JUDGES OF THE CHIEF COURT OF LOWER BURMA

DURING

1915-16.

CHIEF JUDGE.

HE HON'BLE SIR CHARLES EDMUND FOX, KT., *Barrister-at-Law* (on leave from 5th May 1916 to 4th June 1916).

PUISNE JUDGES.

HE HON'BLE SIR HENRY SULIVAN HARTNOLL, KT., I.C.S., *Barrister-at-Law* (on leave from 18th March 1915 up to 19th August 1916, on which date he retires).

HE HON'BLE MR. E. W. ORMOND, B.A., *Barrister-at-Law* (on leave from 1st December 1915 to 12th April 1916).

HE HON'BLE MR. D. H. R. TWOMEY, I.C.S., *Barrister-at-Law* (on leave up to 26th January 1915 and again from 10th November 1916).

HE HON'BLE MR. S. M. ROBINSON, *Barrister-at-Law* (on leave from 14th November 1915 to 13th December 1915).

HE HON'BLE MR. L. M. PARLETT, I.C.S. (Temporary Additional Judge from 2nd November 1914 to 4th June 1916 and appointed Permanent Judge on 20th August 1916 during leave, which expires on 12th December 1916).

HE HON'BLE MR. C. P. R. YOUNG, B.A., *Barrister-at-Law* (officiating Judge up to 26th January 1915 and again from 18th March 1915 to 12th December 1916).

HE HON'BLE MAUNG KIN, *Barrister-at-Law* (officiating Judge from 1st December 1915 to 27th July 1916).

HE HON'BLE MR. A. E. RIGG, I.C.S. (officiating Judge from 10th November 1916).

LOWER BURMA RULINGS, VOLUME VIII.

TABLE OF CASES.

A

PAGE

A.K.A.M. Firm *v.* Ahmed Soolayman Mapara 258
Ahmed Moola Dawood *v.* Fatima Bee Bee 99
Ali Asghar *v.* Mi Kra Hla U 461
Annamalai Chetty *v.* M.L.R.M. Lutchman Chetty 526
Annamalay Chetty *v.* Shwe May 260
Arnachallam Pillay *v.* Iyama 211
Arnachallam Chetty *v.* Meenatchi Archi 159
Asha Bi Bi *v.* Nuruddin *alias* Maung Gyi 262
Asha Bibi *v.* Suleman Ismail 372
Aung Byu *v.* Thet Hnin 50
Aung Hla *v.* Ton Gyi 264

B

Badier Rahman Chowdhry *v.* M.A.R.R.M.R.M. Chetty Firm .. 450
Bamsilall Abeychand *v.* Mohamed Ebrahim Mulla 164
Bank of Bengal *v.* R.M.M.L. Muthia Chetty 219
Bank of Bengal *v.* Ramanathan Chetty 536
Bank of Rangoon, Limited, *v.* Somasundram Chetty 168
Basant Singh *v.* Burma Railways Company, Limited 288
Bon Lon *v.* Po Lu 553
Boyhenj Chandra *v.* Rangoon Municipality 328
Bridget Theresa Mary Glancy *v.* James Glancy 106
British India Steam Navigation Company, Limited, *v.* Jiawoola 293
Burma Railways Company, Limited, *v.* Hira Lall 62
Byramjee Cowasjee *v.* Vera Somabhai Motibhai 561

C

Channing Arnold *v.* The King-Emperor 16
Chatterji, N. C., *v.* R.M.K. Karpan Chetty 350
Chetty firm, V.V.M., *v.* R.M.A.R. Arnachallam Chetty 77
Collector of Rangoon *v.* Aung Ba 382
Collector of Rangoon *v.* Chandrama 163

D

Dey, N. M., *v.* King-Emperor 532

E

Ebrahim Ahmed Mehta *v.* S. Abdul Huq 149
Edward Francis Dover *v.* Evelyn Sarah Dover 332

	PAGE
Ma Htwe *v.* Maung Lun	334
Ma Mai Gale *v.* Tun Win	566
Ma Myo *v.* Maung Kyan	415
Ma Pwa *v.* Yu Lwai	404
Ma Sein Ton, *In re*, *v.* Ma Son	501
Ma Shein *v.* Kin Sein	225
Ma Tun *v.* Waing Tha	205
Mahomed Ismail Ariff *v.* Hajee Ahmed Moolla Dawood	517
Mahomed Ismail Ariff *v.* Mahomed Sulaiman Ismailjee	517
Malayandi Chetty *v.* Narayanen Chetty	363
Maung Gyi Maung *v.* Moosajee Ahmed & Co.	367
Maung Maung *v.* S. G. Firm	233
Maung Maung Gyi *v.* Sein Nyun	531
Maung Naw, *In re*, *v.* Ma Shwe Hmut	227
Maung Pu *v.* Lucy Moss	235
Maung Te *v.* Maung On	165
Maung Thein *v.* Ma Thet Hnin	347
Moola, M. E., *v.* K. C. Bose	420
Moolla Cassim *v.* Moolla Abdul Rahim	422
Moolla Mahomed Bin Moolla Mahomed *v.* P. K. Ebrahim	433
Mra Tun, *In re*, *v.* U Kaing	215

N

Nauk To *v.* Ma Hnin	418
Nga Hla *v.* King-Emperor	461
Nga Kya Thein *v.* King-Emperor	94
Nga Mya *v.* King-Emperor	306
Ngwe Ya *v.* Shwe Ye	388
Nyein Hla *v.* Aung Gyi	204

O

O.A.M.K. Chetty firm *v.* K.P. Chetty firm	112
Oodayappa Chetty *v.* Ramasawmy Chetty	130

P

Padashin *v.* Maung Lun	78
Pan Nyun *v.* Hla Sein	190
Po Chein, *In re*, *v.* King-Emperor	452
Po Hla *v.* King-Emperor	357
Po Hman *v.* Maung Tin	113
Po On *v.* King-Emperor	529
Po Shein *v.* Mahomed Thambi	270
Po Win *v.* Ma Tin	338
Poona *v.* King-Emperor	440
Poozoondaung Bazaar Company, Limited, *v.* T. Gwan Chwan	351
Pranjivandas Jagjivandas Mehta *v.* Chan Mah Phee	458

LOWER BURMA RULINGS, VOLUME VIII.

TABLE OF CASES CITED.

A

	PAGE
Abdulla Khan *v.* Queen-Empress, (1899) 34 P.R. Cr., 39	284
Abdullah Khan *v.* Abdur Rahman Beg, (1896) I.L.R. 18 All., 322 ..	430
Abrath *v.* North-Eastern Railway Co., (1886) L.R. 11 A.C., 247 ..	79
Aga Gulam Hussain *v.* A. D. Sassoon, (1897) I.L.R. 21 Bom., 412	133, 141, 143
Ah Shee *v.* King-Emperor, 3 L.B.R., 229	38
Ahmed Hoosein *v.* Queen-Empress, (1900) I.L.R. 27 Cal., 692	453
Aiyarvu Mooppan *v.* Sawminatha Kavundan, (1905) I.L.R. 28 Mad., 236 ..	559
Alabaster on Chinese Criminal Law	401
Allcard *v.* Skinner, (1887) 36 Ch. D., 145	243
Angammal *v.* Malic Mahomed Syed Aslami Sahib, (1913) 21 Indian Cases, 583	438
Angammal *v.* Malick Mahomed Syed Aslamis Sahib, (1911) 11 Indian Cases, 745	437
Angullia & Co. *v.* Sassoon & Co., (1912) I.L.R. 39 Cal., 568	371
Apana Charan Chowdry *v.* Shwe Nu, 4 L.B.R., 124	469
Arunachallam Chetty *v.* Veerappa Chetty, 4 Bur. L.T., 117	228
Ash (Claudius), Sons & Co., Limited, *v.* Invicta Manufacturing, (1912) 29 R.P.C., 465	565
Assistant Collector of Na'sik *v.* Sha'mji Dasrath Patil, (1883) I.L.R. 7 Bom., 209	559
At Gyi *v.* Ma U Me, 2 U.B.R. (1892—1896), 400	187, 194

B

Bank of Bengal *v.* Vya'bhoy Ga'ngji, (1891) I.L.R. 16 Bom., 618 ..	393, 397
Barough *v.* White, (1825) 4 B. & C., 325=107 E.R., 1080	203
Bawdu Wadein *v.* Queen-Empress, (1899) 5 Bur. L.R., 171	454
Beanland *v.* Bradley, (1854) 2 Sm. & G., 339=65 E.R., 427	254
Belchambers *v.* Sarat Chandra Ghosh, (1908) I.L.R. 35 Cal., 870 ..	393, 397
Beni Ram *v.* Kundun Lal, (1899) I.L.R. 21 All., 496	434, 439
Bently *v.* Craven, (1853) 52 E.R., 29	104
Besant *v.* G. Narayaniah, (1914) L.R. 41 I.A., 314	212
Bhajahari Saha Banikya *v.* Behary Lall Basak, (1906) I.L.R. 33 Cal., 881 ..	158
Bhola Pershad *v.* Ram Lall, (1896) I.L.R. 24 Cal., 34	206
Bibi Jawahir Kumari *v.* Chatterput Singh, (1905) 2 Cal. L.J., 343	352
Birj Mohun Thakur *v.* Rai Uma Nath Chowdhry, (1892) I.L.R. 20 Cal., 8 ..	430
Bishop *v.* Kitchin, (1868) 38 L.J.Q.B., 20 .. .. 392, 395, 396, 398	
Bourne, *In re*, (1906) 2 Ch. D., 427	365
Brace *v.* Calder, (1895) 2 Q.B.D., 253	370
Bradburn *v.* Great Western Railway, L.R. 10 Ex., 1	346

PAGE

Fone Lan *v.* Ma Gyee, (1903) 2 L.B.R., 95 .. .. 208, 224, 301, 406
Fowle *v.* Fowle, (1878) I.L.R. 4 Cal., 260 111

G

Ghasita *v.* Wozira, (1897) 32 P.R., 41 212
Gibson *v.* Barton, (1875) L.R. 10 Q.B., 329 82
Girindra Nath Mukerjee *v.* Bejoy Gopal Mukerjee, (1898) I.L.R. 26 Cal., 246 555
Gisborne & Co. *v.* Subal Bowri, (1881) I.L.R. 8 Cal., 284 383
Glasscock *v.* Balls, (1889) 24 Q.B.D., 13 203
Gobalu *v.* Po Hla, (1906) 4 L.B.R., 82 217
Gobin Prasad *v.* Chandar Shekhar, (1887) I.L.R. 9 All., 486 136, 139, 140, 141, 142
Gobind Dayal *v.* Inayatullah, (1885) I.L.R. 7 All., 775 at 815 469
Gobind Prassad *v.* Mohan Lal, (1901) I.L.R. 24 All., 157 232
Gopee Krist Gosain *v.* Ganga Persaud Gosain, (1854) 6 Moore I.A., 53 .. 206
Gopee Lall *v.* Mussamut Sree Chundraolee Buhoojee, (1872) 19 W.R., 12 .. 337
Goverdhana Dass *v.* Veerasawmy Chetty, (1902) I.L.R. 26 Mad., 537 .. 269
Graham *v.* Peat, (1801) 1 East, 244 377
Gun Bôn *v.* Po Kywe, 2 U.B.R. (1897—1901), 66 .. .. .. 198, 304

H

Hagedorn *v.* Laing, (1815) 6 Taunt., 162 371
Hajee Syud Mahomed *v.* Mussamut Ashrufoonnissa, (1880) I.L.R. 5 Cal., 759 154
Hardwar Singh *v.* Khega Ojha, (1893) I.L.R. 20 Cal., 870 463
Haribhai Maneklal *v.* Sharafali Isabji, (1897) I.L.R. 22 Bom., 861 .. 393, 397
Harrison *v.* Bush, (1855) 25 L.J.Q.B., 25 at 29; 5 E. & B., 344 at 349 .. 446
Hirada Ba'sappa *v.* Gadigi Muddappa, (1871) 6 Mad. H.C.R., 142 .. 152
Hla Gyi *v.* King-Emperor, 3 L.B.R., 75 .. .. 279, 311, 326
Hnin Bwin *v.* Shwe Gôn, 8 L.B.R., 1 .. .. 200, 470
Hnin Dok *v.* Ma U, 2 U.B.R. (1897—01), 126 303
Huguenin *v.* Basely, 1 W. & T.L.C., in Eq., 8th Ed., p. 259 243
Hussein Unwar *v.* Fatima Bee, (1885) S.J., L.B., 368 462

I

Ibrahim Esmael *v.* Abdool Carrim Peermamode, L.R. 35 I.A., 151 .. 524
Ibrahim Saib *v.* Memi Mir Udin Saib, (1870) 6 Mad. H.C.R., 26 .. 469, 497
Ismail Ariff *v.* Mahomed Ghous, (1893) I.L.R. 20 Cal., 834 .. 232
Ismai Kani Rowthan *v.* Nazarali Sahib, (1903) I.L.R. 27 Mad., 211 .. 437
Ismail Khan Mahomed *v.* Jaigun Bibi, (1900) I.L.R. 27 Cal., 570 .. 434
Ismmail Mussajee Mookerdam *v.* Hafiz Boo, (1906) I.L.R. 33 Cal., 773 .. 255
Ittappan *v.* Parangodan Nayar, (1898) I.L.R. 21 Mad., 291 .. 353

J

Jamal *v.* Moola Dawood, 7 L.B.R., 252 369
Jardine Prize Essay, p. 103 483

of both will pass to her in preference to her father. The point to be determined in this case is which of those two contentions is correct according to Burmese Buddhist Law.

A subsidiary question was raised in the Appeal. It was founded upon allegations of commercial partnership existing between the Appellant and her sister, Mah Hnin Boo. Separate issues, which in appropriate circumstances might come to be of great importance under the law of Burma, were raised as to the rights of a surviving partner, on the one hand in a full partnership, and on the other in a limited partnership or co-adventure. These questions have not been lost sight of, but they are superseded by the conclusion to which their Lordships have come as to the right of succession in law by the father on the one hand, or by the sister on the other. The right of succession being determined in favour of the surviving sister carries with it and covers subsidiary rights of partnership as among the sisters *inter se*. No pronouncement accordingly is necessary in regard to the separate case under this head.

A still further question has been argued, and it is well illustrated by the course which the case took in the Courts below. The learned Judge in the Court of First Instance held that by Burmese Buddhist law the Respondent, the father, was entitled to succeed to the estate of his two deceased daughters in preference to the Appellant, their sister. But he also held, however, that the father by his conduct, which in the opinion of the Court amounted to "desertion and intentional and deliberate neglect of the ordinary duties of affection and kindred," had forfeited the right of succession which would otherwise have opened to him, and that for this reason the Suit, which was to declare such a right of succession, must fail. On this latter point the Appellate Court came to a different conclusion, holding that the Respondent's conduct had not been so grave and reprehensible as to justify forfeiture. Accordingly agreeing as it did with the Court of First Instance, that the father fell to be preferred as the heir entitled to the succession to his daughter's estate, they affirmed that right and gave Decree in his favour. But the Appellate Court, in reaching their conclusion as to the import of the Appellant's conduct, showed very clearly by their Judgment that, so far as actual

1914

MA HNIN BWIN v. U SEWA GON.

There were, however, as there are still, documents that could be appealed to, all of them authoritative, but varying in the weight of their authority. These are the Dhammathats, usually reckoned as thirty-six in number. They form the expositions of *inter alia* customs and juridical rules, their dates of issue varying sometimes by many hundreds of years. It is no doubt true that with regard to them a certain evolution can be traced, and it seems by those who have written on the subject also to be admitted that they differ from the ordinary legal institutes in this sense, that a change of dynasty was sometimes accompanied by a fresh composition in the shape of a new and, it might be, a comprehensive Dhammathat, which, while not removing or extinguishing its predecessors, appeared upon the scene clothed with the authority of the fresh Government and containing the latest revisal of accepted juridical doctrine.

It appears to be acknowledged that the laws, or rules, contained in the earlier Dhammathats were in their remotest origin derived from the laws of Manu, which reached Burma by way of Southern India. But with the establishment of Buddhism and the spread of Buddhist doctrine came, in the course of time, the not unnatural desire to strengthen the sanctions of juridical rule by associating its foundations, the Dhammathats themselves, with the religious sentiments of the people, and in the later Dhammathats the commands, precepts, and principles are represented as truly being emanations from the spirit of Buddha himself.

This state of matters must have made the administration of justice still dependent on a comparison of Dhammathat with Dhammathat and a balancing of the weight of their authority. It cannot be said that at the present moment such difficulties have disappeared. Traces of them, indeed, are plain enough in the present case, and one cannot peruse the judgments under review without noting the care with which the learned Judges of Burma address themselves to this task.

There are two views which may be taken. Either the subject is dealt with sufficiently by a single clear or governing authority, or the Dhammathats as a whole must be collated, and judgment determined by the best balance which can be framed as the result of their dicta. The Judges of the Court below

which they refer—arise from the construction of Section 311. That section deals with "relatives of previous generations who are entitled to inherit."

The conflict had better be exhaustively set forth, and the forces on either side stand in this way:—

On the side of preferring the parents and ignoring the brothers and sisters, the Dhammathats stand as follows:—

Manu.—"On the death of a person leaving not even a casually adopted son, his or her parents may inherit."

Various other Dhammathats are cited by U Gaung to the same effect as this extract from Manu.

Vilasa.—"In the absence of descendants the parents are entitled to inherit."

This is repeated—almost literally—in *Dhammathat Kyaw*, in *Nandaw*, and in *Vannana*.

Razathat.—"If the deceased person leaves no wife, children, grandchildren, or other descendants, his parents, grandparents, or other relatives of previous generations are entitled to succeed to the estate."

To the same effect is the extract from *Varulinga*, namely, "In the absence of sons, including those publicly or casually adopted, the parents are entitled to inherit."

Finally comes *Kyannet.*—"In the absence of wife and children, the parents are entitled to inherit the estate of their son."

It is plain that these extracts do not proceed upon the principle of express exclusion of a right of succession by brothers and sisters. The brothers and sisters are omitted or ignored in the statement of the succession.

On the other side, the same section (Section 311) cites later Dhammathats which give very ample warrant not for ignoring, but for recognising, and for placing in priority to parents, the rights of succession on the part of brothers and sisters. The historical light in which these later Dhammathats should be viewed will be remarked upon later. But meantime this observation may be made. The opinion appears to be entertained that the Burmese Empire was in the 18th Century of the Christian Era one of the greatest Empires of the Eastern world. But it is at least certain that in the middle of that

but is on the contrary very plainly postponed to the rights of succession on the part of brothers and sisters.

With regard to the Dhammathats as a whole it has to be admitted that the figurative language so frequently employed becomes little helpful in expiscating the idea of inheritance. "It is natural," says *Razathat*, "for sea-water to flow back into the ocean after entering rivers and streams"; and in another passage, "When lakes are full, the overflow is returned to rivers and streams, and tidal water always flows back to the ocean." In later centuries the mind of the commentators was still struggling with these figurative expressions; as, for instance, in the *Manu Vannana*: "In the absence of wife and children, the parents inherit. Why so? Because of the water which flows into the sea a portion returns up the river." The figure which earlier appears is the simple one of water which cannot find an outlet being borne back to its source; but as the Dhammathats develop it is found that the source of the returning water cannot be reached until the intervening inlets and creeks have all been filled up, and there appears to be the conception accordingly, not of at once reaching to the source, namely, the parent, without having exhausted the collaterals, namely, the brothers and sisters. These struggles with figurative language appear even in the decisions in recent times in the Courts in Burma, and, as is not obscurely indicated in some of these Judgments, they rather perplex than help the mind.

In their Lordships' opinion the balance of the authority of the Dhammathats is upon the side of the sisters and brothers of the deceased being preferred to the parent. It has been already noted that there is nowhere throughout any of the Dhammathats a specific exclusion of brothers and sisters, and it may further be added that the language of the earliest Dhammathats, where collaterals are, as has been stated, either omitted or ignored, seems not to be analysed or explained or the omission accounted for in the later Dhammathats holding the same view, and the concurrence is a mere repetition. Their Lordships incline to the opinion—and a special reason therefor will be immediately given—that a clearer note is struck by the Dhammathats from the time of the 12th Century of the Burmese, or from about the middle of the 18th Century

and the establishment of settled order in Upper Burma under the British rule, a Circular was issued "for the assistance of the Courts in dealing with questions of Buddhist Law." The Circular issued a translation of the Letters Patent in use under the Burmese Government for the appointment of Judges. A list of Dhammathats was appended to it, but, as showing the complexity of the subject, the Judicial Commissioner adds that he "will be glad of information regarding any copies that may be extant of any of these Dhammathats other than the more commonly known ones." After a recital of many resounding titles of the Sovereign, including that of "Mighty Fountain of Justice," the Circular proceeds thus:—

"Now with respect to the office of Judge, it is on this wise: In the Kingdom of which We are the Sovereign Ruler our numerous subjects must not be permitted one to oppress another, and the Judges must admonish and chastise, repress, and judge. In case of dispute they must, in accordance with the Dhammathats, enquire into the causes of the people and decide between them. And for this purpose they are appointed to the Courts as Judges."

This is the general rule, involving as it does that judicial task the difficulty of which has been already mentioned.

To recur to the Manu Kyay—which for so long had been recognised as the leading guide in the administration of justice. Prof. Forchhammer, in his Treatise on the Sources and Development of Burmese Law, thus describes it:—

"This Law Book is written in plain Burmese with very little Pali intermixed. It is not really a Code or a Digest of Law, but rather an encyclopædic record of existing laws and customs and of the rulings preserved in former Dhammathats. Manu Kyay does not attempt to arrange the subject-matter or to explain or reconcile contradictory passages; religious elements are freely introduced; unjust judges shall suffer punishment in Hell with head downwards; a man to whom deposits are made must be a strict performer of his religious duties; a person guilty of perjury will be visited by preternatural punishments."

And having dealt with the development of Burmese jurisprudence and made a division of it into three periods, Dr. Forchhammer concludes thus:—

"The Manu Kyay incorporates the contents of the Law Books of the first and second periods and records laws and customs existing among the people of his time. It deals with the religious laws and usages of the Brahmins and the monastic rules of the Buddhist clergy. It allows the Buddhist element to predominate and draws largely from the Buddhist Scriptures."

It is not seriously disputed that the authority of this

remains of the highest authority, the succession of brothers and sisters in preference to parents is established beyond doubt. This being so, the other Dhammathats do not require to be appealed to to clear up any ambiguity. Were that appeal to be made, it would, in the opinion of their Lordships, as already stated, lead to the same result.

The doubt, however, thrown upon the subject by the judgments of the Courts below can be explained to some extent by a brief glance at the development of authority on the subject.

The sense of the Manu Kyay and the authority of its rule, as above expounded, seem to have been accepted in Burma until the year 1894. On the 12th November of that year there occurred the case of *Mi San Hla Me* v. *Kya Tun and 2 others* (1) and the narrative is observable :—

"The two lower Courts have held that according to Buddhist law property cannot ascend where there are collateral heirs, and they have awarded plaintiff's claim. The general rule that property shall not ascend is laid down in the Manu Dhammathat, Book 10, Sections 1, 18, 19, but the rule is not without exceptions."

(It may be noted that the "Manu Dhammathat" here referred to is simply the Manu Kyay.)

The exception referred to in that case had reference to the separation of one from his adoptive brothers and sisters, and to an adopted son living with his adoptive mother. It is manifest that this so-called exception has nothing to do with the present broad and general case. And it is also clear that the law as above laid down was held to be the general law of Burma.

Thereafter, however, a certain mischance arose by way of what is reported as an *obiter dictum* in the case of *Maung Chit Kywe* v. *Maung Pyo and others* (2) in the year 1895. The substantial question in the case is described as "whether the brothers and sisters of the father of the deceased, Mah Pean, who was unmarried, have, under the rules of inheritance in the Dhammathats, a title to the estate of Mah Pean superior to any title of the defendant as stepfather living with deceased." Here it is also quite clear that the broad and simple question now to be determined was not before the Court.

(1) (1894) P.J. L.B., 116.
(2) 2 U.B.R. (1892—96), p. 184.

with reference to adoptive parents. Various texts were cited, concluding with Section 211 of the Attathanyepa Vannana, which says :—

"Where there is no younger brother or sister, then the property may revert or ascend to the elder members of the family, such as elder brothers, elder sisters, parents, or grandparents."

And the learned Judge says :—

"Although the last-quoted text throws some doubt on the subject, there seems to be good authority to the rule that parents are entitled to inherit in the absence of direct descendants. There has been no argument on the point."

The "good authority" here referred to appears to have been the cases just cited, and in their Lordships' judgment the case of Mah E Dok does not advance the proposition in any respect.

Reference was also made to the case of *Maung Shwe Bo* v. *Maung Pya and one* (5) (27th February 1899) the head-note of which is this :—

"The Buddhist Law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and failing them, to the first line of collaterals, and in the absence of heirs in that degree to the grandfather and grandmother and the next line of collaterals."

It is to be noted that "the Respondents in this case were not represented by Counsel and were unable to afford the Court any assistance in dealing with the difficult point of law involved." In those circumstances the Judge, perhaps not unnaturally, accepted the Chit Kywe case as a guide, and with that their Lordships have already dealt.

It is manifest that the clear and broad issue now to be determined has never been the subject of judicial decision, and that no series of precedents can be relied upon in justification of the Judgments of the Courts below. Out of respect to the Judges, and in view of the embarrassments produced by the cases cited and by the conflict among the Dhammathats, as well as of the importance of the general question being authoritatively settled, their Lordships have thought it right to make an independent investigation so as, if possible, to clear up the whole question. In the result they are of opinion that

(5) (1899) P.J., L.B., 524.

King L.R., 1914, A. C., 221; and *Clifford* v. *K.E.*, L.-R. 40 I.A., 241, referred to.

1914.

CHANNING ARNOLD v. THE KING-EMPEROR.

This was an appeal from the conviction and sentence of the Chief Court of Lower Burma, in its Original Criminal Jurisdiction.

The judgment of their Lordships of the Privy Council was delivered on the 7th April 1914 by

Lord Shaw.—By leave granted by His Majesty in Council this appeal is brought from a conviction of and sentence upon the appellant by the Chief Court of Lower Burma, pronounced on the 19th October 1912. The charge was one of defamation or criminal libel, and the prosecution was laid under the 21st chapter of the Indian Penal Code. In that chapter Section 499 gives a definition of defamation, and sets forth categorically no fewer than ten exceptions, any one of which forms a proper defence to the charge. By Section 500 it is provided that the punishment of defamation shall be "simple imprisonment for a term which may extend to two years, or with fine, or with both."

The appellant was charged with having defamed Mr. G. P. Andrew, Deputy Commissioner and District Magistrate of Mergui, by the publication of two articles in the *Burma Critic*, a Rangoon newspaper, on the 28th April 1912. These articles were entitled "A Mockery of British Justice."

Mr. Arnold has had experience as a journalist; and it appears from the proceedings that he was at one time the chief editor of the *Rangoon Times*. He ceased to be editor of that journal in the end of September 1911, and in January 1912 he was registered as one of the proprietors and the editor of the *Burma Critic*. The articles bear witness to the writer's possession of great invective and declamatory power; and it ought to be said at once that his motives have not been challenged except in so far as that is necessarily involved in the contention that he published serious libels and did so otherwise than in good faith.

The proceedings against him were initiated on the 11th June 1912 by Mr. Andrew, the District Magistrate already mentioned. On the 3rd October 1912 the trial of the case began before Sir Charles Fox, the Chief Judge, with a jury.

having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." Of the ten exceptions under the section three were mentioned. The first exception is in these terms: "It is not defamation to impute anything which is true concerning any person if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact." It was admitted by the counsel for the appellant at their Lordships' bar that their client claimed no benefit under this exception: he did not suggest that the series of libels or any one of them was true; on the contrary all of them in so far as they were assertions of fact were admitted to be false.

In point of form the same course was taken in the Court below. But while this was so and while the plea of veritas was not openly or plainly made, their Lordships regret to observe that surreptitiously it did appear and reappear in the case by way of repeated innuendo. It may be as well to bring this matter to a point at once. In Sir Charles Fox's charge to the jury this passage occurs: "You will observe that under the first exception the only question, apart from the question of the public good, that could arise was whether what had been said was true or not. Now it is noticeable that the defence does not rely on that exception, although up to the end we have had it reiterated that what was said was true." Upon being questioned the learned counsel for the appellant frankly admitted that the exception was not in point of fact pleaded as a defence, and their Lordships do not understand that they disputed that the learned Chief Judge's statement of what occurred at the trial by reiterated innuendo was correct. It was open to the appellant to defend his utterances as true. But he declined to take that course. Their falsehood stood as an admission in the case, the words themselves being so plainly of a libellous character. This part of the case may accordingly be definitely dismissed.

The second exception is in these terms: "It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions or respecting his character so far as his character

these? They were the very things which the prisoner's counsel had throughout the trial insisted on introducing, namely, the question of the conduct of McCormick and of Mr. Andrew, the narrative as to Mr. Andrew being accompanied by the suggestion that it was after all indefensible and corrupt. Their Lordships recognise that this mode of conducting the defence, which it appears to have been difficult to repress, was not unlikely to lead to confusion: but it is at least satisfactory to find that the learned Judge in charging the jury made no mistake in stating what the true issue was. It is admitted by the appellant's counsel that this is so. "What you will have to consider," said the learned Judge to the jury, is "whether the imputations in these articles were published in good faith, after due care and attention has been exercised on the part of the writer of them. What is 'due care and attention' must depend on the circumstances of each particular case." It is also fair to the learned Judge to say that, while he felt constrained—a course which, in view of the conduct of the defence, is not to be wondered at—to go with some fulness into a narrative of fact, he concluded his charge to the jury by bringing their minds directly back to the exact issue which they had to try. He did so in this language: "It is now for you to consider these matters, and to decide whether the accused has satisfied you that he used the reasonable care that he ought to have used. If you are satisfied that he did, and that he did not overstep the bounds of law as I have explained the law to you, then you must acquit him, but if he has not satisfied you that he has exercised such due care and attention before he committed himself to paper in this way, then it is your bounden duty to convict him."

Before the exception and the alleged misdirection of the jury are dealt with, it is expedient to state what the libel contained. Being headed "A Mockery of British Justice," after a considerable amount of inflammatory matter, it proceeds to "speak out against those officials who have forgotten their duty and have dared to trifle with the fair fame of England." Having made these very serious allegations the appellant added: "The facts before us indicate that he (Mr. Andrew) conspired with Mr. Finnie to burke the case; that he conducted it *in*

the career of Mr. Andrew and any otners engaged in conspiring with him as alleged.

The points put forward in the appellant's favour as establishing that although the charges were false yet he was excused by statute because he believed them *bona fide* and had given due care and attention to their truth, were substantially three. In the first place it was urged that he relied upon a letter published with the signature of "Vigilance," and addressed to the *Rangoon Times*. It is dated the 31st August 1911, and at that time the appellant was connected with that paper. It contains a long narrative incriminating McCormick and also Mr. Andrew and others.

The second element proposed in support of Mr. Arnold's good faith is of a different and an important character. It is this: In the district of Tenasserim referred to, the position of Subdivisional Magistrate was occupied by Mr. Buchanan. It is alleged that Mr. Buchanan had been on unfriendly terms with McCormick, but their Lordships do not think that there is anything substantial in this allegation, and they further think it right to put on record their opinion, which is in entire concurrence with that of the Chief Judge, that Mr. Buchanan in his investigations and conduct was actuated by entire good faith. Although his conclusions and suspicions may have been erroneous, their Lordships see no reason to think that from beginning to end he did not act in accordance with the best traditions of the service. He had been absent on leave from the middle of April to about the middle of May 1911, and on his return he heard rumours of misconduct by McCormick. Towards the end of June Mahomed Din, who had had legal differences with McCormick, made allegations which amounted to a charge that the crimes of abduction and of rape had been committed. Mr. Buchanan himself made enquiries and came to the conclusion that McCormick should be put upon his trial. It is a point in the accused's favour that the Subdivisional Magistrate thought that there was a case for committal.

The third point in these protracted proceedings, which is more important than either of the foregoing in support of the contention that the writer of the libels believed them to be true, is the admitted conduct of McCormick himself. Their

do not attach so much importance to the other allegations. That as to bail having been granted to the accused rests on a slender foundation. It is held by the Judges on the spot, and it was proved to be also the opinion of the civil authorities, that the discretion of granting bail applied to this case. It was evidently a case, unless forbidden by Statute, for discretion being exercised, and it would rather appear to their Lordships looking to the great distance to be traversed before the authority claimed by the appellant as requisite for granting bail could be obtained, that much practical hardship would ensue to prisoners unless such a discretion existed. They are not prepared to say that the humane view which was taken of an accused's rights was mistaken. It is unnecessary in this case to decide or dwell upon the point, because their Lordships' opinion is very clear to the effect that this difficult and delicate point of law could never have been viewed as a substantial element weighing with any reasonsable writer in justification of his belief in the truth of the libel. The same observation applies to the other elements in the case which need not be entered upon but all of which have been fully considered. Their Lordships are of opinion that a fair and statable case in support of the statutory defence and of the belief in the wickedness of Mr. Andrew was put forward on the points which have been already enumerated, but that no others were of any real weight. In putting forward, however, the points mentioned, their Lordships think that a case was made which demanded an answer.

Such an answer was given, and it also was both fair and statable.

In the first place a serious and weighty reply was made on the subject of the letter signed "Vigilance." It was not confined to the remark that the letter was no valid excuse for a belief in gross slander. The points proved were these: When that letter was received by the *Rangoon Times* a most proper course was taken, and that with the appellant's knowledge. It was forwarded by Mr. Stokes, the assistant editor, to the Chief Secretary to the Government of Burma, so that there might be official confirmation of its allegations prior to its being published. These allegations were examined into,

Thus, although the true issue in the case was as to his own *bona fides* and the care and attention which would verify that, Mr. Arnold's action when charged gave no help to the Court and must to some extent have embarrassed even his own defence. Having admitted that he assumed responsibility for the articles, he was asked by the Magistrate as follows: "*Q.* Do you wish to make any explanation of your position in the case as to your *bona fides*, etc.? (I pointed out to the accused that, under Section 105, the burden of proof lies upon him.)" *A.* No. I have nothing to say. Everyone, from the Lieutenant-Governor downward, knows my character, and I leave it at that." But of course it was quite impossible to leave it at that, because the libels were there, in all their number and seriousness; the charge was made under the Statute, and the law had prescribed that the author of such libels could only be excused by showing good faith after due care and attention. It is not in accordance with the due or proper administration of justice for an accused to brush all the statutory regulations affecting his position aside in this manner. The attitude and absence of the accused may well have been considered by the jury rather destructive than helpful to the defence set up.

In the third place, this has to be borne in mind. Every officer, judicial or administrative, who investigated this case, except Mr. Buchanan, had agreed with the conclusion at which Mr. Andrew had arrived, namely, that the charge should be dismissed. This circumstance was one peculiarly suited for the appraisement of a local jury.

The next circumstance in the case is one to which their Lordships do not conceal that they attach serious importance. They were moved by the allegation that the prosecutors and those in that interest were alleged to have been led on to the trial by Mr. Andrew, and that Mr. Andrew had wickedly conspired suddenly to leave them in the lurch without an advocate, and to furnish them with a false interpreter. This allegation was, as it turned out, not only untrue, but was, as was made abundantly clear at the trial, particularly cruel. Letters were produced showing that instead of Mr. Andrew having taken up such an attitude, his desire, and indeed his endeavour and entreaty, throughout were that in the enquiry

appellant had any reasonable ground for believing them to be true.

It does not appear that in any view of the case there could have been a defence under the Statute in regard to these substantial portions of the libellous matter, and the case of *The Queen* v. *Newman* (1), was founded upon to this effect. But their Lordships are very anxious, however, not to have the case disposed of on what may be considered a narrow ground. They take these points as included in the sum of the matter to be considered before the jury as relevant to the general case of Mr. Arnold's justification on the ground of having, after due care and attention, and so in good faith, believed that these things were true.

One final matter has, however, to be kept in view. Some of the letters last cited were undoubtedly not before Mr. Arnold when he wrote the libels. But they were before him in the course of his trial. In their Lordships' opinion, when it was discovered that the truth with regard to Mr. Andrew had not been that in these particulars he wickedly conspired to defeat justice, but that he was, on the contrary, anxiously endeavouring to secure that justice should be furthered and guarded, then the duty of the accused, Mr. Arnold, was plain. Their Lordships make every allowance for the heat of advocacy which, as noted by the Chief Judge, seems to have been in this case great. But when a gross mistake of that kind on a matter of fact—the truth of which when exposed would have ruined any administrative or judicial officer's career—was discovered, the libel should not have been adhered to for a moment. The mistake should have been acknowledged and an apology tendered. This was not done, but upon the contrary the case was conducted to its close upon the footing that an unstated defence was the real and good defence, namely, that the libels and all the libels were true. Nobody is to be blamed in these circumstances for thinking that the plea of good faith on the part of Mr. Arnold had sustained a serious shock.

The speeches of the learned counsel for the accused have not been printed, but their Lordships had the advantage of

(1) 1 E. & B., 558.

1914.

CHANNING ARNOLD v. THE KING-EMPEROR.

Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute-law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

Upon the other side it would appear from certain observations of the learned Judge that this false and dangerous doctrine may have been hinted at, that some privilege or protection attaches to the public acts of a judge which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comment. The present case affords a good illustration of what is meant. When the examination before Mr. Andrew concluded with his declaration that in his judgment the action of McCormick was pure and philanthropic, the whole trial would seem to have been laid open to searching and severe observations, and no blame could be attached to these. But when the criticism was converted into an attack upon the Magistrate as a conspirator against justice, a traitor to his oath, a trickster, a man who had manœuvred his procedure so as to defeat truth and protect an associate, then, of course, it is for the person who has uttered these things to justify them, or, under the Indian Penal Code, to establish affirmatively that he believed them to be true, and that on reasonable grounds. On both of these matters last mentioned the learned Judge seems to have properly directed the jury.

This also has to be said. A large part of the criticism directed against the charge of the learned Judge in this case was to the effect that the narrative of the proceedings led up to the conclusion inevitably that Mr. Andrew was innocent

The question is not truly one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless where such power and authority have been parted with by Statute, is undoubted. Upon the other hand, there are reasons, both constitutional and administrative, which make it manifest that this power should not be lightly exercised. The over-ruling consideration upon the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to the Royal Prerogative of review on judicial grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions.

These views are not new. They were expressed more than 50 years ago by Dr. Lushington in his judgment in *The Queen* v. *Mukerji* (2), and Lord Kingsdown, in the case of *The Falkland Islands Company* v. *The Queen* (3) stated the matter compendiously in these words: "It may be assumed that the Queen has authority by virtue of Her Prerogative to review the decisions of all colonial courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended with success." Their Lordships desire to state that in their opinion the principle and practice thus laid down by Lord Kingsdown still remain those which are followed by the Judicial Committee.

There have been various important cases in recent times to which, naturally, reference has been made. The first is the case of *re Dillet* (4). It should be observed that while Dillet's case was in form an application within the ambit of criminal law, the matter of substance which was truly brought before

(2) 1 Moore N.S., 272.
(3) 1 Moore N.S., 312.
(4) 12 A.C., 459.

to convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Their Lordships are clearly of opinion that no such proposition is sound. This Committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the following effect: It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. The limited nature of the appeal in Dillet's case has been referred to, and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated.

The argument for the appellant was to an entirely contrary effect. In the forefront of it the case of *Makin* v. *The Attorney-General for New South Wales* (5) was cited. Makin's case in truth did not raise the question at issue in the present case. It depended upon the construction of Section 423 of the Criminal Law Amendment Act of 1883 (a New South Wales Statute). That section set up the Judges of the Supreme Court as a tribunal to determine questions submitted to them in a case stated by the Judge at the trial, and there was a proviso that there should be no quashing "unless for some substantial wrong or other miscarriage of justice." It was stated by this Board that under that section the Judges have not been substituted for the jury. As they said, "In their Lordships' opinion substantial wrong will be done to the accused if he were deprived of the verdict of the jury on the facts proved by legal evidence and there were substituted for it a verdict of the Court founded merely upon the perusal of the evidence."

(5) (1894) A.C., 57.

appellant of crime." The Board were of opinion that the sentence pronounced against the appellant "formed such an invasion of liberty and such a denial of his just rights as a citizen that their Lordships feel called upon to interfere." But the Board took care to repeat that it did not lightly interfere, and the language of Lord Watson in *Dillet's* case was again cited. It was pointed out that the interference was not on any matter of form, but because of matters lying at the very foundation of justice (the judge had been a judge in his own cause), justice had "gravely and injuriously miscarried." Lanier stands as a fair type of almost the only case in which this Board would advise the interposition of His Majesty the King with the course of criminal justice in the colonies or dependencies. That extreme case is this, that it must be established demonstrably that justice itself in its very foundations has been subverted, and that it is therefore a matter of general Imperial concern that by way of an appeal to the King it be then restored to its rightful position in that part of the Empire.

Their Lordships were referred to the dicta of Judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England; but they are not the rules adopted by this Board, which, as already stated, is not a Court of Criminal Appeal. And the authority of these decisions, which apply to a different system, a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority on the matter of the procedure of this Board in advising His Majesty. This view is in entire accord with the recent proceedings of this Board on applications for leave to appeal. One instance of this is that of *Clifford* v. *The King-Emperor* (8) on the 17th November last, and their Lordships refer to the Judgment of the Lord Chancellor in this and the other refusals referred to.

The application to the present case is simple. Even had this Committee been a Court of Criminal Appeal it is hardly doubtful that the appeal would fail. *A fortiori* their Lordships are left in no doubt as to their own duty in conformity with the practice of the Board. They will humbly advise His Majesty that the Appeal be dismissed. There will be no order as to costs.

(8) L.R. 40 I.A., 241.

Judges and they were equally divided on the question whether ward-headmen outside Rangoon could be regarded as competent witnesses of searches.

It is desirable that the existing uncertainty on this point should be ended and I think it should again be referred to a Full Bench. I therefore refer it under section 11 of the Lower Burma Courts Act.

The gambling in this case appears to have been on a petty scale and the fines are I think excessive for a first offence. The expediency of reducing the fines will be considered (if necessary) when the decision of the Full Bench is received.

The opinion of the Full Bench was as follows:—

Young, J.—The question referred is whether ward-headmen outside Rangoon can be regarded as competent witnesses of searches under section 103, Criminal Procedure Code. The question was raised in a gambling case and is of peculiar importance in cases of this nature inasmuch as the Gambling Act raises certain presumptions against the accused if the search is properly conducted. The arguments before us were also directed towards the provisions of this Act and I therefore propose to deal mainly with searches made under this Act. Section 6 of the Gambling Act provides that all searches shall be made in accordance with the provisions of section 103, Criminal Procedure Code, and section 7 of the Gambling Act provides that when any instruments of gaming are found in any house, etc., entered under the provisions of section 6 or about the person of any of those who are found therein it shall be presumed until the contrary is proved that such house, etc., is used as a common gaming house and that the persons found therein were then present for the purpose of gaming although no play was actually seen. Section 103 of the Criminal Procedure Code provides that the search shall be made in the presence of two or more respectable inhabitants of the locality. In the Full Bench case of *King-Emperor* v. *Kwe Haw* (2) heard before Sir Charles Fox, C. J., Mr. Justice Irwin and Mr. Justice Hartnoll, it was held by Fox, C. J., and Hartnoll, J., Irwin, J., dissenting, that ward-headmen in Rangoon being appointed by

(2) 4 L.B.R., 213.

terize the proposal as absurd and detrimental. There is therefore a majority of learned Judges with actual experience of ward-headmen in favour of retaining them. This may be an accident but when we find it laid down by Lord Mersey in *Thompson* v. *Goold* (5) that "it is a strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity it is a wrong thing to do," it is an element that has to be considered by the Court. In one of the two cases cited by Sir Charles Fox on this point, namely, that of *Curtis* v. *Stovin* (6) the necessity was contained within the four corners of the Act and was clear. Section 65 of the County Courts Act 1888 had provided that "where in any action of contract brought in the High Court the claim endorsed on the writ did not exceed £100 it shall be lawful for either party * * * to apply to a Judge of the High Court at chambers to order such action to be tried in any Court *in which the action might have been commenced.*" But as the jurisdiction of County Courts was limited to claims not exceeding £50 it followed that the action could not have been commenced in any County Court and the Judges therefore read into the section the words "if the amount claimed had been such that it could have been commenced in a County Court." Here it is admitted that it is impossible to predicate of the class in question that it is not *primâ facie* respectable, but it is contended that the Legislature must have meant as an additional qualification that the witnesses must not only be respectable but unconnected with the police. This may or may not be an improvement on the law as it stands, but I am unable to hold that it is an addition necessary in the sense laid down in *Curtis* v. *Stovin*, (6) "*ut res magis valeat quam pereat.*" Nor do I understand that the learned Judges who are in favour of the proposed construction would go so far as to say the addition was necessary in the above sense. Sir Charles Fox in *King-Emperor* v. *Kwe Haw* (2) argued that some limitation was necessary so as to exclude one policeman calling two others and that therefore it was permissible and desirable to carry out the intentions of the Legislature to their fullest extent. Hartnoll, J., in *King-*

(5) 79 L. J. K. B. D., 905. (6) (1889) 22 Q. B. D., 513.
(2) 4 L. B. R., 213.

occurs, and it appears from Maxwell on Statutes that where the statute imposes a duty on the habitants of a certain place it construes the term in its popular sense, but when it imposes a pecuniary burden it excludes persons who though inhabitants have no rateable property and includes persons who though not inhabitants yet hold rateable property there.

Now the Imperial Legislature in section 103, Criminal Procedure Code, uses this very term inhabitant, but limits it by adding a qualification, *viz.*, that the inhabitants are to be respectable, and the Provincial Legislature in incorporating the provisions of this section into section 6 of the Gambling Act has added a further qualification by enacting that the police-officer conducting the search shall not be below the rank of a sergeant or officer in charge of a police-station. This further qualification is obviously introduced by the local Legislature with a view to free searches under the Gambling Act which raises the presumption already mentioned from suspicion. The qualification respectable must have been considered and found insufficient, but instead of limiting it in the manner now proposed the Local Legislature preferred to impose a qualification upon the person employed to conduct the search. It is he and he only who may make the search, and the duties of the "respectable inhabitants" are confined to looking on while he searches. There is nothing in the section that entitles them so far as I can see to lend the officer in charge any assistance whatsoever in making the search and I conceive that objection might properly be taken to any such assistance being given whether by actually participating in or pointing out omissions in the search. It is he and he alone who is authorised by the warrant to make the search, and they are to attend and witness it. The sole exception (and that is the subject of a special provision) is that if a person is to be searched and that person is a woman, the search shall be conducted by one of her own sex. May it not therefore be reasonably held that the Legislature considered that it had gone far enough by confining the right of search to a superior of police such as a sergeant or the officer in charge of the local police-station? Brett, J., in *Lion Insurance Association* v. *Tucker* (10) a much later case than *Rex* v. *Hall* (9) stated that whenever

(9) 1 B. & C., 123. (10) (1883) 12 Q. B. D., 176.

determine whether the safeguards provided are sufficient and refrain from altering under the guise of construing the law. My answer therefore to the question referred is in the affirmative.

Parlett, J.—The question referred has arisen, as it has arisen in all the reported decisions which have been quoted, in a gambling case in consequence of the strong presumption which section 7 of the Burma Gambling Act of 1899 compels to be drawn. That Act permits, on the receipt of certain information, a search warrant to be issued to a police-officer of a prescribed standing; it directs the search to be made in accordance with the provisions of section 103, Criminal Procedure Code, and if at that search instruments of gaming are found it compels the Court to presume, until the contrary is proved, that the house or place searched is used as a common gaming house and that the persons found therein are guilty of an offence under section 11 of the Act. It is noticeable that the law against common gaming houses in other provinces is less stringently worded than is the Burma Gambling Act; for instance the Calcutta Police Act (Bengal Act IV of 1866), the Bengal Public Gambling Act (Bengal Act II of 1867), the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) and the Madras City Police Act (Madras Act III of 1888) use wording similar to that of the Public Gambling Act (Act III of 1867) namely, that the finding of cards, etc., at the search shall be evidence until the contrary is made to appear that the place is used as a common gaming house and that the persons found therein were present for the purpose of gaming. None of them provides that the searches shall be made in accordance with section 103, Criminal Procedure Code, and it was not until Bengal Act III of 1910 was passed that the Calcutta Police Act was amended in this sense. It is therefore not surprising that the question should apparently have never arisen in other provinces, even if persons are there appointed to positions analogous to that of ward-headmen in Burma. Such headmen are appointed as being respectable inhabitants of the locality, and I think very strong and clear reasons are needed for holding that they do not fall into the category of persons competent to witness searches. I doubt if it would have occurred to any

disqualified as being his assistant, and in the event of a general requisition it might become almost impossible to conduct a search in the ward at all. There are no means of compelling any private person to witness a search and if the police are not allowed to utilize the services of men whose duty it is to assist them and who from their status are most likely to act honestly and straightforwardly they may be tempted to fall back upon persons who are ready to do their bidding, and I think it may fairly be said that at any rate that was not the intention of the Legislature. A rule excluding ward-headmen in towns from witnessing searches would I think have to be extended logically to headmen in villages; the necessity or the desirability of so doing has, so far as I know, never been suggested, and I would note that ward-headmen appear to be less directly under the control of the executive authorities than are village-headmen.

In my opinion the Criminal Procedure Code contains nothing from which it can be inferred that the Legislature intended to exclude persons in the position of ward-headmen from the category of respectable inhabitants for the purposes of section 103 and that the subsequent enactment of the provisions of the Burma Gambling Act regarding the presumption which arises in certain circumstances after such a search does not warrant the Court in so interpreting the language of the Criminal Procedure Code as in reality to modify its provisions. In my opinion a person who is appointed to be a ward-headman in a town other than in Rangoon is not merely by reason of such appointment incompetent to witness a search under section 103, Criminal Procedure Code.

