) Criminal Procedure Code did not apply, and that the order directing that the unexpired portion of imprisonment ordered under section 110 Criminal Procedure Code should take effect after the substantive sentence of imprisonment was illegal, because the person in respect of whom an order was made under section 110 Criminal Procedure Code was not, when the order was made, sentenced to or undergoing a sentence of imprisonment, and clause (2) of the same section does not enable the Magistrate who tried the offence under section 451 to alter the date fixed by the Magistrate who made the order under section 123 Criminal Procedure Code, for commencement of the term of imprisonment.

Queen-Empress v. *Nga Kyon* 14

IMPRISONMENT, SENTENCE OF—*Commutation of order to one of detention in a reformatory—Power of High Court to reverse illegal order—Reformatory Schools Act, ss. 8, 16—Order of committal to prison under ss. 118, 123, Criminal Procedure Code* 42

"IMPRISONMENT, SENTENCE OF, EXCEEDING FOUR YEARS"—*Power to fine under s. 75 of the Indian Penal Code—Substantive sentence of imprisonment—Criminal Procedure Code, s. 408, proviso, clause (b)* 57

IMPRISONMENT, SENTENCE OF TRANSPORTATION INSTEAD OF—*Examination of accused* 292

IMPROPER DISCHARGE OF ACCUSED—*Further enquiry—Reference to High Court—Criminal Procedure Code, s. 437—False statement made to police officer—Criminal Procedure Code, s. 161—False evidence—False information—Contradictory statements to police and to Magistrate—Conviction in the alternative—Indian Penal Code, ss. 193, 182—Police Sergeant not subordinate to Township Magistrate—Criminal Procedure Code, s. 195 (1) (a)—Alternative charges—Criminal Procedure Code, s. 236.* It is not necessary in every case in which further enquiry is considered desirable under section 437, or in which the framing of a charge against the accused who has been discharged and his trial are required that reference should be made to the High Court—Even if the words '*further enquiry*' do not include *trial*, the trial would follow as the case of a newly instituted prosecution if the further enquiry established a *primâ facie* charge without reference to the High Court.

Queen-Empress v. *Nga Po Lun*, 1 L. B. R., 9, referred to.

False statements made under section 161 Criminal Procedure Code are not now punishable under section 193 Indian Penal Code.

The written statement made under sections 161 and 162 Criminial Procedure Code is not admissible in evidence.

A Police Sergeant is not *subordinate* to a Township Magistrate, within the meaning of section 195 (1) (a), Criminal Procedure Code.

A conviction in the alternative under section 193 or section 182, Indian Penal Code, is not sustainable on the ground that where one statement has been made to the police and a contradictory statement has been made on oath, the accused must either have given false evidence or false information—.

Section 236 Criminal Procedure Code does not apply to a state of facts in which it is doubtful what are the facts or series of facts that are proved, but to a state of facts in which it is doubtful which of several sections is applicable. The doubt is not as to the facts but as to a matter of law.

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A Magistrate, at the conclusion of an inquiry into a theft case, recorded the following order: "Maung Naing is a man who has been strongly suspected of stealing for the past four or five years. Maung Kyauk Lôn is a man who was convicted under section 380 Indian Penal Code in 1894. He was subsequently ordered to furnish security under section 110 Code of Criminal Procedure, and in 1896 was again convicted under section 215 Indian Penal Code, in respect of stolen cattle. I shall prosecute both Maung Naing and Maung Kyauk Lôn under section 110 Code of Criminal Procedure," and accordingly he issued orders to both Maung Naing and Maung Kyauk Lôn to show cause why each should not give security for good behaviour, basing his order to Maung Kyauk Lôn on the previous convictions and his conduct in the inquiry above referred to. This order in which the Magistrate said: "I am of opinion that he is an habitual thief and receiver and disposer of stolen property" was on the same day read out and explained to Maung Kyauk Lôn and the Magistrate recorded that he said that he had no defence and would furnish security. The Magistrate then made an order in the following terms: "Order:— There is no need to record any further evidence in this case. Accused has no defence. Accused is ordered to execute a bond in accordance with the orders of this Court for his good behaviour for a period of three years"

Held,—that there was no police report or report by any villager or other person, and in fact no information from any one of Nga Kyauk Lôn being by habit any one of the descriptions of offenders specified in section 110 Criminal Procedure Code, and on that ground the proceedings were without jurisdiction from the commencement. Further that the Magistrate's order purporting to issue under section 112, in no way complied with that section, but it showed that the Magistrate had prejudged a matter upon which he was bound to withhold his final judgment until he had inquired into the truth of the information he had received, if he had received any and until he had heard the respondent. Further, there was absolutely no evidence taken in the case, and even if the evidence taken in the theft case could have been used on the enquiry in the case, that afforded no ground for holding that at that time Kyauk Lôn was by habit an offender of any of the descriptions mentioned in section 110.

The record of the Sessions Judge's proceedings was:—

"Read—

Miscellaneous case No. 11 of 1900 of District Magistrate.

"Read also—

Case No. 32 of the same Court.

ORDER.

"The District Magistrate has found that Kyauk Lôn is an habitual thief and has ordered him to furnish security for his good behaviour for three years—his own recognizances in Rs. 200 and four respectable house-owners jointly and severally to the same amount. I confirm the order and direct that in default of furnishing the security required Kyauk Lôn be kept in rigorous imprisonment for three years from the date of District Magistrate's order."

Held,—that this method of disposing of the case was not a real compliance with the law under section 123 of the Code. The Judge is bound to examine the proceedings as a Judge, that is to say, whether those proceedings were in due accordance with law and correct procedure, and to form his own judgment whether upon the evidence in the case and for the reasons given by the Magistrate, it was necessary for maintaining good behaviour that the respondent should execute a bond and, in default,

Page.

W

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G. B. C. P. O.—No. 32, C. C., L. B., 14-2-1907—3,010—T. F. B.