Robinson, J.—The question referred in this case is whether ward-headmen in towns other than Rangoon who are appointed by the Deputy Commissioners are competent witnesses of searches within the meaning of section 103 of the Criminal Procedure Code. In other words can they be properly said to be "two or more respectable inhabitants of the locality." It has been held by a majority of a Full Bench of this Court that ward-headmen in Rangoon who are appointed by the Commissioner of Police are not competent witnesses. The only distinction between the two seems to be that one class are appointed by Deputy Commissioners while the other are

affected. This is in my opinion a very important point in arriving at a decision. The officers appointing ward-headmen and others of a like status must be presumed to have made the appointments in the belief that those selected were honest and respectable men. But if their duties are connected with the police, if they look for credit or reward from work done for, or in conjunction with, the police, would they satisfy the requirements of the object the Legislature had in view? I think not. It is only by giving the words their widest and most popular significance that it can be held that they are such persons as the Legislature had in view. That in my opinion was not intended and that view would not fulfil the intention of the Legislature and would stultify the reasons that led to the enactment of the provision.

For the above reasons they are not in my opinion competent witnesses.

Ormond, J.—For the reasons stated by me in my Judgment in *K.-E.* v. *Kan Haw* (3), I hold that ward-headmen are competent witnesses to a search under section 103, Criminal Procedure Code. There is no necessary implication that the witnesses (not being policemen) should be persons who are free from any obligation of assisting in any way the police in the prevention and discovery of crime; or that they should be persons who do not hold office under Government.

I would answer the question referred in the affirmative.

Hartnoll, Offg. C. J.—I have further considered the matter and can see no good reason for changing the views expressed by me in the case of *K.-E.* v. *Kan Haw* (3).

I would therefore answer the question referred in the negative.

(3) 4 B. L. T., 91.

not provide for such a contingency. But sections 244 to 249 and 390 to 393 of the *ex*-Kinwun Mingyi's Digest deal with cases in which a husband goes on a journey or goes to war, and they show that the wife must wait indefinitely for her husband's return—at any rate as long as she has adequate means of subsistence from the joint estate. Having regard to the spirit of these rules, I think it is clear that Ma Aung Byu had no right to take a second husband, and I would accept the decision of the District Court that her conduct in doing so amounted to desertion and adultery. It has been held however that desertion does not *ipso facto* and without any further and express act of volition on the part of either party dissolve the marriage tie (1). We have therefore to consider when the marriage tie was actually dissolved. Was it dissolved by the act of Ma Aung Byu in taking a second husband or did it subsist until 1911 when Thet Hnin returned from transportation? The Upper Burma Case *Ma Thin* v. *Maung Kyaw Ya* (2) is good authority for the view that the deserting party cannot claim a divorce by pleading the desertion, and Sir Harvey Adamson expressed himself in favour of the same view in *Thein Pe* v. *U Pet* (1) though the point was not decided in that case. I would follow the interpretation adopted by the learned Judicial Commissioner, Upper Burma, and hold that the marriage tie between Thet Hnin and Ma Aung Byu was not dissolved by her action in deserting him, but subsisted until Thet Hnin was released from jail and demanded the joint property from Ma Aung Byu. By that express act he took his stand upon the fact of the desertion and treated his marriage tie with Ma Aung Byu as severed.

It is admitted that in the case of a divorce on the ground of the wife's adultery the husband is entitled to all the property, and where as in this case the husband treats the marriage as at an end on the ground of his wife's desertion and adultery there is no good reason to depart from the ordinary rule.

The District Court has decided that certain property to the value of Rs. 3,675 was in Ma Aung Byu's possession when she took Kyaw Zan Hla as her husband and a decree has been

(1) 3 L. B. R., 175.
(2) 2 U. B. R. (1892—96), 56.

159, Evidence Act. As the case stands, Exhibit B must be excluded from consideration altogether. According to Ma Aung Byu's evidence she received interest at Rs. 30 per cent. per annum for two years on the loan of Rs. 200 to Ma To Le. In the third year Ma To Le failed to pay interest and gave her land in usufructuary mortgage for Rs. 500, which sum presumably consisted of the original debt of Rs. 200 *plus* one year's interest Rs. 60 *plus* cash 240. Subsequently, a further sum of Rs. 300 was paid to Ma To Le who then sold the land outright to Ma Aung Byu and Kyaw Zan Hla. The second sum of Rs. 300 according to Ma Aung Byu was obtained by sale of the produce of her lands. If it were proved that the additional advances paid to Ma To Le came out of the joint estate, it would be reasonable to make Ma Aung Byu who now has Ma To Le's land refund the money to Thet Hnin. But there is no satisfactory proof on this point. Moreover, Thet Hnin did not demand these amounts from Ma Aung Byu. He asked only for the original loan of Rs. 200. In the circumstances I would hold Ma Aung Byu responsible only for Rs. 200 the amount of the original loan to Ma To Le and Rs. 60 the amount of interest which Ma To Le could not pay. Both these amounts were afterwards merged in the sum of Rs. 800 the price for which Ma Aung Byu took over the land from Ma To Le, and I think she should pay these sums aggregating Rs. 260 to Thet Hnin as part of the joint estate.

I would therefore modify the decree of the lower Court by awarding to the plaintiff as against both defendants—

	Rs.
Yindaw paddy land valued at	... 1,600-0-0
Payagon paddy land valued at	... 400-0-0
Kundaw garden land valued at	... 95-0-0
Kundaw house valued at ...	... 160-0-0
Cash Rs. 320 *plus* Rs. 260 ...	... 580-0-0

together with costs on the aggregate amount Rs. 2,835.

I see no sufficient reason to allow the defendants' costs on the difference between the amount decreed and the amount (Rs. 5,595) at which the relief claimed was valued in the plaint. The Court-fee payable on the plaint is Rs. 305 of which however only Rs. 170 (the Court-fee on the amount now decreed)

1914.

RAHIMA BI *alias* MA TA v. MAHOMED SALEH.

of her guardian, in this instance her father, and that admittedly was not obtained. The suit was therefore dismissed. On appeal the Divisional Court held that she had lost her virginity by cohabiting with plaintiff for some eight days before the ceremony of marriage, and had thereby become a Siyeeba and that therefore her father's consent was unnecessary to the marriage, which in other respects was regular. Plaintiff was therefore granted a decree. Defendant now appeals on two grounds, first that intercourse after elopement with the man with whom the marriage ceremony was subsequently gone through did not render her a Siyeeba within the meaning of the Mahomedan law, and secondly that even if it did her marriage without her father's consent would still be invalid under the Shafi law.

The facts are that at the time of suit the girl was 19 or 20 years of age: her mother had long been dead, and she had been living with her aunt Ma Aung. Her father had married again and had a wife and second family at Kyauktalon: when in Moulmein however he lived in the same house as Ma Aung and defendant. He had rejected a proposal from plaintiff for his daughter's hand. He says he objects to the match as plaintiff already had a wife and gave himself out to defendant as a bachelor. The young couple then eloped and went and lived in one Ba Tun's house at Daingwunkwin. Some four days later plaintiff, his father, a maistry of theirs named Abdulla, and a pleader named Abdul Rahim, a brother-in-law of plaintiff and a tenant of his father, went and called the Mullah from a mosque on admittedly false pretences and took him off in a gharry to Ba Tun's house. On the way Abdul Rahim and Abdulla told him he was wanted to perform a marriage ceremony. At the house he did not see the bride but was told that plaintiff's father was her vakil, and that she was a Shafi but had been converted to the Hanafi, the bridegroom's sect. He performed the ceremony at ten o'clock at night with Abdul Rahim and Abdulla as witnesses, plaintiff, his father, acting as the girl's vakil, and a Burman being the only others present. Not having brought his register he wrote the marriage certificate on a loose sheet of paper which the bride is said to have signed (Exhibit A). The Mullah puts the date a day later than

woman of the Shafi sect to a marriage against her will: but it goes on to say that if she consents to any one else performing her marriage, he can do so as her agent. Exhibit C is against him as it says no Shafi marriage is valid which is contracted without the consent of the guardian and the presence of two upright witnesses. In the present case even the witnesses cannot be called independent. Exhibit E says that the guardian's authority ceases when a Shafi Siyeeba woman attains her majority. Though however he may be unable any longer to compel her to a marriage, it does not necessarily follow that she can contract one without his consent. Exhibit G points out that a Siyeeba being under no one's guardianship is incapable of pronouncing the proposal or acceptance required in a marriage ceremony: she must therefore give permission to some man to make the declaration on her behalf. Exhibit H also says that a Shafi Siyeeba who has attained her majority can give assent to some one to effect her marriage. As the former text expressly notes that the Hanafi law does not require her to authorize anyone, it may be that these passages, if authoritative, merely emphasize the difference between the Shafi and Hanafi schools as regards the necessity for the guardian's consent and refer to the case where the woman's natural guardian, *i.e.*, father, is no longer alive, which would frequently happen when the Siyeeba had been previously married. Exhibit F alone states that "a virgin girl of the Shafi sect who has attained maturity marries a man of the Hanafi sect or of the Shafi sect and if her father is not willing, even if he desires to nullify the marriage, it will be valid notwithstanding," and this text so exactly fits the present plaintiff's case as to suggest the possibility that it may have been made to do so. Certainly its authority is not shown. On the other hand Sir Roland Wilson, a recognised authority on Mahomedan law, writes that according to the Shafi doctrines "no woman, whether a virgin or not, can give herself in marriage without the intervention of a guardian" (1) and again "If a person has been contracted in marriage by an unauthorized agent, the transaction cannot be

(1) Anglo-Mahommedan Law, 4th Edition, paragraph 392.

before the 30th June. On the 7th June the arbitrators made an award in favour of the plaintiff for Rs. 12,117-6-6 and on the 11th June they amended the sum to Rs. 13,834-12-6. On the 26th June the plaintiff applied to the District Court under paragraph 20 of the second schedule to the Civil Procedure Code that the award be filed in Court and that judgment be pronounced and a decree passed according to the award. The defendant objected on several grounds, amongst others that the award left undetermined certain matters referred to arbitration. The District Court held that this objection was good and dismissed the suit. The plaintiff now appeals under section 104 (1) (*f*) of the Civil Procedure Code.

His first contention is that instead of dismissing the suit the District Court should have remitted the award for reconsideration of the arbitrators under paragraph 14 (*a*) of the second schedule to the Civil Procedure Code. The mention in paragraph 21 (*a*) of that schedule of the grounds referred to in paragraph 14 appears to mean only that proof of the existence of any such ground empowers the Court to refuse to order the award to be filed, whereupon the only course is to dismiss the application. There is no provision for remitting to the arbitrators an award made in arbitration without intervention of a Court, such as is made in paragraphs 14 and 19 of the schedule in respect of awards made on an order of reference by a Court under paragraph 3 (1) or 17 (4). This construction was put upon the corresponding section of the Civil Procedure Code of 1882 in *Mustafa Khan and others* v. *Phulja Bibi and others* (1) where several decisions to a similar effect are referred to and there is no doubt that they are correct.

The second and main contention of the appellant is that the award did definitely and finally settle all matters referred to arbitration. (*Vide* clause 14 (*a*) of the second schedule, Code of Civil Procedure). The memorandum of agreement to go to arbitration sets out that "Whereas differences and disputes have arisen between the said P. L. M. Subramonian Chetty and the said K. R. V. Vellian Chetty regarding the account of his agency and various other matters connected therewith and

(1) (1905) I.L.R., 27 All., 526.

considered ineffective: such however is not the case and clearly was not intended by the arbitrators to be the case as the evidence shows, and the effect is therefore to leave without final settlement the largest item of the partnership assets and an integral portion of the accounts between the parties, which it was the main, if not the sole, object of the arbitration to completely settle once for all, and to expose the defendant to a suit by the plaintiff for any error or omission subsequently discovered in the accounts however innocent or unintentional it might be, whereas the intention of the arbitration agreement was certainly to preclude any such future litigation between the parties. In this view therefore the award did not finally determine the questions which were referred for arbitration. It was however argued that the plaintiff had to take over the assets on the basis of the defendant's accounts as he had no means of verifying them. To this I cannot accede. He was in no way bound to accept any of the defendant's figures which he mistrusted and could have challenged any of them before the arbitrators, just as he could before a court in a suit for an account, and if they had wished to do so the parties could have fixed a longer time within which the award should be made. Having chosen to accept them as correct the plaintiff cannot reopen them later in his own interests, any more than the defendant could in his. Another argument, so far as I could understand it, was that having taken over the outstandings at a valuation the plaintiff assumed a different position as a purchaser of the outstandings and as such he must be allowed to reopen the accounts if he discovered that the valuation was based on error. I doubt if even an outsider who so purchased the outstandings would have any such remedy unless on the ground of fraud, but assuming that he would, the privilege could certainly not extend to one party to an arbitration particularly designed to finally settle all disputed accounts between the parties, who voluntarily and deliberately took over the outstandings at a valuation agreed upon between them. Lastly it was sought to justify this clause on the ground that the parties signified their assent to it by themselves signing the award. The record itself contradicts this. It contains a memorandum of "facts admitted by the plaintiff and the defendant," one of

1914.

THE BURMA RAILWAYS COMPANY, LIMITED v. HIRA LALL.

Burma Railways prohibiting him from paying to the defendant Rs. 140, being the amount of a security deposit made by him, and also a moiety of the defendant's salary for July 1912, and to the defendant prohibiting him from drawing the amounts. Prohibitory orders were issued accordingly. That issued to the Auditor was returned endorsed as not accepted on account of insufficient particulars as to the identity of the employee and with a note that "Security deposit cannot be attached if the judgment-debtor is still in employment." Eventually on 2nd August it was endorsed by the Auditor as "accepted as regards salary only." On 5th August the suit was decreed and on 7th August the plaintiff obtained another prohibitory order to the Auditor to withhold payment of the Rs. 140. This he endorsed on 12th August as "Not accepted. The security deposit is not at the disposal of the judgment-debtor." This opinion of his was wrong: the deposit could be attached, subject to the Railways Company's lien, though it could not be realized until freed from that lien. In the present case the Railways Company claimed no lien on any part of the deposit, and though they advanced the defence that the money was not liable to attachment at all, they have now abandoned it. In this suit the plaintiff had obtained a decree against the Railways Company for the Rs. 140 disbursed by their Auditor after receipt of the prohibitory orders referred to above. The Railways Company contend that they were not bound by the orders served on their Auditor, who was not the proper officer to be served with such orders. It will be noted that the Auditor never suggested that he was not in a position to comply with the prohibitory orders, but merely disregarded them on the strength of his opinion that the money in question was not liable to attachment: that opinion being erroneous, and service on him being effected, the only point is whether it binds the Railways Company. It is admitted that at the time of the orders the monies in question were under the control, not of the Auditor, but of the Agent of the Company, without whose sanction payment to the defendant could not be made. It is contended for the Company that under Order 21, Rule 46*(i)* as the Company was the debtor the order should have been addressed to the Company, that is some

1914.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. MA DWE.

be declared entitled to claim the right of renewing A's permit every 30 years and that defendant might be compelled to issue a permit in pursuance of that right.

Held,—on appeal that the suit was governed by the provisions of Article 113 of the 1st Schedule to the Limitation Act (1908), inasmuch as—

(1) A person claiming that a covenant for renewal is a covenant for perpetual renewal cannot without strict proof of his claim avail himself of the provisions of Article 131, and (2) Article 144 can only apply where the claim is based on title, and not on contract.

Lalla Ram Sahoy Lall v. *Bibee Chowbain and others*, Sutherlands W. R. Vol. 22, p. 287, followed.

The respondents Ma Dwe and Ma Ya Byu have jointly obtained letters of administration to the estate of Maung Si who was a Government permit-holder in the Attaran forests of the Amherst District. Their claim is based on Exhibits B, C, D and E which were admitted in evidence by the District Court. Exhibit B is a permit entitling Maung Si to extract teak timber from a certain forest called the *Pobaya* forest or "No. 10 in Hobday's map". The permit-holder was to pay duty at specified rates per log at the revenue station. The permit was for 30 years expiring on 1st October 1896. There is no reason to question the genuineness of Exhibits C and D which explain the circumstances in which the permit Exhibit B was issued. It appears that Maung Si or his father Maung Mu belonged to a body of persons who previously worked timber in the Attaran forests and that in consideration of their claims as such, the Government gave each of them the option of buying outright at Rs. 2-8 an acre the whole forest tract in which he had been working, or else of taking out a new permit for 30 years in the form of Exhibit B. The orders in Exhibit D contained the following passage with reference to those who took the new permits: "And it being the object of Government to perpetuate the growth of teak which shall be the property of the *lethmat*-holders, the *lethmats* will be renewed at the end of the term for which they are granted on condition that plantations are made as per notification to be shortly issued." These orders were apparently communicated to Maung Si by the letter Exhibit C of 30th August 1866 and as he elected to take out a permit, Exhibit B was issued to him on the 1st October 1866. No notification was issued as to the conditions on which plantations were to be made. Maung Si died before the

barred even if it is held that the proper period of limitation for the suit was so much as 12 years from 1896. But we find that the appeal can be determined on grounds which render it unnecessary to deal with this question: (it is actually raised in paragraph 2 of the memo of appeal).

We think it is clear that the documents Exhibits B, C, and D must be read together, and reading them in this way we are satisfied that the Conservator of Forests was bound to renew the permit in 1896. There is no force in the argument that the promise of renewal was conditional on the issue of the notification as to plantations foreshadowed in Exhibit D. If such a notification had been issued and if Maung Si failed to comply with its conditions there would no doubt be good ground for refusing the renewal at the end of the 30 years term. But no conditions of any kind having been laid down the promise of renewal must be regarded as unqualified and binding on the Forest Department. If the permit-holder had during the period of 30 years committed a breach of rules such as the permit provides for (by confiscation and ejectment) that would probably be a valid reason for refusing to renew the permit. But short of this it seems to us that the permit-holder had a good right to renewal at the end of the 30 years period.

The plaintiffs-respondents however claim that under Exhibit D they were entitled not merely to a renewal at the end of the 30 years period, but to further renewals at intervals of 30 years in perpetuity. They rely chiefly on the passage in Exhibit D declaring that it is "the object of Government to perpetuate the growth of teak which shall be the property of the *lethmat*-holders", followed by the reference to plantations which are to be made according to the notification (that was to, but in fact never did, issue). It is urged that as the teak trees planted by the permit-holders are said to be their own property and it takes much longer than 30 or even 60 years for a teak tree to reach the proper size for extraction, the parties cannot have intended that there should be only one renewal for 30 years. It is not disputed that teak trees wherever growing are the property of Government, nor is it urged that the Government in 1866 intended to make any new departure in this respect. In our opinion the teak which was to be "the property of the

if Article 131 does not apply then the appropriate article is No. 144, the suit being one for possession of an interest in immoveable property namely the right to fell teak and extract the timber. Standing trees are immoveable property for the purposes of the Limitation Act. But the plaintiff does not ask for possession of an interest in immoveable property: he asks for specific performance of a promise to grant him such an interest. He does not claim to be in any way the owner of such interest; and therefore he has no title under which he can claim possession. For Article 144 to apply, the claim must be based on title and not on contract only. Maung Si was merely the promisee of a right in immoveable property. Article 144 therefore does not apply to the case. We would refer to the case *Lalla Ram Sahoy Lall* v. *Bibee Chowbain and others* (2) in which the Calcutta High Court held that an agreement to grant a lease is not an interest in immoveable property and that a suit upon such an agreement is not a suit for the recovery of such property or of an interest in it. We are asked here to enforce an agreement to grant a permit for the extraction of teak timber. The plaintiffs ask for possession of the interest in the teak trees as the consequence of the permit being granted. Following the Calcutta case cited above we hold that the suit is really brought to enforce the agreement in Exhibit D and that it is governed by Article 113 and not by Article 144.

It follows that the cause of action having arisen in 1896 when the renewal of the permit was refused, the suit was barred by limitation when it was filed in 1907. It becomes unnecessary therefore to deal with the further plea in defence that the rights of the plaintiffs if any over the whole or a part of the area covered by the permit of 1866 were extinguished in the year 1901 by the operation of section 19, Burma Forests Act, 1881. The appeal is allowed. The decree of the District Court is set aside and the plaintiffs-respondents' suit is dismissed with costs. It is further ordered that the plaintiffs-respondents shall pay the court fees which would have been payable by them if they had not been permitted to sue as paupers. A copy of the decree will be sent forthwith to the Collector, Amherst District.

(2) Sutherlands W. R., Vol. 22, p. 287.

1914.

A. J. ROBERTSON *v.* KO CHEIK.

country need not be considered. He can quote no law nor rule giving such a lien in this country. His claim on the first ground put forward by him must fail.

His next ground is that he has a lien on the Rs. 217 by virtue of sections 171, 217 and 221 of the Contract Act; but he did not retain the Rs. 217 in his possession. He paid it into court. He says that he paid it in under protest but explains that his protest was not that he had such a lien as he claims on it but was merely a protest on behalf of his clients that they were paying in Rs. 402 more than was due by them. This protest on behalf of Mr. Robertson's clients was clearly no bar to the attachment of the extra money by the clients' creditors.

No protest was made as to Mr. Robertson's lien for fees Rs. 217 included in the sum of Rs. 402. Seeing that he parted with possession of the money without making any reference to his lien for fees, I do not think we can regard the amount of the fees as having been paid in under protest.

I would therefore dismiss this application.

Twomey, J.—I concur.

Before Mr. Justice Hartnoll and Mr. Justice Ormond.

Special Civil 2nd Appeal No. 76 of 1913.

June 30th, 1914.

(1) SIT YIN (2) KYIN SWE *v.* MA SHIN.

Wiltshire—for appellants.

J. N. Lentaigne—for respondent.

Jurisdiction of Civil Court—Lower Burma Town and Village Lands Act, section 41—suits between private parties.

The ruling of their Lordships of the Privy Council in the case *Secretary of State* v. *Moment* (VII L. B. R., 10) related to suits to which Government is a party. Where private persons litigate concerning claims to land not held under grant or lease from Government or under a license from the Revenue Officer, but which is land at the disposal of Government the jurisdiction of the Civil Court is not barred by section 41 (*a*) of the Lower Burma Town and Village Lands Act.

Ormond, J.—A case must be decided according to the circumstances in existence at the time of the institution of the suit. The eviction of a squatter by another squatter, or of a sub-lessee by a lessee (from Government), is not a matter that "is to be determined by the Revenue Authority" and such a case does not involve the decision of any rights as against Government. An encroachment by a sub-lessee enures for the benefit of his lessor.

1914.

SIT YIN v. MA SHIN

and the decree ordering her eviction on the ground that the jurisdiction of the Civil Court was barred by section 41 (*a*) of the Lower Burma Town and Village Lands Act. This appeal is laid against the decree of the Divisional Court dismissing the appellants' suit asking for the eviction of Ma Shin. The first ground of appeal is that the Divisional Judge erred in holding that the Civil Courts had no jurisdiction to decide appellants' claim. The Divisional Court relied on the cases of *Moment* v *The Secretary of State* (1) and *Maung Law* v *Suppaya Padayachi* (2). Section 41 is as follows:— "No Civil Court shall have jurisdiction to determine (*a*) any matter which, under this Act, is to be determined by the Revenue Officer;

(*b*) any claim to any right over land as against the Government." The last part of it has been held to be *ultra vires* according to the Privy Council decision. *The Secretary of State* v *Moment* (3).

Looking at the case of *Moment* v *Secretary of State* (1) it will be seen that the suit was one by the Secretary of State against Moment for possession and it was dismissed as it was held that both clauses of section 41 of the Lower Burma Towns and Village Lands Act were a bar to the suit. That part of the decision which held that the suit was barred by section 41 (*b*) has been over-ruled. It remains to consider whether the remaining part of the the decision which dealt with section 41 (*a*) is applicable in the present case. The case *Moment* v *The Secretary of State* was one in which the Secretary of State sued Moment for possession and was not one where the litigation was between two private persons as in the present case. The point therefore whether section 41 (*a*) would be applicable in the case of two private persons litigating was not considered. In the case of *Maung Law* v *Suppaya Padayachi* (2) the learned Judge did not apparently notice the distinction. As regards the words of the Judgment in the case of the *Secretary of State* v *Moment* I am not at all sure that the learned Judges meant them to apply in all cases. Adamson, C.J., said: "Section 18 prescribes the method of recovering possession of state land." It would appear that in this passage the learned Judge was contemplating litigation between Government and another

(1) 3 L.B.R., 165. (2) 3 L.B.R., 256. (3) 7 L.B.R., 10.

1914.

SIT YIN v. MA SHIN.

on the merits. On appeal the Divisional Court dismissed it on the ground that the Civil Court has no jurisdiction. The Divisional Judge also expressed his own opinion on the merits. The evidence taken in that suit was by consent admitted as evidence in the present case. The first point for consideration is whether there was an agreement for sale entered into by Ma Hnit and Ma Shin as alleged by Ma Shin. Both the District and Divisional Courts found in the other suit that Ma Shin did not prove that there was. On studying the evidence I have come to the same conclusion. To find that there was I must come to the conclusion that Ma Hnit is wrongfully retaining the Rs. 600 which Ma Shin says she paid as earnest-money. Ma Hnit appears to be a respectable and aged lady; she also seems to be fairly well-to-do. I think it improbable that she would retain Ma Shin's Rs. 600. There were admittedly negotiations between Ma Hnit and Ma Shin with regard to Ma Hnit's selling the property; but the evidence as to their exact nature is conflicting. Maung Shwe Byaw, Ma Hnit's son, says that the Rs. 600 were taken and returned. There is evidence to show that the negotiations between Ma Hnit and Ma Shin fell through as Ma Hnit would not guarantee to bear any penalties the Government might impose on the owner of the property in respect of unauthorized erections on adjoining Government land. No apparent reason exists for disbelieving Po Twe in what he says in connection with this matter. No receipt was ever given for the Rs. 600. Again there is no good reason apparent for disbelieving Po Saing who was admittedly the writer of the conveyance conveying the property in dispute to the appellants. His evidence does not corroborate that of Po Shwe when the latter says that he went and protested against the sale, but it does corroborate that of Po Ko who says that Po Shwe came to offer the Chinaman Rs. 1,500 in consideration of their not buying the house and of their allowing respondent to do so.

I am of opinion that Ma Shin has not proved her plea that there was an agreement for sale between her and Ma Hnit.

As regards the two northernmost rooms it appears that they were an extension made to the other two rooms and the *panat-chut* by Ma Hnit's consent, the latter reducing the rent Rs. 10

1914

SIT YIN
v.
MA SHIN.

tiffs who bought the premises from Ma Hnit, are therefore entitled to evict the Respondent Ma Shin from the whole premises. I concur in the order proposed by my learned colleague.

Before Mr. Justice Twomey.

Civil Revision No. 17 *of* 1914.

July 3*rd.* 1914.

V. V. M. Chetty Firm *v.* R. M. A. R. Arunachallum Chetty.

B. P. Lentaigne—for applicant.

J. R. Das—for respondent.

Revisory powers of High Court—interlocutory orders.

Even if a High Court has the power to deal with an interlocutory order passed in a suit on revision, it will not use that power unless the applicant for revision would obviously suffer substantial injury by being compelled to wait until the conclusion of the suit.

Dhapi v. *Ram Pershad* (1887) I.L.R. 14 Cal., 768 referred to.

There is the authority of the Calcutta High Court in support of the view that the High Court can deal in revision with an interlocutory order in a suit (*Dhapi v. Ram Pershad*) (1) but I note that several other High Courts are opposed to this view. At any rate the exercise of this power is in the discretion of the Court and I think it is obvious that the power should not be exercised unless it appears that substantial injury may be caused to the applicant if he is left to wait for his ultimate remedy in appeal from the decree. There is no precedent, so far as I am aware, for interference in revision with such an order as that now under consideration, *viz.*, an order declining to frame an additional issue in a suit. It is manifestly inexpedient that the progress of a suit should be liable to interruption on such a ground as this, and the most cogent reasons would be necessary to justify it.

The applicants are some of the defendants in a suit brought by the respondent as plaintiff and the additional issue which they wanted the Court to frame was an issue as to whether certain other persons should not be joined as parties to the suit. Apparently this would depend on whether the plaintiff-respondent sued in his individual capacity or as representing his firm, the other persons referred to being, as it is alleged co-partners therein. The heading of the plaint is of an

(1) (1887) I.L.R. 14 Cal., 768.

Soobramony Pillay Chetty v. *Maung Po Lu*, 2 L.B.R., 111, modified.

1907.

PADASHIN
v.
MAUNG LUN

Fox, C.J.—The plaintiffs had been convicted by the 1st Class Magistrate of Kungyangôn of obtaining the defendant's property by cheating. Upon appeal to the Sessions Court they were acquitted. They then brought the suit out of which this appeal arises for damages for malicious prosecution.

They had to prove first that they were innocent of the crime alleged against them, secondly that their innocence had been pronounced by a competent tribunal, thirdly that there was a want of reasonable and probable cause for the prosecution, or that the circumstances of the case were such as to be, in the eyes of the Court, inconsistent with the existence of reasonable and probable cause, and fourthly that the proceedings against them had been initiated in a malicious spirit, that is, from an indirect motive, and not in furtherance of justice. If they failed to prove any one of these matters, their case failed [see *Abrath* v. *The North-Eastern Railway Company* (1)]. The plaintiffs proved to my mind only the second of these matters conclusively. Possibly it may also be said that they also proved the first, for even if they had done all that the complainant said they had done, they were not liable to be convicted of cheating and of obtaining property by cheating. They however, in my opinion, entirely failed to prove the other two requisites for succeeding in their suit. The whole matter turns upon whether the allegation which the 1st defendant had made against them that he had paid them Rs. 4,800 as an advance in part payment of paddy which they had sold to him was utterly without foundation and false. The Magistrate believed that he had paid them the money, and convicted them. Upon the ruling in *Soobramony Pillay Chetty* v. *Maung Po Lu* (2), this conviction would be fatal to the plaintiff's case. Without going as far as adopting the ruling in that case, which I think goes too far, and adopting the rule as stated by Mr. Pollock in section 42 of his draft of a Civil Wrongs Bill, *viz.*, "that an action will lie if the plaintiff was ultimately acquitted on appeal by reason of the original conviction having pro-

(1) (1886) L.R. 11 A.C., 247.
(2) (1903) 2 L.B.R., 111.

Held,—following English decisions, that though owing to some irregularity in his appointment an auditor may not be *de jure* an officer of a company, he may be an officer *de facto*, and that the decision whether or not he is an officer *de facto* must depend on the circumstances of each case.

Gibson v. *Barton*, (1875) L.R. 10 Q.B., 329; *Coventry and Dixon* (1880) 14 Ch. D., 660; *In re London and General Bank*, (1895) 2 Ch. D., 166; *In re Western Counties Steam Bakeries and Milling Company*, (1897) 1 Ch. D., 617; referred to.

The judgment appealed against was as follows:—

Young, J.—This is an application by the Official Liquidator of the Bank of Burma, Limited, for an order under section 214 of the Indian Companies Act, 1882, calling upon Messrs. Mower and Clifford, two of the directors of the late bank being the only two who signed the balance sheet on which the application is based, upon Mr. R. F. Strachan, the manager of the late bank, who also signed it, and upon the firm of Stuart Smith and Allen, who also signed it as auditors to refund the sum of Rs. 61,687-8-0, on the ground that the said dividend was paid out of capital and not out of profits. The respondents, the firm of Messrs. Stuart Smith and Allen, have taken the preliminary objection that the proper course for the liquidator to follow is to file a suit, and that the section and the procedure authorised thereby is not applicable to them for the reasons hereinafter discussed, which with an application for particulars form the sole questions for determination at present before the Court.

Section 214 provides that where in the course of the winding up of any company under this Act it appears that any past or present director, manager, official or other liquidator or any officer of such company has done certain things he may be ordered to repay the losses incurred by his conduct, and in the first place it is to be observed that an auditor is not one of the persons specified by the section and only falls within it if he is an officer of the company.

Article 111 of the bank's Articles of Association provides as follows:—"The number of auditors, the person or persons to fill the office of auditor or auditors and his or their remuneration and term of office may from time to time be determined and varied by the bank in general meeting. The auditor or auditors for the time being shall retire at the ordinary general

appellant took upon himself to act and did act just as if he was such manager (*i.e.* duly appointed). The question therefore is whether a manager *de son tort*—a manager in his own wrong—can protect himself from the liability cast upon a manager under section 27 (the corresponding English section) by saying 'I am not manager *de jure*.' I think he cannot. There are many instances in which a person who *de facto* exercises an office cannot defend himself by saying when called on to bear liability in consequence of his wrong 'I am not rightfully in the office; there is another who may turn me out'." And the learned Judge proceeded to give instances. Lush, J., agreed with him, and said that in section 27 the term "manager" must mean "manager *de facto*," and that it was not competent for him to say "True I acted as manager of the company, but yet not being manager *de jure* I can evade the liability imposed by section 26." Quain, J., dissented and held that it was not enough to be manager *de facto*.

This decision was followed in *Coventry and Dixon's case* (2) in which Jessell, M.R., held that persons not properly elected directors and therefore not *de jure* directors who had yet acted as directors could not be heard to deny that they were directors within the meaning of the section, and the court of appeal, though it reversed his decision on another ground, agreed with him on this point. Then in 1894 Cave and Collins, JJ., *in re the Liberator Building Society* (3) held that a solicitor of a company by accepting a fixed salary foregoing fees and other charges and undertaking to do all the solicitor's business ceased to be an independent solicitor and became from that time an officer of the society. None of these cases, however, dealt directly with an auditor, but *in re London and General Bank* (4) it was held that an auditor, duly appointed, might be and in that particular case was an officer of the company within the meaning of the section. Then the further question whether an auditor not appointed by the company could be held to be an officer of the company came up for consideration *in re Western Counties Steam Bakeries and Milling Co.* (5). The *ratio decidendi* and the *dicta* of the Judges

(2) (1880) 14 Ch. D., 660.
(3) 71 L.T.N.S., 406.
(4) (1895) 2 Ch. D., 166.
(5) (1897) 1 Ch. D., 617.

Mr. McDonnell to admit that there was no sufficient quorum at the meeting. Mr. McDonnell declined to make any such admission with regard to any general meeting except the one that appointed Messrs. Stuart Smith and Allen auditors of the bank and which, except so far as the course of conduct is concerned, is the only one with which we are here concerned, but I see no reason to doubt Mr. deGlanville's assertion that three-quarters of the issued capital was not represented though numerically there were the requisite number of shareholders present. But apart from this flaw and the fact that the general meeting, instead of determining the remuneration of the auditors, delegated their duty in this respect to the directors, the appointment seems to have followed the procedure laid down by article 111 for the appointment of persons "to fill the office of auditor." This article also provided that the auditor or auditors for the time being should retire at the ordinary general meeting in every year, and at the next ordinary general meeting held the following year the proposal was again made by a director, seconded by a shareholder, and carried unanimously that Mr. Stuart Smith be re-elected "the auditor of the bank" at a remuneration to be settled thereafter. Similar resolutions were passed unanimously at the third and fourth general meetings.

At the fifth general meeting the minutes show that the auditor made a report, and article 115 provides that the report of the person appointed to fill the office of auditor should be read at the annual general meeting. This is shown by the minutes to have been done, and again the general meeting unanimously adopted the proposal that Mr. Stuart Smith be re-elected "the auditor of the bank for the ensuing year." At the sixth annual meeting the report of the auditor was again read and he was again re-elected "the auditor of the bank for the ensuing year." At the seventh annual meeting, which is the one with which we are concerned, the report of the auditor was again read and it was unanimously decided that the firm of Messrs. Stuart Smith and Allen be elected auditors of the bank for the ensuing year. It was also decided at this general meeting to "continue the audit of the branch accounts by the leading chartered accountants in the town where the bank has

that through want of the exercise of ordinary skill and diligence they sanctioned accounts containing false statements resulting in damage to the company, and "*In re the Kingston Cotton Mill*" (6) is clear authority that such conduct is misfeasance within the section. With regard to the other branch of the application the liquidator, in addition to withdrawing all charges of actual fraud, undertook to supply the auditors with a list of the debts of the bank on which he bases his statement that the profits of the bank for the half-year ending June 30, 1911, were not and should have been known by the auditors if they had exercised ordinary skill and diligence not to have been Rs. 1,62,277, which, however, they certified to be the case. I must therefore decline to stay the proceedings under the section as against the auditors and to relegate the liquidator to a suit against them and dismiss the preliminary objection with three gold mohurs costs.

Judgments in Appeal.

Ormond, J.—Proceedings were taken against the appellant under section 214 of the Indian Companies Act for misfeasance as an auditor of the Bank of Burma. The question in this appeal is whether the appellant was an "officer" of the bank within the meaning of that section. The appellant's firm were appointed by a unanimous resolution to be the auditors of the bank for the ensuing year, at the general meeting of the shareholders on June 24, 1911. The appellant signed the balance sheet for the half-year ending June 1911 as auditor of the bank. Some time later it was discovered that the appointment as auditor was irregular owing to there not having been a properly qualified quorum at the general meeting sufficient for the appointment of auditor. It is admitted that if there had been a proper quorum the appellant would have been an "officer" within the meaning of the section. There is no doubt that he was a *de facto* auditor of the bank and that he filled that office.

Mr. deGlanville contends that no one could be an "officer" of the company unless such person had been properly

(6) (1896) I Ch. D., 345.

Mr. deGlanville contends that this is so, because a manager and director are expressly mentioned in the section. But the company could repudiate the appointment of such a manager or director, and a manager and a director are both officers of the company. Therefore a *de facto* but not *de jure* manager and director is a *de facto* but not *de jure* officer of the company. Moreover, though it formed no part of Mr. McDonnell's case for the respondent, in my opinion, the appellant was not only a *de facto* auditor of the bank but he was also a *de jure* auditor of the bank and therefore a *de jure* officer of the bank and was validly appointed as such. Under article 111 of the Articles of the Association, the person or persons to fill the office of auditor or auditors may from time to time be determined by the bank in a general meeting: "The auditor or auditors for the time being shall retire at the ordinary general meeting in every year, and if any casual vacancy occurs in the office of auditor, the directors shall forthwith fill up the same." This meeting was the ordinary annual general meeting which had certain powers but it required a certain qualified quorum to appoint an auditor. There were four directors of the bank, of whom one was in England and the other three were at the meeting. The appellant was proposed and seconded by two of these directors, and the third director was amongst those who unanimously voted for him to be appointed. If the shareholders at that meeting were unable to appoint an auditor owing to the want of a quorum, that would occasion a "casual" vacancy in the office, the casualty being for the want of a quorum.

Mr. deGlanville contends that the acts of the directors at this meeting cannot be taken to be an appointment by the directors because they did not purport to act as directors but were acting as shareholders. It was the duty of the directors forthwith to fill up the office, and three of the directors, so far as they were able, appointed the appellant the auditor of the bank at that meeting. No form was necessary for such an appointment by the directors, and the fact that certain shareholders purported also to appoint the auditor would not detract from the power inherent in those three directors to make the appointment. I would therefore dismiss the appeal with costs.

1914.

STUART SMITH v. THE OFFICIAL LIQUIDATOR OF THE BANK OF BURMA, LIMITED.

de facto an officer of the company." The office of auditor of a bank is not one that carries any special insignia. But I think the circumstances show that the appellants actually filled the office. The shareholders in general meeting purported to appoint them to it in the manner prescribed in the Articles of Association. It was in pursuance of this appointment that they entered upon and carried out the duties of auditors of the bank, and no one else was appointed to the post. On the front page of the directors' report issued to the shareholders the appellants are shown as the auditors of the bank. It is not as if the report and balance sheet merely show that the accounts had been audited by Messrs. Stuart Smith and Allen and found correct. The case is distinguished from that of the firm of auditors in the English case cited above, for the latter were only called in by the directors to do a particular piece of work, were never described as the auditors of the company, and their services could have been dispensed with at any moment by the directors without reference to the shareholders. It was never contemplated that Messrs. Stuart Smith and Allen could cease to be the auditors of the bank except in accordance with the terms of article 111 of the Articles of Association which provides for the vacating of the office. They had the full status of auditors of the bank and I think it has been rightly held that they filled that office *de facto*. On these grounds I concur in dismissing the appeal.

Before Mr. Justice Twomey.

Criminal Appeal Nos. 324, 325, 326 *and* 327 *of* 1914.

June 30th, 1914.

KING-EMPEROR *v.* 1. KAMALI KHAN, 2. DEEYAGYI.

Eggar, the Assistant Government Advocate—for appellant.
S. M. Bose—for the respondents.

Hackney Carriages Act XIV of 1879, *section* (6) *(h)—person keeping—limit of owner's responsibility.*

The driver of a hackney carriage cannot be said to "keep" it within the meaning of section (6) (*h*) of the Hackney Carriages Act, 1879. The owner of a carriage cannot be held responsible under the Act for the driver's refusal to ply.

In these four appeals by the Local Government the accused persons are owners of hackney carriages at Insein. They were

supported by the definition of the word "proprietor" in the English Statute relating to Hackney Carriages in London, 6 and 7 Vic., Chap. 86, section 2. It includes any person "keeping" a hackney carriage, but distinguishes a person "keeping" it from the driver. Moreover, if it were intended that the driver should be punishable under Rule 15, we should expect to find the driver expressly mentioned in the rule, as he is made expressly responsible in several other rules (*e.g.* Rules 18, 19, 30, etc.).

But if the only persons who can be punished for breach of the rule are the owners or other persons holding control of the hackney carriage, it is clear that the accused persons in these cases could be convicted only on the assumption that they are liable as masters for the acts of their servants, the drivers. Under several English Statutes employers have been held punishable in respect of violations of the statutes by their servants, if the act done by the servant was within the scope of his authority as such. Most of these cases were under the Licensing Acts, the Merchandize Marks Acts, the Sale of Drugs Acts and the Weights and Measures Acts. The wrongful act of the servant under these statutes is usually held to be the wrongful act of the master. But I have been referred to no case in which a hackney carriage owner has been vicariously punished for breaches of the law by his drivers, and I note that under the Statute 6 and 7 Vic., Chap. 86, such prosecutions as the present would not be possible in London, for it is not the owner but the driver who is made punishable by the statute for "refusing to admit and carry at the lawful fare any passenger for whom there is room" (section 33). It is argued, however, that the Indian Hackney Carriages Act contemplates an owner acting through his drivers, that it is with the driver at a hackney carriage stand the hirer has usually to deal and not with the owner at the gharry stables, and consequently that when the Hackney Carriages Act, section 6, says the owner (or person "keeping" the gharry) shall be bound to let, the intention must be that the owner through his driver should be bound to do so. I am not satisfied that this view of the Act and the rules is correct. Besides Rule 15, there are several other clauses which seem to contemplate the hirer dealing with the owner

1914.

NGA KYA THEIN v. KING-EMPEROR.

None of the witnesses saw the murder committed. Two of them say they saw Kya Thein following Pan Bu who was going in the direction of the spot where Pan Bu was assaulted. One witness said that on the morning of the day on which the murder was committed, he saw the *dah*, which was subsequently found near where Pan Bu's corpse had lain in Kya Thein's hand. His father said he fell in with him returning to the village as he (the father) was driving back his cattle presumably sometime in the forenoon of the day. There is also evidence that in the afternoon of the day Kya Thein openly made some enigmatic remarks about what would happen if one man killed another without any one else being present and what would happen if two men murdered a man. Some of this evidence appears doubtful, but even if it was all true, it would not warrant the conviction of Kya Thein. He has been convicted on the conclusions which the Judge drew from statements he himself made. The first of these was made to the headman of a village close to Kya Thein's village four days after the murder. The others were made to the committing Magistrate and Sessions Judge. The later ones are not entirely the same as the first; where they differ from it the later ones show an attempt to offer explanation of his conduct more favourable to himself, but in the main they followed up the first statement. None were confessions in the ordinary sense of the word, but all contained incriminating statements from which the Judge and assessors drew the conclusion that he took part in the murder even if he alone did not commit it. The circumstances under which the village headman came to question Kya Thein, and what he exactly said to him, have not been gone into as fully as they might have been. In the Magistrate's Court Maung Aung said he questioned him for about two hours in the presence of a ten-house *gaung*, Maung Pu. He had sent for him: he did this because he had been told that the Township Officer had ordered him to investigate the case. The Police Inspector, however, stated that whilst he was making inquiries suspecting Kya Thein, the *thugyi* Maung Aung intervened and asked to be allowed to question him.

In the Sessions Court Maung Aung stated what took place in the first instance at the protracted interview in the following

1914.

NGA KYA THEIN v. KING-EMPEROR.

confession, was admissible in evidence. Maung Aung, the *thugyi*, was a person in authority within the meaning of section 24 of the Indian Evidence Act, and the question is whether it should be held that the incriminating statement and confession appears to have been caused by any inducement, threat, or promise proceeding from him sufficient, in the opinion of the Court, to give Kya Thein ground which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

In the first place it is to be noted that Kya Thein did not go to the *thugyi* of his own motion. He was sent for and must have gone to him because he was sent for by a person in authority. He did not at once offer to make a statement. He made one only after the *thugyi* had told him he would not be punished if he had not taken part in the murder. The question then is whether what the *thugyi* said to him constituted an inducement to make a statement, for I do not think there can be any doubt that the statement was caused by what the *thugyi* said to him. The object of the *thugyi* must have been to induce him to make a statement about the murder. His assurance that the man he was talking to about it would not be punished if he had not taken part in it brought out the statement.

In Amir Ali and Woodroffe's notes to section 24 of the Evidence Act are given examples of expressions which have been held to constitute inducement, threats, or promises. Some are weaker than those which the *thugyi* said he used to Kya Thein. It is evident that the Courts jealously guard against every attempt by a person in authority to obtain self-incriminating statements from suspected or accused persons.

In my opinion what the *thugyi* said to Kya Thein was an inducement, and as Kya Thein's confession was caused by it, what was said gave him reasonable grounds for supposing that by making it he would escape all punishment, the confession was irrelevant and inadmissible in evidence. Excluding this as evidence against him there remains the fact that he pointed out the place or the proximity of the place where the *dah* with which the murder was in all probability committed was found.

Before Sir Charles Fox, Chief Judge, and Sir Henry Hartnoll. P.J.

Civil 1st Appeal No. 78 of 1913.

December 7th, 1914.

1. AHMED MOOLLA DAWOOD, 2. OFFICIAL ASSIGNEE *v.* FATIMA BEE BEE.

Coltman & Alexander—for appellants.

J. R. Das—for respondent.

Limitation Act, IX of 1908—*Schedule I, Article* 68, *administration bond—when a bond subject to a condition.*

An administration bond which provides that in certain events the obligation to pay the amount mentioned in it shall be void comes within the meaning of "bond subject to a condition" in Article 68 of the 1st Schedule to the Limitation Act, and the period of limitation starts from the day when the condition is broken.

One Ebrahim Sahaib Khateeb died intestate at Mecca in or before 1880 leaving property in Rangoon.

His widow and children continued to live at Mecca after his death. In January 1899 his eldest son Mahomed applied to the Court of the Recorder of Rangoon for letters-of-administration to his father's estate, and letters were granted to him. He signed an administration bond as required by section 78 of the Probate and Administration Act, 1881, for Rs. 80,000. Ahmed Moolla Dawood and Mahomed Ebrahim Hoosein Munsoor signed it as his sureties. The latter has since been declared an insolvent, and is represented on this appeal by the Official Assignee.

Two days after the date of the letters Mahomed filed a petition representing that the only assets of the estate consisted of some house property in Rangoon, and that he was unable to administer the estate without selling or mortgaging this property. He asked for leave to be granted to him under section 90 of the Act to sell or mortgage it. This application was granted without any inquiry. The result shows what may happen when such applications are granted without very careful and full enquiry as to the necessity for selling immovable property which has devolved upon members of a family. The property had apparently been for many years the chief source of income of the family, and Mahomed could have carried out his duties as administrator by executing a conveyance of the property to the heirs. If that had been done, there would

all the estate of the said deceased which has or shall come to his possession power or knowledge and do exhibit the same unto the said Court on or before the 18th January 1900 and the same estate and all other the estate of the said deceased at the time of his decease which at any time after shall come into possession of the said Mahomed Ebrahim Sahaib Khateeb do administer according to law (that is to say) do pay the debts which he owed at his decease and further do render a true account of his said administration whenever by law required so to do and the residue of the said estate do pay unto such person or persons as shall be entitled thereto under the said Act . . . . . then this obligation to be void or else to remain in full force."

The last seven words contemplate that the bond shall remain in force for ever if the administrator does not do the acts previously mentioned as relieving him and the sureties from the obligation to pay the amount of the bond, but the Limitation Act makes no special provision for administration bonds, and consequently one of the Articles of it must apply to a suit on it.

Articles 68 and 80 of the First Division of the First Schedule to the Act have been referred to, but as Article 68 exactly meets the case of such a bond no other Article need be considered.

Under Article 68 three years is the limitation period for a suit on a bond subject to a condition and the period begins to run from the time when the condition is broken.

It is clear from the explanation of the word "bond" in section 2 of the Act that the bond in the present case is a "bond subject to a condition" provided for in Article 68.

The first of the conditions of the bond which was broken by Mahomed, the administrator, was that contemplating his filing an inventory within a year of the grant of letters-of-administration, so that the first breach was on the 19th January 1900. Another breach was in 1903 when he had in his hands moneys of the estate which he could and should have distributed amongst the heirs, but did not do so.

Consequently the suit of the plaintiff was long time-barred when brought. The application of Article 68 to administration

own stock. So far as the evidence goes the charges they made for goods supplied to the defendant Company were what they would have made to any other of their customers, and were reasonable retail prices. They themselves had bought the goods wholesale at lower prices.

On behalf of the defendant Company it was contended that the plaintiff Company having been its Managing Agents at the time the goods were supplied, it could not make any profit on goods supplied to it, and consequently no more than the actual cost price could be charged against them. On the one hand vigorous expressions of the rule that no agent in the course of his agency can be allowed to make any profit out of a transaction on behalf of his principal without the knowledge and consent of the principal have been relied on. On the other side some more recent decisions, the result of which is that a Court should not interfere where the contract has not been rescinded by the principal and where the thing bought and sold cannot be restored, have been quoted as affording a rule which debars the defendant's contention.

The learned Judge held that as the defendant Company had accepted the contracts, had not rescinded them, and could not restore the goods, it was bound to pay the prices charged. He was influenced to this decision by consideration chiefly of the reports of the first and second stages of the litigation between a contributory and a former director during the winding-up of the Cape Breton Company. The report of the last stage of this litigation was not brought to the learned Judge's notice: it is to be found in *Cavendish Bentinck* v. *Thomas Fenn* before the House of Lords (1). The facts in that case were that Fenn, the director, had been a party to a purchase of some property by the Company for £42,000, which he and others had purchased two years previously for £5,500 at a time when he was not a director of the Company. The contributory sought to make Fenn liable for misfeasance or breach of trust on the ground that the director had allowed the Company to make the purchase without disclosing his own interest and at a price far exceeding the value. The contri-

(1) (1887) 12 A.C., 652.

1914.

THE TWINZAS OIL COMPANY, LIMITED v. MOWER LIMITED.

It may be noted that Cotton, L.J., referred to *Bentley* v. *Craven* in his judgment in the Court of Appeal in the Cape Breton case. He did not disagree with the decision; on the contrary his remarks imply that it was undoubtedly right, but he distinguished the case from the one they were dealing with.

In the House of Lords, Lord Herschell in some passages of his judgment refers to a description of agency, such as we have to deal with in the present case, as not being parallel with the case they had to deal with. No doubt his remarks contemplate that a Company's agent employed to make purchases of goods for the Company at market rates who supplies his own goods at his own prices, could only be made to repay to the Company any excess over market prices, but he was not deciding this question, and what he said cannot be taken as overruling the long standing rule referred to in *Bentley* and *Craven*.

For these reasons I hold that for their own goods which they supplied to the defendant Company the plaintiff Company is not entitled to recover more than the cost price of the goods to themselves.

I would consequently set aside the decree of the Original Court, and remand the case to it for an enquiry as to the cost of the goods supplied, and for a decree for the amount of the price of the goods at cost rates.

The plaintiff Company should pay the defendant Company's costs of this appeal.

Hartnoll, J.—I concur.

Before Sir Henry Hartnoll, P.J.

Criminal Revision No. 314*B* *of* 1914.

SHWE HMYIN *v.* PO CHET.

Halkar—for applicant.

Brown—for respondent.

Jany. 12*th*, 1915.

Maintenance—Criminal Procedure Code, section 488—neglect or refusal.

The fact that children are for a time in their mother's custody is not of itself proof that their father has neglected or refused to maintain them within the meaning of section 488 of the Criminal Procedure Code.

Venkatasubbaiyan alias *Samaiyan*, 2 Weir's Criminal Rulings, 632, referred to.

The evidence clearly shows that Ma Shwe Hmyin and Maung Po Chet were divorced some six years ago and that the

1915.

BRIDGET THERESA MARY GLANCY v. JAMES GLANCY.

The petition was presented on the 2nd December 1912. The parties had not cohabited since May 1892. The only evidence of the husband's adultery was admission of it by him in a letter dated the 18th November 1911 written in reply to a letter of the wife's to him. The husband has not defended the suit. The parties were married in Madras in 1890. The husband was at the time a Colour-Sergeant in a British Regiment. They came with the regiment to Mandalay in January 1891, and lived there together until May 1892 when the wife returned to her parents' house in Madras. Her life during this period must have been a very unhappy one. Her husband was much addicted to drink and was twice tried for drunkenness whilst she was living with him. He frequently stopped away from their home late at night, and was often out the whole night but evidently not on duty. He neglected her and did not give her sufficient money to get necessaries, and in consequence she had to sell her jewellery and wedding presents and to obtain money from her parents. She admits that she suspected he had been guilty of adultery during the period, but she does not say that she ever taxed him with it at the time. They parted amicably when she went to Madras, he promising to send her money. She says she did not leave him with the idea of parting with him altogether. Her reasons for going away from him were that she was very unhappy owing to his grossly intemperate habits and his neglect of her, but she hoped he would reform and have her back. Any hope of his reform she may have entertained must soon have been dispelled, for he was tried again for drunkenness, and was then reduced to the ranks. He sent her no money, and she in 1893 commenced training for qualification as a nurse. She obtained qualifying certificates in 1895 and earned her livelihood as a nurse until 1906. Since then she has been managing an hotel. From Mandalay her husband's regiment went to Lucknow, and he took his discharge from the army there. From Lucknow he wrote to her a few letters which she describes as just ordinary letters, and she wrote to him. She says that he never asked her to rejoin him. She does not say that she ever asked him to take her back and to provide her with a home. He wrote and told her he was going to England, and he left India in 1900

1915.

BRIDGET THERESA MARY GLANCY v. JAMES GLANCY.

If life with him was beyond endurance at Mandalay, she could scarcely have entertained a wish to rejoin him when she heard he had been reduced to the ranks for drunkenness. Her entering into training to become a nurse appears to indicate very plainly that she made up her mind as far back as 1893 that she would have to make her own livelihood and that there was practically no likelihood of her ever living again with the drunkard she was tied to in matrimony. Her religion forbade her to think of the tie being cut. She must have made up her mind to face the situation, and she did this with courage.

The ordinary rule is that the abandonment must have been against the expressed wish of the party abandoned. I see no sufficient ground for departing from that rule in the present case. There is no evidence that she ever expressed a wish to return to co-habitation with her husband. Although he abandoned her, abandonment against her wish is not proved.

On the question of adultery of the husband considering the picture the petitioner gives of him and his conduct towards her, I should be prepared to hold that his admission of it in his letter was sufficient proof.

Upon the question of delay in presenting the petition although she may have had no evidence to prove the adultery until she received her husband's letter in 1911, it is difficult to believe that she could not have obtained evidence to substantiate it if she had made some effort to obtain it.

Probably such a man as he has been, a man who evidently wanted to get rid of his wife very soon after their marriage would have admitted adultery at any time she taxed him with it. It is difficult to believe that she did not ask him for some explanation of where he had been spending the nights on which he was frequently absent from her in Mandalay, and that she could not have found out whether anything he told her was true or not. It may, no doubt, have been difficult for her to find out what sort of life he was leading after he left India, but he was in India for eight years after they parted and it can scarcely have been impossible for her to have gone to where he was at some time during those years to find out what sort of life he was leading.

by any confirmatory proof, may be acted upon as conclusive evidence upon which to pronounce a divorce provided the Court is satisfied that the evidence is trustworthy and that it amounts to a clear distinct and unequivocal admission of adultery. This rule was followed in the case of *Williams* v. *Williams and Padfield* (2), in which case the Judge Ordinary said: "I entirely concur with the observations of the Lord Chief Justice as to the great danger of relying entirely on such admissions. In each case the question will be whether all reasonable ground for suspicion is removed."

In the present case I think that it would be unsafe to act on respondent's admission. He is written to in England from India by his wife after many years of separation from her when he knows that she is seeking a divorce. He never intends to meet her again in this world. What is easier than to assist her by admitting adultery whether he has committed it or not. He finishes up: "I wish you well and hope you will do well for "Auld lang syne." "Again the admission itself is not satisfactory. It would be more credible if it was an admission of visits to prostitutes: but it requires a stretch of the imagination to think that respondent has been in the habit of compromising several women. I cannot take the statement as sufficient proof of adultery. That being so, apart from the question of the delay in bringing the proceedings, I am of opinion that the petition must fail.

I would not therefore confirm the decree.

Parlett, J.—In my opinion it is by no means clear what act or conduct is relied upon as constituting the desertion of the petitioner and from what date it commenced.

A wife who seeks to prove desertion must give evidence of conduct on her part showing unmistakably that such desertion was against her wish actively expressed, *Fowle* v. *Fowle* (3). The husband must have wilfully absented himself from her in spite of her wish, *Thompson* v. *Thompson* (4).

The petition alleges that the petitioner left her husband in Mandalay in 1892, and went to her parents in Madras owing to the intemperate habits of her husband and his inability to support

(2) L.R. 1 P. & D., 29. | (3) (1878) I.L.R. 4 Cal., 260.
(4) 27 L.J., P. & M., 65.

1915.

O. A. M. K. CHETTY FIRM v. K. P. CHETTY FIRM.

Joykisto Cowar v. *Nittyanund Nundy*, (1878) I.L.R. 3 Cal., 738; *Samalbhai Nathubhai* v. *Someshvar Mangal and Harkisan*, (1880) I.L.R. 5 Bom., 38; *Sakrabhai Nathubhai* v. *Maganlal Mulchand*, (1901) I.L.R. 26 Bom., 206; followed.

Plaintiff obtained a decree against the K. P. Chetty firm which was a joint Hindu family business, belonging to the defendants. 1st respondent is an adult and was the Manager, the other defendants are minors.

Mr. Chari for plaintiff applies under Order 21, Rule 50, for leave to execute his decree against the shares of the minors in the joint family property. The joint family property is not necessarily part of the assets of the joint family firm, and I know of no authority which makes an exception in the case of a Hindu joint family firm so as to render a minor's property which does not form part of the partnership property liable for the partnership debts. On the other hand the cases of *Joykisto Cowar* v. *Nittyanund Nundy* (1), *Samalbhai Nathubhai* v. *Someshvar Mangal and Harkisan* (2) and *Sakrabhai Nathubhai* v. *Maganlal Mulchand* (3) are authorities to show that minor partners of a Hindu joint family business are only liable for the debts of the business to the extent of their share in the property of the firm. Leave is therefore granted to plaintiff to execute his decree against the minors to the extent of their property in the firm and plaintiff is at liberty to execute his decree against 1st respondent free from such restriction.

Before Mr. Justice Ormond and Mr. Justice Twomey.

PO HMAN *v.* MAUNG TIN.

Civil 2nd Appeal No. 12 of 1915.

May 6th, 1915.

Ginwala—for appellant.

Respondent in person.

Buddhist Law : Inheritance—Grandchild of deceased (son of the eldest daughter) claiming as against a son of deceased.

There cannot be an *orasa* daughter as well as an *orasa* son in the same family. Where therefore a Burman Buddhist couple die leaving a son who is capable of becoming the *orasa* son, the son of an elder sister who has predeceased the parents cannot claim a preferential share on the ground of his mother being *orasa*.

(1) (1878) I.L.R. 3 Cal., 738.
(2) (1880) I.L.R. 5 Bom., 38.
(3) (1901) I.L.R. 26 Bom., 206.

1915.

PO HMAN v. MAUNG TIN.

to claim a fourth share on the death of the father and in the same family allowing the children of an elder son or daughter who predeceased the parents special treatment at the time of ultimate partition. Nor can it be held that the children of an eldest son or daughter who predeceased the parents are entitled to a preferential share except when such eldest son or daughter at the time of his or her death was the *orasa* child, *i.e.* had attained the complete status of *orasa*. The texts cited in 7 L.B.R., 27, are sufficient to show that even if the plaintiff Maung Tin's adoptive mother Ma Shwe Ein was an adult when her brother Po Hman was born, her status as *orasa* child was merely presumptive and that when Po Hman reached a competent age he displaced her as *orasa*. There can be no doubt that Po Hman who was 24 years old when his father died and who was the only son born to U Thet and Ma Bwin was the *orasa* son, and for the reasons given in 7 L.B.R., 27, there cannot be an *orasa* daughter as well as an *orasa* son in the same family.

The decrees of the Lower Courts should in my opinion be set aside and instead the plaintiff as an "out of time" grandchild should be awarded a decree for an eighth share of the property specified in the decree of the District Court. It is agreed that the case is one in which the estate should bear the costs of litigation, that is to say the defendants should give the plaintiff his full $\frac{1}{8}$ share less one-eighth of the costs in all Courts.

Ormond, J.—I concur.

FULL BENCH.

Before Sir Charles Fox, Chief Judge, Sir Henry Hartnoll, P.J., and Mr. Justice Twomey.

Civil Reference No. 7 of 1914.

1. SHWE PO, 2. SAN E, *v.* 1. MAUNG BEIN, 2. KYAUK PA.

[*December 7th*, 1914.

R. N. Burjorjee—for appellants.

Ginwala—for respondents.

Buddhist Law—Right of a father to dispose of jointly acquired property on death of the mother, when there is only one son and the father marries again—Right of the son in the property.

A, a Burmese Buddhist, and his wife **B** jointly acquire certain property. There is issue of the marriage **C**. **B** dies. **A** marries again without

that defendant 2 was interested in a half share and that the amended plaint should be rejected as setting up a claim of a substantially different character.

Defendant 2 pleaded that his father could alienate only one-half.

I should have pointed out that the amended plaint was filed in consequence of an order dated 23rd September 1911 in which the Subdivisional Judge held that he could not grant a perpetual injunction but that instead of dismissing the suit straight off, it would be better to direct plaintiffs to amend and sue for possession.

On the amended pleadings a large number of issues were drawn. The first Court held by an order dated 24th November 1911 that the suit should not be dismissed on the ground that the amendment made it one of a substantially different character. On the merits he found the deed of 10th April 1908 had been executed owing to misrepresentation by plaintiff and that plaintiff was really a mortgagee. He found Rs. 875 was still due and gave plaintiff a decree for that amount and that if it was paid by 12th May 1912, plaintiff should reconvey the land to defendants, failing which defendant should be barred from redeeming.

The learned Divisional Judge held that the evidence did not establish misrepresentation; that it was more probable that defendant 1 knew what he was executing but thought as plaintiff did that nevertheless he could redeem; that they could not go behind the deed and show it was meant to be a mortgage and not a sale and that the sale was good to the extent of three-quarters.

The points that I have to decide are: (1) whether the amendment should have been allowed, (2) was there misrepresentation; (3) if not, was the sale good to the extent of half or three-quarters of the land.

Under our present Code of Civil Procedure amendment is a matter of discretion and though as a general proposition it may be said that if the amendment results in changing the claim to one of a substantially different character, the Court would wisely exercise its discretion by not allowing it. I do not think it should ever be regarded as a hard-and-fast rule. It is

Pa was to pay off the mortgage and merely take the Chetty's place, there was no question of a sale. Yet it is clear from defendant's own evidence that Kyauk Pa demanded a sale. He says in describing the conversation that Kyauk Pa in answer to the suggestion that he should step into the Chetty's shoes said "No, a sale I mean he said a mortgage and sale by which I mean that I could redeem my land at any time on payment of the principal and interest." The evidence is agreed that Kyauk Pa at once demanded a sale outright, but he forthwith gave way and agreed to defendant having a right to repurchase. I am satisfied that it was intended that the document should evidence a sale though it is quite possible that defendant asked to be allowed to buy his land back and this may have been granted. This however is a very different thing to proving that the document was deliberately drawn up as a sale when the agreement was that it was to effect a mortgage by conditional sale. It would in accordance with the custom and practice be drawn up as an out and-out-sale. Defendant can read and might have read it had he chosen and if he did not, he took the risk. I am not satisfied that there was any misrepresentation and I agree with the learned Divisional Judge that it is quite likely that they may have thought a right of repurchase still remained. This being so it is not open to defendant to go behind the deed and prove it was intended to be something other than it was. This is admitted.

There remains the question whether the sale is good in respect of half or three-quarters of the land. It does not seem to have been questioned by either party that it cannot be good so far as San E's share of one-fourth is concerned. He was the only son of Shwe Po's first marriage. It is not suggested that he agreed to the sale or that he knew anything about it though it may be questioned whether he did not.

The learned Divisional Judge has merely referred to certain authorities quoted in a written argument filed before him and holds it is good to the extent of three-quarters. The property was the joint property of Shwe Po and his wife Ma Tok. She died leaving one son, San E. Since the ruling in *Ma On* v. *Shwe O* (1) it appears to have always been held in Lower

(1) S.J., L.B., 378.

property only or over three-fourths of the whole property (*a*) where there is only one child of the marriage living, and (*b*) where there are several children ?

The former question only really arises in this case but as it will be necessary to consider the whole question in order to arrive at a decision, I refer the latter branch also subject to the decision of the Bench as to whether it can be referred.

The opinion of the Full Bench was as follows :—

Twomey, J.—The question referred by Mr. Justice Robinson in this case is as follows :—

" In respect of property jointly owned by a Burmese Buddhist husband and wife on the death of the husband, has the widow an absolute disposing power over her half share of the property only or over three-fourths of the whole property (*a*) where there is only one child of the marriage living, and (*b*) where there are several children ? "

The land in suit was acquired by the 1st defendant Shwe Po and his wife Ma Tok as their joint property. They had issue one son, the 2nd defendant, San E. Ma Tok died about 10 years before the suit was filed. Subsequently, Shwe Po married a second wife, Ma Nyein U. There was no partition of the property with the son, San E. After the second marriage Shwe Po sold the land without the consent of San E.

It is clear that the question referred by the learned Judge does not arise, as this is not a case of a widow's estate at all. By consent, the reference has been amended as follows :—

A, a Burmese Buddhist, and his wife B jointly acquire certain property. There is issue of the marriage one son, C. B dies. A marries again without partitioning the property with his son C. To what extent can A dispose absolutely of the property ?

It is clear that as regards one-half of the property at least the widower has an absolute right of disposal. This is admittedly settled law both in Upper and Lower Burma.

The son could certainly have claimed a one-fourth share on his father's second marriage. [See authorities cited in *Maung Seik Kaung* v. *Maung Po Nyein* (1).] He could apparently claim

(1) 1 L.B.R., 23.

Arguments have been addressed to us as to the application of the rule laid down by the Special Court in *Ma On and others* v. *Ko Shwe O and others* (1) that as regards one-half of the joint property of herself and her deceased husband a widow has only a life interest with a power of sale in case of necessity. It is faintly contended that the same rule should be applied by analogy to the case of a widower with an only son.

The sale in the present case is admittedly voidable as regards one-fourth, because it was sold burdened with the *auratha's* right. Is it also voidable as regards any part of the remaining three-fourths on the ground that the sale was not a sale of necessity? It is clearly not voidable as regards half out of three-fourths, for that half was admittedly the father's own to deal with as he pleased. As regards the remaining one-fourth, whatever might be the case if there were more than one child of Maung Shwe Po's first marriage, there is so far as I can find no authority for holding that a father with a single son is under any such restriction. Assuming that the rule laid down in S.J. 378 is well founded, I can see no reason for applying it in such a case as this. The only son is safe-guarded as regards one-fourth of the estate and that is all he could get in his father's life-time. He has only to claim it within the period of limitation. There are no younger children whose interests have to be considered. If the rule laid down in S.J. 378 has any reason to support it, it is only that this protection is desirable in the interests of the younger children who cannot claim partition till both parents are dead. But it would be unreasonable to extend it to the case of an only son who deliberately refrains from claiming his due share in his father's life-time and takes his chance of obtaining a larger fractional share in the residue after his father's death.

The correctness of the rule laid down in S.J. 378 has been seriously disputed in the arguments of counsel, and it has been brought to our notice that the *Dhammathats* on which the rule is based have lately been interpreted by the Judicial Commissioner, Upper Burma, in a different sense. But holding that the rule in question has no application to the present reference, I

(1) S.J., L.B., 378.

1914.

SHWE PO v. MAUNG BEIN.

father's estate. He could claim nothing further until his father died and? then he would claim not as an heir entitled to inherit any portion of the estate consequent on his mother's death but as an heir to his father's estate. In his case claiming as an heir of his mother in his father's lifetime there is no provision of Buddhist law to apply such as was found to exist in the case of *Ma On* v. *Shwe O* in favour of younger children and so nothing to prevent his father disposing of his lapsed share *in toto*.

The Divisional Judge has held the sale to be good to the extent of three-quarters, and in any case in the view I take it was good to such an extent.

I would answer the reference as amended by my learned colleague Mr. Justice Twomey by saying:—

"In any view of the circumstances the sale was good as regards three-quarters of the land; if the period of limitation had lapsed during which San E could claim his share, the sale would be good as regards the whole of the land."

The last part of the answer is not necessary as respondents have not appealed against the dismissal of their claim to one-fourth of the land.

Fox, C.J.—I agree in Mr. Justice Twomey's answer to the amended question consented to by the advocates.

I have nothing further to add.

Ten gold mohurs allowed as advocate's fee in the reference. These costs will follow the result of the case.

Before Sir Henry Hartnoll, Offg. Chief Judge, and Mr. Justice Twomey.

Criminal Appeal No. 524 *of* 1913.

August 12th, 1913.

KYA NYUN *v.* KING-EMPEROR.

May Oung—for appellant.

Maung Kin, the *Assistant Government Advocate*—for the King-Emperor.

Murder—Intention—Directions to Jury regarding—Sections 299, 300, 304, *and* 326, *Indian Penal Code.*

In a trial on a capital charge the Jury should be directed in the event of finding that the accused culpably caused the injuries which resulted in death to find with what intention he did so. If they find that his intention was to cause only such bodily injury as was likely to cause death, they

1913.

KYA NYUN v. KING-EMPEROR.

her right arm. Ma Yin Kywe had one wound 1½ inches deep nearly penetrating the chest cavity and four wounds on her left thigh, two of them being serious. In the charge the Sessions Judge drew attention to the injuries inflicted. In concluding his charge he said: "If you consider that the man who stabbed deceased with the intention defined in clause 1 or 3 of section 300, Indian Penal Code, then the offence committed is murder. If on the contrary you consider that the man stabbed deceased with the knowledge that he was likely to cause death but without any intention to cause death or to cause such bodily injury as was likely to cause death then the offence committed would be culpable homicide not amounting to murder as defined in the second portion of section 304, Indian Penal Code." The jury in returning their verdict said: "We find the 1st accused guilty of having stabbed Ma Shan Ma with intent to cause serious injury but whether with intent to cause death we cannot say. We do not know what offence he should be held to have committed." A question was then put to them under section 303, Criminal Procedure Code, namely: "Do you consider that the 1st accused stabbed deceased with the intention of causing bodily injury and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death? Illustration *(c)*, A intentionally gives Z a sword or club wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder although he may not have intended to cause Z's death. I want you to consider whether Kya Nyun's conduct in stabbing Ma Shan Ma amounted to this."

The answer is recorded: "The jury return a unanimous verdict that 1st accused is guilty of murder in causing the death of Ma Shan Ma."

It is contended that the jury were not asked to consider the alternative finding that appellant stabbed Ma Shan Ma with the intention of causing such bodily injury as was likely to cause her death. This contention appears to be correct. If the jury had come to such a finding it would have amounted to one of culpable homicide not amounting to murder punishable under the first part of section 304, Indian Penal Code. The learned Judge seems to have considered that the case might be one in

bodily injury as was likely to cause death? If so, their verdict would be culpable homicide not amounting to murder punishable under the first part of section 304, Indian Penal Code, or

(4) Is he guilty of voluntarily causing grievous hurt by means of a dangerous weapon? If so, their verdict would find so under section 326, Indian Penal Code.

Where I think the charge is defective in law is that it does not sufficiently ask the jury to consider appellant's intention. Did he deliberately aim a blow at Ma Shan Ma's chest or at any vital part of her trunk? If so, he aimed at a vital part with a deadly weapon and they would be justified in finding that he intended to cause death or bodily injury sufficient in the ordinary course of nature to cause death. Or did he stab Ma Shan Ma without deliberately aiming at vital parts? If so, what was his intention and what considerations should guide the jury in arriving at it? There is his frame of mind as shown by his not only stabbing Ma Shan Ma but also Ma Yin Kywe if they believe he did do so. There is the nature of the weapon used, also the number and nature of the wounds. Besides the chest wound Ma Shan Ma had two wounds 2 inches deep on her arm, which would be on a level with her trunk if her arms were bent up to protect herself when stabbed. Ma Yin Kywe was stabbed on the breast and two of the wounds on her thigh were 1 inch and $1\frac{1}{4}$ inches deep respectively. The stab in her breast was $1\frac{1}{2}$ inches deep and if it had gone a little deeper might have been fatal. What was the frame of mind of the man who inflicted such injuries and in such numbers, and what must be presumed to be his intention? Was it to cause death or bodily injury sufficient in the ordinary course of nature to cause death? If so, the jury would be justified in returning a verdict of murder. Or if so grave an intention was not to their minds to be inferred was not there at least an intention to cause such bodily injury as was likely to cause death? If so, they would be justified in returning a verdict of culpable homicide not amounting to murder. If they do not find that he even had this intention, was his offence one of voluntarily causing grievous hurt by means of a knife? When he stabbed, did he intend or know himself to be likely to cause grievous hurt? If the jury found so

1914.

OODAYAPPA CHETTY v. RAMASAWMY CHETTY.

of which suit a claim against outsiders could be enforced by a Receiver appointed by the Court.

Gobin Prasad v. *Chander Shekhar*, (1887) I.L.R. 9 All., 486; *Ram Narain Nursing Doss* v. *Ram Chunder Jankee Loll*, (1890) I.L.R. 18 Cal., 86; *Motilal Bechardass* v. *Ghellabhai Hariram*, (1892) I.L.R. 17 Bom., 6; *Vaidyanatha Aiyar* v. *Chinnasawmy Naik*, (1883) I.L.R. 17 Mad., 108, referred to. *Aga Gulam* Husain v. *Sir Albert David Sassoon*, (1897) I.L.R. 21 Bom., 412, dissented from.

The following is the judgment appealed against :—

Civil Regular No. 373 *of* 1907.

March 20*th*, 1911.

Robinson, J.—The plaint as originally filed was on behalf of Oodayappa Chetty and Palaneappa Chetty carrying on business in Rangoon under the style of S.O.S. against defendants 1 and 2 and one Vyravan Chetty. It set out that Oodayappa was the son and sole heir of one Chellappa Chetty who died on the 12th August 1907 and who prior to his death had been carrying on business in Rangoon as banker and money-lender in co-partnership with the 2nd plaintiff under the style of S.O.S. It further stated that Oodayappa Chetty was the managing partner of the said firm. It continued that in Civil Regular No. 352 of 1906 of this Court a decree was passed against the Vyravan in his personal capacity for Rs. 10,552-10 and costs; that in execution of that decree Vyravan had been arrested and brought before the Court when he deposited as security for the payment of the decretal amount a registered deed of mortgage in favour of the firm of S.O.S.; that on his failure to pay the money the right title and interest of the mortgagee was sold under the directions of the Court and a sum of Rs. 17,000 was realized; that after payment in full of the decretal amount there was now in Judicial deposit in the said suit the sum of Rs. 4,460-6; that the 1st and 2nd defendants claim to be entitled to attach and have attached part of the said moneys in execution of decrees obtained by them in the Court of Small Causes, Rangoon; and that the 3rd defendant, *i.e.*, Vyravan, claims to be a partner in the firm of S.O.S. The plaintiff denies that he ever was a partner in the firm and pleads that the moneys in Court belong to the firm of S.O.S., and that the 1st and 2nd defendants had no right to attach the whole or any part of it in execution of their decrees. The plaint asks for a declaration that the moneys in Court are the property of the firm and that defendants 1 and 2 are not

deceased partner; that he had no right in suit to have the attachment declared wrongful and must sue Palaneappa for an account and damages. No Written Statement had then been filed and I directed this to be done and the suit has now come up for hearing. Two preliminary issues have been argued. The first is, 1. Can the plaintiff not being a partner but only the heir of a deceased partner bring this present suit? 2. Has the character of the suit been so altered by the amended plaint that the amendment should not be allowed? I may dispose of the 2nd issue at once. The suit is to all intents and purposes entirely unchanged. The alteration has made no difference whatever to the difference of the only defendants contesting the suit. It has had the effect of bringing the matters in issue between the parties clearly before the Court and the amendment should I think be allowed. As to the 1st issue Mr. Lentaigne urges that the suit was filed under the Civil Procedure Code of 1882 and that by section 11 thereof the Court must try all suits coming before it unless their cognizance is barred by any enactment for the time being in force. He urges there is no provision of any enactment forbidding the heir of a deceased partner from suing for property belonging to the partnership in which he would have an interest. He next relies on the fact that the decree obtained against Vyravan Chetty was a decree against him personally and that whatever the circumstances were under which Vyravan put forward the mortgage deed as security to avoid being arrested the balance must still belong to the firm; that his client has an interest therein and that interest he must be entitled to protect against any one. He then relies very strongly on the decision of the Bombay High Court in the case of *Aga Gulam Hussain* v. *A. D. Sassoon* (1), in which it was held that on the death of a partner leaving a surviving partner still carrying on the business of the firm the representative of the deceased partner may sue for and recover debts due to the firm although the firm's assets in the hands of the surviving partner are already sufficient to answer all the claims made on behalf of the deceased partner and although the surviving partner is willing to satisfy such claims and

(1) (1897) I.L.R. 21, Bom., 412.

realized. Failure to pay occurred and the mortgage property was sold. The balance now lies in Court as stated in the plaint. Then an application was filed by the 2nd defendant, *i.e.*, Chellappa Chetty, praying that notice may be given to him before the balance of the sale proceeds was paid to the 1st defendant. Thereafter attachments were issued by the Small Cause Court at the instance of the 1st and 2nd defendants in the present case against the balance lying in Court. Then on behalf of the 1st defendant, Vyravan, and on behalf of the 2nd defendant consent to the payment of the amount of the decree to the plaintiff was given with the consent of Mr. Chari for the two attaching creditors and the money was paid to plaintiff. It is thus clear that the decree passed in that suit was not a decree against the firm of S.O.S. or the firm of S.O. but was a personal decree against Vyravan Chetty only. Similarly the two decrees that have been obtained by the 1st and 2nd defendants in this case were decrees against Vyravan Chetty personally. Both suits were brought against Vyravan Chetty and Chellappa Chetty carrying on business in co-partnership under the style of S.O.S. Both suits as against Chellappa were withdrawn with liberty to bring a fresh suit and a decree was passed against Vyravan who confessed judgment for the amounts claimed. The position therefore is this that a mortgage deed in favour of S.O.S, Vyravan Chetty, who was either a partner in the firm or was the agent of the firm, was tendered by Vyravan as security to avoid his arrest and was sold in satisfaction of personal decrees against Vyravan. The balance is lying in Court and the representative of one of the partners in the firm of S.O.S. claims to be entitled to bring a suit to protect that property by declarations and realization of the amount prayed for. It must be assumed for the purposes of this argument that that mortgage was the property of the firm of S.O.S. and the question now is whether the surviving partner of the firm is alone entitled to sue to recover that money or protect it or whether such a suit may be brought by the representatives of a deceased partner. There can be no question that in the opinion of the Bombay High Court in the case quoted above he could bring a suit to recover an asset of the firm from the person holding that asset. The learned

1914.

ODDAYAPPA CHETTY v. RAMASAWMY CHETTY.

of English law is that, although the right of the deceased partner devolves on his executor, it is now fully settled that the remedy survives to his co-partners, who alone must enforce the right by action, and will be liable on recovery to account to the executors or administrators for the share of the deceased. He goes on to hold that the effect of section 45 of the Contract Act is to extend the English law applicable to trading partnerships, which is stated above, to all cases of partnership, and he lays down: "It may be that the legal representative of a deceased partner might under section 45 be joined in a suit by the surviving partner for a debt due to the partnership, but I see nothing which prohibits the rule of English law in the case of trading partnerships being applied in India. It may be doubted whether those who framed that section had a case of this kind in view. The legal representative in this case would not be entitled necessarily to a moiety of the amount recovered in the action: his share of the amount recovered would depend on a settlement of accounts on the realization of the partnership assets, and it would, in my judgment, be highly inconvenient and possibly mischievous to allow him to interfere in the realization of the assets unless through the intervention of the Court, by the appointment of a Receiver in cases in which such interference by the Court might be necessary." It would not be difficult to imagine cases in which, if the legal representative was allowed to bring suits for the realization of assets for the firm, great injustice and many difficulties might arise. It is not to my mind a case of denying the legal representative a remedy because he has the remedy which is indicated in the judgments I have quoted above of bringing a suit for a partnership account and for the appointment of a Receiver. To allow him to bring a suit would be to allow him to assume the position of a representative of the firm, whereas his position is merely that of a representative of the deceased partner in the firm, who may be entitled, after accounts have been settled, to some share in interest in the firm's assets if they show a credit but who cannot at any time be said to be entitled to this or that particular asset. The danger of allowing him to bring suits to realize specific assets is very real. It may be that two persons would be collecting the assets of the firm and

of the decrees obtained by them in the Small Cause Court. Appellant goes on to allege that Vyraven Chetty is the son of Pallaneappa, the 4th defendant, and that Pallaneappa has failed to carry on the business of the partnership of S.O.S. or to take any steps to protect the property of the partnership, and is unwilling to do so, or to assist him in recovering and protecting the said property, because Vyraven Chetty is his son and because he, appellant, is taking other proceedings against Vyraven Chetty for breaches of trust as agent of the said firm. The share of Chellappa Chetty in the partnership is alleged to be Rs. 7,500 out of Rs. 10,000. Appellant asked that it be declared that the Rs. 4,460-6-0 in deposit is the property of the S.O.S. firm, that Muthia and Pallaneappa be declared not entitled to attach this sum in execution of their decrees, that it be declared that Vyraven never was a partner in the S.O.S. firm and that the Rs. 4,460-6-0 may either be ordered to be paid to the appellant or be kept in the custody of the Court until a partnership suit has been decided between him and the fourth defendant Pallaneappa or until he and Pallaneappa otherwise agree.

Vyraven Chetty and the fourth defendant Pallaneappa Chetty did not appear to contest the suit, nor have they appeared on this appeal. So the contest has been between appellant and the first and second defendants Muthia and Pallaneappa Chetty. Muthia died in the course of the litigation, and his legal representative, Ramasawmy, has taken his place. The suit has been dismissed by the learned Judge on the Original Side on the ground that it cannot be brought by appellant because he is not a partner in the S.O.S. firm, but only the legal representative of a deceased partner—that his proper course would be to bring a suit against Pallaneappa, the 4th defendant, for dissolution of partnership and an account, and to apply in that suit for a Receiver to be appointed to bring the present suit against Muthia and Ramasawmy. The learned Judge has relied strongly on the case of *Gobin Prasad* v. *Chandar Shekhar* (1). That suit was one in which a surviving partner sued a debtor of the firm without joining as plaintiffs the representatives of the deceased partner. It was held that such a suit would lie and that the English rule of law should

(1) (1887) I.L.R. 9 All., 486.

moneys in dispute have been made parties. He strongly relies on the case of *Aga Gulam Husain* v. *Sir Albert David Sassoon* (4). This was a case in which the legal representative of a deceased partner was allowed to sue to recover sums due to the partnership by a third party, making such third party and the surviving partner, who would not join as a plaintiff, defendants. Now, as was said by Farran, J., in the case of *Motilal Bechardass* v. *Ghellabhai Hariram* the Contract Act is not an Act of Procedure. It defines and declares rights and obligations arising out of contracts and obligations *quasi ex contractu*. The rules as to the procedure for enforcing these rights—the remedy in cases of breach of them—must be sought elsewhere; and in commenting on the Allahabad case the same learned Judge said: "Logical consistency has there yielded to long-established practice based on considerations of practical convenience. The inconvenience of altering the procedure is pointed out by Edge, C.J., in his judgment in the above cited case of *Gobin Prasad* v. *Chandra Shekhar*." In the last mentioned case Edge, C.J., said: "The legal representative in this case would not be entitled necessarily to a moiety of the amount recovered in the action: his share of the amount recovered would depend on a settlement of accounts on the realization of the partnership assets and it would in my judgment be highly inconvenient and possibly mischievous to allow him to interfere in the realization of the assets unless through the intervention of the Court by the appointment of a Receiver in cases in which such interference by the Court might be necessary." Lindley in his book on Partnership, 7th Edition, page 650, says: "Unless all the partners have agreed to the contrary when one of them dies, his executors have no right to become partners with the surviving partners, nor to interfere with the partnership business."

The present suit, if allowed, might not lead to any mischievous result; but that hardly seems to be the point. In the same class of suits it is expedient that only one rule of procedure should be followed, and the point is what should be the general rule. The English rule is based on grounds of common sense and expediency and it should in my judgment be followed. It is not as if the appellant has no remedy if the English rule be

(4) (1897) I.L.R. 21 Bom., 412.

1914.

OODAYAPPA CHETTY v. RAMASAWMY CHETTY.

the isolated precedent in *Aga Gulam Husain* v. *Sir Albert David Sassoon* (5), in which case it was held by a single Judge of the Bombay High Court sitting on the Original Side that the legal representatives of a deceased partner may sue to recover a partnership debt. That decision is directly opposed to the English rule which confines the executors to a suit against the survivors for an account and allows only the surviving partners to bring suits on behalf of the firm.

It is true that sub-rule (2) (*b*) of Order 30, Rule 4, of the Code of Civil Procedure allows the legal representatives to enforce any claim against the survivor or survivors. But this refers, I think, to a suit for an account as between the legal representatives and the survivors. The present suit goes much further. It is a suit for *inter alia* a declaration of the firm's right to certain money in deposit in the Court, this money having been attached by outside creditors of one Vyraven, an attorney of the firm whose status as a partner in the firm is disputed and who is a son of the surviving partner. It is thus not only a claim against the survivors but is also a claim on behalf of the firm against outsiders who were made defendants to the suit. Such a suit can in my opinion be brought only by the surviving partner, and if he refuses to bring it the only remedy of the legal representatives of the deceased partner lies in a suit against the surviving partner for winding up and for an account of the partnership, in pursuance of which suit the claim against the outsiders could be enforced by a Receiver appointed by the Court.

On these grounds I would dismiss the appeal with costs.

Before Mr. Justice Twomey.

KING-EMPEROR *v.* PO RA.

Criminal Revision No. 106B of 1914.

May 25th, 1914.

Punishment—Whipping—Section 376, Indian Penal Code.

A sentence of 15 stripes for the offence of rape is inadequate, even in the case of a juvenile offender.

The following reference under section 438 of the Code of Criminal Procedure was made to the Chief Court of Lower Burma by the Sessions Judge of Bassein Division :—

ORDER OF REFERENCE.

Nga Po Ba has been convicted by Maung Po Bye, Special Power Magistrate of Myaungmya, of rape and has been sentenced, as a juvenile offender, to a whipping of 15 stripes.

(5) (1897) I.L.R. 21 Bom., 412.

1914.

KING-EMPEROR v. PO BA.

finding as to the age of the accused is not justified by the evidence. But that finding is final and conclusive under section 5 of the Whipping Act (*see* the explanation to the section). The sentence of whipping has been carried out.

A whipping under section 5 of the Whipping Act is "in lieu of any other punishment," and it would not be lawful to add any other punishment to the punishment which has already been inflicted in this case.

The records are returned.

Before Sir Charles Fox, Chief Judge, and Sir Henry Hartnoll, P.J.

Civil 1st Appeal No. 130 of 1913.

December 22nd, 1914.

U WISAYA *v.* U ZAW TA.

May Oung—for appellant.
Po Han—for respondent.

Buddhist Law—Jurisdiction of Civil Courts in Lower Burma in Ecclesiastical matters.

There is not in Lower Burma any recognised Buddhist Ecclesiastical Authority, such as exists in Upper Burma.

Civil Courts in Lower Burma have jurisdiction to decide and should decide suits of a civil nature in which points of Ecclesiastical Law arise.

Fox, C.J.—The suit is one between two Burman Buddhist priests. The appellant sued the respondent to recover possession of certain lands of which he has been in possession for a considerable number of years and for possession of certain religious manuscripts. The lands appear to be lands that have been occupied by members of the Buddhist priesthood for a long period of years, and the points at issue between the parties appear to involve points of Burmese Buddhist Ecclesiastical Law. The suit has been dismissed on the ground that Civil Courts should abstain from deciding points which fall within the sphere of Ecclesiastical jurisdiction. In appeal it is urged that there are no Ecclesiastical Courts in Lower Burma and that the case is triable by a Civil Court. In Upper Burma it has been ruled that the Civil Courts are bound by the decisions of the Buddhist Ecclesiastical authorities in matters within their competence and that they should also abstain from deciding points which fall within the sphere of Ecclesiastical jurisdiction. It has been brought to our notice that Government has recognized the authority of the Taungwin *Sayadaw*,

1915.

TUN U
v.
Y.P.S.P.L.
PALANIAPPA
CHETTY.

ment on the ground that the land was his. His application failed: the order dismissing it was made on the 15th March 1912. He appealed to the Divisional Court against this order. The appeal was rejected on the 29th April 1912 on the ground that no appeal lay against the order. The plaintiff presented an application in this Court on the 28th May 1912 asking for revision of the order. This application was dismissed on the 3rd September 1913 on the ground that there was no power to revise the order. He filed a suit to have his title declared on the 9th September 1913. This has been dismissed as barred by limitation under Article 11 of the First Schedule of the Limitation Act.

For the plaintiff it was contended that he was entitled to have excluded the time taken in prosecuting the abortive appeal and application for revision.

Sub-section (1) of section 14 of the Act says that in computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceedings, whether in a Court of First Instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it.

The course which the plaintiff should have pursued is very clearly indicated in Rule 63 of Order XXI of the Civil Procedure Code, which says that where a claim or an objection is preferred to an attachment the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. Article 11 of the Limitation Act gives one year from the date of the order for the institution of such suit.

With such plain provisions staring him in the face it was sheer culpable negligence on the part of the advocate who was then acting for the plaintiff to incur the risk of the plaintiff losing all remedy by filing the appeal and the application for revision. If the plaintiff is bound by the acts of his advocate no case for exclusion of time under section 14 of the Act is

Before Sir Charles Fox, Chief Judge, and Sir Henry Hartnoll, P.J.

Civil 1st Appeal No. 12 of 1913.

February 8th, 1915.

EBRAHIM AHMED MEHTER *v.* S. ABDUL HUQ.

J. R. Das—for appellant.
N. N. Burjorjee—for respondent.

Limitation Act, IX of 1908—*First Schedule, Article* 85—" *Mutual, open and current account*" *defined.*

A mutual account means not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account.

If an account does not come within such a definition Article 85 of the 1st Division of the 1st Schedule of the Limitation Act has no application to a suit thereon.

Parkinson v. *Hanbury*, (1867) L.R. 2 H.L., 1, at pp. 11 & 19; *Narrandas Hemraj* v. *Vissandas Hemraj*, (1881) I.L.R. 6 Bom., 134; *Hirada Ba'sappa* v. *Gadigi Muddappa*, (1871) 6 Mad. H.C.R. 142; *Webber* v. *Tivill*, (1663) 2 Wms. Saund., 124 = 85 E.R., 843; referred to.

Phillips v. *Phillips*, (1852) 9 Hare, 471 = 68 E.R., 596; *Padwick* v. *Hurst*, (1854) 18 Beav., 575 = 52 E.R., 225; *Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa*, (1880) I.L.R. 5 Cal., 759; *Ram Pershad* v. *Harbans Singh*, (1907) 6 Cal. L.J., 158; followed.

Fox, C.J.—The suit from the decree in which this appeal is made was instituted by Mahomed Salay Naikwara on the 21st August 1909 against the appellant Ebrahim Ahmed Mehter, son and executor of Ahmed Hashim Ariff who died on the 2nd June 1907. The respondent is the assignee of the decree in the suit. The plaintiff claimed Rs. 74,914-6-10 as being due on an agency account between him and Ariff, or, in the alternative, he prayed for the account to be taken, and for a decree for the amount found owing thereon. The plaint stated that the cause of action arose on the 1st July 1907 when the agency ceased. This date is admittedly wrong because the agency ceased on the 2nd June 1907 when Ariff died. Sums were advanced to the defendant executor for funeral expenses of the deceased after his death, and the plaintiff collected some rents of houses which had belonged to him. This should have gone into a separate account against the executor, and were not properly included in the account of Ariff.

1915.

EBRAHIM AHMED MEHTER v. S. ABDUL HUQ.

On the taking of the account the defendant insisted on every item being proved strictly, and contended and still contends in appeal that no items should be allowed as proved which were not supported by vouchers. On the plaintiff's evidence before the Commissioner I am of opinion that his accounts even up to the end of 1906 were agreed to as being correct, and the defendant was not entitled to have items before that time vouched for, and consequently that this objection on appeal is of no force except as regards items between the 1st January and the 2nd June 1907. It does not seem necessary to enter into whether such last-mentioned items have been proved or not.

The substantial ground of appeal was that the claim was barred by limitation. The plaint was not framed on the basis of the suit being one "for the balance due on a mutual open and current account where there have been reciprocal demands between the parties," nor, until the further hearing of this appeal, was there anything before the Court to show which was the last item in the account which was admitted or proved. In going through the case after the first argument of the appeal I found that the account in English which had been referred to in the argument was on the face of it merely a synopsis, and that it could not be a current account or a translation of anything entered in the plaintiff's books. The advocate for the respondent was consequently asked to have sufficient of the plaintiff's books which had been before the Commissioner translated to show what he relied on as proving that there was a mutual open and current account, and the item he relied on as the last item admitted or proved. This has been done, and I am satisfied that the plaintiff kept regular books of account in the Guzerati language, and that he all along kept a current account of all transactions with or done on behalf of Ariff, and that such account was still open when Ariff died. An item of Rs. 32 entered in his cash book on the 22nd May 1907 as a debit against Ariff for sundry small repairs to his houses or an item of Rs. 504 credited to him on the 1st June 1907 is the last item previous to his death entered in the cash book and carried to his ledger account. Even if the item of Rs. 32 was not strictly proved, the item of Rs. 504 is not disputed, and consequently may be held to be admitted.

due on a mutual open and current account, where there have been reciprocal demands between the parties": the period of limitation was made three years from the time of the last item admitted or proved in the account.

The provision in the Act of 1859 seems to clearly point to cases in which two merchants or traders, who are all supposed to keep accounts, had accounts against one another. The Act of 1871 refers to one account only which must be that of the plaintiff who sues, but this does not necessarily exclude the view that the article applied only to cases in which each party has kept an account against the other. This Act extended a provision which had previously applied to accounts between merchants and traders to accounts between every description of persons, but the phraseology which has given rise to so much discussion was adopted. The source of the phraseology must, I think, have been the English law: the words "mutual" and "reciprocal demands" are those used by Mr. Justice Denison in a case referred to in Sergeant Williams' notes to the old case of *Webber* v. *Tivill* (4). The word "demand" appears to have been used in those days in the same sense as "claim" or "right to claim."

The fact that there were mutual accounts between the parties was one of the grounds on which Chancery Courts exercised their equitable jurisdiction in regard to decrees for accounts to be taken, and in connection with the exercise of this jurisdiction it had to be decided what mutual accounts were. In *Phillips* v. *Phillips* (5), Vice-Chancellor Sir G. J. Turner said: "I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account." In *Padwick* v. *Hurst* (6), a case not unlike the present case, the Master of the Rolls (Sir John Romilly) said: "Mutual accounts appear to me to be accurately defined by Sir George Turner in *Phillips* v. *Phillips*. They are not constituted by a person receiving moneys for and paying and lending moneys to his principal, or

(4) (1663) 2 Wms. Saund., 124=85 E.R., 843, at p. 846.
(5) (1852) 9 Hare, 471=68 E.R., 596.
(6) (1854) 18 Beav., 575=52 E.R., 225.

1915.

EBRAHIM AHMED MEHTER v. S. ABDUL HUQ.

anything for the plaintiff; it is not alleged that he transacted any business for him or that he paid any sums on his account. Ariff was not then in a position to say to the plaintiff, "I have an account against you to be set off against your account against me."

For these reasons I am of opinion that Article 85 of the 1st Division of the 1st Schedule to the Limitation Act does not apply to the account on which the plaintiff sued, and consequently that the appeal must be allowed on the first ground of appeal. In his written statement the defendant executor admits that he as executor of his father, or in other words that his father's estate was liable for Rs. 16,941-2-6, consequently the part of the decree dated the 15th July 1910 which ordered him to pay the plaintiff that amount should stand, but the rest of that decree and the decree of the 30th August 1912 should, in my opinion, be set aside.

The appellant asks for his costs of the suit. I do not think he should be allowed them: he did not pay the Rs. 16,941-2-6 which he admitted that his father's estate owed the plaintiff and the latter was forced to bring a suit. The large expense incurred in the suit was chiefly due to the line he took in requiring every item in the plaintiff's account to be strictly proved. I would make no order as to the costs of the suit.

The appellant is, I think, entitled to receive from the respondent his costs of the appeal to be calculated on the difference between Rs. 16,941-2-6 and Rs. 67,912-14-2.

Hartnoll, J.—I concur.

Before Mr. Justice Parlett.

Special Civil 1st Appeal No. 38 of 1914.

February 18th, 1915.

T. KATCHI ROWTHER *v.* K. NAINA MOHAMED.

Karaka—for appellant.
A. C. Dhar—for respondent.

Promissory Note payable otherwise than on demand—Stamp Act, Schedule I, Articles 49 and 13.

A purchased a boat from B for Rs. 3,000. He paid 300 cash and executed a promissory note at Rs. 1-4-0 per cent. per month interest for Rs. 2,700. At the same time he executed an agreement to pay the Rs. 2,700 in fixed instalments on fixed dates, and on default to forfeit all previous payments and hand over the boat. This was stamped with a one-rupee stamp.

1915.

T. KATCHI ROWTHER v. K. NAINA MOHAMED.

on demand, and the insufficiency could not be remedied under section 35 of the Act. But in my opinion it is not a promissory note at all. Clause 22 of section 2 of the Stamp Act shows what is meant by a promissory note which is not payable on demand and the document in question is not of that nature. In my opinion it is an agreement and as such is sufficiently stamped. Its meaning and effect are I think plain. Defendant undertakes to make certain specified payments towards the sum due under the promissory note and agrees that his failure to do so shall render him liable both to forfeit any payments he may already have made and to return the boat. If the stipulated payments were made the plaintiff would doubtless forbear to enforce his rights under the promissory note, but upon default in payment he was, I consider, entitled to do so, and this he has done in this case, which is brought on the promissory note. The defendant alleged certain payments which the plaintiff did not give credit for, and he must now have an opportunity to prove them. The decree is reversed, and the suit will be readmitted and decided on its merits, costs to follow the result. A certificate for refund of court-fees in this appeal will issue under section 13 of the Court Fees Act.

Before Mr. Justice Twomey.

Civil 2nd Appeal No. 78 *of* 1912.

February 22nd, 1915.

1. SAN NYEIN, 2. PO MYIT, 3. PO TIN *v.* MA KYAW.

Xavier—for appellant.
R. N. Burjorjee—for respondent.

Award by Arbitrators, Effect of—Section 21, *Specific Relief Act.*

Section 21, Specific Relief Act, refers only to inchoate and abortive arbitration proceedings. But where there is a complete and final award it is equivalent to a final judgment binding on the parties, and bars a Civil Suit relating to the matters decided by the arbitrators.

Bhajahari Saha Banikya v. *Behary Lal Basak,* (1906) I.L.R. 33 Cal., 881; *Laldas Jibhai* v. *Bai Lala,* (1908) 11 Bom. L.R., 20; *Krishna Panda* v. *Balaram Panda,* (1896) I.L.R. 19 Mad., 290; followed.

On the first issue referred by this Court for trial the Divisional Court has held that the plaintiffs-appellants are not deprived of their right of suit by the provisions of the proviso to section 21, Specific Relief Act. I concur in the finding that section 21 is not a bar to the suit but on grounds differing from those stated by the Divisional Judge. He considered that the

1915.

SAN NYEIN v. MA KYAW.

was duly submitted to arbitration and there was a definite and valid award that Ma Kyaw, the defendant-respondent, should retain the land but that she should pay a sum of Rs. 500 to the original owners, the plaintiffs-appellants. On Ma Kyaw's failure to carry out the award the plaintiffs-appellants' remedy was not a suit on their original mortgage but an application to the Court under clause 20 of the 2nd Schedule of the Code of Civil Procedure to have the award filed in Court, and to have a decree passed accordingly.

I think there can be no doubt whatever that the jurisdiction of the Court in this suit was ousted by the award, and it is a matter for regret that the fundamental character of this objection to the suit was not perceived at an earlier stage of the litigation. The appeal is dismissed with costs.

Before Sir Charles Fox, Chief Judge, and Sir Henry Hartnoll, P.J.

Civil 1st Appeal No. 83 of 1913

February 22nd, 1915.

1. ARUNACHELLAM CHETTY, 2. MUTHUVEERAPPA CHETTY, 3. RAMASAWMY CHETTY, CARRYING ON BUSINESS UNDER THE FIRM AND STYLE OF S.M.A. BY THEIR DULY CONSTITUTED ATTORNEY PALANIAPPA CHETTY *v.* 1. MEENATCHI ARCHI, 2. LUTCHUMANAN CHETTY (MINOR BY HIS MOTHER, THE GUARDIAN *ad litem* MEENATCHI ARCHI), 3. RAMEN CHETTY, 4. ANNAMALAI CHETTY (MINOR BY HIS GUARDIAN *ad litem* RAMEN CHETTY), 5. SOLIAPPA CHETTY, 6. ANNAMALAI CHETTY, 7. ALLAGAPPA CHETTY, 8. ARUNACHELLAM CHETTY, CARRYING ON BUSINESS UNDER THE FIRM AND STYLE OF M.L.R.M.A. BY THEIR DULY CONSTITUTED ATTORNEY SOLIAPPA CHETTY, 9. THE OFFICIAL ASSIGNEE.

Coltman—for appellant.
B. Lentaigne—for 2nd respondent.

Limitation Act, IX of 1908, *section* 19—*Acknowledgment by a receiver of a partnership property.*

A receiver appointed in a suit for dissolution of partnership is not the agent of all the partners. Whether he can give an acknowledgment which will create a fresh period of limitation against the partnership under section 19, Limitation Act, will depend entirely upon the terms in which he is appointed.

firm in Rangoon. The plaintiff's agent asked him to give an acknowledgment of the debt, but Soliappa refused to do so because a receiver had been appointed, and the receiver would give one as he had given in other cases. Both went to the receiver, who said he had no money in hand but he would renew the loan. He then gave the acknowledgment in Soliappa's presence, the latter agreeing to this course being adopted.

For the plaintiffs it is contended that in signing the acknowledgment the receiver did so as a duly authorised agent of all the partners of the M.L.R.M.A. firm in virtue of his position as receiver of its assets, or at any rate as authorised by its managing partner Soliappa, and that in view of how it came to be given the partners of the M.L.R.M.A. firm are or Soliappa is estopped from repudiating the acknowledgment.

I agree with the learned Judge that no question of estoppel arises in the case. The plaintiff's agent was not dealing direct with partners of the firm. It lay upon him to ascertain the extent of the authority of the person he dealt with to bind the partners in the firm. Soliappa was no longer the managing partner, and had refused to himself give any acknowledgment. This should have conveyed to the plaintiff's agent that Soliappa did not profess to have any authority at the time to bind his fellow partners.

Upon the question whether the receiver was, as such, an agent of the partners duly authorised to sign an acknowledgment of a debt due by them, *Chinnery* v. *Evans* (1) has been relied on. It was a case in which a receiver of mortgaged property had been appointed under an Irish Act, and the question was whether payments of interest he had made kept alive the mortgage over several properties, although in fact he had been in possession of only one of them. It was held that in making the payments he acted as agent of the mortgagor, and the mortgage debt over all the estates was not barred by limitation. From the report of the arguments at page 129 of the report it would appear that the wording of the Statute under which the receiver was appointed treated a receiver under it as the agent of all the parties concerned. The decision underwent some examination and criticism in *Lewin* v. *Wilson* (2) in the Privy Council. It

(1) (1864) 11 H.L.C., 115. (2) (1886) L.R. 11 A.C., 639.

the acknowledgment. Consequently the acknowledgment did not afford a fresh start for limitation and the suit was barred.

I would dismiss the appeal with costs against the defendant who has appeared on the appeal.

Hartnoll, J.—I concur.

Before Sir Charles Fox, Chief Judge, and Sir Henry Hartnoll, P.J.

Civil 1st Appeal No. 165 of 1914.

March 4th, 1915.

THE COLLECTOR OF RAṄGOON *v.* CHANDRAMA.

McDonnell—for appellant.

N. C. Sen—for respondent.

Land Acquisition Act—Appeals.

There is no appeal from an award under Part III of the Land Acquisition Act made by a Judge of the Chief Court exercising original jurisdiction. It is not a decree or order, nor does section 54, Land Acquisition Act, give a right of appeal in such a case.

The Rangoon Botataung Company, Limited v. *The Collector of Rangoon*, 6 L.B.R., 150, followed.

This is an appeal from an award made under Part III of the Land Acquisition Act, 1894, by a Judge exercising the original civil jurisdiction of this Court.

Like appeals have hitherto been accepted and dealt with in this Court, but the decision of their Lordships of the Privy Council in *The Rangoon Botataung Company, Limited* v. *The Collector of Rangoon* (1) necessitates consideration whether any appeal lies in such a case. Their Lordships refer to an award made under Part III of the Land Acquisition Act as "an award made in an arbitration as to the value of land taken for public purposes," and refer to the two Judges who dealt with the case n this Court as arbitrators. Their words imply that an award under the Act is not a decree. Even if an award were an order an appeal might have lain under section 109 of the Code.

The award being neither a decree nor an order, section 14 of the Lower Burma Courts Act which provides for appeals from decrees and orders made by a single Judge exercising the original civil jurisdiction of the Court does not apply, and an appeal by virtue of that section is not admissible. Section 54 of the Land Acquisition Act enacts that subject to the provi-

(1) 6 L.B.R., 150.

1915.

BAMSILALL ABEYCHAND v. MOHAMED EBRAHIM MULLA.

He was not a transferee of any interest in immovable property, and the cases referred to by the learned Judge did not apply. The law applicable was that stated in *Madhubmoney Dassee* v. *Nundo Lall Gupta* (1).

The decree against the 3rd defendant is set aside and the suit is dismissed with costs as against him only.

The plaintiff must pay the 3rd defendant's costs of this application—two gold mohurs allowed as advocate's fee.

Before Sir Charles Fox, Chief Judge.

Civil 2nd Appeal No. 145 of 1913.

1. MAUNG TE, 2. MA OH *v.* MAUNG ON.

April 29th, 1915.

Harvey—for appellants.
Halkar—for respondent.

Execution—Sale of land—Right to eject judgment-debtor.

A judgment-debtor even after his land is sold in execution is entitled to remain in possession of it till removed by due process of law in execution of the decree or until successfully sued by some one who can show that he has a good title.

The appellants, although they are judgment-debtors whose land was sold in execution of a decree against them, are entitled to remain in possession of it until removed by due process of law in execution of the decree, or until some one who can show that he has a good title sues them and gets a decree.

The plaintiff claimed title by reason of a purchase from L. A. R. Subromonian Chetty. In execution of the decree against the appellants the land was sold to Kali Mutu.

There is nothing to show that Kali Mutu transferred the land to L. A. R. Subromonian Chetty. The plaintiff bought from a person who had no title, and consequently he acquired no right to the land by his purchase, and no right to have the defendants ejected from the land. The appeal is allowed. The decrees of both the Lower Courts are set aside, and the suit is dismissed with costs. The plaintiff must pay the defendants' costs in the District Court and in this Court.

(1) (1899) I.L.R. 26 Cal., 338.

The *dah* had a blade 16½ inches long and the weight of the *dah* was 60 tolas. The medical officer says that with such a weapon "moderate" force would be required to cause the wound.

The case is governed by sections 87 and 90, Indian Penal Code. The deceased gave his consent under a misconception of fact, erroneously believing that he was proof against *dah* cuts. But it cannot be said that the appellant knew of this misconception or had reason to believe that the deceased was mistaken in thinking himself invulnerable. He is a youth of 19 and the probability is that he really believed in the pretensions of the deceased, a much older man than himself. Burmese cultivators are notoriously credulous and seeing that Pan Zôn was willing to put his pretensions to the proof on his own person, Shwe Kin probably expected the edge of the *dah* to be chipped or turned aside.

The appellant certainly had no intention of causing death or grievous hurt, and I think it is highly doubtful whether he can properly be said to have known that his act was likely to cause any such result. In the first place he did not use great force; secondly, he had Pan Zôn's assurance that he was invulnerable and the appellant was too ignorant to see the absurdity of it; lastly, he inflicted the cut on the part of the body specially presented for the purpose by the deceased, and this moreover was a part not ordinarily regarded as a vital part.

I am of opinion that the case falls within the exception set forth in section 87, Indian Penal Code, which deals with acts done by consent which are not intended and not known to be likely to cause death or grievous hurt.

The conviction and sentence are set aside, and the appellant is acquitted and will be released unless he is liable to be detained on any other charge.

executed there was deposited with the Bank a mortgage deed executed by him in favour of the A.A. firm as collateral security. The principal sum secured by the mortgage deed was Rs. 65,000. Subramonian and Somasundrum were alleged to be partners. Somasundrum contested the suit by stating that he was not a partner in the A.S.P.L.S. firm. The learned Judge on the Original Side found that it was not proved that Somasundrum was a partner and so the suit was dismissed against him. The suit was also dismissed against Subramonian as it was found that the power which he gave his agent Kadiresan did not authorize him to sign as surety for another firm, that he did sign the promissory note in question in such capacity, that no part of the money borrowed on the promissory note was taken either by Kadiresan or Subramonian and that the Bank through their Shroff, Pasupathi Iyer, had notice that Kadiresan was signing the name of Subramonian simply as surety for a loan advanced solely for the benefit of the A.A. firm. As regards the other defendants the Bank was given the relief asked for. The learned Judge gave Subramonian and Somasundrum separate costs as regards counsel fees. This appeal has been laid on the ground that the suit was wrongly dismissed against Subramonian and that the learned Judge erred in awarding Somasundrum his full costs. They still maintain that he is a partner in the A.S.P.L.S. firm but do not desire to appeal against the finding that he was not. It must therefore be taken for the purpose of this appeal that the firm of A.S.P.L.S. consisted of Subramonian only. Subramonian Chetty gave a power of attorney dated the 10th June 1903 to Somasundrum to transact his affairs. The power authorized Somasundrum to appoint a substitute in his place, such substitute to have the same powers as he had. In pursuance of such authority Somasundrum appointed one Kadiresan as his substitute on the 2nd November 1905. It is admitted that Kadiresan while acting in Somasundrum's place had the same powers as he had. The plaintiff Bank saw and noted the power of attorney given by Subramonian to Somasundrum and the deed of appointment by Somasundrum in favour of Kadiresan on the 6th January 1906. The Bank therefore must be held to have knowledge of both deeds.

goods, effects, and things belonging to Subramonian, etc., and to give, sign, and execute receipts, etc., to represent Subramonian in Court, to act for him in actions to compound and compromise for the payment of debts, etc., to enter on immovable properties in which Subramonian may be interested, etc., to pay rents and taxes, etc., to let lands in which he may be interested, to recover rent, etc., to transfer and assign sales and mortgages in which he may be interested, to sign all deeds of sale, etc., and appear before the Sub-Registrar, and to deal with all moneys received by him under and by virtue of these presents. Then follow the words: "To sign my name to and make and execute on my behalf all cheques, contracts, agreements, deeds, transfers, assignments and instruments whatsoever requisite or necessary for *all or any of the purposes aforesaid* and generally in and about the said premises to execute and do every deed and thing requisite and necessary *for all or any of the purposes aforesaid* as fully and effectually to all intents and purposes aforesaid as I myself could do if personally present." The power appears to me to be one constituting an agent to conduct Subramonian's business of Banker, Money-lender and General Trader, and although taken by itself the clause relied on by the Bank is in the widest possible terms, I am of opinion that it should not be given the widest possible meaning and that it should only be held to authorize the making and signing of promissory notes, etc., which would be made and signed in the ordinary course of transacting Subramonian's business, and that it should not be held to authorize any transaction outside the scope of such business. Construing the clause in this manner, is there any evidence on the record to show that it was an ordinary part of Subramonian's business to sign promissory notes merely for the accommodation of another firm? There is nothing from which such an inference can be drawn. On the other hand the evidence goes to show that, when two Chetty firms sign joint and several promissory notes, they are both jointly interested in the moneys borrowed. I would therefore hold that it is not proved that the power authorized Kadiresan to sign his principal's name merely for the accommodation of another, and so that this ground of appeal fails.

appellant Bank was justified in advancing to the A.S.P.L.S. and A.A. firms money on a joint and several promissory note signed by their agents and that the A.S.P.L.S. firm would be liable for the money so borrowed if the Bank did not know that their agent signed merely as surety; this was the position taken by the counsel of the A.S.P.L.S. firm at the hearing of the appeal, when it was again admitted that the agent of the firm had power to borrow jointly with another firm. It may be said that when two persons jointly and severally borrow money on a promissory note and each take a share in the sum so borrowed each stands security for the other for the amount taken by him. The A.S.P.L.S. firm might have contested its liability to the Bank of such a ground but it did not do so. On the contrary it admitted its liability in such a case. It therefore seems to me that such an aspect of the case should not be considered. Taking the admission with the extract from the judgment I have just quoted it seems to me that the position is that *primâ facie* the Bank was justified in advancing the money as it did since it is allowed that the agent of the A.S.P.L.S. firm could borrow jointly with another firm and that is what he purported to do when he signed the promissory note of the 12th August 1907. If the A.S.P.L.S. firm desires to escape liability, it is for them to show that their agent signed merely as a surety to the knowledge of the Bank. The case seems to fall within both section 102 and section 103 of the Evidence Act. Now, has Subramonian proved that the Bank had such notice? He calls Latchmanan Chetty to prove that the Shroff of the Bank, Pasupathi Iyer, knew that the money was wanted by the A.A. firm only—that in fact it was Pasupathi Iyer himself who told Latchmanan to get another man to stand as surety. He also calls Subbia, who was a clerk in the employ of the A.S.P.L.S. firm from 1905 to 1908, to produce certain books of the firm and prove that the firm did not get any of the Rs. 60,000. He also relies on the fact that the mortgage deposited as collateral security when the note was signed was one in favour of the A.A. firm and had nothing to do with the firm of A.S.P.L.S. The sum secured by the mortgage was Rs. 65,000. In the face of the promissory note itself the

in other ways. He said: "I don't remember if Rs. 30,000 out of the sum of Rs. 60,000 was withheld by the Bank and taken towards a debt due by me already." So his recollection of the details of the transaction was not very vivid. If he could not recollect that Rs. 30,000 of the consideration was on account of the renewal of an old debt, how does he recollect that Kadiresan signed as a surety? He went on to say: "Kadiresan Chetty and I had jointly borrowed Rs. 30,000 before that. I took that money. It was money got in cash. I have borrowed moneys in the National Bank of India, Chartered Bank of India, and Bank of Burma. I might have borrowed jointly from these Banks with Kadiresan Chetty. In some cases he would have stood surety for me and in some cases we might both have taken the money. *In the Bank of Rangoon also we have borrowed money for both of us together. I do not remember if we both borrowed Rs. 30,000 from the Bank for both of us.*" In re-examination he said: "I paid back the sum of Rs. 30,000 borrowed by me with the joint signature of Kadiresan from the Bank." Now, Churchward, the manager, says (and there is no reason to disbelieve him) that except for the two loans of the 8th July and 12th August he has never given any other loans to the two firms of A.A. and A.S.P.L.S. together and that he has never received any other promissory notes from them together. When therefore Latchmanan Chetty allowed that in the Bank of Rangoon he and Kadiresan had borrowed money for both of them together, what loan was he referring to? or was the statement a loose and random one? If it was a loose and random one the fact that he should make it goes to impair his credibility. If it was a true statement, it must refer to either the loan on the 8th July or that of the 12th August. His evidence as regards the loan of Rs. 30,000 is unsatisfactory. He first said he took the money, then that he did not remember if they both borrowed Rs. 30,000 from the Bank for both of them and then in re-examination said that he paid back the sum of Rs. 30,000 borrowed by him with the joint signature of Kadiresan from the Bank. The learned Judge on the Original Side has remarked that as regards Latchmanan's interest it is more in favour of the Bank's case in that if his accounts were passed on the footing that the A.A. firm got only a share of the loan

period from November 1905 to November 1907, the ledger containing the account of the Bank of Rangoon, (2) a day book beginning from the 14th March 1907 up to the time he gave his evidence, (3) two current account books. He says that between 1905 and 1907 there is no entry of a debt on the joint signatures of A.A. and A.S.P.L.S., and it is clear that there is no note of such a transaction in the books produced. The point is whether the books can be relied on as correct and trustworthy for the entries made in them in Kadiresan's time. It must be remembered that the A.S.P.L.S. firm allows that Kadiresan was a bad servant to them and did not conduct their business properly. Subbia says that he was prosecuted for a defalcation in Rangoon. A study of Subbia's evidence leads me to note as follows. The two current accounts give ledger accounts with the different persons with whom A.S.P.L.S. had dealings. Exhibit P contains accounts with two people other than Chetty firms. No such ledger account was produced in regard to transactions with the A.A. firm, though looking at the evidence of joint transactions between the two firms it would be expected that one would be in existence. If separate ledger accounts were kept for dealings with others, why was not one kept for dealings with the A.A. firm? Towards the commencement of his cross-examination Subbia said that the accounts of his firm with the A.A. firm were not in the ledger he produced but in another ledger which he had at his house and that they had with the A.A. firm the current account ever since his firm started up to the time their firm got into difficulties in January 1908. The next day he brought two current account books, and at first said that he would have to find out where A.A.'s account was and that he had not looked into it at home. He then said that the account was not in the two books. His explanation as to the variance between his evidence does not seem to me to be satisfactory. He distinctly said at first there was a separate current account with the firm of A.A. As there were such for transactions with others, why was there not one with A.A.? The impression left on my mind is that there may be such an one with A.A. and that it may have been suppressed.

Then looking at the ledger account produced (p. 173) there is a note under date the 7th October 1907 of a joint transaction

Subbia does not satisfactorily explain the Rs. 431-8-0 in Exhibit F-4, the Rs. 438-4-0 in Exhibit H-2, and the Rs. 451-3-6 in Exhibit K-2. When Subbia comes to give evidence as to transactions between his and A.A. firms he says: "I cannot say what the state of account was between A.A. firm and our firm on 8th July 1907. I shall have to work it out. I cannot say whether a balance of Rs. 50,000 might have been owing from one firm to another. 1907 August 12th. I cannot say what was the state of accounts between A.A. firm and our firm. I cannot say whether a balance of Rs. 60,000 might have been owing from the one to the other.....Though I conduct the case now on behalf of the defendant I have not looked into the state of affairs in August 1907 for the purposes of the suit. As we have no current account between the two firms I shall have to examine all books of Bank loan transactions to find that out. Bank loan transactions if carried into another book then that must be looked into. I will have to work out from Exhibit I. I think the account has not been carried into any other book. I think their account must appear only in the book." He is then taken through entries in the ledger beginning from the 8th July 1907, the date of the first promissory note. It would have been more satisfactory if Subbia had been able to give more definite evidence about the state of the account between the two firms on 8th July 1907. As regards the transactions of the 8th July and 12th August 1907 it is impossible to say from the entries as they stand that the A.S.P.L.S. firm benefitted from the loans taken from the Bank of Rangoon on that day. Rs. 30,000 were taken from the A.A. firm on the 12th August, Rs. 28,000 being repaid on the 13th August; but this does not show that both firms benefitted equally from the extra Rs. 30,000 taken on that day.

If the books can be believed and trusted, they may be said to show that the A.S.P.L.S. firm did not jointly borrow the Rs. 60,000 from the Bank of Rangoon; but in the face of my analysis of Subbia's evidence can they be trusted? There is the fact of Kadiresan's character, the non-explanation of an entry of a loan apparently taken on the 27th August 1907 till the 7th October, the giving of a cheque for Rs. 11,000 to the C.V.C.T. as part of consideration for a loan which according

note for Rs. 60,000, and on the evidence produced I am unable to find that they have proved that the Bank had such notice. In the first place it does not seem to me that they have proved that they were not interested in either of the sums of Rs. 30,000, and in the second, even assuming that they were not interested in either of such sums, and that it is a fact that Kadiresan signed both notes merely as a surety, I am unable to hold that on the unsatisfactory evidence of Lutchmanan Chetty it is proved that Pasupathi Iyer knew or had notice that Kadiresan signed merely as a surety. If he did sign merely as a surety, it may possibly have been that he did do so without anything being said about it to Pasupathi Iyer. All parties may have then been of opinion that the power gave Kadiresan authority to sign his principal's name as surety, and if so there would be no special reason for any talk as to the capacity in which Kadiresan signed, and in considering whether this is what actually took place the credibility of that part of Latchmanan's evidence, in which he says that Kadiresan told him that his principal had not permitted him to sign and borrow for another and that he had given express instructions not to borrow for another, and that he had signed to oblige him, comes into question. Is such a story likely to be true?

In this view it is unnecessary to discuss whether, if Pasupathi Iyer knew that Kadiresan signed merely as a surety, such knowledge would be notice to, and would bind, the Bank.

One further point remains and that is whether Subramonian and Somasundrum should have been each allowed counsel fees. I would not interfere with the order of the learned Judge on the point as Somasundrum had to meet quite a different case to the case Subramonian had to meet.

In the result I would vary the decree passed by the learned Judge on the Original Side by ordering that the names of the legal representatives of Subramonian now deceased, namely, Somasundrum Chetty and Shunmugan Chetty, be added to that of Ramasawmy Chetty as being liable to the Bank in the sum of Rs. 78,744-10-6 for principal and interest and that the same decree be passed against them all three as was

this power was given, namely the business of a Chetty money-lender, necessarily involves the drawing of promissory notes as surety for strangers. It may be that Chetties do frequently sign joint promissory notes as sureties, but that does not make it a necessary incident of a Chetty's business. It is plain that a money-lending business can be effectually carried on without entering into such accommodation transactions. The only kind of borrowing expressly authorized by this power is that of borrowing money from Banks, etc., with or without pledge of securities for moneys advanced to various persons.

The plaintiff-appellant Bank, however, pleaded that the respondent firm is liable for its agent's act because the agent did not ostensibly sign merely as a surety and because to all appearances it was a joint transaction in which each signatory was partaking as principal (*i.e., principal* as distinguished from *surety*). The learned Judge on the Original Side placed on the plaintiff-appellant Bank the burden of showing that the respondent firm was *substantially interested* in the transaction, that is to say, of proving that the agent Kadiresan did not sign merely as a surety for the co-signatory. And the learned Judge found as a matter of evidence that the respondent firm was not interested at all and that Kadiresan signed merely as a surety. We are asked to hold that the learned Judge erred in thus laying the burden of proof on the plaintiff Bank and that the respondent firm should have been required to show that the Bank had notice of the alleged fact that Kadiresan was signing merely as a surety.

My learned colleague has accepted this contention and has found after a careful examination of the evidence that the respondent firm failed to discharge the burden of proving knowledge on the part of the Bank that Kadiresan was signing the promissory note merely as a surety for the firm A.A.

But it seems to me that any detailed examination of the evidence is unnecessary in view of the admissions made before the learned Judge on the Original Side and the admissions made before us at the hearing of the appeal.

It was admitted on behalf of the respondents on the Original Side that if the Bank did not know that the agent

1914.

THE BANK OF RANGOON, LIMITED v. SOMA-SUNDRUM CHETTY.

signed merely as a surety for the A.A. firm. For, a power to sign accommodation notes may well be inferred from a power to sign promissory notes jointly with others.

For these reasons, I concur in the orders which my learned colleague proposes to pass varying the decree of the Original Side.

Before Mr. Justice Twomey.

LAL MAHOMED *v.* 1. MRA THA AUNG, 2. HLA WIN PYU.

Civil 2nd Appeal No. 236 of 1913.

March 4th, 1915.

J. N. Lentaigne—for appellant.
Agabeg—for respondents.

Fraud—must be pleaded—Gifts made orally—Transfer of Property Act.

A plea of fraud will not be heard unless it is expressly and specifically advanced in the pleadings.

Gifts made before the introduction of the Transfer of Property Act on 1st January 1905 are not invalidated merely by the absence of a registered instrument.

Maung At Gyi v. *Ma U Me and* 1, 2 U.B.R. (1892-96), 400, referred to.

The plaintiff-appellant Lal Mahomed sued for possession of a paddy land holding measuring 56·55 acres sold to him for Rs. 3,000 in 1911 by a registered conveyance executed by Mi Shwe Ban We, the owner, who died in December 1911. The defendants-respondents are Mra Tha Aung and Mi Hla Win Pru, husband and wife, who are the son-in-law and daughter respectively of the vendor Mi Shwe Ban We, and who are in possession of the holding. The plaintiff sued also for a year's rent of the land alleging that the defendants were his tenants.

The defence was that at the time of the conveyance the vendor had no saleable interest in the land as she had previously in 1904 made over the northern moiety of it by way of gift to her daughter, the 2nd defendant, and in 1906 sold the remaining (southern) moiety to her son-in-law Mra Tha Aung for Rs. 360.

The plaintiff has been unsuccessful in both the Lower Courts. Both Courts decided that the deceased Mi Shwe Ban We had no saleable interest in the land, having already disposed of it as pleaded in the written statement. But they went out

the defendants I think it should be held to be unproved, and the ordinary presumption in favour of fair dealing would prevail.

Turning now to the substantive defence I see no reason to dissent from the finding of the Lower Courts that the gift of the northern part of the holding, 25·60 acres, to the 2nd defendant was proved. The land was made over to the defendants and a report was duly made to the Revenue Surveyor by the donor, Mi Shwe Ban We. It is urged that she could under the *Dhammathats* revoke the gift and that she must be held to have exercised this power by actually selling it seven years later to the plaintiff-respondent. I am not prepared to hold that the gift in this case is governed by the Dhammathats at all. As in the Upper Burma case of *Maung At Gyi* v. *Ma U Me and* 1 (1) the mother treated the property as her own absolutely with an absolute power of disposal, and the daughter claims it as her own by virtue of an exercise of that power in her favour. No question of inheritance or succession is involved. Nor has it been proved in this case any more than in the Upper Burma case that when a Burmese Buddhist father (or mother) makes a gift to a child it is an implied incident that the gift is revocable at the parents' will.

Moreover, even if the donor had the power of revocation an exercise of the power could not be inferred from the mere fact that the donor conveyed the property to a stranger; an express act of revocation would at least be necessary.

Mr. Lentaigne argues that the gift is invalid as it was not effected by a registered instrument under section 25, Contract Act. No instrument was necessary before the introduction of the Transfer of Property Act from 1st January 1905. Explanation 1 to section 25, Contract Act, provides that nothing in the section shall effect the validity, as between donor and donee, of any gift actually made. The same rule applies as between the donee and persons claiming through the donor (like the plaintiff-appellant in this case). I think it is clear that the conveyance to the plaintiff-appellant is of no effect as regards the area 25·60 acres given to the 2nd defendant in 1904.

(1) 2 U.B.R. (1892-96), 400.

1915.

LAL MAHOMED v. MRA THA AUNG.

The decrees of the Lower Courts are set aside and a decree will be granted in favour of the plaintiff-appellant for possession of the area claimed by him *minus* the area 25·60 acres given to Mi Hla Win Pru in 1904. The District Court should cause the area 25·60 acres to be demarcated in a compact block adjoining Mra Tha Aung's other land on the north.

The claim to rent is dismissed.

Looking to the excessive nature of the plaintiff-appellant's claim I direct that the parties shall pay their own costs throughout.

Before Sir Henry Hartnoll, P.J.

Special Civil 2nd Appeal No. 314 *of* 1913.

March 22nd, 1915.

KYI HLAING *v.* 1. MA HTU, 2. KYA MAI, 3. MA SEIN, 4. KYE HMÔN, 5. NYEIN HMYIN.

Po Han—for appellant.

R. N. Burjorjee—for respondents.

Buddhist Law—Right of orasa son to claim his one-fourth share.

The *orasa* son is entitled to claim his one-fourth share from his mother even if she does not marry again.

Maung Seik Kaung v. *Maung Po Nyein*, 1 L.B.R., 23; *Maung San Dwa* v. *Ma Min Tha*, 2 Chan Toon's L.C., 207—referred to.

Maung Kyi Hlaing is suing for a quarter share of the estate of his parents Maung Shwe Hla and Ma Htu. His cause of action is given him by the death of his father. He sues his mother and his sisters. It is not denied that he is the *orasa* son; but it is claimed that as his mother Ma Htu has not married again he cannot obtain any share of the estate. The Divisional Judge has acceded to such a claim and dismissed the suit. His judgment is largely based on the texts given in sections 36 and 37 of the *Kinwun Mingyi's* Digest as Maung Kyi Hlaing is living separately from his mother. The texts comprised in those sections are meagre. No text from the *Manukye* is amongst them. They deal with the case of a child who has been given property prior to the death of the father. In my opinion the general rule is that given in the texts collected under section 30 of the same Digest. Such texts are generally in accordance with the rule given in the fifth section of the 10th Book of the *Manukye*. This section is said to state the law even when the mother does not marry

1915.

PAN NYUN v. HLA SEIN.

Nga Pan U v. *Mi Kyu and others*, (1874) S.J.L.B., 30; *Maung Shwe Thwè* v. *Ma Saing*, 2 U.B.R. (1897-1901), 59; *Mra Do Aung* v. *Shwe U*, (1874) S.J.L.B., 22; *Maung At Gyi* v. *Ma U Me and* 1, 2 U.B.R. (1892-96), 400; *Maung Ni* v. *Maung Po Min and* 1, (1875) S.J.L.B., 44—referred to.

Twomey, J.—The plaintiff, Ma Hla Sein, sued for the recovery of a piece of paddy land measuring 27·96 acres which had been inherited by her from her late husband Maung Tha Ku, and which had been given to him by his father Maung Paw Tin at Tha Ku's *shinbyu* ceremony in the year 1902. Tha Ku died in 1912, four months before the death of his father Paw Tin. The defendants were (1) Tha Ku's step-mother Ma Lôn Gale, who as Paw Tin's widow was in possession of the land, (2) a Chetty to whom the land was mortgaged in 1909, and (3) and (4) two other children of Paw Tin. Possession of the land was admittedly never given to Tha Ku, but about a year after the *shinbyu* ceremony Tha Ku's name was substituted as holder of the land in the Revenue maps and registers, and from 1903-04 to 1909-10 Tha Ku's name alone appeared. In 1910-11, for some reason which is not explained, the name of the father Paw Tin was restored as holding the land jointly with Tha Ku. There is nothing in the Revenue register to show that the land was given to Tha Ku as a *shinbyu* gift. It is stated in an entry in the remarks column of the register for 1903-04 that Tha Ku's name was substituted as he had "acquired by way of inheritance."

The District Court in which the suit was tried found that the plaintiff failed to prove her allegation that there was such a public gift of the land at the *shinbyu* ceremony as under the Buddhist Law would render the delivery of possession unnecessary for the validity of the gift. On appeal the Divisional Court, while admitting that the direct evidence of a public gift was not strong, decided in the plaintiff's favour because he held that the direct evidence was strongly corroborated by certain circumstantial evidence. A decree was therefore granted to the plaintiff.

The defendants appealed to the Court under section 30 of the Lower Burma Courts Act. The 1st defendant, Ma Lôn Gale, has since died and her legal representatives have been substituted. Questions as to the validity of *shinbyu* gifts are

1915.

PAN NYUN v. HLA SEIN.

enforced. This view is supported by the extracts from other *Dhammathats* given in section 124 of the Digest prepared by the Honourable U Gaung (ex-*Kinwun Mingyi* in the Courts of the Burmese Kings Mindôn and Thèbaw). *Rajabala* says distinctly that "the donees shall not claim restitution on the death of the parents if the property has been expended by them." The *Dhamma* text is equally clear: "The parents are at liberty to utilize animate and inanimate property given to their son at the time of the latter's entering the Order either as novice or as a monk. But after the death of the parents, the coheirs of the donee shall not obtain any portion left unexpended by the parents" (that is to say, the donee will get such portion and such portion only for himself). One text, the *Dayajja*, nodoubt says that the donors "shall not revoke" such a gift, but the effect of this prohibition is nugatory as it is clear from the other texts (including the *Manukye* which is recognised by the Privy Council as the chief authority) that the parents may dispose of the property completely, leaving nothing for the prospective donee. Indeed it may be gathered from the texts cited in section 124 that the rule as to *shinbyu* gifts is a rule which was intended only to operate as between the donee and his coheirs. In other words, it is a matter only affecting the partition of the estate on the parents' death. I would deduce from the texts—

(*a*) that a gift of property made publicly (သူသိသူထင်) by both the parents (or by the surviving parent if one is dead) at the time of the *shinbyu* ceremony constitutes *as between the donee and his coheirs* a valid gift although possession of the property was not given;

but (*b*) that property so given remains absolutely at the disposal of the parents or the survivor of them for their life-time or his or her life-time.

I think it is clear also—

(*c*) that if the donee dies leaving either of the donors surviving, the gift has no effect. For the *Manukye* lays down that the donee is to get the property only after the death of the parents and if it has not already been disposed of by them (literally မဖျက်ရှိပေလျှင် = if it has not been destroyed)

survival of the donee himself beyond the life-time of both his parents.

If the views expressed above are adopted it follows that the plaintiff's claim in this case must fail. Even if Tha Ku survived his father Paw Tin he could not obtain the land during the life-time of his step-mother, Ma Lôn Gale. (She was married to Paw Tin in 1898 or four years before the *shinbyu* ceremony.) But Tha Ku died before either of his parents. His right to obtain possession of the land remained a mere contingent right up to the time of his death and he had no vested interest in the property which could pass to his heirs.

These findings are sufficient to dispose of the case apart altogether from the question of publicity on which the Lower Courts differed. But on the issue as to publicity also I think the view taken by the District Court is well founded. Out of seventeen witnesses who stated that they attended the *shinbyu* ceremony only three gave direct evidence about the gift, and there are substantial grounds for distrusting the veracity of at least two of the three. Even if these witnesses are believed, their statements only go to show that the gift (or more correctly speaking the dedication of the property to Tha Ku's use after the death of his parents) was made not at the time of the *shinbyu* celebration which took place according to custom in a *mandat* at Paw Tin's house, but next morning at the *pôngyi kyaung*. In the evening at the end of the feast the boy was robed and went to the *kyaung*. Nothing was said about a gift up to then and not till next day when the guests had dispersed. It is argued that this is sufficiently near in point of time to justify the Court in regarding the gift as made at the time of making the boy a novice. But if the next day is near enough it might be contended that the next week or even the next month would not be too late. I think we should insist on strict compliance with the terms of this exceptional provision and require the gift to be made *coram populo* during the actual celebration. The circumstantial evidence which the learned Divisional Judge relied upon as corroborating the direct evidence of a gift at the *shinbyu* ceremony falls under three heads: the mutation of names in the Revenue register, certain admissions made by Paw Tin at Tha Ku's wedding in 1909, and

1915.

PAN NYUN v. HLA SEIN

Such a representation would probably be sufficient to induce Tha Ku to sign. In any case Tha Ku did not act to his detriment in executing the mortgage. His right in the property was purely contingent, and under the Buddhist Law it was open to his father to sell the land outright at any time without reference to him. I think it is clear that there was no estoppel.

On all these grounds I would set aside the decree of the Lower Appellate Court and restore that of the Court of First Instance, and would direct that the appellants' costs in the Divisional Court and in this Court shall be borne by the respondent.

Ormond, J.—I agree with my learned colleague in holding that under Buddhist Law the gift is invalid; and it cannot be valid under any other law. It is unnecessary in this appeal to decide whether a question as to the validity of a gift of land by Burmese parents to their son on the occasion of his taking the yellow robe—a frequent though not a necessary incident of a *shinbyu* ceremony—is or is not a question of religious usage or institution; and I prefer not to express an opinion on that point. I concur in the order suggested by my learned colleague.

Before Mr. Justice Ormond and Mr. Justice Twomey.

Civil Miscellaneous Appeal No. 165 1913.

March 23rd, 1915.

MA EIN *v.* 1. TIN NGA, 2. BAN OK, 3. TAW TAUNG, 4. A CHILD, MINORS BY THEIR GUARDIAN *ad litem* TIN NGA, 5. MA SO MYA, 6. MA KYIN PO (MINOR BY HER GUARDIAN *ad litem* MA SO MYA)—ALL HEIRS AND LEGAL REPRESENTATIVES OF MAUNG MEIK, DECEASED.

Chari—for appellant.
Maung Kin—for respondents.

Buddhist Law : Inheritance—Rights of parents of married couple dying childless—Letters-of-administration.

When a husband and wife die childless within a short time of each other, their estate retains its character as the joint estate of both, and a parent of one or the other who was living with the couple will not be debarred from participating merely because his (or her) son (or daughter) was the first to die.

Ma Gun Bôn v. *Maung Po Kywe*, 2 U.B.R. (1897-1901), 66; *Ma Kadu* v. *Ma Yôn*, 2 U.B.R. (1904-06), Buddhist Law: Inheritance, 7; *Ma Hnin Bwin* v. *U Shwe Gôn*, 8 L.B.R., 1—referred to.

Twomey, J.—The appellant Ma Ein applied to the District Court of Pyapôn for letters-of-administration to the estate of her daughter Ma Shwe Myit and son-in-law Maung Tun Tha

estate is regarded as predominant, whereas when one lives long after the other, the presumption arises that the joint interest has completely merged in the sole interest of the survivor, and there is no doubt a certain amount of plausibility about such a distinction."

And Mr. Justice Irwin thought that the balance of authority is plainly in favour of such a construction, which he stated in the following words (2) :—

"While the husband and wife are both alive and childless the relations of both have reasonable expectations of inheriting. When they die within a short interval, the succession would seem to be governed by accident or by the caprice of fate, rather than by a rule of law, if the relatives of the survivor exclude those of the spouse who die shortly before. After the lapse of some time the interests of the latter naturally pass out of sight."

This construction appears reasonable, and the same construction would apply to section 32 of the *Manukye* which deals with another case of a husband and wife dying within a short interval of one another and without issue. Section 32 expressly provides for the case where parents are surviving.

Richardson's version is as follows :—

"*32nd. Parents having given their children in marriage, and in a separate residence, they both shall die, the law for the partition of their property between the parents of both.*

"When the parents on both sides have given their son and daughter in marriage, and they, dwelling apart from their parents, shall both die, the law by which the partition of their property is made between the parents of both, is this. If any husband and wife, living in a separate dwelling, shall both die without issue, let the parents of the wife have what she brought with her at marriage; let the parents of the husband have what he brought with him originally, and let the property acquired during the marriage be divided equally between both. If they had no property originally, let the parents divide equally what they have acquired. If the wife had no original property, and the husband had, let it be divided into three shares, and let his parents have two, and the wife's parents one. If the husband had no original property, and the wife had, let it be divided into three shares, and let the parents of the wife have two, and of the husband one. If the wife dies first, and the husband after her, let the parents of the one who died first have one, and of the person who died last two shares, and pay the debts in the same proportion."

The special provision in the last sentence for the case where "the wife dies first and the husband after her" would indicate that the earlier part of the section relates to cases where the two persons die simultaneously or within a short interval of one another, while the last sentence refers to cases where a considerable interval elapsed between the two deaths.

(2) 2 U.B.R. (1904-06), Bud. Law, Inheritance 7.

couple lived with the parent. The present case belongs to the latter class and I would hold that Ma Ein clearly has rights of inheritance under section 32 of the *Manukye*. If Tun Tha as well as Ma Myit had left a parent surviving, then under section 32 the parent of Tun Tha would take Tun Tha's ancestral property, the parents of Ma Myit would take Ma Myit's ancestral property, and the jointly acquired property of the husband and wife would be divided equally between the two parents. But as the parent of only one of the deceased is left surviving the question will arise whether that parent entirely or only partially excludes the brothers and sisters of the other deceased. We are however not called upon to decide this question. It is sufficient to find for the purposes of section 23 of the Probate and Administration Act, 1881, that Ma Ein is entitled to the whole or at any rate to some part of the estate of the two deceased.

It is curious that the *Dhammathats* should lay down definite rules for the two special cases (1) where the childless couple leave parents, and (2) where they leave the six distant collaterals. In both these cases we find provisions which can only mean that if the husband and wife die one shortly after the other, the estate is to be regarded as retaining its joint character and is to be divided accordingly. But the principle deduced by Mr. Burgess and Mr. Justice Irwin might fairly be applied generally, *i.e.*, to all cases where a childless couple die within a short time of one another. For example, if there are no parents surviving but the husband and wife leave brothers and sisters, it would seem reasonable to deal with the estate by analogy as a joint estate.

I would set aside the order of the District Court and direct that letters-of-administration to the estate of her deceased daughter and son-in-law should be issued to the appellant Ma Ein on her furnishing security in the ordinary course. The appellant's costs in both Courts should be borne by the respondent. Advocate's fee in this Court five gold mohurs.

Ormond, J.—I concur.

able on demand is regarded as a continuing security—*Barough* v. *White* (1). There was no evidence to show that demand for payment had been made by the payee before the indorsement and delivery of the note to the plaintiff, consequently the provisions of the 1st paragraph, section 59 of the Act, did not apply. I understand the Judge to have held that the plaintiff was a "holder in due course" as defined in section 9 of the Act, that is to say, he had become the possessor of the note for consideration before the amount mentioned in it became payable without having sufficient cause to believe that any defect existed in the title of the payee from whom he derived his title. No indorsements of payments have been made on the note: consequently there was nothing on it to show any one accepting it as a security or buying it that it was not negotiable for the full amount expressed on it. Indorsements of payments may be made on a negotiable instrument under section 56 of the Act, in which case the note becomes negotiable only for the balance due, but if no indorsement is made the note remains negotiable for the full amount expressed on it.

The payee Ramsamaj Singh committed a fraud by transferring and negotiating the note for the full value without informing the plaintiff that payments had been made in respect of it. Either the plaintiff or the defendant must suffer by the fraud. The one to suffer must be the defendant because by his omission to insist on his payments being indorsed on the note he enabled the fraud to be committed. Instances of the right of a *bonâ fide* indorsee to recover in such a case are to be found in *Glasscock* v. *Balls* (2) and *Nash* v. *De Freville* (3).

The decision of the learned Judge was not according to law in that it was opposed to one of the essential principles of the law relating to Negotiable Instruments.

The decree is set aside, and in lieu thereof there will be a decree for the plaintiff for the full amount claimed with costs, the amount decreed to carry interest at the rate of 6 per cent. per mensem. The defendant must pay the plaintiff's costs of this application—2 gold mohurs allowed as advocate's fee.

(1) (1825) 4 B. & C., 325; also 107 E.R., 1080.
(2) (1889) 24 Q.B.D., 13.
(3) (1900) 2 Q.B.D., 72.

1915.

NYEIN HLA v. AUNG GYI.

It was urged at the hearing that no appeal lay to the Divisional Court. This is the case, but the ground was not taken in the application for revision, and as the Divisional Court's decision set right a decision of the District Court which was obviously unjust to the decree-holder in the Sub-divisional Court, I decline to exercise the revisional powers of the Court in the applicant's favour. If I did so, I should feel bound to revise the District Court's order and to pass the same order with respect to it as the Divisional Court did. The application is dismissed with costs.

Before Sir Charles Fox, Chief Judge.

Civil 2nd Appeal No. 11 *of* 1914.

May 17th, 1915.

MA TUN *v.* 1. WAING THA, 2. MA SEIN, 3. SHWE MA, 4. MA GLAY, 5. MAUNG BA, HEIRS AND LEGAL REPRESENTATIVES OF MAUNG PE, DECEASED.

Chari—for appellant.

Villa—for respondents.

Benamidar—Right to sue on mortgage deed—Right of mortgagor to repudiate his own deed—Section 92, *Evidence Act.*

A *benamidar* in whose name a mortgage is executed has a right to sue the mortgagor. The mortgagor cannot be allowed to plead that the money lent came from some one other than the person named in the document.

Munshi Basiruddin Ahmed v. *Mahomed Jalish Patwari*, (1908) 12 C.W.N., 409, and *Mohendra Nath Mookerjee* v. *Kali Prashad Johuri*, (1902) I.L.R. 30 Cal., 265, dissented from.

Bhola Pershad v. *Ram Lall*, (1896) I.L.R. 24 Cal., 34; *Sachitanand Mohapatra* v. *Baloram Gorain*, (1897) I.L.R. 24 Cal., 644; *Yad Ram* v. *Umrao Singh*, (1899) I.L.R. 21 All., 380; *Nand Kishore Lal* v. *Ahmad Ata*, (1895) I.L.R. 18 All., 69; *Ram Bhurosee Singh* v. *Bissesser Narain Mahata*, (1872) 18 W.R., 454—followed.

Gopee Krist Gosain v. *Ganga Persaud Gosain*, (1854) 6 Moore I.A., 53, referred to.

The plaintiff is the widow of Shwe Gan, who was son of San Bwin and Ma Aung.

Admittedly the original defendant Maung Pe whose legal representatives are the respondents on this appeal executed a mortgage bond in favour of Shwe Gan for money lent. Shwe Gan died and the plaintiff obtained a certificate to collect debts due to him. She sued Maung Pe to recover the amount due

the legal representative of a mere *benamidar* had a right to sue on the mortgage the further question arises whether it was open to the defendant to raise and have tried in the suit the question whether the mortgagee was a mere *benamidar*. In my opinion he was not. It was not open to him to repudiate his own deed in writing, and to contend that although by the document he promised to repay the money to Shwe Gan he in fact promised to repay it to Shwe Gan's parents San Bwin and Ma Aung. To allow him to do so would be an infringement of the principle if not of the actual letter of section 92 of the Evidence Act.

The dispute between the plaintiff and her mother-in-law as to who had the right to the mortgage money was no concern of the defendants. He paid the money to Ma Aung's agent knowing full well that the plaintiff claimed it. He did so at his own risk and he has only himself to blame if he has to pay over again to the plaintiff.

To allow a mortgagor when sued on a mortgage by the mortgagee to raise questions as to whom the money lent came from and as to some one other than the mortgagee named in the document being entitled to recover it would be to allow a course which might throw an intolerable burden on mortgagee (plaintiffs) and encourage harassment of creditors by fraudulent debtors.

Following the course taken in *Ram Bhurosee Singh* v. *Bissesser Narain Mahata* (8), I hold that it was not open to the defendant to raise any question as to the right of the plaintiff to recover on the mortgage.

The appeal is allowed. The decrees of the Lower Courts are set aside.

There will be a mortgage decree in the plaintiff's favour for Rs. 950 principal and Rs. 228 interest up to the 13th February 1911 and further interest at the rate of Rs. 2 per cent. per mensem from that date until the 13th day of February 1916 which is the date fixed for payment into Court together with costs of the plaintiff in all the Courts, in default of payment the property in the mortgage to be sold and the usual consequent orders to be entered in the decree.

(8) (1872) 18 W.R., 454.

party on whom the onus lies, usually fails. In the present case there is an almost unanimous consensus of opinion not only amongst the Chinamen called by the wife, but also amongst the Chinamen called by the husband, that the marriage is valid. Thus Saw Tin Hi, plaintiff's witness No. 3, says, "I recognise plaintiff and defendant as man and wife and defendant not as kept mistress." In case of an elopement among Chinese Buddhists when the girl is brought back to her parents and the latter consent to the union, it will be recognised as a marriage if no other ceremony be performed. Even if defendant does not visit plaintiff's parents still she will be recognised as his wife. Witness No. 5 agrees with witness No. 3. Witnesses Nos. 2 and 4 also say that in this particular case they would recognise the union as legitimate because the pair have children, a somewhat extraordinary reason, but the fact remains that the plaintiff is unable to produce a single person of his own nationality who does not regard him as the husband of the defendant. These are, as it seems to me, all admissions made against the plaintiff by persons whom plaintiff has himself called forward as persons likely to know his customary law. The *ratio decidendi* with at least three of them is that it suffices if the girl's parents consented to the marriage. Thus plaintiff's witness No. 2, Lim Chauk, says that the custom in this country for a runaway couple is that after a little time the girl is brought back to her parents and if these consent to the union the marriage becomes legal.

Witness No. 3 for the plaintiff says the same things but does not confine the custom to this country but extends it to all Chinese Buddhists. He says," In case of an elopement amongst Chinese Buddhists when the girl is brought back to her parents and the latter consent to the union it will be recognised as a marriage if no other ceremony be performed; even if defendant do not visit plaintiff's parents she will be recognised as plaintiff's wife."

Plaintiff's witness No. 4 says, "In Burma if a young Chinaman elopes with a Burmese girl if the parents on *both* sides consent the marriage becomes valid." Plaintiff's 5th and last witness says, "In case of elopement if the girl is brought back and her parents consent, the marriage becomes valid.

1915.

SAW MAUNG GYI v. THU KHA.

On the other hand the evidence of Gwan Taik, U Taik, Ma Thein Gywe is directly to the effect that the parents did consent and I am not prepared to hold that what they consented to was an illicit union. In other proceedings plaintiff, as he himself admits, sought to prove that she was a wife, but a divorced wife because he had deserted her for three years. He seems to be a person that will take up any position that he considers will suit him without regard to its truth. In my opinion he did apply to the girl's parents for their consent to a regular union. Gwan Taik occupies a respectable position and seems to be related to the defendant, and I believe his indignant assertion that he would not have been a party to any other kind of application, and I am not satisfied that the union so sought by the bridegroom and consented to by the bride's parents did not constitute a valid marriage. I must therefore decline to interfere with the judgments of the Courts below and dismiss the appeal with three gold mohurs costs.

Before Mr. Justice Young.

Special Civil 2nd Appeal No. 52 1915.

May 27th, 1915.

ARUNACHALLAM PILLAY *v.* IYAMA.

S. M. Bose—for appellant.

N. S. Aiyer—for respondent.

Guardians and Wards Act, VIII of 1890, *section* 25—*Suit for the custody of a child.*

A suit for the custody of a child cannot be brought otherwise than under the Guardians and Wards Act.

Sharifa v. *Munekhan*, (1901) I.L.R. 25 Bom., 574; *Sham Lal* v. *Bindo*, (1904) I.L.R. 26 All., 594; *Krishna* v. *Reade*, (1885) I.L.R. 9 Mad., 31; *Ghasita* v. *Wazira*, (1897) 32 P.R., 41—referred to.

Ma Shwe Ge v. *Maung Shwe Paw*, 2 L.B.R., 140, not followed.

Besant v. *G. Narayaniah*, (1914) L.R. 41 I.A., 314, followed.

This was a suit brought by a father for the custody of his child. He succeeded in the Court of First Instance but failed in first appeal. The suit was not brought under the Guardians and Wards Act, and the respondent who is the mother of the child now and for the first time takes the objection that this should have been done and that the present suit must be dismissed. The question whether this Act forbids the taking of

1915.

ARUNACHALLAM PILLAY v. IYAMA.

been taken under the Guardians and Wards Act. I am also of opinion that as the point affects jurisdiction it can be raised at any time. I therefore dismiss the appeal but make no order as to costs inasmuch as the objection has been taken so late.

Before Mr. Justice Ormond and Mr. Justice Twomey.

Civil 1st Appeal No. 108 of 1911.

June 2nd, 1915.

1. MA GUN *alias* FULJAN BIBI, 2. ABDUL JABBER, 3. ABDUL SATTER, 4. ABDUL GAFFOOR, 5. NOOR AHMED, 6. MAHOMED ZAHIR, 7. MAHOMED SYED, 8. MAHOMED JAMAL, 9. ABJAN BIBI, 10. ZAMINA KHATOON *v.* R. MONIANDY SURVEY.

Fagan—for appellants.

Doctor—for respondent.

Appeals from orders—Order on a preliminary objection, directing suit to proceed—Section 2 (2), *Code of Civil Procedure—Decree.*

Where a preliminary objection is taken that a suit is not maintainable, an order overruling such an objection and directing the suit to proceed, is not a decree within the meaning of section 2 (2), Code of Civil Procedure. It does not determine the rights of the parties with regard to any of the matters in controversy in the suit, and it is not conclusive.

There is therefore no appeal from such an order.

Sidhanath Dhonddev Garud v. *Ganesh Govind Garud*, (1912) I.L.R. 37 Bom., 60, dissented from.

Chanmalswami Rudraswami v. *Gangadharappa Baslingappa*, (1914) 16 Bom. L.R., 954, followed.

Kamini Debi v. *Promotho Nath Mookerjee*, (1914) 20 Cal. L.J., 476, followed.

The plaintiff sued for possession of land and for mesne profits. The defendant raised a plea in bar, *viz.*, that the suit was not maintainable inasmuch as the plaintiff at the time of the institution of the suit was not registered as the owner of the land in accordance with Rule 14 of the Pegu Waste Land Grant Rules of 1863. The District Judge held that the rule in question is not in force or at least that it does not affect the jurisdiction of the Courts, and he ordered the case to proceed. Against that order the defendant now appeals. The question is whether an appeal lies. It is not an order from which an appeal lies under the Code of Civil Procedure and it is clearly not a final decree. Is it then a preliminary decree within the

FULL BENCH.

Before Sir Charles Fox, Chief Judge, Mr. Justice Ormond and Mr. Justice Twomey.

IN RE MAUNG MRA TUN *v.* U KAING.

Civil Reference No. 3 of 1915.

July 5th, 1915.

Sin Hla Aung—for applicant.
N. C. Sen—for respondent.

Mortgage decree—Execution—Attachment of property—Application for removal of attachment—Civil Procedure Code, Order 21, *Rule* 58.

Procedure by attachment is not appropriate to a mortgage decree. But if an attachment is made, any claims or objections thereto must be entertained. Order 21, Rule 58 (*et seq.*), applies to such proceedings.

S.R.M.A.N. Muthappa Chetty v. *S.A.R.M. Pallathappa Chetty*, (1903) 2 L.B.R., 138; and *Gobalu* v. *Po Hla*, (1906) 4 L.B.R., 82, overruled in part.

The following reference was made by the Hon'ble the Chief Judge to a Full Bench under section 11, Lower Burma Courts Act:—

In Regular Suit 22 of 1914 of the Township Court of Kyauktaw, U Kaing obtained a decree against Pan Aung and Maung Sein Bu on a bond by which they mortgaged or hypothecated to him ten buffaloes. The decree directed that if the defendants failed to pay the amount found to be due the buffaloes should be sold. It amounted to a mortgage decree. Four days after the date of the decree U Kaing applied for attachment of the buffaloes, and nine were attached. The report of the Deputy Bailiff is silent as to whose possession they were in when he attached them, and in what manner he did it. He reported merely that he had attached the buffaloes and had left them in the possession of Mra Tun, *thugyi* of Thawingaing village, for him to look after them. Mra Tun applied for removal of the attachment, alleging that the cattle had been made over to him before the attachment for a debt which Pan Aung owed him on a bond mortgaging the cattle to him.

The Township Judge held on the authority of *S.R.M.A.N. Muthappa Chetty* v. *S.A.R.M. Pallathappa Chetty* (1) that he was precluded from going into Mra Tun's application. The ruling of Birks, J., justified this part of the Township Judge's

(1) (1903) 2 L.B.R., 138.

1915.

IN RE MAUNG MRA TUN v. U KAING.

investigating a claim or objection to the attachment under Rule 58 and following rules of Order XXI of the Civil Procedure Code?"

The opinion of the Full Bench was as follows :—

We agree with Birks J.'s judgment in *S.R.M.A.N. Muthappa Chetty* v. *S.A.R.M. Pallathappa Chetty* (1) and Hartnoll J.'s judgment in *Gobalu* v. *Po Hla* (2) in so far as they hold that proceedings by way of attachment are not applicable to mortgage decrees, but the decisions quoted in those judgments do not appear to us to be authorities supporting the ruling that if a mortgagee attaches property under a mortgage decree a claim under section 278 of the Civil Procedure Code of 1882 could not be brought or admitted.

It appears to us that in all cases of property being attached claims and objections to the attachment can be brought under the corresponding provision of the Civil Procedure Code, 1908, namely, Order 21, Rule 58, and that such claims or objections must be dealt with under that rule and the following rules prescribing the procedure for investigation of claims and objections.

Before Mr. Justice Twomey.

KING-EMPEROR *v.* NGA AW.

Criminal Revision No. 130B of 1915.

July 7th, 1915.

Eggar, the Assistant Government Advocate—for the King-Emperor.

Excise Act, sections 3, 51—*Person drawing tari from his own rees—Evidence Act, section* 106.

Every toddy climber must be presumed to know roughly the yield of a given tree in a given time, if a given number of pots are affixed to it.

If the pots are found on examination to contain more than four quarts, the *tari* climber must show that owing to exceptional unforeseen circumstances the quantity received was unusually great, and that under normal conditions the quantity received would not exceed four quarts. The burden of proof is on him.

The following reference has been made to this Court by the District Magistrate, Thayetmyo :—

"I doubt if the Magistrate has correctly interpreted the meaning of Criminal Revision No. 748 of 1902, page 214, Lower Burma Rulings, Volume I.

"The facts are that the accused was working two toddy trees

(1) (1903) 2 L.B.R., 138. (2) (1906) 4 L.B.R., 82.

FULL BENCH.

Before Sir Charles Fox, Chief Judge, Mr. Justice Ormond and Mr. Justice Twomey.

Civil Reference No. 4 of 1915.

July 13th, 1915.

THE BANK OF BENGAL *v.* R.M.M.L. MUTHIA CHETTY.

Giles—for the Bank of Bengal.

Court Fees Act, section 17—Distinct Subjects—Suit on cash credit account, and on each portion of it severally guaranteed.

When a plaintiff sues the Principal Debtor on a cash credit account and also in the same suit seeks decrees against the several persons who have guaranteed separate portions of the debt the plaint is chargeable with the aggregate amount of fees with which plaints embracing separately each of the amounts guaranteed would be chargeable.

Each claim must be taken to be a Distinct Subject within the meaning of section 17, Court Fees Act.

P.L.R.M.N. Perchiappa Chetty v. *Po Kin*, (1909) 5 L.B.R., 94, referred to.

Civil Execution No. 89 of 1915.

June 14th, 1915.

The following reference was made by Mr. Justice Robinson to a Full Bench under section 11, Lower Burma Courts Act:—

The plaintiff Bank sued a Chetty firm for the amount due on a cash credit account and also certain persons who had guaranteed repayment of the amount due to the extent of Rs. 25,000 each. The Bank requires such guarantors to endorse to the Bank promissory notes for the amount of the guarantee drawn in their favour by the firm to be guaranteed and further requires the guarantors to execute a letter of guarantee in a certain printed form.

The plaint is stamped on the amount claimed from the Chetty firm and the question is whether it should not be stamped on the various amounts for which decrees are asked for against each guarantor, or in other words whether section 17 of the Court Fees Act, 1870, does not apply to the case.

In Civil Regular 114 of 1915, I decided that a very similar suit embraced two or more distinct subjects. In that suit the Bank did not sue the principal debtor as it does in the present case, but I do not think that this makes any difference. Again, in the former suit the aggregate amount of the sums claimed from the various guarantors exceeded the amount due by the principal debtor, while in the present case it is less. The court-fee, however, if section 17 applies would exceed Rs. 3,000 in the

securities, but even if it be correct it seems to me that this provision, which is one of procedure only, was meant to provide for the avoidance of a multiplicity of suits and does not touch the matter provided for in section 17 of the Court Fees Act.

That section is aimed at protecting the revenue from loss by lawful action on the part of plaintiff, that is, by separate causes of action being lawfully combined in one suit, and the question still remains whether the suit as framed embraces several distinct subjects.

The matter is however not free from difficulty and involves large sums of money and will arise in several suits before this Court. I think it right, therefore, to refer the following question for decision by a Bench of this Court:—

" Where a plaintiff sues the principal debtor on a cash credit account and also in the same suit seeks decrees against the several persons who have guaranteed that account for the full amounts to which they have guaranteed it should the plaint bear a court-fee calculated on the amount claimed from the principal debtor or on the various amounts claimed from each and all of the guarantors whichever is greater? "

The opinion of the Full Bench was as follows :--

Fox, C.J.—The plaint in the suit is headed " Suit for the balance of an account and to enforce security": it has not been claimed, however, that it is a suit "for the balance due on a mutual open and current account" falling under Article 85 of the 1st Schedule of the Indian Limitation Act. No other article in that Schedule referring to an account is applicable, so that the suit must really be a suit for money lent governed by Article 59 of the 1st Schedule if the lending of the money can be separated from the promissory notes and the equitable mortgage.

The guarantee agreements contemplate that the Bank shall, subject to a specified condition, be at liberty to take steps to enforce payment of the promissory notes referred to in the agreements. This is what the Bank is doing in the suit. In the 38th paragraph of the plaint exemption from the ordinary period of limitation for suits on the notes is claimed. It appears to me that so far as the guarantors are concerned the suit must be regarded as one on promissory notes, and so far as the mortgagor defendant is concerned as a suit upon a mortgage.

1914.

THEIN SHIN v. AH SHEIN.

Fone Lan v. *Ma Gyee*, 2 L.B.R., 95, referred to; *cf.* also *Ma Shein* v. *Kim Sein*, 8 L.B.R., 225, and *Saw Maung Gyi* v. *Ma Thu Kha*, L.B.R., 208.

Twomey, J.—The plaintiff-respondent Ah Shein is the son of a Chinaman, In Ya, deceased. After the death of Ah Shein's mother Ma Le, In Ya married Ma Thein Shin, the 1st defendant-appellant, and had issue by her, a daughter, Ma E Chi, the 2nd defendant-appellant. Ah Shein sued Ma Thein Shin and Ma E Chi for his father's estate. Ah Shein being a minor filed the suit through his next friend Ma To, and was allowed to sue as a pauper. The value of the estate is put at Rs. 6,005. Ah Shein pleaded that his father, In Ya, was a Chinese Buddhist and that according to the law applicable to the case he was entitled to the whole of his father's estate to the exclusion of his father's second wife, the widow, Ma Thein Shin, and her daughter, Ma E Chi.

The defendants-appellants pleaded that Ah Shein's mother was not lawfully married to In Ya and that Ah Shein was therefore entitled to nothing. They denied that In Ya was a Buddhist. They also disputed the value of the property left by In Ya.

The District Court has found that In Ya was a Chinese Buddhist, that Ah Shein is the legitimate son of In Ya by his first wife Ma Le, and that under the customary law applicable to the case Ah Shein is entitled to the whole of his father's estate to the exclusion of the defendants-appellants. As regards the value of the estate the District Court came to no finding but appointed a Commissioner "to find out what was the estate of In Ya, its value and any deduction which ought to be made therefrom, such as debts and funeral expenses, etc." The passing of orders as to court-fees under Order 33, Rule 10, was postponed until the value of the estate should be ascertained.

In this appeal by the defendants it is urged that Ah Shein's mother Ma Le is not proved to have been legally married to In Ya, that the evidence as to the customary law applicable to the case is insufficient, and that the plaintiff failed to prove his title to the whole estate to the exclusion of his step-mother and step-sister.

1914.

THEIN SHIN v. AH SHEIN.

There appears to be no written law on the subject of inheritance among Chinese Buddhists, and the case has to be decided according to the somewhat meagre oral evidence produced by the plaintiff. The defendant Ma Thein Shin produced no evidence at all on the subject. The evidence of Ko Sit Oh and I Taik shows that daughters are altogether excluded by sons. But neither of these witnesses supports the view taken by the District Court that the widow gets nothing. Ko Sit Oh says: "The wife inherits from the husband. I do not know to what extent. It is a small proportion." I Taik says, "The mother has a right somewhat over the estate," but he was unable to say what her share would be. In the absence of definite evidence I think we may proceed according to justice, equity and good conscience, and we shall not be far wrong in awarding the widow a third share which is the share she would have received if the Indian Succession Act were the law applicable to the case.

I would therefore modify the decree of the District Court by awarding Ah Shein two-thirds of the estate of his father In Ya. The direction for the appointment of a Commissioner to take accounts will stand. The order as to costs is set aside. The whole of the costs in both Courts will be borne by the estate. The court-fee in both Courts on Rs. 6,005-3-6, the amount at which the suit is valued in the plaint, will be recovered from the estate and will be a first charge thereon. A copy of the decree will be sent to the Collector, Ma-ubin District.

Parlett, J.—I concur.

Before Mr. Justice Ormond.

Criminal Revision No. 261B of 1915.

November 29th, 1915.

MA SHEIN *v.* KIM SEIN *alias* SAW CHAN SEIN.

Sutherland—for applicant.
A. J. Maung Gyi—for respondent.

Marriage—Chinese Buddhist Law—Presumption of validity.

In the absence of good evidence to the contrary, a marriage between a Buddhist Chinaman and a Burmese Buddhist woman according to Burmese Buddhist custom is to be regarded as valid under Chinese Buddhist Law.

Ma Thein Shin v. *Ah Shein*, 8 L.B.R., 222, referred to.

The petitioner Ma Shein applied under section 488, Criminal Procedure Code, for an order for maintenance against her husband, the respondent Kim Sein. The respondent denied that

1915.

MA SHEIN
v.
KIM SEIN.

ceremony is essential for a valid marriage under that law. And the parties having cohabited for several years as man and wife, the presumption that there was a valid marriage must prevail.

I set aside the order of the Magistrate and direct that the petitioner's application be proceeded with and the amount of maintenance to be awarded to her, determined.

FULL BENCH.

Before Sir Charles Fox, Chief Judge, Mr. Justice Ormond and Mr. Justice Twomey.

Civil Reference No. 2 of 1915.

July 9th, 1915.

IN RE MAUNG NAW v. 1. MA SHWE HMUT, 2. MAUNG PEIN.

May Oung—for the respondents.
Rutledge, the Government Advocate—for the King-Emperor.

Jurisdiction of Civil Courts—Lower Burma Land and Revenue Act, sections 56 (a), 55 (b), 19, section 6—Claim for possession without title.

A sued B to recover possession of land in respect of which there was no grantee, lessee or person having the status of landholder, basing his claim on the fact that he had been in possession and paid revenue to Government and had been dispossessed by B.

Held,—On a reference made by Ormond, J., that section 56 of the Land and Revenue Act does not oust the jurisdiction of a Civil Court. "Claims" in section 55 (*b*) of the Land and Revenue Act mean claims against Government. Mere previous possession is sufficient to support a claim for possession against one who has dispossessed the plaintiff when the defendant has no title himself.

Maung San Paing v. *Shwe Hlaing*, 1 L.B.R., 277; *Arunachallam Chetty* v. *Veerappa Chetty*, 4 Bur. L.T., 117, and *Maung Po Chit* v. *A.A.R.M. Periacurpen Chetty*, 4 Bur. L.T., 215—overruled.

Maung Yat v. *Maung Tarok*, 1 L.B.R., 16; *Saya Hlaing* v. *Maung Lu Gyi*, P.J.L.B., 436; *Krishnarav Yashvant* v. *Vasudev Apaji Ghotiker*, (1884) I.L.R. 8 Bom., 371; *Ismail Ariff* v. *Mahomed Ghous*, (1893) I.L.R. 20 Cal., 834; *Gobin Prasad* v. *Mohan Lal*, (1901) I.L.R. 24 All., 157—followed.

The following reference was made to a Full Bench by Mr. Justice Ormond under section 11, Lower Burma Courts Act:—

Civil 2nd Appeal No. 179 of 1913.

April 22nd, 1915.

The plaintiffs sued for a declaration that a strip of land belonged to them, for possession of the same; and for Rs. 400 damages against the defendant for cutting *dhanee* trees belonging to the plaintiffs on that strip of land. Both the Lower Courts have found that the plaintiffs were in possession

lands under sections 19, 20 and 21 " in section 55 (*b*) of the Act refer to claims against Government and not to claims between private individuals.

Section 56 (*a*) of the Act bars the jurisdiction of Civil Courts as to (*inter alia*) :—" claims to occupy or resort to lands under section 19 and disputes as to the use or enjoyment of such lands between persons permitted to occupy or resort to the same."

The last part of clause (*a*) of section 56 could only apply to the present case if both parties had in fact the permission of Government to occupy the land in dispute.

As to the first part of the clause (*a*) of section 56 :—Section 19 merely empowers the Local Government to frame rules. A " claim to occupy land under section 19 " must therefore mean a claim to occupy land under such rules. The rules prescribe the manner in which a license or title to occupy certain lands can be obtained from Government, and the conditions under which such license will be granted. They also empower any Revenue Officer to eject (on behalf of Government) any person occupying such lands in contravention of such rules. " A claim to occupy or resort to lands under section 19 " mean a claim against Government, to be granted under its rules a license to occupy certain lands ; or a claim to be recognized by Government as its licensed occupier of such lands. If these words are intended to include a claim by a licensee of Government for possession against a private individual, the last part of clause (*a*) is unnecessary. If A obtains a license from Government to occupy certain lands in accordance with the rules (whether by payment of revenue or otherwise), he thereby obtains a title to such lands for the time being. If, relying upon his title, he sues B for possession, he cannot be said to be preferring a claim under the rules which authorized his title to be made.

Still less can it be said that A is preferring a claim under section 19 : if, when suing B for possession, he does not allege any title derived from the owner, *i.e.*, any right to occupy the land under Government, but relies solely upon the fact that within 12 years before suit he was in possession and was dispossessed by B. A and B may have been

The effect of the sections is to bar the jurisdiction of the Civil Courts when a suit is a claim to occupy or resort to land under section 19, 20, or 21 of the Act, or when it involves a dispute as to the use or enjoyment of land of which Government has not made a grant or a lease or over which a right has not been acquired in one of the modes specified in the Act between persons permitted to occupy or resort to the same. In a suit of the description mentioned in the reference the plaintiff cannot be said to be making a claim to occupy or resort to land under section 19 of the Act. The basis of his claim has nothing to do with the Act. Sections 20 and 21 are not applicable. "Claims" in clause (*b*) of section 55 must mean claims advanced to Government or to some Government officer.

Neither the plaintiff nor the defendant in the suit could be rightly classed as a person permitted to occupy or resort to the land sued for, unless it were proved that they had been expressly permitted by a Revenue Officer to occupy the land. Rule 51 (*a*) of the Rules under the Act does not contemplate any permission being required to enter on or remain in occupation of waste or uncleared land for purposes of cultivation. In a suit based upon the plaintiff having been once in possession and having been dispossessed otherwise than in due course of law it may be assumed that the plaintiff does not sue as one permitted to occupy or resort to the land. The latter part of clause (*b*) of section 55 would not apply to such a case, and the jurisdiction of the Civil Court would not be barred by section 56 (*a*).

Irwin, J.'s ruling in *Maung San Paing* v. *Shwe Hlaing* (1), in so far as it held that if it appears at the hearing that the plaintiff has neither a grant nor the status of a landholder his claim falls under section 19 of the Lower Burma Land and Revenue Act and the jurisdiction of the Civil Court is ousted by section 56 read with section 55 (*b*) of that Act, appears to me to be erroneous. Although neither party may have a right or title to the land as against Government, in a suit under section 9 of the Specific Relief Act previous

(1) (1902) 1 L.B.R., 277.

1915.

IN RE MAUNG NAW v. MA SHWE HMUT.

(*c*) and (*d*), where it is quite clear that only claims against Government are contemplated.

The latter part of section 55 (*b*) can only refer to *disputes* between two or more persons jointly permitted—

(i) to resort to the same grazing ground or the same *taungya* area; or

(ii) to occupy the same piece of waste land temporarily under rules issued in pursuance of section 19.

But as the existing rules under section 19 (*viz.* Rules 51 and 52) do not require a cultivator to obtain permission before occupying such land it follows that there can be no disputes of class (ii) in regard to land occupied for purposes of cultivation. The case under reference clearly does not fall under class (i).

I concur in answering the question referred in the negative.

Before Mr. Justice Ormond.

Special Civil 2nd Appeal No. 165 *of* 1912.

MAUNG MAUNG *v.* S. G. FIRM BY ITS AGENT SANMUGAM PILLAY.

September 1*st*, 1913.

May Oung—for appellant.
Doctor—for respondent.

Transfer of Property—Fraudulent—Transfer of "grant" land by involved debtor—Position of volunteer paying off an attaching creditor—Transfer of Property Act, section 53.

A, who had obtained a grant of land from the Collector with the right to transfer it with the permission of the Collector, transferred the land to his brother, B, with the permission of the Collector, at a time when he was too heavily involved to be able to pay his debts. A judgment-creditor sought to obtain a declaration that the transfer was void as against him.

Held,—that A's right to transfer the land subject to certain conditions was a valuable right and that, under the circumstances set forth above, the transfer was void as against the plaintiff under section 53 of the Transfer of Property Act and that the plaintiff had a right to attach the land as if the grant to A were still subsisting.

It was also argued that B, having paid off a previous attaching creditor C, stood in the shoes of C.

Held,—that B's paying off C merely gave B at most a right of action against A personally.

The plaintiff-respondent attached land under a decree obtained against one Maung Myaing. The defendant Maung Maung, who is a brother of Maung Myaing, obtained an order for the removal of the attachment. The plaintiff then sued for

Before Mr. Justice Ormond and Mr. Justice Twomey.

Civil 1st Appeal No. 83 of 1912.

June 24th, 1914.

1. MAUNG PU, 2. MAUNG PU, HUSBAND OF MA MI (*deceased*), 3. MAUNG SHU MAUNG, MINOR, BY HIS *guardian-ad-litem* THE 1ST APPELLANT, 4. AN INFANT SON, UNNAMED, BY HIS *guardian-ad-litem* THE 1ST APPELLANT [APPELLANTS 2, 3 AND 4 APPEAL AS LEGAL REPRESENTATIVES OF MA MI (*deceased*)], 5. MA KHIN MIN, MINOR, BY HER *guardian-ad-litem* KYAW DIN, *Barrister-at-law*, 6. MAUNG SHU MAUNG, BY HIS *guardian-ad-litem* 1ST APPELLANT *v.* 1. LUCY MOSS AND 2. CHARLES WEDIKIND NEPEAN, HEIRS AND LEGAL REPRESENTATIVES OF MA HMWE GAING (*deceased*).

Lentaigne—for appellants.
N. M. Cowasjee with *Dantra*—for respondents.

Gift before death—Parent and child—Alleged undue influence—Burden of proof.

No presumption of undue influence to be drawn in the case of a gift to near relatives even if made during the donor's illness and shortly before his death. It is for the person alleging the undue influence to prove it.

Huguenin v. *Basely*, 1 W. & T. L.C. in Eq., 8th Ed., p. 259; *Morley* v. *Loughnan*, (1893) 1 Ch.D., 736; *Allcard* v. *Skinner*, (1887) 36 Ch.D., 145; *Beanland* v. *Bradley*, (1854) 2 Sm. & G., 339=65 E.R., 427; *Ismail Mussajee Mookerdam* v. *Hafiz Boo*, (1906) I.L.R. 33 Cal., 773—referred to.

The judgment appealed against was as follows:—

Civil Regular No. 485 of 1909.

March 25th, 1912.

Robinson, J.—This is a suit brought by Charles Nepean as the next friend of his mother, Ma Hmwe Gaing, widow of John Nepean, against Maung Pu, Barrister-at-law of this Court, and Ma Mi, his wife, also Ma Khin Min, defendant (3), a minor and adopted daughter of Ma Hmwe Gaing, and Maung Shu Maung, the infant son of Maung Pu and Ma Mi. During the pendency of the suit Ma Hmwe Gaing died and her daughter, Lucy Moss, was added with Charles Nepean as her legal representative. Ma Mi also died and her husband and her sons, Shu Maung and another, an infant, were added as her legal representatives.

The plaint alleges that Ma Hmwe Gaing was 83; that she is and has been weak and infirm, her mental capacity having been affected by reason of age and illness; that being incapable of managing her affairs she is represented by her son, Charles Nepean, as her next friend. It states in detail facts which had occurred including a criminal prosecution of Maung Pu and

1914.

MAUNG PU v. LUCY MOSS.

Phayre Street and jewellery, and she carried on after her husband's death money-lending business. What the residue amounted to has not been brought out and it is impossible to say to what extent it was increased. Her own children then were fairly well provided for. She adopted Ma Mi and Ma Khin Min—at least the alleged adoption has not been contested in this suit. Maung Pu was a teacher in Shwegyin and married Ma Mi. He then went to England and studied for the Bar, and Ma Hmwe Gaing paid a good deal, if not all, of the expenses in connection therewith. He was called to the Bar in January 1908 and at once came out to Shwegyin and lived with his wife with Ma Hmwe Gaing in her house. Shortly after Ma Hmwe Gaing wanted to execute a deed of settlement with regard to the 1,000 acres of land which had come to her and the deed was drawn up, by which the profits of this land were settled on three of her grandchildren and her two adopted daughters, Maung Pu being appointed sole trustee and being given 20 per cent. of the profits in return for his services in collecting them. The deed was not executed by Ma Hmwe Gaing because of some trouble in getting the Sub-Registrar of Nyaunglebin over to Shwegyin and difficulty of taking her, Ma Hmwe Gaing, over to Nyaunglebin in consequence of her age. Maung Pu therefore obtained from her a power of attorney authorising him to execute and register the deed on her behalf, and he did so. Immediately afterwards a suit was instituted by the present plaintiffs to set aside this deed of settlement in which they alleged that Ma Hmwe Gaing was not capable of managing her affairs. The suit, the history of which I will narrate here though it was not finally settled for several years, was tried by the Subdivisional Judge at Pegu. The settlement was set aside on the technical ground that Maung Pu having received an interest the power of attorney was ineffective.

Maung Pu and Ma Mi filed an appeal in which they urged that the mental capacity of Ma Hmwe Gaing had not been considered. The appeal was dismissed. A second appeal was filed in this Court, and when it came on for hearing, Ma Hmwe Gaing being dead and the learned Judge holding that under her husband's will she had only a life interest in this land, the appeal was dismissed.

1914.

MAUNG PU v. LUCY MOSS.

took place, and as the old lady persisted in demanding the return of the money Maung Pu and Ma Mi suggested that she should go with them to Rangoon where they would give it her. Mrs. Moss was very fearful of her mother going to Rangoon with Maung Pu and Ma Mi. It is obvious that she suspected that, if the old lady was with Maung Pu and Ma Mi, they would persuade her to take some action with reference to the money which would affect her inheritance of a portion of it. She went and consulted with an old friend of theirs and her son Stephen, a Subdivisional Officer, as to whether she could prevent her mother from going to Rangoon; she was told she could not. She then wanted to know whether she would be justified in taking her mother's jewel and money box and keeping it in order to prevent her mother's going. She was told that if she kept it only for a short time she would not get into trouble. She thereupon went to her mother's house, where apparently a stormy interview took place, and she carried off the box to her own house. Maung Pu brought the police and headman, but she explained to them that she was only keeping it for a short while in order to prevent her mother going to Rangoon, and so they left. The box was taken on the 17th October 1908 and returned on the evening of the 20th October 1908. That night somewhere between midnight and 2 a.m. Maung Pu, Ma Mi, Maung Khin Min and Ma Hmwe Gaing left by boat to catch the train to Rangoon from Nyaunglebin. It is stated that they started at this somewhat untimely hour out of consideration for the old lady and to avoid travelling in the great heat of the day. On the other side it is stated that there was no necessity whatever to start at such an hour; that taking the route they did, their journey lay through creeks through the jungle, were dangerous to navigate in the dark or by the light of the lamp which Maung Pu said was used, and that they started at this hour because they wanted to get the old lady into their control without the knowledge of her daughter. On the 21st October Mrs. Moss filed a criminal complaint against Maung Pu and Ma Mi of misappropriation of the money. They had, it is said, threatened this before, and Maung Pu knew that it was likely to be done. An application was then filed for the transfer of the case to Rangoon on the ground supported by a certificate of Dr. Pearce that the old

1914.

MAUNG PU v. LUCY MOSS.

old lady that she should take independent advice as to it. She asked him to call in Mr. Rahman, a barrister friend of Maung Pu's, who used to visit the house and whose acquaintance she had made. He did so. Mr. Rahman took her instructions and drafted the deed. The draft deed was handed over to Maung Pu, who had it engrossed and stamped. Major Röst, who was then Civil Surgeon of Rangoon, was called in, and Mr. Ba Thein, another barrister and partner of Mr. Rahman's, was present. Major Röst examined the old lady and put a few questions to her and gave her the following certificate: "I hereby certify that I have examined Ma Hmwe Gaing, a robust old lady of 82 years of age, and found that she is both mentally and physically sound. I further witnessed her agreement to the conditions of a document which she signed in my presence."

Mr. Ba Thein and Major Röst have deposed that the deed was explained to the old lady in Burmese; that she said she understood it and expressed her approval of its contents; that she then executed it and Major Röst and Mr. Ba Thein attested her signature. The old lady continued to live with Maung Pu and Ma Mi until July 1909. Then she became very ill. In what her illness consisted we have no definite evidence. Maung Pu called in a Burmese doctor to attend her and states that her illness consisted of sleeplessness and loss of appetite. That she was very ill cannot, I think, be doubted,—in fact, so ill that Maung Pu fearing that she might die thought it wise to wire in her name to Mrs. Moss to come down. She came and lived there for a fortnight or three weeks, after which her mother got better, and as she was very anxious to go back to her home at Shwegyin Mrs. Moss took her there. Very shortly after her arrival at Shwegyin Mrs. Moss became aware of this deed of gift and at once took steps. She brought her mother down to Rangoon to instruct advocates to file the present suit. Ma Hmwe Gaing was examined in October 1909 by Colonel Davis and by Dr. Joy and in January of the following year Colonel Pridmore was also called in to examine her. Her evidence was taken in this Court on the 3rd March 1910. It is of no particular value as far as the proof of any particular facts go, but it is of some value in respect to her mental condition. It begins by asserting that she is 55 and that she is sure of that fact.

1914.

MAUNG PU v. LUCY MOSS.

lected in White and Tuder's Equity cases under the case of *Huguenin* v. *Basely* (1). I think it is not necessary for me to go into the authorities in detail. I think it will be sufficient if I quote from the judgment of Mr. Justice Wright in *Morley* v. *Loughnan* (2). The learned Judge states: "There is no doubt about the law, which is illustrated by numerous cases quoted in White and Tuder's work under the leading case of *Huguenin* v. *Basely* (1) and continuing down to the case of *Allcard* v. *Skinner* (3). That law is, that where large voluntary gifts are made and accepted *inter vivos* the recipient may be called upon to show that the donor had capacity and knowledge of what he was doing. In this case that capacity and knowledge are not disputed. Proof may then be given against the recipient to show that the donor's intention to give was produced by undue influence, and then the Courts of course set it aside, unless the transaction as a whole was a benefit to the donor. Or the donor may show that confidential relationship existed between the donor and the recipient, and then the law on grounds of public policy presumes that the gift, even though in fact freely made, was the effect of the influence induced by those relations, and the burthen lies on the recipient to show that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances. Here the plaintiffs took both grounds. They say there is actual proof of undue influence producing the gifts; secondly, they say there was confidential relationship within the meaning of that rule, and the donor had no independent advice, and there were no equivalent circumstances. The peculiarity of this case is that it is not one of those ordinary confidential relationships such as solicitor and client, physician and patient, parent and child, or guardian and ward, or religious superior and inferior, but it is of a nature which I think is sufficient to bring it within the rule as laid down by Lord Eldon, adopting the argument of Sir Samuel Romilly in *Huguenin* v. *Basely* (1), that the rule stands on a general principle applying to all the variety of relations by which dominion may be exercised by

(1) 1 W. & T. L.C. in Eq., 8th Ed., p. 259.
(2) (1893) 1 Ch.D., 736.
(3) (1887) 36 Ch.D., 145.

to give the money or to buy a house to be given to the wife of the Burmese Barrister."

Question.—Did she appear to be under the influence of anybody?

Answer.—She seemed to be fairly clear and reasonable. As far as I could see she understood what she was doing. She showed great signs of age. Her physical condition was not robust. She was rather flabby. A woman in her condition was liable to be influenced by her surroundings. At the time she appeared to me to be fairly clear, and I had not before me the possibility of her being influenced. She was old and there were signs of senile decay. But thinking over the matter afterwards when some time after I was asked about the possibility of her having been influenced my idea is that she might have been influenced. She would mix up the buying of the house with giving money to buy the house. I think it would be quite possible for anyone who wished to persuade her to a certain course of conduct if he had her under his sole control to persuade her to do as he wished. I had come to this conclusion owing to the want of decision that she displayed. I think she understood clearly enough what she was doing, but she appeared to me to be vacillating. Therefore I think she might have been influenced. I think she knew she was giving away a large sum of money for buying a house and was quite willing to do so. But at the same time I think she might have been influenced; her willingness may possibly have been due to influence brought to bear on her.

And in cross-examination he says: "In January I saw no signs of influence as a matter of fact. At that time my recollection is that she was fairly clear and that she understood fairly well what was proposed. . . . I was asked to see if she was in a state of mind capable of executing a deed. I went away satisfied that she fairly was. . . . It is impossible to say without knowing the degree of illness what effect an illness in July would have had on her with reference to the condition I saw her in in October." The conclusion that I have come to with reference to Colonel Davis' evidence is that he is not prepared to say that in January 1909 she was unable to manage her affairs or form a rational judgment, but that judging from her

slow progress but sometimes it is greatly accelerated by any disease which would lower vitality. Illness will cause a more rapid degeneration afterwards. I say any illness would have this effect in accelerating senile decay." Facts similar to those which I have set forth as existing in this case were put to him and he was asked if a person who had acted more or less as Ma Hmwe Gaing acted would in his opinion be of unquestionable mental capacity and capable of managing her own affairs. He thinks the facts would only show that she was changeable and not that she was incompetent to manage her own affairs. He regards this as merely a symptom of old age and an indication of the degeneration of the mind which old age brings. As to her liability to be influenced he says: "One always thinks of that when examining these cases. There was nothing which led me to think like that. I think there is no doubt that old people are more easily influenced than young people. I don't think there was anything to indicate that she was more liable to be influenced than anyone of her age; 82 or 83 is a very great age for this country . . . a person of 82 or 83 is easily to be influenced." He then says, "In opinions concerning mental conditions persons should be kept under observation to see if they are under the influence of others. It is difficult to say about anyone's mind in one examination. And finally he says, "I thought she was of perfectly sound mind and that she understood what she did." There remains the evidence of Dr. Joy and Colonel Pridmore. Dr. Joy and Colonel Davis examined her in the October following after she had the severe illness in July. There can be no question on the evidence that she was then in an advanced stage of senile decay; that she was very feeble both in body and in mind; and that her memory and will power had undoubtedly gone. It is admitted that senile decay is slow and gradual. A severe illness would accelerate the progress very rapidly. I think there is no doubt that she suffered from a very severe illness in July and that it would be impossible for the doctors, who examined her after this illness, to be able to form or give any indication of the state of her mental capacity in the previous March without knowing exactly what the illness was and how severe it was. I am unable, therefore, to rely on their

Maung Pu and Ma Mi her action and her evidence are all in their favour.

Bearing these facts in mind and weighing them together with the medical evidence that has been given I think it is perfectly clear that she certainly was a person who, although she might understand to a certain extent the conduct which was proposed to her, would act in accordance with suggestions made to her or influence brought to bear upon her.

Now an old lady of this age can hardly be held, on the facts that I have held to be established, to have had capacity and knowledge to the full extent of those terms. But even if she had, it is to my mind clear that her intention to make the gift in suit was produced by influence brought to bear upon her. The sum paid for the house and the money originally entrusted to Maung Pu are nearly the same. She entrusted it to him and on the slightest suggestion that he was misappropriating it she decides to withdraw the money from him. He is criminally prosecuted in connection with it and he gets her under his control and she at once sides with him and at the same time, although she had shortly before been demanding that he should return the money, she makes a gift of this large sum to him and his wife and her other adopted daughter. It has been urged that she was by this depriving herself of practically the whole of her property. There is not sufficient on the record to enable me to say that this was the case but she was depriving herself of what was almost certainly a very large amount of her property.

When a gift of such a large sum is made under the circumstances I have described by a person of her age and character, I think it must follow there is a very grave fear that her actions were due to influence brought to bear upon her. Further I consider that the relationship which existed between her and Maung Pu and his wife, when we find her mind and body to have been enfeebled and remember the action which she has taken throughout the various incidents that arose in this case, was such as would bring the case within the purview of that rule of equity as to confidential relationship and that therefore, even if we assume that the gift

JUDGMENTS IN APPEAL.

1914.

MAUNG PU v. LUCY MOSS.

Ormond, J.—This was a suit originally instituted by Ma Hmwe Gaing, the widow of John Nepean deceased, against Maung Pu (her son-in-law), Ma Mi (her adopted daughter, Maung Pu's wife), Ma Khin Min (minor adopted daughter) and Maung Shu Maung (the minor son of Ma Mi and Maung Pu), to set aside a deed of gift, dated the 5th March 1909, on the ground that it was obtained by the undue influence of Maung Pu. Ma Hmwe Gaing died during the pendency of this suit and her daughter and son, Lucy Moss and Charles Nepean, were substituted as the plaintiffs. Ma Mi, the wife of Maung Pu, also died and her representatives were substituted in her place. The plaintiffs obtained a decree on the Original Side of this Court and the defendants now appeal.

Ma Hmwe Gaing had a house at Shwegyin where she lived. She was an old lady of over 80 years of age. Her husband, John Nepean, who died about 30 years ago, left a thousand acres of land and Rs. 10,000 to his wife and to each of his three children, Lucy Moss, Charles Nepean and George Nepean since deceased. Maung Pu is an advocate of this Court. After marrying Ma Mi he was sent to England and was called to the Bar and his expenses were partly defrayed by his mother-in-law, Ma Hmwe Gaing. Shortly after he had returned to this country, Ma Hmwe Gaing in July 1908 made a gift of her 1,000 acres in five equal shares to her two adopted daughters, Ma Mi and Ma Khin Min, and her three natural grandchildren; and she appointed Maung Pu as the manager and trustee at a remuneration of 20 per cent. of the profits. In August 1908 Ma Hmwe Gaing gave Rs. 37,000 to Maung Pu to invest for her. At that time Maung Pu was living in Rangoon, Ma Hmwe Gaing was living at Shwegyin, and Mrs. Lucy Moss was also living at Shwegyin next door to her mother's. Early in October 1908, Ma Hmwe Gaing wanted the money back, and it is clear from the evidence that she wanted it back because her daughter, Mrs. Lucy Moss, had given her to understand that Maung Pu was making a wrong use of the money. Maung Pu and his wife came over to Shwegyin and Ma Hmwe Gaing then wanted to go and stay with Maung Pu at Rangoon. Mrs.

to Shwegyin. On the 23rd November 1908 the old lady filed a written statement in Charles Nepean's suit (to set aside the settlement of July 1908) in which she supported the settlement, but on the 29th July 1909, after she had returned to Shwegyin after her illness, she filed a second written statement in which she confessed judgment and consented to a decree for the relief prayed for. On the 5th January 1909, the day when the agreement for the purchase of the house was made, Colonel Davis was called in and he certified that the old lady was of sound mind and capable. On the 5th March 1909, when the deed of gift was executed, Major Röst was called in and he certified to the same effect. Charles Nepean having alleged in his plaint (in October 1908) in the suit to set aside the settlement of July 1908 that Ma Hmwe Gaing was 82 years old and her mental capacity had been affected by old age and that she was under the influence of Ma Mi and Maung Pu, it was only prudent on the occasion of this second gift to have reliable medical evidence to show that the old lady's mental capacity was not impaired.

The learned Judge held that the deed could not be set aside on the ground of unsoundness of mind in the old lady, but he found that she was of weak intellect, infirm and liable to be influenced and that she did not have full capacity of knowledge as to what she was doing, that the gift was produced by influence brought to bear upon her, and further that the relationship which existed between her and Maung Pu and his wife was such as would bring the case within the purview of the rule of equity as to confidential relationship: and that, therefore, even assuming that the gift was properly made it was the effect of influence induced by those relations and that the burden, therefore, lay on Maung Pu to show that she had independent advice or that she adopted the transaction after the influence was removed.

The learned Judge in finding that at the time of the gift the old lady was of weak intellect, infirm and liable to be influenced, and that she did not have full capacity of knowledge as to what she was doing, relied upon the evidence of Colonel Davis. Colonel Davis at the hearing, though called as a witness for the plaintiff, emphasises the fact that the old lady was fairly

spiritual adviser to the donor. Mr. Cowasjee for the respondents has urged before us that the confidential relationship of lawyer and client existed, and that Maung Pu was the old lady's legal adviser. This suggestion was first made in appeal; no mention of it is to be found in the plaint or in the issues. Maung Pu no doubt consulted lawyers on behalf of the old lady and he may have given her legal advice; but I think he clearly did so as a son-in-law and not as a professional lawyer. It is clear that Mrs. Lucy Moss tried to exert her influence over the old lady to prevent her from benefiting her adopted children. There is nothing to show that Maung Pu exerted any counter influence; but assuming that he did, there was no undue influence. The remarks of their Lordships of the Privy Council in the case of *Ismail Mussajee Mookerdam* v. *Hafiz Boo* (3) are very apposite. The transaction was very natural and reasonable under the circumstances existing at the time. The natural family had been provided for. The old lady must have been deeply irritated by the conduct of Mrs. Lucy Moss and Charles Nepean in seizing her jewels and in filing the Criminal and Civil proceedings in October 1908 and she had never wished to benefit them. She was old and in case of her death they would have inherited equally with the adopted children. As in the case cited above there is no evidence establishing any general case of domination on the part of Maung Pu and his wife, and of subjection on the part of the donor. Even if a presumption is to be raised against Maung Pu in this case with reference to the interest taken by Maung Pu's wife and child under the gift, no such presumption could be raised in connection with the interest taken by Ma Khin Min who had lived all along with her adoptive mother. The gift to her could only be set aside if it were established by evidence that the gift had in fact been induced by undue influence; and there is no such evidence.

In my opinion the plaintiffs have failed to make out their case, and no onus rested on Maung Pu to disprove influence. I would allow the appeal with costs in both Courts, 10 gold mohurs a day as advocate's fee for every day's effective hearing after the first—in both Courts.

Twomey, J.—I concur.

(3) (1906) I.L.R. 33 Cal., 773.

1915.

MA ARRAY v. E PO.

She presented her petition for divorce nearly four years after his parting from her. The grounds on which she asked for a divorce were adultery coupled with desertion without reasonable excuse for upwards of two years.

Adultery by the respondent has now been adequately proved. The Divisional Judge refused a decree for divorce holding that desertion within the meaning of the Indian Divorce Act had not been proved, and that the petitioner had been guilty of unreasonable delay in presenting her petition.

" Desertion " under the Act implies an abandonment against the wish of the person charging it, but as pointed out in *Yin Za* v. *C. Nash* (1) it is not a universal rule that the abandonment must be against the expressed wish of that person. In the present case the respondent left the petitioner telling her an untruth about where he was going, and not leading her to suspect in any way that he was going to abandon her. She must have been under the impression that he was coming back to her. She had no opportunity then of expressing any wish against his abandoning her. Shortly afterwards she heard that instead of taking her to where he had to live he had taken another woman to live with him there. This abandonment of her must have been against her wish. No woman who had been so recently married to a man and who thought they were living happily together could have felt other than resentment at such conduct.

She was in no way bound to ask him to provide a home for her in which to live together again after such treatment. Section 22 of the Act gave her a right to a judicial separation : she was not bound to forgive the adultery, and by asking him to live with her she would have done so and have condoned it. The element of abandonment against the wish of the party charging it seems clear in the present case.

In regard to the question of unreasonable delay the petitioner had to wait for two years before she could present her petition for divorce. Her petition was presented short of two years from the time she might have presented it. She says she was told she had to wait three years, so that according to her lights she delayed something short of a year.

(1) 6 L.B.R. 53.

the Court, and this composition was binding on all their creditors and precluded the plaintiffs from suing them.

It appears from Insolvency Case No. 9 of 1911 that the defendants were adjudicated on the 4th March 1911. Notice of the adjudication was published in the *Gazette of India*, the *Burma Gazette* and the *British Burma Advertiser* in March 1911. By the adjudication order the insolvents were ordered to file their schedule within 30 days from service of the order on them. No schedule was ever filed, and nothing was done in the case until the 22nd February 1912, *i.e.* nearly a year after the adjudication order. The insolvents then presented a petition stating that the creditors who had obtained the adjudication were their only creditors, and that they were willing to compound for eight annas in the rupee. They asked the Court to approve this arrangement and to annul the adjudication. This application appears to have been regarded as a submission of a proposal under section 28 of the Presidency Towns Insolvency Act, but it is not clear that the section applies when there is only one creditor. Sub-section (4) of section 29 appears to show that the sections under the heading "Composition and schemes of arrangement" apply only when there is a general body of creditors. Sub-section (2) of section 28 contemplates that the insolvent's proposal should be submitted to the Official Assignee and sent by him to each creditor mentioned in the insolvent's schedule or who had tendered a proof. In the present case there being no schedule the prescribed procedure could not be carried out, yet the farce of calling a meeting of creditors was gone through. There was no public examination of the insolvent, no special leave to dispense with such examination was obtained, consequently if the insolvent's application was one under the composition sections it could not be heard in view of the express prohibition in sub-section (2) of section 29. When the matter came on to be dealt with the adjudicating creditor's advocate stated that the creditor had been paid eight annas in the rupee which he accepted in full satisfaction. The Official Assignee stated that costs, commission and charges had been paid.

The order made was simply, "The insolvency is annulled." There is nothing in this to show that it was meant to be an

for an annual festival; but there is no evidence of dispossession by the defendant, *i.e.*, there is no evidence to show that the plaintiffs were in possession of this land at the time that the defendant took possession. The case has proceeded and has been decided solely upon the question of title, *i.e.*, upon the question whether the land formed part of the pagoda site or not. Both the Township and the District Court found in favour of the plaintiffs on this question and have given the plaintiffs a decree as prayed.

The question in this appeal is whether the Civil Courts had any jurisdiction to determine the above question. In my opinion they have not. Under section 4 of the Lower Burma Land and Revenue Act, 1876, a pagoda would have by implication a title to the land which formed part of its site at the time that Act came into force, so long as the land continued to be used for the purposes of the pagoda. But section 5 clearly shows that the boundaries of such land (if no other mode of defining them is provided by law) are to be defined by the Revenue Officer; and if before they are defined, any question arises as to whether any land is included within them, such question is to be decided by the Revenue Officer whose decision, subject to appeal and review as thereinafter provided, is to be final.

Government is the original owner of the land: and a pagoda cannot, under sections 4 and 5 of the Act, acquire as against Government a title to the land forming its site, except through the Revenue Officer, either by having the boundaries defined by him, or by his decision that the land in question belonged to the site of the pagoda when the Act came into force and is continuing to be used for the purposes of the pagoda.

In this case, as stated above, the plaintiffs do not rely as against the defendant upon a title by possession: they must therefore show a title from Government.

The Revenue Authorities have held an enquiry as to whether a lease of the land in dispute should be granted to the defendant: but they have not decided whether or not the land in dispute forms part of the pagoda site under the Act. The Civil Courts are precluded from deciding this question, and until the plaintiffs have obtained a decision in their favour from the

the meaning of Article 182 of the Schedule to the Limitation Act, in which case the prior application for execution would admittedly save it.

Various cases were cited by counsel on the point which was a vexed one even under section 583 of the old Code, but this is an application under section 144 of the present Code, and the alterations introduced by the Legislature have been so great, that unless we are to consider them meaningless and objectless which is impossible—c.f. *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (1)—these older authorities are only useful as pointing out the divergencies of opinion to put an end to which it may be assumed was one of the reasons for the change of language. In the first place the position of the section is altered. In the old Code the section relating to these applications found place in Chapter 41 which deals with appeals from original decrees. Its corresponding place in the new Code should therefore have been in Part VII, but as a matter of fact it is placed in Part XI which deals with miscellaneous matters. Its connection therefore with the reversing decree is not so obviously close as it was under the former Code, and in proportion as its connection weakens or vanishes the argument that it is an execution of that decree weakens or falls. Then too section 583 of the old Code was the section that provided how Appellate Court decrees should be executed. Now we have sections 37, 38 providing how appellate decrees are to be executed and placed within the appropriate chapter dealing with execution. There is not a word about execution in section 144, all reference is studiously omitted; section 583 dealt chiefly with execution and referred to persons entitled "under a decree" to any benefit, words that seem to me to lend colour to the argument that the section only applied where the relief applied for was expressly granted by the decree. In the new section those words are also studiously omitted. These changes cannot in my opinion have been unintentional, and the combined result, I think, is that where, as here, the decree does not expressly order restitution or other relief, but such is the necessary sequela of the decree, any person entitled,—no longer a party only, as under the

(1) (1905) 2 Cal. L.J., 546.

not allege dispossession. What he says is that in 1914, *i.e.* about three years after he had bought the land from Ma Nabu, a Land Records subordinate brought to his notice that part of the area shown on the *kwin* maps as Ma Nabu's garden plot was occupied by the defendants. He therefore brought the suit. The case falls under Article 144, and not under Article 142.

It is further contended that the defendants have failed to prove adverse possession for twelve years. But before the defendants can be required to prove adverse possession it is necessary to see whether the plaintiff has prove title. The Township Court's finding on this point is based on the extracts from the revenue maps and on the evidence of the witness Bo Yi. The District Judge gives good reasons for disregarding Bo Yi's evidence altogether. This witness says that when the defendants bought their land he helped them to put up a fence on the boundary over against Ma Nabu's land. He does not explain why he helped them to grab part of Ma Nabu's land. His evidence as to what Maung Pa Gale pointed out as the boundaries of his land is confused. On the other hand there is no evidence that Ma Nabu was ever in possession of the strip now in dispute. She is still living and was even cited as a witness by the plaintiff, but she was not examined. This tells strongly against the plaintiff. According to plaintiff's 3rd witness Maung Sin, Ma Nabu's son objected to the defendants' fence saying that he thought the defendants were encroaching. This witness is admittedly on bad terms with the defendants. His evidence if true would only show that Ma Nabu was aware of the fact that the defendants in 1906 enclosed a strip of land shown on the maps as hers and that she took no active measures to assert her claim to it but allowed defendants to remain in occupation year after year. The plaintiff admits that his vendor Ma Nabu never told him that the defendants had encroached on her garden plot. Even the plaintiff's own witness Maung Sin says that before the defendants put up the fence the fruit growing on the land was enjoyed by the "public." There is nothing to show that Ma Nabu exercised rights of ownership over it.

If the plaintiff had proved that Ma Nabu was ever in possession it would no doubt be necessary for the defendants to prove twelve years' adverse possession. But the plaintiff having

1915.

SAN BWIN v. A. N. K. NAGAMUTU.

deed. This mortgage was usufructuary, and under it the plaintiff was to hold possession of the holding for six years, the principal not being repayable until the expiration of such period. In pursuance of this mortgage the plaintiff had entered into possession of the land and was in possession of it when his suit was filed. In 1913 the 1st defendant firm had sued the mortgagors on the mortgage of 1905 for Rs. 300 principal and interest due, and had obtained a mortgage decree for such amount of principal, Rs. 172-8-0 interest, and Rs. 52-8-0 costs. The decree directed that in default of payment of Rs. 525 with interest at 6 per cent. per annum from the 16th October 1912, the two mortgaged holdings were to be sold. The plaintiff was not a party to the suit, and no mention was made of his having the usufructuary mortgage over one holding. The holdings were sold under the decree and the 2nd defendant bought the one mortgaged to the plaintiff for Rs. 735; an order had been made at the instance of the 2nd defendant ordering Ma Thè to deliver up the land to him. The plaintiff apprehended disturbance of his possession under his usufructuary mortgage.

The prayer of the plaint is—

(1) that it may be declared that the decree in Civil Regular Suit No. 448 of 1912 (the suit on the 1st defendant firm's mortgage) and the sale of the land in Civil Execution No. 150 of 1913 of the Township Court of Yedashè is inoperative against the plaintiff's interest in the land and voidable; and

(2) that the defendant No. 2 (the purchaser at the sale in execution) is not entitled to disturb the plaintiff's possession.

It may be said at once that the plaintiff can have no right to a declaration that the sale under the decree is voidable either at his instance or that of any of the mortgagors. There is however a question whether if he can prove what he alleges he is not entitled to a decree containing the other declarations he asks for.

The Subdivisional Judge did not appreciate the real point involved in the case, which is whether the plaintiff as a puisne usufructuary mortgagee who was not made a party to a suit on the first mortgage (as he should have been under Order 34, Rule

who was not a party to the suit by the first mortgagee?" The answer of the Full Bench was in the negative.

The judgment makes it clear that a stranger who buys is in no better position than a first mortgagee who buys at the sale in pursuance of his decree. Their Lordships say, "the authority of the Judicial Committee is clear for the position that whatever rights the second mortgagee as such may have at the date of his mortgage whether to possession (if his mortgage be one with possession and the previous one without it) or to sale or foreclosure under section 67 (of the Transfer of Property Act), such rights remain altogether unaffected by the suit of the first mortgagee without the second being a party to it and the sale n execution of his decree." This judgment arrived definitely at conclusions towards which all the latter decisions were tending and it appears to me undoubtedly to state the law correctly. Their Lordships say that there is nothing in *Goverdhana Doss* v. *Veerasami Chetti* (2) to support the contentions of the respondent who argued in favour of an affirmative answer to the question referred. Adopting this judgment the plaintiff in this case, if he was a second mortgagee in possession under a mortgage under which he was entitled to possession, could not be lawfully ousted from possession by the mortgagor, or by the first mortgagee, or by a purchaser at a sale under a decree in a suit on the first mortgage to which he was not a party. That being so a suit for declarations that the decree and sale in the first defendant's suit was inoperative against him, and that the second defendant was not entitled to disturb his possession was open to the plaintiff in this case, and he was not obliged to seek further relief. All he wants is to be left in the possession which he alleges he had at the time he filed his suit. It is open to him to choose his own time for enforcing other rights which the law may give him in respect of his usufructuary mortgage.

The case will be remanded for trial, but the issues fixed by the Subdivisional Judge are not appropriate. I fix the following issues:—

1. Did Ma Thè mortgage the holding in suit to the plaintiff by an usufructuary mortgage and was the plaintiff in

(2) (1902), I.L.R. 26 Mad., 537.

Ramrick Dass v. *Mohamed Yacubji Dudah*, 2 L.B.R., 122, referred to.

The facts before the Court were as follows :—

The defendant occupied a room in a house which at one time belonged to A. Mahomed Eusoof. In a previous suit (No. 4324 of 1914) brought by the plaintiffs against the 1st defendant for rent, one Andiappa Chetty produced a mortgage deed by which this Eusoof purported to mortgage the house to M.V.E.V.E. Curpen Chetty, but as Andiappa Chetty said he was not in Rangoon at the time the mortgage was executed he did not prove that the mortgage had in fact been executed by Eusoof. Andiappa had the house sold by auctioneers under a power of sale contained in the mortgage. One Kader Bacha bought the house thus sold. Subsequently Kader Bacha sold the house to the plaintiff on the 24th April 1914. Several people were living in the house as tenants of Eusoof. The defendant was one of them. On the 27th April an advocate on behalf of Eusoof sent the 1st defendant a letter requiring him to pay rent to him and to no other person. On the 1st June 1914 the plaintiffs through an advocate gave notice to the tenants of their having purchased the house and requested them to pay rent for May. The letter also gave them notice to quit the house at the end of June, and warned them that if they did not comply with the demands against them legal proceedings would be taken against them without further reference. On the 25th June another letter warned the tenants that if they did not quit the house before the 1st July they would be charged enhanced rents, and demand was also made for the rent of June at the rate at which they had been paying to Eusoof. On the 17th June the plaintiffs instituted Suit No. 4324 against the defendant for Rs. 9 as being due for the rent of the room he occupied in the house for the month of May 1914. This suit was dismissed, the learned Judge holding that a suit by the plaintiffs for rent did not lie, because (1) they could not be regarded as having stepped into the shoes of the original lessor Eusoof, (2) the tenants had not attorned to them and their possession should be treated as adverse to the new owners, (3) the lease was at an

on express or implied contract between the owner and the person who has used and occupied his property, and the other by the owner for damages for use and occupation against one who has wrongfully occupied his property. This is not so: in the 14th Chapter of Woodfall's Law of Landlord and Tenant the subject matter of the particular form of suit is dealt with fully, and the form of plaint for such a suit given in Bullen and Leake's Precedents of Pleading; the notes upon this form may usefully be referred to in order to ascertain the scope of such a suit.

In the present case the plaintiffs' suit for use and occupation did not lie in respect of anything being due for use and occupation between the 1st July and the 1st November because between those dates the defendant was a trespasser. It did not lie for the month of May because the plaintiffs' proper suit in respect of that month was for rent. Assuming that the learned Judge adhered to his opinion that section 23 of the Provincial Small Cause Courts Act need not be acted on if the plaintiffs had proved their title in the first suit, the Judge's dismissal of that suit would have been wrong. He was in error in thinking that no one but the original lessor can sue a tenant for rent. Section 109 of the Transfer of Property Act was brought to his notice, and he was right in thinking that the section did not apply to the case before him because it was not a case of the lessor having transferred the property leased. The section, however, does not contain the whole law as to the rights of an original lessor devolving on or being acquired by another. Such rights may be acquired by derivative title by any person who lawfully acquires or becomes entitled to the property leased. Some of the cases in which the rights of the original lessor devolve on others are dealt with in Chapter VII of Woodfall's Landlord and Tenant dealing with substitution of parties to the contract of tenancy. In view of one contention put forward by the defendant in the case, it may be noted that the rule that a tenant may not dispute his landlord's title applies only to the title of the original landlord who let him into possession and not to that of an

1915.

S. P. GHOSH v. KING-EMPEROR.

Courts Act, as to whether the Chief Judge erred in accepting the jury's verdict.

Held—firstly, that a Court acting under this section is not a Court of Appeal and cannot deal with questions, not raised in the Government Advocate's certificate; and *secondly*, that the fact that an accused has been charged with dacoity does not necessarily invalidate a verdict of guilty of abetment of robbery. Section 114, Indian Penal Code, only applies when an abettor has done something constituting abetment prior to the commission of the crime itself, and when he has also been present at the commitment of the crime, but has not actually committed it.

Hla Gyi v. *King-Emperor*, (1905) 3 L.B.R., 75; *Muthukumaraswami Pillai* v. *King-Emperor*, (1912) I.L.R. 35 Mad., 397; *Yeditha Subbaya* v. *King-Emperor*, (1912) 23 Mad. L.J., 722; *Emperor* v. *Kashia Antoo*, (1907) 10 Bom. L.R., 26; *Queen* v. *Mussamut Niruni*, (1867) 7 W.R. Criml., 49; *Abdulla Khan* v. *Queen-Empress*, (1899) 34 P.R. Cr., 39—followed.

Regina v. *Chand Nur and Pirbhai*, (1874) 11 Bom. H.C., 240; *Padmanabha* v. *Emperor*, (1909) I.L.R. 33 Mad., 264; and *Singaravelu Pillay* v. *Emperor*, (1912) 14 Indian Cases, 203—distinguished.

Fox, C.J.—The accused S. P. Ghosh was tried with five other accused at a Criminal Sessions of this Court at which I presided on the following charge:—

"That you on or about the 31st day of March 1915 in the Pegu creek near Dawbong committed dacoity in that you conjointly confined Maung Lun Maung and his crew, beat them and robbed them of Rs. 20."

The general effect of the story of Maung Lun Maung and those with him was shortly as follows:—Eight of them were going up the Pegu river at night in a Burmese paddy boat: the helm of their boat fouled the anchor chain of a barge anchored in the stream. One of the crew of the Burmese boat fell into the river. Lun Maung asked the men on the barge to send their sampan to rescue the men, but they refused to do so, and they tied the helm of the Burmese boat to the chain of the barge and would not release it. A sampan put off from the barge to another barge anchored near by, and brought back some Indians. The Burmese were then told that the clerk had come and that they must come on to the barge. They got on to it and were told to go into a small room on the deck. When they went in they were told by the 3rd accused S. P. Ghosh to sit down. He asked them their names and took these down in writing. When this was done the 1st accused in the case demanded to know which of them had abused him, and without

stances pointed to a plan having been formed amongst all those on board the barge to get the Burmans to come on to the barge and to go into the room, confine them there, and then beat them and get money from them. I told the jury in the course of my summing up that assuming that they did not believe the one witness who spoke to this 3rd accused having joined in the violence they should not convict him merely because he was present when the violence took place and the money was demanded, and that before they could convict him they must be satisfied that he was a party to a plan for obtaining money from the Burmans by violence or threats or that he had in some way joined or had a part in extorting the money from Lun Maung by the violence and threats spoken to. I put before them for consideration the possibility of coming to a conclusion that no plan for extorting money from the Burmans had been arranged prior to their being sent into the room, and that the idea of beating them and getting money from them may have started with the 1st accused when he demanded to know who had abused him.

In dealing with the case of each accused separately I pointed out to the jury that this 3rd accused's case on the facts was that he was not present on the barge when any violence had occurred, and I told them that if they believed this they should of course acquit him.

In my general explanation of the constituents of the offences of extortion, robbery and dacoity, and of the points as to which they should be satisfied before they convicted any of the accused, I told them that if they believed the Burman witnesses' story about the Rs. 20 having been extorted by violence and threats they should convict those of the accused who in their opinion had taken any part in extorting or in any plan for extorting the money by such violence and threats of either dacoity or robbery according as they found that five or less than five persons took part in committing the offence. Having at the end of the case for the prosecution directed the acquittal of the 5th and 6th accused on the ground that there was no evidence identifying them as having been present at the occurrence, the case of four accused had to be decided by the jury. After retirement to consider their verdict the jury

present at the time of the commission of the robbery.

The second of the above grounds must be based on a misstatement made to the Government Advocate. I certainly put to the jury the 3rd accused's case that he was not present at the time of the commission of any dacoity or robbery, and told them that if they believed that they should acquit him. If the Burman witnesses were believed there could be no question as to his having been present at the dacoity or robbery.

As to the first ground the verdict was unanimous, and the Code makes no provision for the presiding Judge not accepting an unanimous verdict. Under section 305 of the Code it is only when the jury are not unanimous that it lies with the Judge to take one of the courses specified in the section. There could be no error in law in my accepting the verdict because no question of acceptance of an unanimous verdict can arise—vide *Hla Gyi* v. *King-Emperor* (1). The verdict had to be recorded and the accused was by it convicted of the offence of which the jury found him guilty. The contention of the learned advocate who argued the case for the accused before this Bench was not that I committed any error in law in accepting the verdict. He was unable to suggest what course other than the one I took should have been adopted by me under the peculiar circumstances of the case. His contention was that the jury had given a verdict which for several reasons was illegal.

The first question for consideration is whether it is competent for this Bench to enter into and deal with points other than those raised in the certificate.

In *Muthukumaraswami Pillai* v. *King-Emperor* (2) a Full Bench of the Madras High Court unanimously held that a certificate of the Advocate-General has not the effect of opening the whole case as if on appeal, but it only gives the Court the power or authority to review the case or so much of it as is necessary in order to determine the point or points of law raised in the certificate and thereupon, that is to say if it finds there has been error of law in those points, to alter the sentence and pass such judgment and sentence as may seem right.

(1) (1905) 3 L.B.R., 75.
(2) (1912) I.L.R. 35 Mad., 397, at pp. 409, 424, 425.

1915.

S. F. GHOSH v. KING-EMPEROR.

Lest, however, I am taking too narrow a view of the powers of this Bench, I will deal with some of the points raised by the learned advocate who argued the case.

One was that the accused having been charged with dacoity only, he could not be legally convicted of abetment of robbery whether he was present or not present at it. It was not disputed that if present he could be convicted of robbery although the only charge was of dacoity, but it was argued that if he was to be convicted at all he had to be convicted of either dacoity or of robbery. The argument was founded on the wording of section 114 of the Indian Penal Code and of some of the sections in Chapter XIV of the Criminal Procedure Code dealing with the law as to charges, and on some decisions of High Courts in India.

The first of the cases bearing on this question is *Regina* v. *Chand Nur and Pirbhai* (3). In that case Chand, at the instigation it was said of Pirbhai, put some poison into a mill belonging to one Rajebhai, an enemy of Pirbhai's. Rajebhai was not killed but his two sons were. Chand and Pirbhai were charged with murder. The Sessions Judge found on the evidence that Pirbhai was not present at the commission of the offence, but he found him guilty of abetment of murder. The High Court held that this conviction was wrong, and directed that Pirbhai should be retried on a charge of abetment of murder. The reasoning on which the High Court arrived at this conclusion was that the section of the then Code of Criminal Procedure, which corresponds to section 238 of the present Code, did not apply to a collateral offence, which was in that case the instigation by Pirbhai of Chand to commit the offence, which instigation must have taken place before the murder at a different place, so that the set of facts Pirbhai had to meet if he had been charged with abetment of the murder were separate and distinct from the facts the actual murderer had to meet. The learned Judges said that when a man is accused of murder he may not be conscious that he will have to meet an imputation of collateral circumstances constituting abetment of it which may be quite distinct from the circumstances constituting the murder

(3) (1874) 11, Bom. H.C., 240.

1915.

S. P. GHOSH v. KING-EMPEROR.

a universal rule that in no case can a conviction for abetment be possible where the charge was only of the principal offence. He went on to say: "The question is what were the facts charged? If on those facts two charges could be framed, namely, the commission of the principal offence, and the abetment, then by virtue of provisions of section 237 the accused may be convicted of the offence of the abetment though it was not charged separately against him."

In my opinion a charge of abetment of robbery might have been made against the 3rd accused in this case notwithstanding that the prosecution's case was that he was present at the robbery, and section 114 of the Penal Code would not have been a bar to his conviction for abetment of the robbery. The wording of the section is—

"Whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence."

The exact meaning is somewhat obscure, and as Mr. Mayne says the section introduces a statutory legal fiction whereby an abettor is treated as if he had actually committed the offence himself by reason of his presence at the time and place of the offence. It has been decided, however, that this section does not apply to the case of an abettor whose abetment consists in something done or omitted when the offence was committed in his presence.

In a case reported at page xxxvii of the Appendix to the 4th Volume of the Madras High Court Reports, 1869, that Court said that the section simply provides for the punishment of what the English Law calls principals in the second degree, who according to paragraph 803 of Dr. Gour's Penal Law of India are persons who abet a crime and countenance it by their presence at it, but who do not actually engage in it.

Dr. Gour's remarks on the words "shall be deemed" in the section are that they imply that the change of status from abettor only to principal is only by way of legal fiction—not that the abettor actually commits the offence he is present at.

We should have to consider whether the error had in fact occasioned a failure of justice.

The error consisted in returning a verdict of aiding and abetting the robbery when according to the direction I gave the jury they should, if they accepted the case of the prosecution, have found this accused guilty of robbery.

The verdict was not guilty of dacoity in respect to all the accused, guilty of robbery against the 1st and 2nd accused: in respect to the 3rd accused it was neither one of guilty nor one of not guilty of robbery but a special verdict of aiding in and abetting the robbery. From the point of view of the layman this verdict was a perfectly reasonable one, and on the facts before them it expressed a view which any non-lawyer might take. They had to consider and decide whether this 3rd accused had taken any part and, if so, what part in the crime spoken to by the Burmese witnesses. None of these witnesses had spoken of the 3rd accused having demanded money, and the evidence as to his having used threats or violence was very dubious and weak, but his story as to not having been present when the crime was committed could not be believed, and the circumstances showed that he was present at it and that he was party to a plan for extorting money as suggested by the prosecution. I can quite understand reasonable men coming to the decision that although this man may be liable to be convicted of the grave offence of actual robbery we will convey our view that he did not take such an active part in the robbery as those we convict of it by convicting him of an offence which will indicate more closely than a conviction of robbery would the actual view we take of what he did. The verdict is not open to the charge of inconsistency even from a lawyer's point of view: it was not one of not guilty of robbery but guilty of aiding and abetting the robbery: it was one finding him guilty of what would appear to the ordinary men to be a minor offence instead of finding him guilty of a grave offence. If the bringing in a verdict of guilty of a minor offence when according to the direction of the Judge there should have been a verdict of guilty of a major offence is to be regarded as a ground for setting aside a verdict altogether and releasing an accused, it strikes me that the consequences may be direful.

stated or indicated in the charge :—*Regina* v. *Chand Nur* (3) and *Yeditha Subbaya* v. *Emperor* (6).

The 3rd accused was charged with five others with "committing dacoity in that they conjointly confined Maung Lun Maung and his crew, beat them and robbed them of Rs. 20 and thereby committed an offence under section 395 of the Indian Penal Code."

Section 391 of the Indian Penal Code which defines dacoity says : "Where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding is said to commit 'dacoity.'"

The case against the 3rd accused as disclosed in the charge was that he participated in the common intention of committing the robbery ; that he either took part in the actual commission of the robbery or that he was present and aided the commission of the robbery. Possibly the charge would not warrant a conviction of abetment of robbery on the ground that the accused had previously instigated the robbery ; but it would clearly warrant a conviction of abetment by being present and aiding in the robbery. And even if the acts constituting such abetment were sufficient to make the accused liable for the robbery under section 34, Indian Penal Code, a conviction or a verdict of guilty of abetment of the robbery would be lawful.

The fact therefore that the accused had been charged with dacoity only, does not necessarily invalidate a verdict of guilty of abetment of the robbery. No reference is made by the Government Advocate in his certificate to the facts of the case or to the learned Chief Judge's charge to the jury. As the question before us stands, it must be assumed that—but for the fact that there was no specific charge of abetment of robbery, but a charge of dacoity only—the verdict of the jury is not open to question.

There is nothing in the certificate of the Government Advocate which would warrant us in going into the question whether the verdict was bad on any other grounds, *e.g.*, that the law relating to abetment was not explained to the jury, or that the

(3) (1874) 11 Bom. H.C., 240. (6) (1912) 23 Mad. L.J., 722.

plaintiff all monies which were and would become due to him by the Company in connection with the contracts.

On the 1st of September 1910 the plaintiff sent the document to the 3rd defendant as District Engineer with a letter asking him to pay all monies due to the 1st defendant to him (the plaintiff).

The 3rd defendant, Roberts, endorsed on this letter: "The deed cannot be recognized in accordance with the rules on the subject." Roberts said that he verbally told the plaintiff to take the deed to the Company's Auditor, who is the officer who disburses monies. The plaintiff did not do this. He says he was told that the bills for work done by Chanda Singh would be made out in his name, and he left the document with Roberts. Subsequently he heard that the money due had been paid to Chanda Singh, so he went again to Roberts, and was told that the money due had been paid to Chanda Singh. The money had in fact been paid partly to Chanda Singh and partly into the Small Cause Court, Rangoon, under attachments from it. The plaintiff received the document back from the District Engineer on the 14th January 1911 as shown by the receipt produced from the Engineer's office.

The plaintiff sues the Company and Roberts for the monies which he claims should have been paid to him.

The questions in the case are whether the notice given to the District Engineer was a sufficient notice, and whether the Company became liable to pay the plaintiff in consequence of it. There is no case against the 3rd defendant. The debt due to Chanda Singh was an actionable claim as defined in the Transfer of Property Act. Chapter VIII of that Act states the law as regards transfers of such claims. The document effected a valid transfer of the debt as between Chanda Singh and the plaintiff, but the Company were not bound by it unless it received express notice of it in writing conforming to the provisions of section 131 of the Act. The notice required by that section is a notice in writing signed by the transferor—in this case Chanda Singh—or his agent duly authorized in that behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and the notice must state the name and address of the transferee.

1915.

KING-EMPEROR v. NGA E MAUNG.

proved. He acquitted the accused and released him, completely ignoring the imperative provisions of section 471 (*1*) of the Criminal Procedure Code. Nga E Maung has been called upon in revision to show cause why those provisions should not now be given effect to, and has shown cause through an advocate.

The allegation made against Nga E Maung was that at about 7 A.M. on 21st March he entered the house of Maung Po Thaik while the latter was dressing and approached him and stabbed him on the left forearm with a clasp knife: Nga E Maung stabbed at him again but Maung Po Thaik caught his hand in which the knife was and sustained only a slight wound on the chest. He held Nga E Maung till other persons came and disarmed him.

The case was carelessly tried by the Magistrate in several respects. Thus Maung Po Thaik's evidence might be read as implying that he avoided entirely the blow aimed at his arm, and that it did not take effect at all: one of the witnesses, Maung Kala, who came on the scene at once, also refers to Po Thaik as showing people his wound: the Sub-Assistant Surgeon was allowed to leave the witness box after deposing to the nature of only one wound on Maung Po Thaik, that on his chest; he was however recalled, and made it plain that he also had a wound on the forearm, though all he said as to its nature was that it was not the result of great force. That however and Maung Tin's evidence make it perfectly clear that Po Thaik had two wounds, one on the arm and one in the chest.

The Magistrate appears to have found that had Nga E Maung been sane he would have been guilty of an offence under section 452, Indian Penal Code, but it is not clear whether he held that he committed any act besides entering Po Thaik's house armed with a clasp knife. He has expressly found that Nga E Maung did not inflict the wound on Po Thaik's chest, but throughout his rambling memorandum on the charge and his judgment I nowhere find any decision as to whether accused inflicted the wound on Po Thaik's forearm. On the evidence the finding should have been that he did

Cause is shown by Nga E Maung's advocate on three grounds. First that it is unnecessary to report the case for

1915

KING-EMPEROR v. NGA E. MAUNG.

The provisions of section 471 (*1*) are plain and imperative and I feel no doubt that if a subordinate court disregards them this court has power to remedy the error in revision. In this case I consider this will best be done by recording the finding which the Magistrate should have recorded under section 470 and passing the order which he should have passed under section 471 (*1*).

The finding is that at 7 A.M. on 21st March 1915 Nga E Maung, son of Maung Tun U of Einme entered the house of Maung Po Thaik of Einme carrying a clasp knife, wherewith he stabbed Maung Po Thaik in the left forearm. But for Nga E Maung having been found to be, at the time, by reason of unsoundness of mind, incapable of knowing the nature of the acts committed or that they were wrong or contrary to law, they would have constituted an offence.

Under section 471 (*1*), Criminal Procedure Code, read with section 24 of Act IV of 1912, Nga E Maung will be committed to the Rangoon Lunatic Asylum under a warrant in Criminal Form 121A.

Before Sir Charles Fox, Chief Judge.

Civil Revision No. 91 of 1915.

August 20th, 1915.

BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED v. JIAWOOLA.

McDonnell—for applicant.
Hancock—for respondent.

Bill of Lading—construction of—shipowner's liability construed.

Certain betel leaves shipped on one of defendant-company's steamer were damaged in transit owing to lack of ventilation, which was the result of their being stowed in the 'tween decks. On the Bill of Lading under which the leaves were shipped was the clause, "At shipper's risk with option of carrying on deck."

Held—that the option was the shipping company's option and that the company was not liable for damage.

The suit was for damages for negligence in carrying betel leaves packed in baskets on a voyage of one of the defendant-company's steamers from Calcutta to Rangoon in October 1914. The baskets were stowed in the 'tween decks, and owing to want of sufficient air or ventilation there for betel leaves they went bad. The question in the case was whether the defendant-

1915.

IN THE MATTER OF A IST GRADE PLEADER, RANGOON.

being that he, having received from the complainant sums aggregating Rs. 1,150 as fees for defending Maung Ok Gyi and Ma San Me in a criminal case before the Senior Magistrate, Mandalay—after appearing on two occasions when the case was not heard, failed without good cause to make any further appearance on behalf of his clients or to make proper arrangements for the conduct of their defence by another advocate.,

The petitioner Po Tin is the brother-in-law of Ok Gyi and the husband of Ma San Me. His case is that on the 7th September he engaged the respondent to defend Ok Gyi in the criminal case for a fee of Rs. 900, the respondent to pay his own expenses, and paid him Rs. 400 on that day. Respondent gave petitioner a receipt (Exhibit A) for "Rs. 400 on account of criminal case Mandalay—Balance Rs. 500." A few days later, he engaged the respondent to appear also for Ma San Me for a fee of Rs. 250. The case was fixed for the 23rd September. The respondent attended in Court but the case was postponed until the 30th September, because one of the other accused was not present. The respondent attended on the 30th September but the case was again postponed for the same reason as before until Monday the 12th October. On the 12th October the case was postponed until the 23rd October for the same reason as before. The evidence for the prosecution was taken on the 23rd, 24th and 26th October. On 27th October Ok Gyi (with others) was charged and Ma San Me was discharged; and the case was postponed until the 24th November.

The respondent did not appear on the 12th October or on any subsequent date—his case being that he was engaged to go to Mandalay only on two occasions or for two hearings, for the said sum of Rs. 1,150. On the 20th or 21st October the respondent left for Ceylon without leaving anyone to look after this case for him.

On the morning of Sunday, 11th October, the petitioner arrived in Rangoon, and with Po Kun went to respondent's house to pay him the balance of Rs. 1,150 which remained unpaid, *viz.*, Rs. 100. The respondent was out and did not return to his house until 1-30 or 2 P.M. The petitioner went off to catch the midday train for Mandalay and left the money

1915.

IN THE MATTER OF A 1ST GRADE PLEADER, RANGOON.

to enter upon his defence and in that case one trip to Mandalay only would be necessary; and that two trips—one for the case for the prosecution and one for the case for the defence—would in any case see the case through. The respondent states that neither party contemplated his making a trip to Mandalay when the case was not taken up. He put it to the petitioner that the case would take two days' hearing, *i.e.* would require two trips to Mandalay, and he agreed to defend Ok Gyi for a fee of Rs. 900. Nothing was said at the interview of the 7th September about any further fees being payable in the event of the case necessitating more than two trips to Mandalay. And the receipt for " Rs. 400 on account of the criminal case Mandalay, balance Rs. 500 " would shew that Rs. 900 was the fee for the whole case.

The case set up by the respondent in his written answer that there was an agreement for two visits only is certainly not made out. And the respondent was ill-advised in calling his three clerks and the client Aung Dun to prove statements by the petitioner that the petitioner had engaged the respondent for two trips. I attach no weight to the evidence of these witnesses; and if the petitioner did ever speak of two trips in connection with this contract, he must have meant that the respondent agreed to go up to Mandalay not only for the prosecution but also for the defence and to see the case through.

It is not too much to expect that statements made by Advocates to the Court should be made with the utmost candour. If the respondent in his written explanation had stated the case in its true light, the matter would have borne a very different complexion and this hearing might have been obviated.

In this country where Advocates receive instructions from the lay clients themselves (or their friends), it is incumbent on the Advocate to see that the terms of his engagement are clear and are understood by his client. And in the absence of any special contract, the fee must be taken to be for the whole case. The proof of the terms of the contract should not have to depend upon the evidence of the Advocate's clerks, whose evidence is as a rule valueless. The witness box is not the proper

respondent's own admissions and I agree with my learned colleague in rejecting the evidence of the lawyer's clerks and the client Aung Dun. The receipt given on 7th September showing a lump sum fee and a balance of Rs. 500 still due tells strongly in support of the petitioner's version which is moreover in accordance with probabilities. The respondent admits that neither he nor the petitioner contemplated the possibility of the respondent going to Mandalay for mere adjournments. But, if the respondent was engaged specifically for two trips only, the possibility of adjournments would almost certainly have been considered. The respondent knows that Magistrate's cases up-country are apt to hang fire from one cause or another especially when as in the petitioner's case there are several accused and when the witnesses have to come from various other districts. This was clearly a case that was prone to suffer from adjournments. In such a case it is hardly conceivable that a Rangoon lawyer would be engaged without the question of adjournments being considered. The fact that this matter was not discussed with the petitioner points only to the conclusion that the respondent was engaged for the whole case. It is urged that if an Advocate goes to Mandalay his expenses are just as great when there is a mere adjournment as when there is an effective hearing and therefore the respondent would necessarily fix a maximum number of trips with reference to the amount of the fee paid. But this would not be so obivious to the petitioner as to the respondent. It can be argued with equal force that the petitioner would not have engaged the respondent and paid the fee if he had been told that the respondent proposed to pay only two visits to Mandalay, however the case might go, and that an additional fee would be payable for any further attendance in the event of the respondent—owing to defective information or otherwise—going to Mandalay twice for mere adjournments. So far as I can see the petitioner had no inkling that he was liable to be treated in this manner. It is in the last degree unlikely that he would have agreed to such an arrangement. It certainly should have been explained to him at the beginning, and I should have expected to see a note of the fact on the receipt given on 7th September. The truth appears to be that the

Schedule II of the Court Fees Act. And there is no notification under section 35 of the Act in respect of orders under Rule 50 as there is in respect of orders under section 47 of the Code. The Court-fee should therefore be *ad valorem*.

1915.

VALLIAPPA CHETTY *v.* RANGASAWMY NAICKER.

Before Sir Charles Fox, Chief Judge.

1. FOESON OR FAKIR CHAN, 2. GOVINDO CHANDRO *v.* ADI CHANDRO BORWA.

Civil 2nd Appeal No. 179 *of* 1914.

September 3rd, 1915.

Campagnac—for appellants.

J. E. Lambert—for respondent.

Budhist Law.—What law applicable to non-Burman Buddhists.

The law to be applied to a non-Burman Buddhist is the customary law prevailling in his own country.

Ma Tin v. *Doop Raj Barna*, 1 Chan Toon's L.C., 370, dissented from *Fone Lan* v. *Ma Gyi*, 2 L.B.R. 95, referred to.

The case was between Rajbansis or Mugs. One question for determination was whether the wife of a Rajbansi had an interest in property which had been sold by her husband. The District Judge on the strength of the decision in *Ma Tin* vs. *Doop Raj Barna* (1) was of opinion that she had. The part of the judgment quoted by the District Judge *viz.*, "*primâ facie*, as a Buddhist, deceased would come under the Buddhist Law of the country at large, and the burden of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance" appears to me to be entirely opposed to the course of decisions in the Indian Courts, some of which are referred to in *Fon Lan* vs. *Ma Gyee* (2). The various races are accorded the customary law prevailing amongst them, and such customary law is applied to them in whatever part of the Indian Empire they may settle or be. I cannot accede to the proposition that Burmese Buddhist Law is applicable to the Rajbansis, even if they are Buddhists, The law to be applied to them is the customary law prevailing amongst them in their habitat which is Chittagong. Burmese Buddhist Law not being applicable in the case there is no foundation for the claim that the wife in this case owned half the property sold to the deceased whom

(1) (1894) 1 Chan Toon's L.C., 370. (2) (1903) 2 L.B.R., 95.

1915.

SHWE PAW v. PAN ZI.

no children by any of her three husbands. Shwe Nyein died before his adoptive mother Mi On Gaing.

The property in question is found to have been acquired while Mi On Gaing was married to her second husband Tun U.

The plaintiff Saw Pe claimed that not only his father Shwe Nyein but he himself was adopted by Mi On Gaing. The District Court found that he was not adopted.

The District Court decided that Saw Pe the son of the *Kittima* son ranked as a grandson and was entitled as against his step-grandfather Shwe Paw to one-half of his grandmother's property. The learned Judge relied upon the Upper Burma rulings. *Ma Hnin Dok* v. *Ma U* (1) and *Maung Kado* v. *Ma Kyin* (2).

Maung Shwe Paw the defendant appealed to the Divisional Court on the grounds that Shwe Nyein's adoption was not proved and in any case that Maung Saw Pe was at best an "out of time" grandchild and could not succeed to any part of the estate as against his grandmother's surviving husband. The Divisional Judge concurred in the finding that Shwe Nyein was the *Kittima* son but then went out of his way to consider the position of Saw Pe's mother Mi Pan Zi. He came to the conclusion that Saw Pe could not sue during his mother's life time as she was a step child of Mi On Gaing and was moreover the sole heir of her husband the adoptive son Shwe Nyein. The Judge thereupon purporting to act under Order 1, Rule 10, Code of Civil Procedure, joined Mi Pan Zi as a plaintiff and ultimately decided that she was entitled to three-fourths of Mi On Gaing's estate as against Mi On Gaing's surviving husband, and that the original plaintiff Saw Pe was entitled to nothing.

The Divisional Judge's procedure was erroneous. On his finding that the plaintiff Saw Pe had no right of action in his mother's life time the proper course would be to set aside the decree of the District Court and dismiss the suit. Neither Order 1, Rule 10 nor any other provision of the Code authorises a Court on finding that the plaintiff must fail to import into the case as co-plaintiff a person who has a different cause of action inconsistent with that of the original plaintiff and

(1) 2 U.B.R. (1897-01), 126. (2) 2 U.B.R. (1897-01), 164.

It has been urged that Saw Pe has a brother Tun Win and that he should be joined as co-plaintiff. This is not necessary. If Saw Pe is one of two sons of the *Kittima* son Shwe Nyein and if it is held that Saw Pe is entitled to a share, he should get only one-half of the share to which he would be entitled as the only son. The other half would be claimable by his brother Tun Win but it need not be awarded in this suit.

It may be questioned whether the Divisional Judge is right in regarding Mi Pan Zi as Shwe Paw's step daughter. Shwe Paw is the subsequent husband of Mi Pan Zi's stepmother Mi On Gaing and the rules relating to partition between stepchild and stepfather seem to have no application as between them. When Mi Pan Zi's father Tun U died Mi Pan Zi might have claimed partition from her stepmother Mi On Gaing but apparently did not do so because she was the wife of Mi On Gaing's *Kittima* son.

"Step-children," the Divisional Judge remarks "would seem to be treated under Buddhist Law upon the same principles as children." This is true only when there are no children of the whole blood. Children of the half blood cannot succeed on the footing of children when there are children of the whole blood. And one of the points which has to be decided in this case is whether a *Kittima* son, as being for all purposes equivalent to a natural born son of his adoptive parents, does not exclude a child of the half blood.

When a son dies before his parents and the parents afterwards die the question arises whether the deceased son's widow or his children or both widow and children represent him in the ultimate partition of the parental estate. Among other authorities sections 162 and 164 of the Digest may be consulted on this point.

The decree of the Lower Appellate Court is set aside and the case is remanded to the Divisional Court for a fresh decision after striking out Mi Pan Zi's name as co-plaintiff. The costs of this appeal will be borne by the estate.

A certificate will be given to the Appellant under section 13, Court Fees Act, for the refund of the Court-fee on the memorandum of appeal.

Ormond, J.—I concur.

causes the death of another man and does that act with the deliberate intention of causing death: that is one of the branches of the definition of culpable homicide amounting to murder. For that branch you have to be satisfied that he caused the death and did so with the express intention of causing death. There is another branch which is to be applied where you are not able to hold that an express intention of causing death existed in the mind of the accused, *viz.*, if the act is done with the intention of causing bodily injury and the bodily injury that he intends to cause is sufficient in the ordinary course of nature to cause death; then also he will be guilty of this offence. There is an illustration attached to this section, which is intended to show the class of cases to which this branch of the definition refers. (Reads illustration (*c*) to s. 300) and the illustration which is appended to the first branch of the definition is (Reads illustration (*a*) to section 300).

So you have the two cases one in which the man actually uses a weapon which itself shows that death is the almost certain consequence, and in the other case you have a man using a weapon such as a sword or club, that is the sort of weapon used in this case by the use of which death is not of necessity so absolutely certain as if he had used a weapon like a revolver. Then as to how you are to arrive at a man's intention. I do not think I can do better than to read to you a portion of a judgment of Sir Charles Fox's which is always referred to and relied upon by this Court as the final word on the question of murder: He says. "In the absence of an expression of his intention by the accused previous to or after or at the time of committing the act, his intention can only be inferred from the act itself and the circumstances under which it was done. In making an inference as to the accused's intention, the knowledge which must be attributed to him must usually be a matter for consideration. As Mr. Mayne says, "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

between accused, who did not let go the knife, and the man who caught him. We know that the accused when taken outside the house had no longyi on pointing possibly to the truth of this evidence that the deceased had kept hold of it and it so came of in the course of this struggle. You have got the fact that the body was dragged, and you have the nature of the wound and there is the possibility perhaps that striking through the collar bone or portion of the collar bone this knife stuck in in a portion of the bone and so did not come out very easily. Of course, gentlemen, if there is a direct motive for committing the crime there would be a strong reason for taking it into consideration in deciding whether the assailant acted with the intention of causing death. You have got the fact that death followed immediately. You have the medical evidence that the wound inflicted was one that was almost necessarily fatal, although the doctor speaks of the fact that, if a medical man had been present on the spot and attended to the matter at once, there was a very remote possibility of saving his life. The matter is only important to you now in dealing with the question as to what the intention was, and for that purpose we may take it that this wound was almost necessarily fatal and that the man died immediately after or within a very few minutes. Then as regards the second branch, you have to find whether there was an intention of causing bodily injury sufficient in the ordinary course of nature to cause death. Now it must be obvious that the injury that was caused was sufficient in the ordinary course of nature to cause death. If you find that the man did not intend to cause death you will then have to consider whether on the same circumstances nevertheless he must have intended to cause bodily injury sufficient in the ordinary course of nature to cause death. * * *

* * * * *

JUDGMENT OF THE FULL BENCH.

Fox, C. J.—The case is before this bench for review under section 12 of the Lower Burma Courts Act upon the following certificate of the Government Advocate:—

tion of causing bodily injury. The words "A is tried for the murder of B: it is the duty of the Judge to explain to the Jury the distinction between murder and culpable homicide" in Illustratian (*a*) to section 299 of the Code of Criminal Procedure, are relied on in support of this contention, as is a ruling upon which the illustration may possibly have been brought into the Code. The case of *Hla Gyi* v. *King-Emperor* (1) in which it was held that omission on the part of the Judge to explain the difference between murder and culpable homicide not amounting to murder was a material misdirection, is also relied on. There could be no question that there was material misdirection in that case, but if the judgments lay down that such an omission is a material misdirection in every case they go too far.

The weight to be attached to apparent statements of law in illustrations used in Acts, has been the subject of consideration in many cases enumerated in Woodroffe and Amir Ali's Law of Evidence at page 98 of the 6th Edition. The general consensus of opinion is that they cannot be taken as laying down substantive law, and that they merely go to show the intention of the framers of the Act, and in that and other respects they may be useful, provided they are correct. Substantive law can only be made by express enactment in an Act. There is no express enactment laying down the rule stated in illustration (*a*) to section 299 of the Code of Criminal Procedure. The only express provision as to the duty of a Judge in charging a Jury is that in section 297, which says that he shall sum up the evidence for the prosecution and defence and lay down the law by which the Jury are to be guided. The act which the accused in the present case was charged with having committed was the plunging of a sharp-pointed kitchen knife, the blade of which was 9½ inches long, into the upper part of the back of the man who was killed by him with force sufficient to drive it down 5½ inches into the man's body until it came out in part of the man's chest. The accused is said to have accompanied his blow with an exclamation that could only mean that he struck the blow intentionally. He is said to have followed this up with other savagery in keeping the knife

(1) (1905), 3 L.B.R., 75.

The remarks in the case of *King-Emperor* v. *Upendra Nath Das* (2) as to the conduct of a case by Counsel not being a negligible factor in a Criminal Court bear on this part of the present case. The efforts of the advocate for the accused in this case appear to have been chiefly directed to trying to get the Jury to come to the conclusion that the evidence for the prosecution was so unreliable that the accused should not be convicted on it, and that his story that he did not stab and kill Po Myit should be believed. It was open to him to have also put before them considerations as to his intention in the event of their coming to the conclusion that he did stab the man, but the learned Advocate did not do so. The learned Judge cannot be said to have erred in omitting to raise a case for the accused which his advocate had not raised in any explicit way, and a case for which there was no real foundation.

The second matter which the Government Advocate has put before the Court for consideration is whether the learned Judge erred in omitting to direct the Jury that if they believed there was a row over a gambling dispute and a fight during which the deceased was stabbed, it was open to them to consider the effect of exception 4 to section 300 of the Indian Penal Code. The wording of that exception is—"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner." Under section 105 of the Evidence Act it lay upon the accused to bring himself within that section. Neither he nor his Advocate alleged any such case involving as it does the admission that he had killed Po Myit, but that he had done it under circumstances stated in the exception.

There was nothing whatever to support such a case. In his statement to the Magistrate he said that he with others had played the game of "Ket" in the house where the occurrence took place. He had put down 8 annas as his stake but Po Mya did not pay the equivalent. For some reason which he did not explain Po Mya, Sein The and Tha Dun surrounded him and hit him with their fists, so he struck Po Mya with what he thought was a stick. As he was under the influence of liquor

(2) (1914) 19 C.W.N., 653.

intention of inflicting an injury which was only likely to cause death.

The statement of the accused shews that the question of drunkenness affecting in law his intention, does not arise in this case; and the Judge was right in not explaining the law on this subject to the Jury.

But can it be said in this case that a verdict of guilty of culpable homicide not amounting to murder could not have been properly brought in by the Jury:—if they had found that the accused when being fisted by 2 or 3 others, had picked up the knife and stabbed the deceased with it? Such an aspect of the case was I think sufficiently before the Court to make it incumbent upon the Judge to explain the law applicable thereto.

The examination of the accused is to be taken as evidence in the case (section 287, Criminal Procedure Code). The facts therefore stated by him must be considered by the Jury in the same way as facts deposed to by the witnesses in the case. The Jury are at liberty to accept as true all, none or some only, of the facts stated by the accused. But it is the duty of the Judge to explain to the Jury, not only the law applicable to the facts as deposed to by the witnesses in the case, but also the law which is applicable to the facts as stated by the accused.

The accused's statement necessarily implies I think that he picked up the weapon during the fight. And his statement comes to this:—that he did not stab the deceased; but that if it is found that he did stab him; he did so when he was being fisted by 3 others, intending to stab one of his assailants—with the knife which he found handy at the time. In determining whether any part of the accused's story was true or not the Jury would consider the fact that there was no evidence as to where the knife came from,—and the probability or otherwise, of unarmed men attacking the accused when he was in possession of the knife.

The accused's Counsel should no doubt have put the accused's alternative case clearly before the Court; but his omission does not relieve the Judge from his duty to do so.

I think it was incumbent on the Judge to explain to the Jury the law contained in exception 4 of section 300 coupled with section 301, Indian Penal Code. The alternative case set up

and would be slow to raise this special defence if neither the accused nor his advocate relied on it. There is evidence of drunkenness in this case. The prosecution witness Po Mya said in cross-examination that the accused appeared to have been drinking. Po Set in answer to questions by the Court said he got the smell of liquor from the accused. The defence witness Ma Kin said that the accused was drunk, another defence witness said he was very drunk and staggering about, and a third said that he could not talk properly. But the advocate for accused did not question the important eye-witnesses Tha Dun, Sein The and Po Set at all about drunkenness. The accused himself in his examination does not mention that he was drunk till he reaches the climax of his story. After describing the alleged gambling at Po Mya's house in detail he says: " Po Mya, Sein The and Tha Dun surrounded me and punched me with their fists. So I struck Po Mya with, I think, a stick. As I was drunk (ayet-mu) I did not know whom it struck." His statement is not consistent with a plea that he was too drunk to know what he was doing, for according to his own account he was able to take part in the game of "Ket" which presumably requires some cunning. Mr. May Oung says that in addressing the jury he laid stress on the accused's drunkenness. The learned Judge has no note of this, though he kept a note of Mr. May Oung's address. At any rate the fact of drunkenness seems to have been pressed merely as adding to the improbability that the accused was the man who actually stabbed the deceased Po Myit. The learned counsel did not specifically urge that the accused owing to drunkenness was incapable of forming either of the intentions described in clauses (i) and (iii) of section 300, and the evidence was in my opinion insufficient to justify the Judge in himself raising for the accused an alternative line of defence which would be inconsistent with the line actually taken up by the learned Counsel.

Stress is laid on the first illustration to section 299, Criminal Procedure Code, but I cannot see that it obliges the Judge in all cases of murder to descant also on culpable homicide not amounting to murder. From its context the illustration is clearly an injunction not to the Judge but to the jury so far as

though not engaged in the fight was somehow stabbed by the accused in mistake for one of his assailants. But even the accused himself did not say that this was what occurred and his learned advocate did not advance such a theory at the trial. In these circumstances and looking to the absence of evidence as to a fight I think we cannot hold it a dereliction of duty on the Judge's part that he did not ask the jury (in the words of Woodroffe, *J.*, in the case of *Upendra Nath Das*) "to consider whether the evidence disclosed circumstances which would have established such a defence had it been specifically raised."

I would therefore answer the second question also in the negative.

Robinson, J.—Nga Mya was tried at the last Sessions before me and a special jury on a charge under section 302, Indian Penal Code. The jury brought in a unanimous verdict of guilty and I sentenced the accused to death.

The Government Advocate has granted a certificate under section 12 of the Lower Burma Courts Act which raises three points in respect to my summing up. I will only deal with the first two.

As the trial Judge I will first record what took place at the trial. I have carefully read my notes and have searched my memory for on this point my statement is conclusive *Reg.* v. *Pestanji Dinsha* (1). I will also briefly set out the cases for the Crown and the defence respectively as shown in the evidence and the addresses of Counsel, for in my opinion the questions involved necessitate this. The charge laid was under section 302 only. In opening the case for the prosecution the Assistant Government Advocate read section 299, Indian Penal Code, to the jury. Then he read the commencement of section 300 and stated that he would not trouble the jury with any of the exceptions as they did not, as far as he knew, arise in the case. He explained the first and third clauses of the definition of the offence.

The case for the Crown, as disclosed by the prosecution evidence, was, that Po Mya and Po Set, his brother-in-law, were in their kitchen having their evening meal. They were joined by Tha Dun who sat down and chatted while they had their

(1) (1873) 10 Bom: H.C.R., 75.

and that he did not fight with deceased with whom he was on good terms.

Mr. May Oung then opened the case for the defence. He stated that there were two points only that he would press on the earnest consideration of the jury. They were that there was gambling going on in that house that night and that the prosecution witnesses had deliberately denied this that he would establish it and, if so, the prosecution witnesses, who had lied on this matter, could not be believed at all, or that, at any rate, their evidence must be received with the greatest caution. The second point was that there was absolutely no motive.

He then produced his witnesses. The first three were called to prove there was gambling that night and the first also stated that accused and deceased were on friendly terms. The third witness said he went to Po Mya to collect interest due. Accused, deceased and Sein The came up: deceased asked Po Mya to get money to gamble and pressed him also to stay and gamble. He refused and left. He says accused was very drunk. Three other witnesses were called to prove accused and deceased used to go about and drink together, the last of whom says that on the night of the occurrence accused and deceased were drinking together when Sein The came up and said to them "Let us go to the gambling—good gambling is going on."

Mr. May Oung then addressed the jury. He emphasized the fact that gambling had been going on there and urged that it was proved that a row took place in the course of which deceased was stabbed and argued that the prosecution witnesses denied it to save themselves from suspicion. He implied that one of the prosecution witnesses had stabbed deceased. He tells us that he urged that accused was drunk, but I have no note of this nor did I understand that it was urged as affecting the intention to be imputed to the accused. He pressed on the jury that there was no motive and lastly said that they must be quite certain before they found his client guilty. He told us he did not address the jury as to the law.

My summing up was recorded by the shorthand-writer.

I explained the first and third branches of the definition of culpable homicide amounting to murder in section 300, but I

the legal points arising as they seem to me partly to overlap.

It is said that accused having stated there was a row over a bet which ended in a fight, I should have put exception 4 to the jury. It is true that the accused did say so, but he does not suggest that deceased took any part in this alleged fight. To me he said distinctly "I did not fight with Po Myit" and to the Magistrate he said "I did not stab him with *dah*.". The evidence of the only other persons who were there, as far as we know, is that there was no such fight. I cannot think that the bare statement of the accused that there was a fight compels the Court to put exceptions 1 and 4 to the jury. There was no evidence of a fight and even the accused in his statement says deceased was not in it even if there was one.

To come now to the legal points. It is urged that illustrations (*a*) to section 299 of the Code of Criminal Procedure shows that it is always the bounden duty of the Judge to explain both culpable homicide and murder to the jury. I cannot agree. An illustration to a section cannot extend or restrict the provisions of the section to which it is attached. [*Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (2).] This particular illustration if it has this effect seems wrongly placed. It is attached to a section that lays down the duty of the jury and not the duty of the Judge. It is given merely to explain the duty of the jury and cannot be taken as a substantive enactment of the duty of the Judge. There are no doubt many cases in which the Judge should and must explain the distinction between culpable homicide and murder. It may be that in most cases he should do so but it does not therefore follow that he must in all cases do so. His duty is laid down in sections 297 and 298 and it is there merely said that he must "lay down the law." That must be with regard to the case as put forward and as developed by the evidence. It would be unreasonable, for instance, to argue that in such a case as is given in Illustration (*a*) to section 300 the Judge must put all the details of the very complicated definitions of culpable homicide and murder together with all the exceptions. That could not help the jury and would only tend to confuse them

(2) (1881) I.L.R. 7 Cal., 132.

As to the first ground of the certificate, therefore, I do not think that I ought to have put it to the jury that the accused might have intended to cause injury that was merely likely to cause death. Having regard to the whole of the evidence for both the prosecution and the defence, including the medical evidence and to the cases as presented by Counsel, and to the law, I do not consider I should or ought to have done so though it may be said there was some evidence.

As to the second ground also I think the same. It is not sufficient for the accused to say there was a fight to raise the question of the exception. It was not sufficient even if there was a fight for he must also prove several other matters and in particular that he took no undue advantage and that he did not act in a cruel or unusual manner. In this case we have no evidence at all except the accused's statement that there was a fight. The evidence of the prosecution is that there was no such fight. The accused says the fight was with Po Mya, Tha Dun and Sein The and that the deceased took no part in it. The suggestion put forward is, that when attacked by these three he picked up something which he thought was a stick and with that he struck Po Mya. He denies striking deceased. If we disbelieve him and hold that he did strike deceased what foundation is there for the exception? Is not this defence really that he stabbed deceased by accident? If so, there is no question of this exception. Can it be said that a man who stabs another and causes his immediate death under these circumstances is pleading this exception? His Counsel never affirmatively raised it; he never told the jury what is necessary to establish this exception nor how it was to be held to be established in this case. Section 105 of the Evidence Act requires the Court and the jury to hold that it does not exist unless and until it is proved by or for the accused. That means that all its necessary ingredients must be proved. Can it be said that a man who seizes a knife, such as the exhibit in this case, and stabs deceased, who was unarmed and not taking any part in the fight, with it took no unfair advantage and did not act in a cruel or unusual manner? There is in this case then no evidence, beyond the statement of the accused, of any fight and none whatever of any of the other facts that must be

of murder it is necessary in all cases to explain the distinction between the two. It is quite possible, as the present case shows, to explain fully and correctly what murder is without stating what it is not.

The plea was never set up that accused was by reason of intoxication incapable of forming the intention requisite to constitute the offence of murder, nor does the record disclose that such a plea was maintainable. The Crown preferred a charge of murder only and the evidence at the trial was such that, if it was believed, the only reasonable conclusion was that the accused did an act with such intention as to constitute his offence murder, and nothing less, and on the materials I do not think it was open to the Judge to suggest that it was anything less.

The second point in the certificate should also, I think, be answered in the negative.

The Court is bound to presume the absence of circumstances bringing the case within an exception unless and until the existence of those circumstances is proved. Where, as here, the exception requires the concurrence of several different circumstances before it can become applicable there must be material from which the existence of each such circumstance can be properly inferred; such material must, at the lowest, be an allegation by the accused. If there is material for inferring some only of such circumstances, but not others, I consider it would not be right for the Judge to raise the applicability of the exception before the jury, as by so doing he might mislead them into contravening section 105 of the Evidence Act. In the present case I am of opinion that the circumstances the existence of which might bring the case under the exception in question could not properly be inferred from the evidence or the accused's statement, and therefore the effect of that exception did not fall to be considered. I do not think that the verdict can be interfered with.

1915.

BOYHENJ CHANDRA v. RANGOON MUNICIPALITY.

any ordinary person being told that a man "keeps his cows under the house" would understand that the cows were kept under the house habitually or at least for a considerable time.

The bye-law did not in my opinion apply to what the applicant did, and he was not liable to conviction for having infringed it.

I set aside the conviction and acquit the applicant. The fine paid will be refunded.

The Magistrate considered that if he did not adopt the, in his view, strict meaning of the word "keep," he would have to consider the length of time in very many cases, and he instanced the case of a man prosecuted for having his motor lamp unlit when it ought to be alight. I confess to not being able to trace the connection or analogy between not having a motor lamp alight and keeping a goat, nor do I see at present how even the strictest logic need force him into the trouble he anticipated.

I may add that the Municipal Committee did not appear by advocate in this Court to support the construction of the bye-law put before the Magistrate on its behalf, and from this I gather that on further consideration the Committee does not wish to press for such construction.

Before Mr. Justice Twomey.

KING-EMPEROR *v.* NGA KALA.

Criminal Appeal No. 746 of 1915.

December 15th, 1915.

Maung Kin—Assistant Government Advocate for appellant.

Police-Officer, preventive powers of—Criminal Procedure Code, section 149—Police (Act V of 1861) section 23.

The preventive action of the police is not confined to the duties prescribed in Chapter XIII of the Criminal Procedure Code. Under section 23 of the Police Act it is a police-officer's duty to prevent the commission of offences and there is no authority for restricting the scope of this provision to cognizable offences.

The accused Nga Kala in this case was sentenced by the Subdivisional Magistrate, Myaungmya, to suffer rigorous imprisonment for six months under section 332, Indian Penal Code, for striking a Head Constable of Police at a *pwè* after the Head Constable had stopped the performance as being held without a license and while the Head Constable was in the act of disarming a man who had a formidable *dah*. It is

an unlicensed *pwè*, but only to report it. The Head Constable's action was quite illegal."

The Sessions Judge cites no authority for the proposition that the police are empowered to prevent only cognizable offences. Some colour is given to this proposition by section 149, Code of Criminal Procedure, which provides only for the prevention of cognizable offences by the police. But section 23 of the Police Act, 1861, appears to give wider powers for preventing offences in general.

The word "offences" in that section is not defined in the Act, and it does not appear to be governed by the definition of "offence" in section 40 of the Indian Penal Code (enacted in the previous year 1860). The Police Act was clearly intended to give the police force, then newly formed, extensive powers of preventing breaches of the law, and I am not prepared to hold that it is outside their powers to stop a *pwè* which is being held without a license. At any rate, the Head Constable Maung Po Yeik might very well believe that he had power to stop the *pwè*, and the Sessions Judge's assumption that the disarming incident was invented because the Head Constable knew he had been acting illegally, can only be described as fanciful.

Nga Kala has not appeared in support of the acquittal order. His defence in the Magistrate's Court was an *alibi*, and the Magistrate gave good reasons for disbelieving it.

The order of acquittal passed by the Sessions Judge is set aside and the conviction of Nga Kala under section 332 is restored. Although there is no medical evidence as to the extent of Po Yeik's injuries, I cannot regard the offence as anything but serious and the sentence of rigorous imprisonment for six months was not too heavy. The sentence is re-imposed and Nga Kala will be arrested and sent to prison to undergo the unexpired portion of it.

one, and then a preliminary decree was drawn up. This omits a good deal of what is included in Form 21 of Appendix D of the First Schedule to the Code of Civil Procedure. The record affords no explanation of why the judgment did not direct a decree in the ordinary form, nor does the judgment explain why accounts were to be taken to the 31st March of this year only.

The decree should in ordinary course have declared that the partnership should stand dissolved as from the day on which the judgment was pronounced, and should have appointed a receiver of the partnership estate and effects to get in the debts due to it, and should have ordered the goodwill of the business and the stock-in-trade to be sold on the application of the parties leaving it to an officer of the Court to fix a reserved bidding, and should further have ordered that any of the parties should be at liberty to bid at the sale.

The form in the Schedule to the Civil Procedure Code is based on the ordinary practice of the English Courts—*see* Lindley on Partnership (8th Ed.) 614.

The application for a receiver is opposed by the defendants on the ground that it will cause some of them great inconvenience and expense, and incidentally that those living in the house where the business is carried on and those engaged in carrying on the business at the present time should be allowed to continue to do so. This assumes that the goodwill should be allotted to them, and that the Court should tell the plaintiff that he must be content with what the Court may by some unexplained method of valuation hold to be the value of the goodwill and assets of the business.

Inconvenience to the parties is an inevitable incident when partners fall out, and is a disadvantage of carrying on business in partnership. The rules as to goodwill are thus stated in Lindley on Partnership, page 511.

1. That if a firm is dissolved and there is no agreement to the contrary the goodwill must be sold for the benefit of all the partners if any of them insist on such sale.
2. That, so far as is possible, having regard to the right of every partner to carry on business himself, the

1916.

MA HTWE
v.
MAUNG LUN.

the alleged mortgage and the defendant denies it and sets up a sale the plaintiff cannot recover possession if by the provisions of the Transfer of Property Act he is debarred from proving the mortgage.

Maung Yeik v. *Maung Pe To*, (1914) 8 Bur. L.T., 70, overruled. *Gopee Lall* v. *Mussamut Sree Chundraolee Buhoojee*, (1872) 19 W.R., 12; *Mylapore Iyasawmy Vyapoory Moodaliar* v. *Yeo Kay*, (1887) I.L.R., 14 Cal., 801; *Eshen Chunder Singh* v. *Shama Ghurn Bhutto*, (1866) 11 Moore's I.A., 7; *Sheo Prasad* v. *Lalit Kuar*, (1896) I.L.R. 18 All., 403; *Kurri Veerareddi* v. *Kurri Bapireddi*, (1904) I.L.R. 29 Mad., 336, followed.

Special Civil 2nd Appeal No. 330 *of* 1914.

December 6th, 1915.

The following reference was made by the Chief Judge to a Bench under section 11 of the Lower Burma Courts Act, 1900.

This is one of numerous cases in which a plaintiff sues a defendant in possession seeking to redeem land on the ground of it having been mortgaged only and the defendant resists the suit on the ground that the land had been sold outright to him. The transaction took place long after sections 54 and 59 of the Transfer of Property Act had been brought into force in Lower Burma. The amount advanced on mortgage or according to the defendant's version of the transaction the price paid for the land was Rs. 150. No instrument in writing embodying the terms of the transaction was executed and registered consequently the plaintiff could not prove the mortgage nor could the defendant prove a sale to him.

It is contended that in a suit for redemption on the basis of the land having been mortgaged a decree for recovery of the land on payment of the amount advanced can be given notwithstanding that the plaintiff cannot prove the mortgage, and I am asked to go into the evidence as to whether the transaction was a mortgage or sale. The case of *Maung Yeik* v. *Maung Pe To* (1) is cited as an instance of the relief claimed having been granted in such a case. In *U Tun* v. *Ma Hnyin* (Special Civil Appeal No. 257 of 1914) I have held that in a similar case the plaintiff cannot obtain recovery of possession. The basis of a suit for redemption of a mortgage is the mortgage alleged, and if by reason of some provision of law the mortgage cannot be proved it appears to me that the suit must fail. It may be that if the plaintiff had sued for possession on the ground of her title only she would have been entitled to a decree without paying anything, but a decree

denies the mortgage alleged by the plaintiff and sets up a sale to him can the plaintiff recover possession when by reason of the provisions of the Transfer of Property Act the plaintiff cannot prove the mortgage sued on and the defendant cannot prove the sale relied on by him."

The opinion of the Full Bench was as follows :—

Fox. C. J.—The case is before this Full Bench merely for answer to the question referred.

No question as to whether an amendment of the plaint should have been or should be allowed is before the Bench.

The case must be dealt with as it stands, that is as a suit for redemption of a mortgage which the plaintiff could not prove.

In *Gopee Lall* v. *Mussamut Sree Chundraolee Buhoojee* (1) it was taken as a firmly settled rule of law that a plaintiff can only recover according to his allegations and his proofs. In *Mylapore Iyasawmy Vyapoory Moodaliar* v. *Yeo Kay* (2) their Lordships took occasion to repeat the following words of Lord Westbury in *Eshen Chunder* v. *Shama Churn Bhutto* (3):—

"This case is one of considerable importance, and their Lordships desire to take advantage of it, for the purpose of pointing out the absolute necessity that the determination in a cause should be founded upon a case either to be found in the pleading, or involved in, or consistent with the case thereby made".

The case of *Sheo Prasad* v. *Lalit Kuar* (4) affords a good example of the application of the principle to the case of a suit on a mortgage. Chief Justice Edge remarked in that case that it is in accordance with principles of sound common sense and justice that a man who brings a case and fails to prove it should not get a decree on a different cause of action from that alleged by him.

An essential part of a cause of action to redeem a mortgage is the mortgage to redeem which the suit is brought. If it is denied, and the plaintiff fails to prove it, the suit must be dismissed.

(1) (1872) 19 W. R., 12.
(2) (1887) I. L. R. 14, Cal., 801.
(3) (1866) 11 Moore's I. A., 7.
(4) (1896) I. L. R. 18 All., 403.

1915.

PO WIN v. MA TIN.

and finally passed a decree setting out the share that each heir was entitled to, and what the moveable and immoveable property of the deceased consisted of with value or estimated value. The decree then on the basis of such values set out the value of each heir's share. It ordered a Court fee of Rs. 385 to be paid by Ma Tin and gave her the costs of her suit which were to be deducted from the value of the estate before division. The other parties were to bear their own costs. Ma Tin's costs came to Rs. 385 plus Rs. 416-1-5, or Rs. 801-1-5.

Ma Tin then applied for execution and asked that the record be sent to the Collector with directions to partition the estate in accordance with the decree passed and to put her in possession of her share. The application was evidently made under the provisions of section 54 of the Code of Civil Procedure.

The Collector appointed the Superintendent of Land Records to carry out the division of the immoveable property. This officer worked out the value of the shares of the moveable and immoveable property after making allowance for the costs, and then divided up the different holdings also allowing to each a share of the moveable property. The District Judge accepted the division and an appeal is laid against this order.

Counsel for respondents urges that the appeal is time-barred as the appeal should be taken to lie against the order sending the case to the Collector to effect a division. It seems to me that an appeal lay from the order of the District Judge accepting the proceedings of the Superintendent of Land Records and in that case the appeal is not time-barred.

In any case the Collector had nothing to do with the moveable property, but I am of opinion that the execution was not one for action under section 54 of the Code of Civil Procedure at all.

The decree was not in the form that it should have taken. The correct form is indicated by No. 17, Appendix D of the First Schedule of the Civil Procedure Code. The correct method of execution would appear to be to appoint a receiver to get in the debts, collect the cattle and paddy and sell it, or collect the proceeds of them if sold, and to collect the money —also to sell the immoveable property and then to divide up the proceeds according to the shares allotted by the District Judge

difficulty in the proper distribution of the estate, but we cannot deal with this matter now.

Mr. Villa for Po Win and Mr. Palit for respondents consent to the decree being amended so that the 2nd paragraph shall read—"And it is further ordered that the District Judge do appoint a receiver to get in the debts, collect the cattle and paddy and sell it, or collect the proceeds of them if sold, and to collect the money—also to sell the immoveable property if necessary to do so to meet charges and legal expenses payable out of the estate: the other immoveable properties to be distributed according to holdings amongst the heirs as the Judge shall direct after hearing the parties."

As already noted Po Win entirely objects to the allotments of holdings previously made and to the valuations put upon them.

In order to assist the Judge in coming to a decision as to how the holdings should be allotted amongst the heirs it may be remarked that one method of settling disputes of the sort which might possibly be resorted to would be to ascertain first through the receiver or Bailiff the probable value of each holding, and then to hold an auction confined to the heirs or to invite tenders from them with a view to ascertaining what amount each heir is willing to have debited against his or her share in the estate should a holding be allotted to him or her, and on the condition that the heir to whom a holding may be allotted must before the land is transferred to him or her pay into Court the difference between the amount bid or tendered by him or her and the value or amount of his or her share as ultimately ascertained should the former amount exceed the latter, and on the understanding that each heir who wants land will be allotted a holding, or holdings equal in number to the number allotted to another such heir so far as this can be done.

We do not say that a method such as this can be adopted in the present case in view of what we have been told has happened since the decree.

The District Judge should hear the parties upon the question how the estate can best and most equitably be distributed, and then work out a method of doing this.

PRIVY COUNCIL.

Privy Council Appeal No. 70 of 1914.

(ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.)

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

A. K. A. S. JAMAL *v.* MOOLLA DAWOOD SONS AND COMPANY.

Contract Act, sections 73, 107—breach of contract by buyer, resale on—negotiable securities—damages how measured.

In a contract for sale of shares in Companies the measures of damages for breach of contract is the difference between the contract price and the market price at the date of the breach, but the seller must mitigate the damages by getting the best price he can at the date of the breach.

Section 107 of the Contract Act applies to cases in which a seller has a lien on goods or has stopped them in transit, and should not be extended beyond its scope.

Staniforth v. *Lyall*, 7 Bing. 169; *Yates* v. *Whyte*, 4 Bing. N.C., 272; *Bradburn* v. *Great Western Railway*, L.R. 10 Ex., 1; *Jebson* v. *East and West India Dock*, L.R. 10 C.P. 300; *Rodocanachi* v. *Milburn*, 18 Q.B.D., 67; *Williams* v. *Agius*, 1914 A.C., 510 referred to.

This was an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side.

The Judgment of their Lordships of the Privy Council was delivered on the 3rd November 1915.

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

By the 30th December the shares had fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding: "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo, responsible for all losses sustained thereby." The purchasers did not pay the sum demanded. They set up a contention that the

3*d.* (*viz.* at 4*s.*). In one case it was at 4*s.* 3*d.* In every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realised, by giving him credit in reduction of the damages for the increased prices in fact realised over the market price at the 30th December, the date of the breach. The appellant contends that this is wrong.

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

The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach —with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller holds on to the shares after the breach the speculation as to the way the market

1915.

A.K.A.S. JAMAL *v.* MOOLLA DAWOOD SONS AND COMPANY.

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

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

Before Sir Charles Fox, Chief Judge.

Civil 2nd Appeal No. 345 of 1914

December 6th, 1915.

1. MAUNG THEIN, 2. SHWE PAW *v.* 1. MA THET HNIN, 2. MA HLA BON.

A. C. Dhar—for appellants
Ko Ko Gyi—for respondents.

Burmese Buddhist Law—marriage, consent essential to valid—damages for breach of promise by party's parent not sustainable.

A Burmese Buddhist, whether male or female, adult or minor, cannot be legally married without his or her consent or against his or her will. The breach therefore by a father of his promise to give his son in marriage and to give marriage presents suitable to his position in life does not afford a cause of action on which a Court can make a decree for compensation.

Maung Taik v. *Ma Cho*, 2 U.B.R. (1897—01) 197 followed.

The first plaintiff is a spinster of over 20 years of age: the 2nd plaintiff is her adoptive mother. The 1st defendant is a bachelor who is also above the age of minority: the 2nd defendant is his father. The suit was for Rs. 300 as compensation for breach of promise of marriage: it presents novel features.

The plaint sets out that in the Spring of 1913 the young man and woman loved each other, and went off and lived together as husband and wife by mutual consent for about a week. In other words they eloped without the consent of their parents,

feelings, affections and social position. One of the witnesses called by the plaintiffs said that he did not think that the young woman's reputation was affected in consequence of her having eloped with a bachelor. The ideas prevailing in the particular part of the country appear to be peculiar. The claim was based not upon injury to reputation, injured feelings or anything remotely connected with love and romance, but upon the monetary, and some may think sordid, aspect of matrimony. Wounded feelings at promises made by the father not being carried out must have weighed less with the plaintiffs than the hope of getting as much as they could out of him.

The legal question involved in the case is whether the breach by the father of his promises to give his son in marriage to the young woman or to make his son marry her, and to give the couple marriage presents suitable to his position in life afforded the plaintiffs jointly, or afforded either of them, a cause of action on which the Courts could make a decree for compensation. The Township Judge gave both plaintiffs a decree because he understood the Burmese Buddhist Law to allow compensation to be given for breach of promise of marriage to the parents of the party injured as well as to that party. The District Judge was led to uphold the decree by reference to sub-section (2) of section 25 of the Contract Act, but he does not work out in his judgment how that can be applicable to the case.

No doubt some texts in *Dhammathats*—for instance those in sections 54 and 56 of the Kinwun Mingyi's Digest—contemplate penalties on parents who refuse to carry out a promise to give a child in marriage, but these texts apply to parents of a girl only. I can find no similar provision penalizing parents of a male child. But even if there were one, the provision would be one which it would not be possible for our Courts to carry out in these days. Our Courts must recognize that the free consent of the actual parties is essential to a marriage between an adult man and an adult woman. No giving in marriage by parents in such a case can be recognized as constituting a marriage unless the actual parties consent to be married. In *Maung Taik* v. *Ma Cho* (1) it was held that among Burmese

(1) 2 U. B. R. (1897—01), 197.

Before Mr. Justice Robinson.

Civil Revision No. 141 of 1915.

December 17th, 1915.

THE POOZUNDAUNG BAZAAR COMPANY, LIMITED *v.* T. GWAN CHWAN.

N. M. Cowasji—for applicant.
Higinbotham—for respondent

Transfer of Property Act, sections 106, 107—landlord and enant—lease unregistered, effect of—notice to quit.

A agreed to lease to B a building for 3 years. A lease in accordance with the agreement was drawn up and executed by both parties. B entered into possession and for some months paid the rent agreed upon, Rs. 125, but A neglected to have the lease registered. After 1½ years had elapsed, A gave B 18 days' notice to quit, alleging that the lease, not having been registered, was of no effect. B refused to quit, and A sued him to recover rent Rs. 125 for the month by the end of which he had given notice to quit and damages for use and occupation at Rs. 200 a month for each of the subsequent months B had remained in occupation.

Held,—that A's suit must fail. He could not rely upon section 106 of the Transfer of Property Act, as the presumption mentioned therein would only arise, if there was no contract to the contrary, nor upon section 107, for it is open to B at any time to bring a suit for specific performance of contract by registration of the deed and as between A and B the relation is that of Landlord and Tenant under the terms and condition of the original agreement, and no rights of third parties are affected.

Bibi Jawahir Kumari v. *Chatterput Singh*, (1905) 2 Cal. L. J., 343; *Ittappan* v. *Parangodan Nayar*, (1898) I. L. R. 21 Mad., 291 referred to.

Plaintiffs admittedly leased a certain building to defendant for one year from 16th October 1911 with an option to renew for a further term of one year. It is also admitted that later the parties entered into a contract to lease these premises for a term of 3 years from the 15th August 1913 and that on the 15th August 1913 a lease in accordance with this agreement was drawn up and executed by both parties. The rent throughcut was fixed at Rs. 125 per mensem.

The document was after execution returned by defendant to plaintiffs but they did not register it. Defendant paid the rent.

On 1st December 1914 plaintiffs wrote to defendant alleging that he had broken the terms of the document of lease and had thereby put an end to the lease. They requested him to quit within a week's time. In his written statement defendant alleges that they realized that they had no grounds for their allegation, waived their notice and requested him to pay the rent due up to the end of January 1915 which he did.

1915.

THE POOZUN-DAUNG BAZAAR COMPANY, LIMITED v. T. GWAN CHWAN.

been duly registered. To hold otherwise would permit plaintiffs to take advantage of their own fraud or wrongful neglect to force defendant to pay a higher rent.

This is the view taken in the case cited above. Reference may also be made to *Ittappan* v. *Parangodan Nayar* (2).

The petition is dismissed with costs. Advocate's fees 5 gold mohurs.

Criminal Reference No. 81 of 1915.

January 10th, 1916.

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

In re KING-EMPEROR *v.* NGA SAING *alias* AH SAING.

Ginwala—the Assistant Government Advocate, for the King-Emperor.

Criminal Procedure Code, section 110—*prisoner within limits of Magistrate's Jurisdiction—section* 120.

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

Queen-Empress v. *Chi Do Bon*, P. J. L. B., 204; *Emperor* v. *Bapoo Yellapa*, (1907) 9 Bom. L. R., 244; In re *Kora Rangan*, (1912) 33 Mad. L. J. 535 referred to.

King-Emperor v. *Po Thaw*, 4 L.B.R. 148 over-ruled.

Criminal Revision No. 295-B of 1915.

November 29th, 1915.

The following reference was made by Mr. Justice Twomey to a Full Bench under section 11, *Lower Burma Courts Act* :—

This case has been submitted for orders in revision by the Sessions Judge, Ma-ubin Division. A Chinaman named Ah Saing was convicted of assaulting an Excise Sub-Inspector and was sentenced by the Additional Magistrate, Danubyu, to rigorous imprisonment for six months under section 353, Indian Penal Code, on the 22nd July 1915.

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

(2) (1898) I.L.R., 21 Mad., 291.

1916.

In re KING-EMPEROR *v.* NGA SAING.

The opinion of the Full Bench was as follows:—

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

The decision in *King Emperor* vs. *Po Thaw* (1) in so far as it held that a Magistrate had no jurisdiction to commence proceedings under section 110 against a person undergoing imprisonment in a jail, appears to me erroneous. Whether a Magistrate should do so is a matter of discretion to be exercised according to the circumstances of each case, it being remembered that the only object of the provisions of Chapter VIII is to ensure if possible the keeping of the peace or good behaviour for a limited period.

If a person is in jail under sentence for a long period his keeping of the peace and good behaviour so far as the outside public is concerned is assured for such period, but if a person is undergoing only a short sentence it may be that in some cases there may be reason for calling upon him to give security for keeping the peace or for his good behaviour for a period subsequent to the expiration of the sentence on him.

My answer to the question referred is in the affirmative.

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

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

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

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

(1) 4 L.B.R., 148.

1916.

J. & F. GRAHAM & Co. v. H. C. ELSEY

to consider the case in its revisional jurisdiction. This is so, but I entirely agree with Jenkins, C.J. when he said in *Faujdar Thakur* v. *Kasi Chowdhury* (1) that in cases of acquittal the revisional jurisdiction of a High Court should ordinarily be exercised sparingly, and only where it is urgently demanded in the interests of public justice.

It has been urged that the present is a case in which interference is called for urgently in the interests of public justice. I cannot assume that the Local Government has refused to direct an appeal in such a case.

There is no precedent of a High Court entertaining an application by a complainant to revise an acquittal after the Local Government has declined to direct an appeal against it.

The allowance of even an appeal from an acquittal is peculiar to India alone of all His Majesty's Dominions; it is safeguarded by confining the power to direct an appeal to the Local Government. The reasons for this safeguard presumably are that it should not lie with complainants to decide whether an appeal should be made, and that the authority who should decide this should be the highest authority in each Province. It may be presumed also that the Legislature intended that the exceptional power to direct an appeal should not be exercised except in cases in which the Local Government considered that the interests of public justice called for further consideration of a case by the highest Court in the Province.

When the Local Government has considered a case in that light and has declined to direct an appeal, it would not, in my opinion, be a proper or fitting exercise of the discretion of a Judge of this Court even to entertain an application by a complainant to interfere with the acquittal.

I reject the application.

Before Mr. Justice Twomey.

PO HLA v. KING-EMPEROR.

Criminal Appeal No. 16 *of* 1916.

February 14*th*, 1916.

Pardon—how forfeited—Criminal Procedure Code, sections 337, 339.

A was tendered a pardon as an approver in a dacoity case and was subsequently released on his own recognizances before the trial began. Four men were sent up for trial on the charge of dacoity and A was exam-

(1) (1914) I.L.R., 42 Cal., 612.

Subdivisional Magistrate of Pyu on the 15th June. He was directed to come again next day as he had not been cross-examined. He did not turn up next day. There seems to be no doubt that he had absconded though he says that he thought his examination was finished and that he happened to elope with a girl shortly afterwards. The four accused were discharged on the 13th October 1914. From the Special Power Magistrate's order of discharge it appears that even if the approver Po Hla had duly turned up next day as he was ordered to and if his evidence had been taken into consideration against the four accused the result would have been the same, for the Special Power Magistrate found that the approver's statement was not sufficiently corroborated. The District Magistrate who examined the case in revision was inclined to take the same view. I gather that the learned Sessions Judge also is of the same opinion, for when Po Hla was re-arrested in July 1915 no action was taken to put the four discharged accused on trial again as might clearly have been done.

There seems to be no doubt that Po Hla absconded after his examination-in-chief because, as one of the assessors puts it, "the offence he committed was a serious one and he did not quite trust the pardon granted to him".

A pardon is tendered to an approver on condition of his making "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof". Section 339 lays down the circumstances in which a person to whom a pardon has been tendered may be tried for the offence in respect of which he was pardoned. It must be shown that he has forfeited the pardon either—

(*a*) by wilfully concealing anything essential; or

(*b*) by giving false evidence.

It is not contended that Po Hla gave false evidence. But the learned Sessions Judge has held that "by deliberately withdrawing himself from cross-examination he has concealed something essential, to wit, the whole of the answers which he would have been compelled to give in cross-examination." This view, in my opinion, involves an unwarranted straining of

Before Mr. Justice Parlett.

Criminal Revision No. 316B of 1914.

November 24th, 1914.

KING-EMPEROR *v.* 1. PO GYI, 2. KYAW THA, 3. TUN HLA.

Eggar.—Assistant Government Advocate, for the King-Emperor.

Criminal Procedure Code, section 435 (4)—revision, concurrent jurisdiction of Sessions Judge and District Magistrate in—

A District Magistrate on June 4th 1915 called for the proceedings of a case in which persons accused under section 477, Indian Penal Code, had been discharged. On the 20th June the complainant in the case presented an application to have the order of discharge set aside to the Sessions Judge. The Sessions Judge sent for the proceedings to the District Magistrate, who on the 26th before submitting them to the Sessions Judge and without notifying the Sessions Judge of his action signed his name on a printed form bearing the words "On a perusal of the record no cause appearing for interference, it is ordered that the record be returned." Subsequently the Sessions Judge passed orders directing that the accused be committed for trial.

Held—that the District Magistrate's action in calling for the record was not equivalent to entertaining an application and that there was nothing in section 435 (4) of the Criminal Procedure Code to render the Sessions Judge's order invalid.

Kali Muthu v. *King-Emperor*, (1902), I.L.R. 26 Mad., 477, distinguished.

One A. R. S. P. N. K. Nagamuthu Pillay prosecuted Nga Po Gyi and two others under section 477, Indian Penal Code. On the 20th of May 1914 the Special Power Magistrate discharged the accused. On the 4th June the District Magistrate called for the proceedings which were sent to him on the 5th and apparently received in his Court on the 6th June, but so far as the records show no action was taken with regard to them for twenty days, namely till the 26th. Meanwhile on the 20th June Nagamuthu Pillay presented an application to the Sessions Judge under section 435 of the Code of Criminal Procedure. On the 23rd the Sessions Judge called for the record of the Special Power Magistrate's proceedings, his order reaching the District Magistrate on the 24th. Instead of sending the proceedings at once as they were, or even informing the Sessions Judge that they had been called for by himself, the District Magistrate on the 26th June signed his name on a printed form bearing the words "On a perusal of the record no cause appearing for interference, it is ordered that the record be returned" and returned it the same day to the Special

1914.

KING-EMPEROR *v.* PO GYI.

entertainment of it prevented the District Magistrate from dealing with the matter *suo motu*.

I decline to interfere with the commitment order. The records may be returned.

Before Mr. Justice Ormond and Mr. Justice Twomey.

Civil 1st Appeal No. 175 of 1913.

June 15th, 1915.

1. MALAYANDI CHETTY ALIAS PALLANEAPPA CHETTY, 2. MUTHIA CHETTY, 3. RANGANATHEN CHETTY AND 4. SUBRAMONIAN CHETTY, MINORS AND THEY ARE REPRESENTED BY THEIR NEXT FRIEND MALAYANDI CHETTY ALIAS PALLANEAPPA CHETTY, ALL CARRYING ON BUSINESS UNDER THE MARK OF C. T. V. M. BY ITS AGENT ANNAMALAY CHETTY *v.* 1. (1) NARAYANEN CHETTY, AT PRESENT RESIDING AT BAZAAR QUARTER, PEGU, (2) KANNAPPA CHETTY, AT PRESENT RESIDING AT KARRAKUDDY, RAMNAD DISTRICT, MADRAS, (3) RAMAN CHETTY, AT PRESENT RESIDING AT KARRAKUDDY, RAMNAD DISTRICT, FORMERLY CARRYING ON MONEY-LENDING BUSINESS IN PARTNERSHIP AT TAWA, PEGU DISTRICT, UNDER THE MARK OF N. L. C. T. K. R. M. AND NOW SIMPLY COLLECTED OUTSTANDING. 2. (4) KUMARAPPA CHETTY, (5) KANNAPPA CHETTY, (6) RAMEN CHETTY, CARRYING ON MONEY-LENDING BUSINESS AT RANGOON AND WAW IN PARTNERSHIP UNDER THE MARK OF N. K. K. R. M. REPRESENTED BY AGENT CHINNIAH PILLAY, BAZAAR QUARTER, PEGU.

Ormiston—for appellant.

Chari—for 2nd and 3rd respondents.

Munshi—for 4th, 5th and 6th respondents.

Partnership—winding-up—power of one partner to mortgage firm's assets.

When a money-lending firm is being wound up, a single partner has no authority to borrow money on behalf of the firm, except perhaps in case of necessity,—and consequently has no authority to mortgage the firm's assets. Any such mortgage made by one partner would be binding against him alone.

Butchart v. *Dresser*, 4 De G. M. and G., 542; 43 E.R., 619.

In re Clough, (1885) 31 Ch. D., 324 and *In re Bourne*, (1906) 2 Ch. D. 427 distinguished.

Ormond, J.—The plaintiff firm C. T. V. M. are mortgagees of certain paddy lands under a registered mortgage dated 18th

The mortgage was executed at Pegu in the shop of A. R. A. R. in a room separated from the room occupied by the Pegu firm by two other rooms. It was not registered until the 10th March 1910. A Rs. 30 stamp would have been sufficient for the mortgage but the stamp actually used was one of Rs. 40 which had been sold on the 25th May 1909 to Punia Pillay, a clerk in Narayanen's firm at Tamatake. The District Judge dismissed the plaintiff's suit on the ground that Narayanen was not the managing partner of the firm and that in a winding up only the managing partner has authority to execute a mortgage on behalf of the firm. The business no doubt was in a state of being wound up and Malayandi, the managing partner of the plaintiff firm, must have known that fact because when he came to Pegu he would put up at the place of business of the Pegu firm. Both Kannappa and Narayanen took an active part in the winding up of the Tawa firm and we must take it that Narayanen had the full powers of an ordinary active partner. The business was an ordinary Chetty money-lending business and as long as such a business is a going concern each of the partners would have authority to borrow money on behalf of the firm for the purposes of the business and to mortgage the firm's assets for that purpose. But when a money-lending firm is being wound up, in my opinion, one partner has no authority to mortgage the firm's assets because he no longer has authority to borrow money, except perhaps in the case of necessity: and he cannot give an acknowledgment for a subsisting debt so as to bind the firm. Both the power to mortgage the firm's assets and the power to give an acknowledgment for an antecedent debt on behalf of the firm, must rest on the power to borrow on behalf of the firm. Mr. Ormiston for the plaintiff appellant has cited the following cases:—*Butchart* v. *Dresser* (1), *In re Clough*, (2) and *In re Bourne*, (3). *Butchart* v. *Dresser* (1) shows that one of several partners after dissolution can sell the assets and receive payment of debts and can complete a transaction which was commenced before the dissolution. In that case the firm had agreed to buy certain shares and dissolved partnership

(1) 4 De G. M. and G., 542, 43 E.R., 619.
(2) (1885) 31Ch. D., 324 (3) (1906) 2 Ch. D., 427.

Before Mr. Justice Ormond and Mr. Justice Twomey.

Civil 1st Appeal No. 48 of 1914.

July 2nd 1915.

MAUNG GYI MAUNG *v.* MOOSAJEE AHMED & Co.

Chari—for appellant.

J. R. Das—for respondent.

Contract Act, section 107—resale on buyer's default repudiated by buyer—damages claimable at market rate.

A buyer failed to take delivery of goods and the seller, having a power of resale, purported to exercise that power but bought in the goods himself "benami." The seller sued for resale damages; the defendant impugned the resale as being void. The plaintiff at the hearing obtained leave to amend his plaint by adding in the alternative a claim for damages based upon the market rate and obtained a decree.

Upon appeal, *Held*:—Plaintiff was entitled to renounce the resale and pursue his claim for damages based upon the market rate. A plaintiff can sue for damages by way of resale and in the alternative for damages based upon the market rate of the due date.

Semble:—the buyer could have held the seller to the resale; and if prejudiced by an improper resale could have claimed damages by way of set off and to be placed in the same position as if the resale had been properly held and a proper price obtained.

Jamal v. *Moola Dawood*, 7 L.B.R., 252; *Oldershaw* v. *Holt* (1840) 12 *A. & E.*, 590; *Smith* v. *M'Guire* (1858) 27 L.J.Ex., 465; *Brace* v. *Calder*, (1895) 2 Q.B.D., 253; *Hagedorn* v. *Laing*, 6 Taunt, 162; *Yule & Co.* v. *Mahomed Hossain* (1896) I.L.R., 24 Cal., 124; *Cäve Jute Mills & Co. Ltd.*, v. *Ebrahim Arab* (1896) I.L.R., 24 Cal., 177; *Angullia & Co.* v. *Sassoon & Co.*, (1912) I.L.R., 39 Cal., 568 referred to.

Buchanan v. *Avdall*, 15 Ben. L.R., 276 distinguished.

Ormond, J.—In September 1909 the plaintiffs agreed to sell to the 1st defendant 3,000 shares (Rs. 5 paid up) in the Twinzas Oil Company, 2,000 at Rs. 10-8-0 and 1,000 at Rs. 11, for delivery and payment on 31st March 1910. The defendant admits that the shares were duly tendered and that he committed a breach of the contracts by failing to take delivery. The plaintiff gave notice of resale and sold the shares by public auction on the 11th and 12th April 1910, 2,000 at Rs. 5-3-0 and 1,000 at Rs. 5-4-0; but in reality he bought the shares in himself in the names of two other persons. Subsequently and before the institution of the suit, the value of these shares had risen considerably. The plaintiff sued for damages on the resale; but at the hearing he abandoned his claim to resale damages; and amended his plaint by claiming, in the alternative, damages upon the basis of the market rate on the due date. The amount of damages assessed upon the market rate was less than the resale damages; and the

1914.

MAUNG GYI MAUNG v. MOOSAJEE AHMED & Co.

plaintiffs abandoned the difference. The suit was instituted on 7th November 1912 when the market rate of these shares was Rs. 9-12-0. The highest price that these shares touched was Rs. 10-4-0 on the 20th November 1912.

The plaintiff's case was that the property in these shares had never passed to the defendant; that there was no resale, because the plaintiffs could not sell to themselves their own property; and that the notice of the resale does not preclude the plaintiffs from claiming damages based upon the market rate. The defence was that the property had passed to the defendant that the resale was invalid because the plaintiffs had bought benami; that the plaintiffs deceived the defendant into believing that they had resold and thus prevented the defendant from subsequently tendering the contract price when the shares went up in value; and that the plaintiffs could not recover any damages without first accounting to the defendant for the shares upon the authority of *Buchanan* v. *Avdall.* (1)

The learned Judge on the Original Side held that as the defendant had not given evidence, he could not presume that the defendant was not aware of the repurchase by the plaintiffs and did not acquiesce in it; and gave the plaintiffs a decree for the amount of damages claimed. The defendant now appeals.

A resale must be conducted openly and fairly. The inference to be drawn from the plaintiffs' buying the shares benami is that they intended to conceal the fact that they had bought in the shares. The onus of shewing that the defendant knew that the plaintiffs had bought the shares was therefore on the plaintiffs. It is not alleged however that the shares were bought in at less than their market value; and the question whether or not the defendant knew of the benami character of the sale is immaterial.

As to the property having passed to the defendant: in a contract for the sale of shares, it would not be unreasonable to presume that the buyer authorizes the seller to appropriate on the buyer's behalf shares answering to the contract. The property in shares would not pass without a written transfer signed by the assignor; and there is nothing in the evidence to

(1) (1875) 15 Ben. L.R., 276.

show that the seller had executed a written transfer; but the shares are admitted to have been duly tendered. The parties apparently considered that the property in the shares had passed to the defendant; and I think it must be deemed to have done so. But this question also does not arise in the case: for not only is it the case of both parties that the resale is invalid, but in the case of a sale in which the property has passed to the buyer, if the seller resells, he rescinds the contract, revests the property in himself and sells as owner—see Benjamin on Sales, 8th edition, page 945, and the authorities there cited. If then a seller buys the goods at the resale, he buys his own property—whether the property in the goods had previously passed to the buyer or not. The defendant would therefore be entitled to treat the resale as invalid, not because the plaintiffs had bought 'benami,' but because they had bought their own property.

The question then is: Is a seller of goods by giving notice of resale and effecting an invalid resale, precluded from recovering damages against the buyer who is in default?

Mr. Das for the plaintiff-respondent cites the case of *Jamal* v. *Moola Dawood* (2) as an authority to shew that a seller may disregard his notice of resale and can recover damages otherwise than on resale. In that case, which was an appeal from a decision of mine on the Original Side, shares were sold for delivery at a future date; the buyer was in default and the seller gave notices to the buyer that he intended to resell; about 2 months later he gave notice to the buyer that unless he paid a certain sum by a certain date by way of compensation, he (the seller) would proceed to enforce his rights by suit. The seller during the next six or eight months and before he instituted his suit sold the shares on his own account at prices which upon the average were higher than the market rate on the due date. I held that the buyer was entitled to treat those subsequent sales as having been made in pursuance of the seller's notices of resale. The Appellate Court apparently gave no effect to the notices of resale, but allowed the buyer the benefit of the higher prices realized by the seller, in mitigation of

(2) 7 L.B.R., 252.

1914.

MAUNG GYI & MAUNG v. MOOSAJEE AHMED & CO.

damages: upon the authority of *Oldershaw* v. *Holt* (3), *Smith* v. *M'Guire* (4), and *Brace* v. *Calder*. (5) I do not think however that it could have been intended to lay it down as a principle that where shares sold for delivery at a future date are tendered on the due date and the buyer makes default, the seller—because he subsequently sells the shares on his own account at a price higher than the market price on the due date—is precluded from recovering damages based upon the market rate on the due date. In my judgment in that case I did not intend to hold that a seller by giving notice of his intention to resell altogether precluded himself from claiming damages based upon the market rate on the due date. The seller can revoke his notice of resale. But certain obligations are imposed on the seller by his giving a notice of resale: he must deliver the goods to the buyer if the buyer pays the contract price and any expenses incurred by the seller in respect of the resale at any time before the resale is effected, or before the notice of resale is revoked and probably within a reasonable time after such revocation. If he proceeds to a resale, he must resell fairly and the buyer can hold him to the resale. If the seller resells at a price higher than the contract price, he cannot put aside the resale and claim higher damages as upon the market rate on the due date. If he sells unfairly at a price less than would have been obtained by a proper resale, the buyer may, by way of set off or in a separate suit, claim damages and be placed in the same position as if the resale had been properly held and a proper price obtained. But if the buyer impugns the resale and does not claim such damages, the seller may renounce the resale and claim damages based upon the market rate on the due date: which is what has happened in the present case.

In *Buchanan* v. *Avdall*, no claim was made for damages upon the basis of the market rate on the due date; there was no evidence of such damages and the resale was invalid. From an observation of Markby, J. during the argument at page 283, it would appear that he was of opinion that it was then too late to ask for damages upon that basis; and in his judgment he

(3) (1840) 12 A. & E., 590. (4) (1858) 27 L.J.Ex., 465.
(5) (1895) 2 Q.B.D., 253.

points out that there was no evidence of the market rate apart from the resale which in that particular case could not be relied on as any indication of the market rate. Although Pontifex, J., at page 292 was of opinion that if the plaintiff's conduct had not been so improper with regard to the resale, he would probably have been entitled to have damages assessed upon the basis of the market value.

There are certain observations of Pontifex, J., in that case which are in the plaintiff's favour, shewing that the property in the goods after the resale remained in the original buyer. But those observations were *obiter dicta* and I think the learned Judge must have overlooked the fact that the seller was entitled to rescind the contract. A seller by reselling must be taken to have rescinded the contract and to have revested the property in himself; even though the resale, as such, is invalid—see *Hagedorn* v. *Laing*. (6) The defendant therefore after the resale had no further rights under the contract and could not insist upon delivery of the shares upon paying the contract price.

There can be no doubt that a plaintiff can sue for damages by way of resale and in the alternative for damages based upon the market rate on the due date. This proposition was assumed in *Buchanan* v. *Aydall* and also in the following cases: viz., *Yule & Co.* v. *Mahomed Hossain* (7), *Clive Jute Mills & Co., Ltd.*, v. *Ebrahim Arab* (8), and *Angullia & Co.* v. *Sassoon & Co.* (9). It is a matter of common practice and I know of no authority to the contrary.

For the above reasons I think the plaintiffs were entitled to damages based upon the market rate on the due date and I would dismiss this appeal with costs.

Twomey, J.—I concur.

(6) (1815) 6 Taunt., 162.
(7) (1896) I.L.R., 24 Cal., 124.
(8) (1896) I.L.R., 24 Cal., 177.
(9) (1912) I.L.R., 39 Cal., 568.

Civil 1st Appeal No. 102 of 1914.

August 18th, 1915.

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

ASHA BIBI *v.* 1. SULEMAN ISMAIL ATCHA, 2. THE BANK OF RANGOON, LIMITED.

B. Cowasjee—for appellant.
Robertson—for 1st respondent.
Clifton—for 2nd respondent.

Possession, constructive—any possession is legal possession as against a trespasser.

The Rangoon Town Lands' Register shows a piece of land as having been sold to A in 1872 and as having been transferred to B, as A's nephew and heir in 1907. What happened to the land in the interval is not known. Shortly after the transfer B sold it to a third party, who mortgaged it to a bank. In 1912 the bank obtained a mortgage decree against the land, and at the ensuing sale it was bought by C. At the time of the sale the land was unoccupied except for some bricks, but when two months later C sought to enter into possession, he found that a fence had been put along the front of the land by D. D alleged that many years ago she had been allowed to occupy the land by A, and had been in occupation ever since. C brought the present suit to eject her. D entirely failed to prove her allegations.

Held—that D was a mere trespasser and that, any possession being legal possession as against a wrong doer, C inasmuch as he had up to the date of the trespass a *bona fide* claim to constructive possession through the at one time rightful owner was entitled to oust her without proving the validity of his claim.

The Trustees, Executors and Agency Company, Limited v. *Short*, (1888) L. R. 13 A.C., 793; *Secretary of State for India* v. *Krishnamoni Gupta*, (1902) I.L.R. 29 Cal., 518 and *Graham* v. *Peat* (1801) 1 East 244 followed.

Fox, C. J.—The suit as against the 1st defendant (appellant) was for possession of a plot of land in Rangoon which at one time belonged to one Goolam Hoossain Cassim Surma or Soorama which is a Surati name. He disappeared from Rangoon many years ago. A witness, M. E. Patail, who professed to be related to him said that Surma died in Rangoon 12 years ago, but none of the other witnesses knew what had become of him, or if they knew they did not say anything about having seen or heard of him since he left Rangoon or disappeared. The Town Lands Register contains an entry of a transfer of the land by sale by Adam Saheb to Goolam Hoossain Cassim Soorama on the 3rd September 1872. The next entry is of a transfer from Soorama to Husmat Hossein on the 22nd May 1907. What led up to this is shown in the copy of a Revenue Proceeding of the Collector of Rangoon.

Husmat Hossein filed a petition to the Collector stating that he was the nephew of Goolam Hoossain Cassim Soorama who died some years previously leaving no heir except himself, and asking that the land be transferred to his name from that of the deceased. According to the procedure then prevailing notice of the application was advertized in local newspapers calling upon persons who desired to oppose to appear before the Registrar of Town Lands within 15 days. No one having appeared to oppose the Registrar ordered mutation of names, and according to the register Husmat Hossein became the owner of the land. A month later he sold the land to Ma Gun. She mortgaged it to the Bank of Rangoon which brought a suit against her on the mortgage and obtained a decree.

Under the decree the land was sold by the bailiff on the 8th July 1912, and the sale was confirmed on the 10th August 1912. According to the bailiff who conducted the sale, the process-server who affixed the proclamation of sale on the land and others present at the sale the land was unoccupied, and bare except for some bricks here and there, and no one raised any protest to the sale or made any claim to the land. The plaintiff did not take any steps to obtain actual possession of the land until about two months after the confirmation of the sale. When he went to it he found that a wall of corrugated iron had been put along the front of the land he had bought, and a durwan told him that the defendant had had it put up. He tried to obtain possession in execution proceedings but failed. He then brought the present suit. The defendant's written statement set up that she had been in possession of the land for considerably over 12 years, denied that Ma Gun had ever been in possession or had had any right to the land, denied that the land was vacant at the time of sale and that no one was then in possession of it, but admitted that her servant had resisted the plaintiff taking possession of it because she was the owner of it. The meaning of the defence clearly was that she had acquired ownership of the land by continuous adverse possession for over 12 years.

In her evidence the defendant stated she had been in possession or occupation of the land for over 30 years. Her account of how she came to have anything to do with it was

1914.

ASHA BIBI v. SULEMAN ISMAIL ATCHA.

that a poor old woman named Ma Gon asked her to speak to Goolam Hoossain and obtain permission for her to put up a hut on the land in which she could sell things. There had been a carriage shed on the land but that had been destroyed by fire. Goolam Hoossain's reply was that he would not give permission to any one to put up a shed on the land, but that she (Asha Bibi) could put up a fence on it and do whatever she liked with the land. This seems a somewhat fantastic reply to a request made on behalf of a poor old woman to put up a shelter for herself on the land. The time this alleged conversation took place would be about 1884. At that time the defendant's father, Mahomed Hussain Arcoti, was alive, and he owned the land adjoining which the defendant now owns, and he was living in the house on it. *Prima facie* it would be out of the ordinary course for a Mahommedan woman who had a father alive and living in the same house to have any personal dealing with another male Mahommedan who was not related to her in any way.

If her husband, Maulvie Zin Udin, was living at the time personal dealing between her and another male Mahommedan not related to her would be still more extraordinary. Her father lived until 1902 or 1904.

She says that more than 20 years ago she leased the land to a photographer who had a shed on it for four or five years. One Rajab Ali kept timber on the land about 20 years ago, but whether he did so with her permission or not she did not say. In her account there is a long gap between the use of the land by the abovementioned people and the next man she referred to. He was Mulla Bux, an auctioneer of old furniture, who kept the articles he had for auction on the land. This began four to six years previous to the time she gave evidence which would be 1908 at the earliest. This auctioneer used the land for four to six years. After that her son-in-law, Mahomed Hanif, kept ship's articles and bricks, and one of the Dhars kept bricks and planks on the land with her permission.

She admitted that she did not think that Goolam Hoossain intended to give her the land: she thought he would come back, but because he did not she took it that he had made a gift of the land to her.

The whole story is one of those absurdities which people of the class of witnesses called by her put forward apparently in the hope that the case may fall to be tried by a Judge imbued with childish credulity. Her chief witness was S. Dhar, a pleader, whose evidence in another case had been discredited and a man who evidently took a leading part in the present case. He professed to have known the land from 1883. According to him the 1st defendant's father's tenants kept sampans, anchors, chains and the like on the land from 1885 or 1888 to 1895, and Mulla Bux, the auctioneer, kept furniture on it from 1897 to 1900. According to him broken bricks were after this kept on the land, and there was a shed on it occupied by a durwan. No other witness speaks about this shed. It is evident that S. Dhar's proneness to draw upon a lively imagination was very strong on the day he gave his evidence. Part of it in which he said he had first heard in Mr. Burjorjee's office that Mr. Robertson had been to see Asha Bibi must have been deliberately false.

Mahomed Hanif's evidence does not call for consideration. He did not hesitate to tell a deliberate falsehood in saying that Mr. Robertson had been to his house shortly after the sale and before he (Hanif) had gone to consult Mr. Burjorjee. G. C. Dhar evidently suffers from the same failing as his brother. It certainly is not at all unlikely that he should have stacked his building materials on the land, but that he should have been so conscientious as to ask the 1st defendant's permission to do so is another matter. Abdul Rahman's evidence as to a brother of Asha Bibi having lived in a small house on the land does not fit in with any other witness's evidence. M. E. Patail is the witness who professed to be Goolam Hoossain Surma's grand-nephew. If he is this it is passing strange that he should not have heard about his grand-uncle having left property in Rangoon until the year 1914. It is quite possible that Rajab Ali stored his building materials temporarily on the land, but there is only his own word for it that he asked the permission of the 1st defendant's father to do so.

The actual facts spoken to by the witnesses is that the land was used as a sort of dumping-ground all along : possibly the furniture auctioneer may have put up some sort of fence to

1914.

ASHA BIBI v. SULEMAN ISMAIL ATCHA.

protect his articles from being stolen, but the user spoken to was not such a user as indicated that the person using it claimed ownership of the land and consequently not such a user as would form the basis of a title by adverse possession. If there had been such a user it could scarcely have escaped the notice of municipal officers, and some one must have been called upon to pay taxes in respect of the land. The first defendant does not allege that she was ever called on to do this.

The first indication of any claim to the land on her part was the putting up of the fence of corrugated iron sheets after the auction at which the plaintiff bought the land. This was a sheer and impudent trespass.

In appeal it has not been contended that the 1st defendant acquired a title by adverse possession as against Surma or the person now having title to the land, but the ingenious argument was put forward that having been let into possession by Surma she is entitled to retain possession as against everybody but Surma and his heirs and his or their assignees and that if any person claims the land by title he must prove his title as against her. The basis of this argument disappears if it is not proved that she was let into possession by Surma, and I hold that this is not proved. The only witness to prove it is the 1st defendant herself, and her story about how Surma gave her permission to use the land is fantastic and incredible.

The only remaining question is whether a flagrant trespasser who has seized a piece of land can call upon a person who claims the land by title to show that his title is good. In this case it amounts to whether the 1st defendant can resist the plaintiff's claim he not having proved that Husmat Hossain was the only heir of Goolam Hoossein Cassim Soorama. The circumstances are unusual. Soorama and his heir or heirs left the land vacant and unused for a number of years. No one acquired any title to it by adverse possession. Up to the time the 1st defendant put up her fence on it the constructive possession must on the principle acted on in *The Trustees, Executors and Agency Company, Limited* v. *Short* (1) and *The Secretary of State for India* v. *Krishnamoni Gupta* (2) be held

(1) (1888) L.R. 13, A.C., 793. (2) (1902) I.L.R. 29, Cal., 518.

1914.

ASHA BIBI v. SULEMAN ISMAIL ATCHA.

to have been with the rightful owner of the land. As remarked by Kenyon, C.J., in *Graham* v. *Peat* (3) any possession is a legal possession against a wrong-doer. The plaintiff claims title through the at one time rightful owner and has at least a foundation for his claim. The 1st defendant is manifestly a trespasser and a wrong-doer.

Under the circumstances it appears to me that the plaintiff is entitled to succeed against the 1st defendant in obtaining actual possession and ousting her without proving that Husmat Hossain succeeded to the property on the death of Goolam Hoossein Cassim Soorama.

I would dismiss the appeal with costs as against both respondents, allowing two sets of costs.

Parlett, J.—I concur.

Before Mr. Justice Parlett.

Criminal Revision No. 198B. *of* 1915.

September 2*nd*, 1915.

TUN MYAING *v.* (1) KAUK SAN, (2) NGA YO, (3) SAN SHWE, (4) THA ZAN.

Criminal Procedure Code, section 435*—revision, power of Sessions Judge to review orders passed in—*

A Sessions Judge of his own motion called for proceedings in which a Magistrate had discharged four persons accused of theft, but finding on the record no cause for interference returned the proceedings to the Magistrate without taking further action. On the day he returned them, A, the complainant, applied to him to have the case reopened and the Sessions Judge, holding himself to be barred from taking further action, returned the application to be presented to the Chief Court.

Held,—that the Sessions Judge was not barred from dealing with the application himself.

Maung Tun Myaing prosecuted four persons under sections 379 and 381 of the Indian Penal Code before the Third Additional Magistrate of Nyaunglebin who on the 28th May 1915 discharged them all.

On the 1st July on perusal of the statement of cases dealt with by the criminal courts in the Pegu District during May, the Sessions Judge called for the proceedings in the case. On the 12th July the Sessions Judge ordered the record to be returned "On a perusal of the record no cause appearing for interference."

(3) (1801) 1 East 244.

1915.

TUN MYAING v. KAUK SAN.

On the same day an application was filed by an advocate on behalf of Maung Tun Myaing asking the Sessions Judge to reopen the case in which the Magistrate had discharged the accused, and the Judge called for the proceedings. On 19th July he returned the petition to be presented to the Chief Court as the case had been before him in revision. The application was then filed in this Court. I doubt whether the order returning the petition for presentation to this Court was correct as I know of no provision for such a course. I think the correct procedure would have been to deal with the petition, and if it was rejected to leave the petitioner to take any further steps which he might be advised to take.

I think however that the Sessions Judge may have regarded a consideration of the petition on its merits as being of the nature of a review of his order of 12th July returning the proceedings, and therefore may have thought that he was not competent to enter upon it.

Though however a mere perusal of the record may not have disclosed sufficient cause to the Sessions Judge to interfere of his own motion, when the complainant came forward and alleged specific reasons for interfering I do not think the Sessions Judge was precluded from hearing him, and, if the arguments led him to do so, from altering his view. I think therefore that he should have heard complainant's advocate, and if he was of opinion that there were grounds for reopening the case against any of the accused, he should have given him or them an opportunity to show cause against that being done. The application will therefore be returned to the Sessions Judge for disposal accordingly.

Criminal Revision No. 279B of 1915.

November 25th, 1915.

Before Mr. Justice Parlett.

KING-EMPEROR *v.* PO AUNG.

Maung Kin,—Assistant Government Advocate, for the King-Emperor.

P. Jordon,—for the respondent.

Criminal Procedure Code, section 110—*preventive sections—arrest outside Magistrate's jurisdiction.*

Proceedings under section 110, Criminal Procedure Code, against a person who at the time of the institution of the proceedings was within

the jurisdiction of the Magistrate instituting them, are not invalidated by the fact that the actual arrest was effected without the jurisdiction.

Ketaboi v. *Queen-Empress*, (1900) I.L.R. 27 Cal., 993, dissented from.

Emperor v. *Bapoo Yellapa*, (1907) 9 Bom. L.R., 244 and In. re *Kora Rangan*, (1912) 23 Mad. L.J., 535 followed.

Sona Ram R. Sangma v. *King-Emperor*, (1905) 3 Cal. L.J., 195 distinguished.

On 9th June 1915 the Subdivisional Magistrate of Thatôn ordered Nga Po Aung to enter into a bond for Rs. 500 with two sureties for his good behaviour for three years under section 110, Criminal Procedure Code, and as security was not furnished he submitted the proceedings to the Sessions Judge under section 123 (2). The Sessions Judge discharged the accused, first, because he was arrested in Rangoon and on that ground the prosecution was bad, and, secondly, because he thought the order of the Magistrate was not justified on the evidence. The Local Government has moved this Court in revision against the Sessions Judge's order, and the accused has shown cause through counsel. The Sessions Judge, on the first point, purported to follow the case of *Ketaboi and others* v. *Queen-Empress*. (1) In that case it appears that a dacoity having been reported to have taken place in the district of Naraingunge, the Sub-Inspector of Police of Naraingunge arrested the petitioners who were inhabitants and residents of the village of Nalchar in the district of Tipperah, and while they were in confinement proceedings were taken against them under section 110, Criminal Procedure Code, by the Subdivisional Magistrate of Naraingunge. It was held that only when a person within the limits of a Magistrate's jurisdiction, *i.e.*, who is residing within the limits of such jurisdiction, is found to be a person of the description given, the Magistrate can take action. The proceedings were therefore held to be without jurisdiction and the order was set aside. Even if that ruling were followed however it would not apply to the present case, for here the accused is a resident of Thatôn, that is to say within the jurisdiction of the Magistrate making the order. The Sessions Judge however quoted another extract from the Calcutta case as making the proceedings bad, namely that it is

(1) (1900) I.L.R. 27 Cal., 993.

1915.

KING-EMPEROR v. PO AUNG.

not contemplated that the Magistrate should issue a warrant so as to pursue the persons concerned into another jurisdiction. That observation was clearly an *obiter dictum*, for the report shows that the Magistrate issued no such warrant in that case, nor was it even ruled that such action would have vitiated the proceedings: they were held bad simply for want of jurisdiction by reason of the accused's non-residence within the limits of the Magistrate's jurisdiction. That ruling has been expressly dissented from by both the Bombay (2) and Madras (3) High Courts who point out how it would tend to defeat the object of section 110, Criminal Procedure Code, and their criticisms commend themselves to me as eminently sound. Even therefore were the Calcutta case applicable to the present one, which it is not, I should not be disposed to follow it. Another case, *Sona Ram R. Sangma* v. *King-Emperor* (4), has also been quoted on accused's behalf. There it appears that the petitioner was not within the local limits of the Magistrate's jurisdiction when proceedings were taken against him under section 110. He had been in Calcutta and he was arrested at Goalpara. He was not found within the Garo Hills. The Magistrate there had therefore, it was held, no jurisdiction in these circumstances to conduct proceedings under section 110 and his order was set aside. The circumstances in the present case are not similar. Here accused usually resides, with his wife, in a house in Thatôn. On 9th April 1915 the Subdivisional Magistrate of Thatôn received information against him and sanctioned the institution of proceedings. He seems then to have disappeared from Thatôn and on 16th May was arrested in Rangoon by the officer in charge of a police-station, as being by repute an habitual robber and thief, under section 55 (1) (*c*), Criminal Procedure Code. He was taken before a Magistrate with a view to his conveyance to Thatôn and the Magistrate released him on bail to appear on 22nd May before the Subdivisional Magistrate, Kyaikto, which appears to have been a mistake. The bail bond was sent to Kyaikto. He did not appear before the Court at Kyaikto on 22nd, but was produced in custody before the

(2) *Emperor* v. *Bapoo Yellapa*, (1907) 9 Bom. L.R., 244.
(3) *In re Kora Rangan*, (1912) 23 Mad. L.J., 535.
(4) (1905) 3 Cal. L.J., 195.

Subdivisional Magistrate, Thatôn, on 24th, having been arrested in Thatôn by the Thatôn Police on 22nd. He said that he went to the Thatôn police station to enquire the date fixed for his case: this may be true: he had however clearly failed to comply with his bail bond and that bond was clearly not before the Thatôn Police, and they doubtless believed he was liable to arrest under section 55 (1) (c), Criminal Procedure Code, and I am not disposed to hold the contrary. The accused was clearly within the jurisdiction of the Thatôn Magistrate when he was arrested and when the Magistrate took proceedings against him. I am of opinion that those proceedings were valid.

Turning to the evidence, I am bound to say that I think a strong case for putting the accused on security was made out. A large number of witnesses of high standing, who had known him and lived near him for years, deposed to his reputation among the bulk of his fellow-townsmen as an habitual thief and robber, an organizer of such crimes, an associate of convicted thieves, and a person upon whom suspicion frequently fell when thefts occurred, and that this reputation persisted up to the time of trial since accused's release from jail three years before. He was represented by a pleader, but most of the witnesses were not cross-examined at all, and such as were cross-examined were in no way shaken. When questioned the accused told the Magistrate that he was liable to furnish security and was ready to do so and he declined to call witnesses in his defence.

In my opinion the Subdivisional Magistrate's order was justified.

I therefore order Nga Po Aung to enter into a bond for Rs. 500 with two respectable sureties, to be approved by the Subdivisional Magistrate, Thatôn, for his good behaviour for three years from 9th June 1915, and that unless such security be given, he be committed to prison and undergo rigorous imprisonment until such period expires or until within such period he gives the security required.

Civil Revision No. 125 *of* 1915.

January 18*th*, 1916.

Before Sir Charles Fox, Chief Judge and Mr. Justice Twomey.

THE COLLECTOR OF RANGOON *v.* AUNG BA.

Eggar—the Assistant Government Advocate, for applicant.

Shaw—for respondent.

Indian Stamp Act, section 2 (5)—1*st Schedule, Article* 5—*bond, distinction between ordinary contract and—, agreement for sale of merchandise.*

A and B executed an instrument, attested by witnesses, under which B was to deliver to A a certain amount of paddy at a fixed rate. The Judge of the Rangoon Small Cause Court impounded it and treated it as an agreement liable under Article 5 (*c*) of Schedule I of the Stamp Act to 8 annas duty. The Collector holding that it should have been treated as a bond within the meaning of clause (5) (*c*) of section 2 of the Act referred the matter to the Chief Court.

Held,—that the instrument was not a bond within the definition of section 2 (5) (*c*) of the Stamp Act, but an agreement relating to the sale of goods exclusively and as such exempt from stamp duty under clause (*a*) of the exemptions under Article 5 of the 1st Schedule. The word "oblige" in section 2 (5) is to be interpreted in a technical sense. The distinction between an obligation under a bond and an obligation under an ordinary contract is that breach of an obligation under a bond does not and breach of obligation under an ordinary contract does "sound in damages."

Gisborne & Co. v. *Subal Bowri*, (1881) I.L.R. 8 Cal., 284 followed.

Twomey, J.—The following is a translation of the instrument which is the subject of this reference by the Collector, Rangoon, under section 61, Indian Stamp Act:—

"On 7th waning of Tazaungmon, 1276, this sale and purchase transaction is made between mill-owner Ko Aung Ba of No. 51, Oliphant Street, Rangoon, of the one part and Kala Ratanaw of Ywathit village of the other part, in respect of 4,000 baskets of *midon* paddy belonging to the latter, at a rate of Rs. 140 per 100 baskets, to be delivered into cargo boat. The paddy shall weigh 52 lb. (per basket) at least. When the paddy is measured, it shall be measured exactly in the basket with the top levelled. The paddy shall be free from yellow or broken or inferior grains; and only good grains shall be measured and given. If there be a breach (of this contract) owing to the variations in the market price, the party responsible for the breach shall lawfully stand (the loss) as well as the expenses. So agreeing, the contracting parties sign hereunder. An advance of Rs. 200 (two hundred) is made for this paddy.

When the measuring of the said paddy is completed (the vendor) shall come and take the price from *Thuhte* Ko Aung Ba in Rangoon.

Witnesses :—

(Sd.) Ko Ein Da (Kala).

(Sd.) Tun Hlaing.

8-11-14.

One anna.	
Sd.	Maung Aung Ba h.
Sd.	Ratanaw.

Advance Rs. 200."

It was originally stamped with a one-anna stamp. The First Judge of the Small Cause Court, Rangoon, to whom it was tendered in evidence impounded it under section 35 of the Stamp Act and treating it as an agreement liable to an eight-anna stamp under Article 5(*c*) of Schedule I, levied a penalty of 5 rupees and 7 annas deficient duty.

It is suggested now on behalf of the Collector that the document falls within the definition of a bond in section 2 (5) (*c*) being an attested instrument whereby one of the two executants rendered himself subject to a legal obligation to deliver grain to the other, and that it was therefore chargeable *ad valorem* under Article 15 of the schedule. On the other hand, it is contended by the learned counsel for the executant Aung Ba that this instrument is merely, as it describes itself, an agreement between two parties, one of whom is to supply a specified quantity of paddy at a specified rate to the other party who pays a certain sum as earnest money, and special provision is made for damages in the case of a breach of contract by either party.

The distinction between a bond and a contract a breach of which has to be compensated in damages is pointed out in the judgment of Garth, C.J., in the Calcutta case *Gisborne & Co.* v. *Subal Bowri* (1) from which the following extract is taken :—

"The definition of a bond in section 5 of the Act is precisely what we understand by a bond in England, and it is an obligation of a different character from a covenant to do a particular act, the breach of which must be compensated in damages.

Whether a penal clause is attached to such a covenant or not, the remedy for the breach of it is in form and substance a

(1) (1881) I.L.R. 8 Cal., 284.

1915.

THE COLLECTOR OF RANGOON v. AUNG BA.

suit for damages; and by section 74 of the Indian Contract Act, the English rule with regard to liquidated damage is abolished, and the plaintiff in such a suit has no right under any circumstances to claim the penalty itself as such. He can only recover such compensation, not exceeding the amount of the penalty, as the Judge at the trial considers reasonable; but he is entitled to that compensation, whether he proves any actual damages or not.

The remedy upon a bond is very different. The plaintiff in the case of a simple money-bond recovers the sum named in the bond, or in the case of a bond conditioned for the performance of covenants, he recovers the actual damage which he can prove that he has sustained. In either case not only is the bond a contract of a different form and nature from a covenant with a penal clause, but the remedy upon it, and the amount recoverable for the breach of it, is also different."

It is clear that the obligation of the document now under consideration is not such that specific performance could be enforced as in the case of instruments falling under clauses (*a*) and (*b*) of the definition of "bond" in section 2 (5). The executant, Ratanaw, does not "oblige himself" to deliver grain in the legal sense but merely contracts to do so. On a proper construction of section 2 (5), clause (*c*), it would appear that it was intended to apply mainly if not exclusively to instruments securing the repayment of loans in kind and the cases in which the clause has been held to apply are all cases of this nature.

I would hold therefore that the instrument now in question is not a bond but an agreement under Article 5 of the schedule. As it relates exclusively to the sale of goods it falls under exemption (*a*) of that article, and no stamp was required.

Fox, C. J.—The Legislature had necessarily to use in the Indian Stamp Act many words which have technical meanings in commerce and in English Law. Where it intended that such words should cover possibly more than they would under English Law, the word "includes" is used in the definition section instead of the word "means." The primary and technical meaning of such words cannot be disregarded when considering whether a document falls within any particular article and definition in the Act.

1915.

THE COLLECTOR OF RANGOON v. AUNG BA.

Under English Law a bond is a deed wherein a party acknowledges himself to be bound or indebted to another in a certain sum of money. It is sometimes called an obligation in a special sense of the word, and the parties are called respectively the obligor and the obligee—see Leake on Contracts, 6th edition, 96, quoting a case decided in 1670. Donogh in his Indian Stamp Act, 5th edition, p. 46, quotes similar definitions.

A distinction between an obligation under a bond and an obligation under an ordinary contract is that breach of an obligation under a bond does not, to use a legal expression, sound in damages," whereas "damages" is what one who breaks an ordinary contract is subjected to.

In the definition of "bond" in the Indian Stamp Act, the words "where a person obliges himself" are used in every clause; this indicates that what was in the minds of the law-makers was a document embodying an obligation in the special sense of the word referred to in Leake.

The document now in question does not bind or oblige either of the parties in that sense, and in my opinion it is not a bond within the definition in the Indian Stamp Act.

If it is not a bond the learned Assistant Government Advocate admitted that it is an agreement for or relating to the sale of merchandise exclusively, and as such it was exempt from stamp duty under clause (*a*) of the Exemptions under Article 5 of the 1st Schedule.

In my opinion the document falls within that clause.

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

Civil Reference No. 8 of 1915.

February 21st, 1916.

MA CHO *v.* MAUNG SEIN.

Wiltshire—for applicant.

Palit—for respondent.

Divorce Act (IV of 1869), sections 10 and 22—judicial separation—cruelty of what kind requisite for divorce.

The cruelty requisite to entitle a wife to a divorce "a mensâ et toro" must be such as endangers life, limb or health, bodily or mental, or induces reasonable apprehension of such danger. Adultery alone is sufficient cause for judicial separation.

The suit was brought by an elderly Christian Karen woman against her husband, who is also a Christian Karen for

1915.

MA CHO
v.
MAUNG SEIN.

dissolution of their marriage on the ground of his having been guilty of adultery and cruelty to her and having deserted her. Adultery was admitted by the husband: it is clear that the idea of marriage in Christendom—*viz.* the voluntary union for life of one man with one woman to the exclusion of all others—has not much force with him. Some of his adulterous misbehaviour has been condoned by his wife, but she has not condoned his latest misbehaviour with one of her relations. She left the village where he lived about October 1913 and has refused to return to him. Her petition was filed on the 23rd February 1915. He did not contribute to her support during the interval. In his written statement the defendant said he had no objection to a divorce, but a marriage between Christians cannot be dissolved because the parties want it dissolved. To justify a decree for divorce in this case adultery of the husband coupled with desertion without reasonable cause for two years or upwards, or adultery of the husband coupled with such cruelty as without adultery would entitle the wife to a divorce *a mensâ et toro*, must be proved. The adultery of the husband is established, but the requisite desertion is not.

The only question is whether the requisite cruelty has been proved.

The plaintiff said that the respondent had beaten her on six occasions and his beatings were severe on all of them. The statement appears exaggerated, for even if he did beat her six times the injuries caused appear to have been cured with a little shampooing on most of the occasions. Even about the worst treatment of her Ma Dun Zan who saw it merely said that he went a little too far. Ill-treatment corroborated by other witnesses occurred once in 1910, and once in September 1913 not long before she left the village. On both occasions quarrels over jewellery and money gave rise to it. The plaintiff accused the defendant of getting hold of the key of her box and taking her jewellery, and the defendant accused her of concealing the jewellery and money which he wanted. His assault on her in September 1913 was undoubtedly severe and degrading to an elderly woman, but since the examination of her box must have convinced him that she was not keeping the jewellery in the house his conduct with a view to force her to give it up would

1915.

MA CHO v. MAUNG SEIN.

not be likely to be repeated even if she went back to live with him. There is little likelihood of her doing this, or of his taking her back even if she were willing to go.

The cruelty requisite to entitle a wife to a divorce, *a mensâ et toro* must be such as endangers life, limb or health, bodily or mental, or a reasonable apprehension of it. This single severe assault on the plaintiff considered in connection with the circumstances under which it was made scarcely amounts to the requisite degree of cruelty. For this reason the decree for divorce cannot be confirmed, but as adultery of the husband affords ground for granting a wife a decree for judicial separation she is entitled to such decree which will accordingly be made.

The order of the Divisional Court ordering the defendant to pay the plaintiff Rs. 24 a month as alimony from the date of institution of the suit and also the plaintiff's costs appears just and it will stand.

The defendant must also pay her costs of the hearing in this Court—3 gold mohurs allowed as advocate's fee.

The question of permanent alimony should be dealt with by the Divisional Court under section 37 of the Act.

Twomey, J.—I concur.

Robinson, J.—I concur.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Twomey.

Civil 1st Appeal No. 73 of 1915. February 22nd, 1916.

MA GUN *v.* THA HNYIN.

May Oung—for appellant.

J. R. Das—for respondent.

Civil Procedure Code, 1908, *Order* 25, *Rule* (1) (3) *and Order* 33—*pauper suit by woman—security not required.*

Order 25, rule (1) (3) of the 1st Schedule to the Civil Procedure Code does not apply in the case of a woman who has been permitted under Order 33 to sue as a pauper.

Mussamat Hafizan v. Abdul Karim, (1907) 12 C. W. N., 163 followed.

The plaintiff applied for permission to sue as a pauper. Eventually when she claimed Rs. 40,000 as her share in her parent's estate permission was given. The defendant then applied for an order to her to give security for his costs under

1915.

MA GUN v. THA HNYIN.

Order 25, Rule 1 (3). The District Court made an order under that rule. The plaintiff was unable to furnish security, and her suit was dismissed. She appeals on the ground amongst others that the Court erred in law in directing a pauper plaintiff to give security for the defendant's costs. *Mussamat Hafizan v. Abdul Karim* (1) is relied on in support of this ground. We agree with the learned Judges' views in that case. The effect of the order for security would render nugatory an order permitting a person to sue as a pauper.

We allow the appeal, set aside the decree dismissing the suit, and direct that it be re-admitted by the District Court under its original number and heard according to law.

The defendant must pay the plaintiff's costs of this appeal—3 gold mohurs allowed as advocate's fee.

Civil Revision No. 181 *of* 1909.

January 31*st*, 1911.

Before Mr. Justice Twomey.

NGWE YA *v.* SHWE YE.

Harvey—for applicant.

R. N. Banurji—for respondent.

Tort—suit for damages for injuries caused by animal—negligence to be proved.

A suit for damage caused by an animal will not lie against its owner, unless it be proved that the damage was the result of the owner's negligence. In deciding whether the owner was negligent or not, his knowledge or want of knowledge that his animal was of a vicious disposition is an important point.

Maung Kyaw Dun v. Ma Kyin and one, 2 U.B.R. (1897-01), 570 followed.

The respondent's buffalo gored the applicant's buffalo and broke its leg rendering it useless. The Township Court awarded damages, but the District Court on appeal set aside the Township Court's decree and dismissed the suit, holding that negligence on the part of the defendant-respondent was not proved. The District Judge remarked also: "I do no think it proved that the defendant knew that his buffalo was a dangerous animal." The only ground of this application for

(1) (1907) 12 C.N.3,1.W 6.

1911.

NGWE YA v. SHWE YE.

revision is that the Judge "erred in holding that defendant's knowledge that the buffalo was a vicious animal was essential."

In cases of this kind the Upper Burma ruling in *Maung Kyaw Dun v. Ma Kyin and another* (1) may well be followed. It is for the plaintiff to prove that the damage done to his animal was caused by the defendant's negligence, and in deciding whether the defendant was negligent or not his knowledge or want of knowledge that his animal was of a vicious disposition is an important point. Where the animal that does the injury is a domestic animal, as in this case, the burden of proving negligence lies in the first place on the plaintiff. It might be otherwise if the injury were caused by a tiger or a bear.

In the present case proof is wanting not only that the defendant had any knowledge that his animal was of a vicious disposition, but that the animal had as a matter of fact evinced any signs of special viciousness before goring the plaintiff's buffalo.

The application for revision is dismissed with costs.

FULL BENCH.

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

Civil Reference No. 12 of 1915.

January 10th, 1916.

G. HURRY KRISHNA PILLAY *v.* M. ANTHILATCHMY AMMAL.

Giles—for applicant.

N. M. Cowasjee—for respondent.

Contract Act, sections 23, 24, 25, 27—agreement in restraint of trade—want of consideration—void contract.

A and B entered into an undertaking by which A promised that she would not in any way set up or carry on a stevedoring business and B in consideration thereof promised that he would pay her Rs. 350 a month. B paid the sum agreed upon for 3 months and then discontinued payment, A sued to recover arrears due.

Held,—that A was not entitled to recover anything. Her promise was in restraint of trade and could not be enforced. There was therefore no consideration to make B's promise binding upon him, and the whol contract was void under section 25 of the Contract Act.

(1) 2 U.B.R. (1897—01), 570.

1916.

G. HURRY KRISHNA PILLAY v. M. ANTHILATCHMY AMMAL.

Wallis v. Day, (1837) 2 M. and W., 273; 46 R.R., 602; *Bishop v. Kitchin*, (1868) 38 L.J.Q.B., 20; *Haribhai Maneklal v. Sharafali Isabji*, (1897) I.L.R., 22 Bom., 861; *Bank of Bengal v. Vya'bhoy Ga'ngji*, (1891) I.L.R., 16 Bom., 618; *Belchambers v. Sarat Chandra Ghosh*, (1908) I.L.R., 35 Cal., 870; *Davlatsing v. Pa'ndu*, (1884) I.L.R., 9 Bom., 176 referred to.

Madhub Chunder Paramanick v. Rajcoomar Das (1874), 14 Ben. L.R., 76; *Nur Ali Dubash v. Abdul Ali*, (1892), I.L.R., 19 Cal., 765 followed.

Civil Revision No. 84 of 1915.

November 18th, 1915.

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

The plaintiff-respondent is the widow of P. M. Madooray Pillay, who carried on the business of Stevedore in Rangoon, Akyab, Moulmein and Bassein, with the defendant as his General Manager. After Madooray Pillay's death, the defendant started a stevedoring business of his own in the same four places and the parties entered into an agreement whereby, in consideration for plaintiff not directly or indirectly setting up and carrying on a stevedoring business in Rangoon, Akyab, Moulmein and Bassein or in any way interfering directly or indirectly with defendant's business of stevedore in those places, the defendant covenanted to pay her regularly every month during the term of her natural life the sum of Rs. 350. Three such monthly payments were made and the present suit was brought to recover two more which had fallen due. The plaintiff was granted a decree it being held that though her covenant was not enforceable by law, as being in restraint of trade, yet she having in fact performed it was entitled to recover the payment due therefor in terms of the agreement. In this Court both parties have raised points which they do not appear to have advanced in the Court below. For the defendant it is argued that plaintiff's covenant will last until her death and has not yet been fully executed, and the effect of the Lower Court's decision is to split up the single consideration into an indefinite number of monthly considerations thereby altering the contract. This argument which would appear to have been applicable to certain English cases which have been referred to, was not raised in them, and is not, I consider, sound. The wording of the agreement makes it clear, I think, that the intention of the parties was that the monthly payment should be made after every month during which the plaintiff

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

For the defendant sections 23, 24 and 25 are relied upon and it is argued that the object of the agreement is unlawful being forbidden by law and opposed to public policy, that being

1916.

G. HURRY KRISHNA PILLAY v. M. ANTHILATCHMY AMMAL.

the basis of the law as to contracts in restraint of trade. The consideration for the promise to pay the monthly allowance being unlawful the whole agreement is void under sections 24 and 25, none of the exceptions to the latter section applying to the present case. The consideration being bad vitiates any contract founded on it.

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

In *Bishop v. Kitchin* (2) the plaintiff was a traveller in hops and defendants had purchased the good-will and interests of plaintiff in his connexion among the buyers of hops. The defendants undertook to pay plaintiff an annuity of £100 during his life and agreed to employ him as their traveller on a salary of £250 per annum, payable quarterly, with a proviso that so long as the plaintiff should be so employed and in receipt of the salary the annuity should be suspended. After the making of the agreement and while the plaintiff was not employed as a traveller of defendants or in receipt of the salary of £250, four quarterly payments of the £100 a year

(1) (1837) 2 M. & W., 273; 46 R.R., 602.
(2) (1868) 38 L.J.Q.B., 20.

became due; and the plaintiff did all things necessary to entitle him to be paid the same and all things happened and all times elapsed to entitle the plaintiff to be paid the same. An action was brought to recover arrears of the annuity, the consideration for which was an agreement by the annuitant that he would not, at any time thereafter, either on his own account or on account of any other person or persons whomsoever, excepting the defendants, solicit orders for hops from any of the customers in the West of England, or in South Wales, or any district whatsoever. It was demurred that the agreement was bad as being in general restraint of trade, and even if the part as to trading in particular districts were separated from the rest, it was still greater than necessary and so unreasonable. It was held, without deciding whether the restraint of trade so far as it regarded the West of England and South Wales could be enforced, that plaintiff who had performed his part of the contract was entitled to recover the consideration.

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

Other cases quoted for the plaintiff are *Bank of Bengal v. Vya'bhoy Ga'ngji* (4) and *Belchambers v. Sarat Chandra Ghosh* (5). Both relate to agreements entered into without the sanction of the Court required by section 257A of the Civil Procedure Code, 1882, and merely serve to support the proposition that though an agreement may not be enforceable by law, yet that does not prevent the consideration for such agreement being recovered, if the agreement has been carried out. The

(3) (1897) I.L.R., 22 Bom., 861. | (4) (1891) I.L.R., 16 Bom., 618.
(5) (1908) I.L.R., 35 Cal., 870.

1916.

G. HURRY KRISHNA PILLAY v. M. ANTHILATCHMY AMMAL.

former case decided that "where an agreement to give time not sanctioned by the Court as required by section 257A, formed part of the consideration for the bond, and has actually been enjoyed by the obligor of the bond, such consideration not being in its nature illegal, and not having as a fact failed, there is no reason why the obligee should not enforce the terms of the bond." It may be noted that here the void agreement was not the sole consideration for the bond, though probably the line of reasoning followed would have led to the same conclusion even if it had been. The later case decided that a provision as to giving time to execute a decree is not illegal, though it may be incapable of enforcement as an agreement made without the sanction of the Court under section 257A of the Civil Procedure Code.

For the defendant *Madhub Chunder Poramanick v. Rajcoomar Doss* (6) is relied upon. There the plaintiff consented to cease carrying on his business in consideration of the defendants reimbursing him advances made to his workmen. He ceased carrying on business and then sued for his money. It was held first that section 27 of the Contract Act applies to partial and not merely to total restraint of trade and secondly that there is no foundation for the opinion that though the agreement on the part of the plaintiff might be void, he might enforce the agreement for the payment of money. In the judgment it was said: "If the agreement on the part of the plaintiff is void, there is no consideration for the agreement on the part of the defendants to pay the money; the whole agreement is a void agreement and plaintiff has no right to recover the money." This is a clear pronouncement of the law of India applicable to a case like the present. It cannot be assumed that the learned Judges who made it overlooked the English cases referred to above. No subsequent case in which it has been expressly dissented from has been cited, and I should be disposed to follow it. As however the point is one of some difficulty and considerable importance I think it desirable that it should be decided by a Bench, and I accordingly refer the question whether the plaintiff having refrained from setting up

(6) (1874) 14 Ben. L.R., 76.

or carrying on the business of a stevedore and from otherwise interfering with defendant's business during the months of November and December 1914 is entitled to recover the allowances of Rs. 350 in respect of each of those months claimed in this suit.

The opinion of the Full Bench was as follows :—

Fox, C. J.—The question is whether a dictum of Lord Abinger in *Wallis v. Day*, (1) and the ruling in *Bishop v. Kitchin* (2) are applicable in India. We have to look to the Indian Contract Act alone. Section 27 of that Act says that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void. The agreement now in question does not fall within any of the exceptions stated in the section.

In it is embodied a promise and undertaking by the plaintiff that she will not in any way set up or carry on a stevedoring business, and a promise and undertaking by the defendant that in consideration of the plaintiff's promise and undertaking he will pay her Rs. 350 per mensem during her life. The agreement extends to nothing more, consequently and owing to the plaintiff's undertaking being in restraint of her trading the whole agreement is void. If the plaintiff's promise is of no binding effect, then there is no consideration to make the defendant's promise binding on him, and it is a *nudum pactum* and void under section 25 of the Act.

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

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

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

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

(1) (1837) 2 M. and W., 273. | (2) (1868) 38 L.J.Q.B., 20.

1916.

G. HURRY KRISHNA PILLAY v. M. ANTHILATCHMY AMMAL.

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

It is urged that section 27 of the Indian Contract Act makes every agreement in restraint of trade, to that extent, void and that the section declares the agreement, or not merely the promise, void.

Further that as plaintiff's promise is void and as it is the sole consideration for defendant's promise there is no consideration to support defendant's promise and no suit can therefore lie on the agreement.

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

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

The facts in *Bishop v. Kitchin* (2) were very similar to those of the present case. The only question argued was whether part of the contract which was in partial restraint of trade was bad as being unreasonable. The defendant was not called upon, but counsel interpolated that the suit was not to enforce the agreement but to recover the consideration for the restraint on the plaintiff. The judgment was as follows: "The agreement having been executed and the plaintiff

(1) (1837) 2 M. & W., 273; 46 R R., 602; 150 E.R., 759.
(2) (1868) 38 L.J.Q.B., 20.

having submitted to the restraint, he is clearly entitled to recover the consideration due in respect of it." This was a decision of four Judges.

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

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

The *Bank of Bengal v. Vya'bhoy Ga'ngji* (4) was a case where the sanction of the Court to an agreement to give time for the satisfaction of a judgment debt had not been obtained. It was pointed out that the expression "void" in section 257A of the Code of Civil Procedure is not equivalent to illegal in the sense of prohibited by law but only means that it is not capable of being the foundation of any legal right. The consideration was however not only to give time but also to accept Rs. 5,000 in full discharge of a debt of Rs. 11,900 odd. The Court held that the contract was "not invalidated in its formation by the legal failure of part of the consideration; and no part of the consideration has failed in point of fact so as to give the debtors a counter-claim of any description." In *Belchambers v. Sarat Chandra Ghosh* (5) the same view was taken and in this case also there was consideration over and above the agreement to give time.

Davlat Sing v. Pa'ndu (7) is a similar case in which it is pointed out that even if part of the bond is void this would not

(3) (1897) I.L.R.,22 Bom., 861. (4) (1891) I.L.R., 16 Bom., 618.
(5) (1908) I.L.R. 35 Cal., 870. (7) (1884) I.L.R., 9 Bom., 176.

1916.

G. HURRY KRISHNA PILLAY v. M. ANTHILATCHMY AMMAL.

invalidate the rest of the agreement if the former part can be separated from it.

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

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

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

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

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

As I have pointed out the considerations here are the reciprocal promises. If one fails the other fails with it. Plaintiff's promise must impose some burden on her as well as confer some benefit on defendant. Her promise amounted to nothing

(6) (1874) 14 Ben. I.L.R., 76. (8) (1892) I.L.R., 19 Cal., 765.
(2) (1868) 38L.J.Q.B., 20.

1916.

G. HURRY KRISHNA PILLAY v. M. ANTHI LATCHMY AMMAL.

for she might treat it as nought at any moment and defendant could not compel performance or obtain any recompense for payments made to her. Her promise must be of some value but the giving of it made no difference in her position.

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

In my opinion therefore plaintiff's suit must fail.

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

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

Civil 1st Appeal No. 20 of 1915.

SEIN KYI *v.* MA E.

MA E *v.* SEIN KYI.

January 10th, 1916.

N. M. Cowasjee—for appellant.

J. N. Lentaigne—for respondent.

Civil 1st Appeal No. 37 of 1915.

January 10th, 1916.

Chinese Buddhist Law—marriage—law of domicile as affecting marriage—customary law of woman when to be considered.

A Chinese Buddhist man persuaded a Burmese Buddhist woman to live with him as his wife by executing a document setting forth that from the date of execution of the document they were to live together as husband and wife for their whole life, whether in sickness or in health, and that in the event of his failing in his duties he would pay her Rs. 5,000 compensation. After they had lived together as husband and wife for some months, he deserted her. She sued him for restitution of conjugal rights or in the alternative for Rs. 5,000 for breach of contract of marriage and in the Original Court was awarded Rs. 2,000 damages.

Held, on appeal—per curiam—that there had been a breach of contract of marriage and that damages had been rightly awarded.

Held by Parlett, J.—that in the absence of the preliminary negotiation between the parents of the parties and other ceremonies usual in Chinese marriages, the union could not be regarded as a valid marriage;

Held, by the Chief Judge—that there is *primâ facie* no strong reason why the customary law of the man should be applied and that of the woman disregarded, and that the rule of British Courts should be applied to such

1916.

SEIN KYI v. MA E.

1916.

MA E v. SEIN KYI.

cases, *i.e.*, the validity of a marriage should be determined by the "*lex loci contractus*" and the question of the capacity of the parties to marry by the "*lex domicilii.*"

Pai Beng Teng v. Ko Maung, (1904) 2 L.B.R., 261; *Brook v. Brook*, (1861) 9 H.L.C., 193; *Brinkley v. Attorney-General*, (1890) L.R., 15 P.D., 76; *Sottomayor v. De Barros*, (1877) L.R., 3P.D., 1; *Ma E v. Maung San Da*, (1897) 3 Bur. L.R., 8 and 1 Ch. Toon L.C. 140; Alabaster on Chinese Criminal Law, referred to.

Parlett, J.—Ma E sued as a pauper for a declaration that she was the lawful wife of Maung Sein Kyi and for a decree for restitution of conjugal rights or in the alternative for Rs. 5,000 for breach of an agreement to marry her. The defendant denied the marriage and the promise to marry her. The learned Judge on the Original Side held in his favour on the former and against him on the latter point and assessed the damages at Rs. 2,000. Both parties appeal, Ma E as a pauper while Maung Sein Kyi has become insolvent during the pendency of his appeal which has been continued by the Official Assignee. Ma E asks for a declaration of the marriage and restitution of conjugal rights or in the alternative for the full amount of the damages claimed. Maung Sein Kyi contends that there was no valid agreement between the parties for the breach of which damages could be awarded and that the amount awarded is excessive and he asks that the suit be dismissed.

Ma E is a Burmese Buddhist and Maung Sein Kyi is a Chinese Buddhist; the father of neither is alive. Through a man named Ismail they became acquainted and subsequently became attached to each other, but Ma E having had a previous matrimonial venture which proved unfortunate she and her mother were at first adverse to her remarrying the defendant, but eventually agreed upon his undertaking to sign a document. On the 9th of November 1913, the parties went to a house in a garden belonging to Ismail's sister and there executed a document which was attested by Ismail and Bun Sein, a friend of Sein Kyi, in the presence of Ismail's brother-in-law. Neither plaintiff's nor defendant's mother was present. The latter has admittedly never consented to the marriage. After the document was executed the defendant cohabited with the plaintiff at her mother's house for five or six months and then moved with her to Bun Sein's mother's house but subsequently deserted her.

There can be no doubt that this would not constitute a valid marriage according to Chinese Customary Law, none of the preliminaries thereto having been observed, in particular no negotiations between the parties' parents having taken place and the defendant's mother not having given her consent (see *Pai Beng Teng v. Ko Maung* (1) and Alabaster's notes on Chinese Criminal Law, page 172). But evidence is offered that in Burma such a union between parties, one of whom is Chinese or half Chinese, is recognized as a valid marriage and that the Chinese ceremonies though often observed are optional and not essential. Ma Ket says that 35 years ago she married a Chinaman without any ceremony and has since been recognized as a wife, but whatever people may have thought, it is clear that at the outset she had not the full status of a wife, for he already had a wife in China who has only been dead about 10 years. (*See* Alabaster, page 171). Her son Bun Sein took a wife of Chinese extraction a year ago; Aung On Shwe, a half Chinese, took a Burmese wife 20 years ago; and Ma Mya, a half Chinese, took a Burmese husband 16 years ago, in each case without any ceremony, and the parties are recognized as husband and wife. Such evidence appears to me at most to show that public opinion in this country with regard to such unions is uncritical and lenient, and I consider it falls far short of proving that they constitute legal marriages. I would hold that there was no marriage effected between the parties to this suit.

The defendant contends that the agreement was one not to marry but to live together in concubinage and as such is void under section 23 of the Contract Act. In my opinion it cannot bear any such interpretation. The material portion runs as follows: "As I, Maung Sein Kyi, will live with Ma E for her whole life as husband and wife, hereafter I, Maung Sein Kyi, from the day we thus live as husband and wife throughout my whole life will never abandon Ma E, whether infirmity or blindness or any affliction overtakes her or any person interferes or makes mischief between us or any relation on my side objects. Handing all my salary as well as all property we may acquire together, to her, my wife, I will attend

(1) (1904), 2 L.B.R., 261.

1916.

SEIN KYI v. MA E.

1916.

MA E v. SEIN KYI.

to, maintain, look after and cherish her in conformity with the duties of a husband. If I fail in any of the aforesaid duties I will pay Rs. 5,000 as compensation for damage to the reputation of my wife Ma E. Ma E also, upon Maung Sein Kyi not failing in but performing the duties defined above, will throughout her whole life carry out the various acts of attendance upon her husband in accordance with the duties of a wife. Though her husband becomes infirm or blind she will not desert him." No wording could, I think, make it plainer that a life-long and binding union was contemplated by the parties. The defendant admits that his intention was to marry the girl if he could get his mother's consent, and there is no doubt that it was due to her opposition that he failed to carry it out. I am of opinion that there was a promise to marry her which defendant broke.

The plaintiff contends that she should be awarded the full amount of compensation named in the agreement to be paid in case of its breach. It appears to me however that under section 74 of the Contract Act it is open to the Court to award such compensation not exceeding the amount so named as appears to it to be reasonable. The defendant urges that Rs. 2,000 is an excessive amount to award against a person in his position of a clerk on Rs. 75 a month. As he is insolvent it appears to me improbable that the plaintiff would realize any considerable sum from the defendant himself, but as pointed out his step-father holds a well paid Government appointment and the defendant's position does not alone justify a reduction of the damages. He has treated the plaintiff in a shameful and hard-hearted manner and if, as was stated in this Court and not denied, he has since married another girl, he has put it out of his power to make even tardy amends to the plaintiff by offering her the status of a chief wife. On the other hand, Rs. 2,000 is a handsome sum to a girl in the plaintiff's position and is I consider a reasonable compensation under the circumstances. I would dismiss both the appeals and would order the plaintiff Ma E to pay the Court-fee which would have been paid by her if she had not been permitted to appeal as a pauper and a copy of the decree to be forwarded to the Collector.

1916.

SEIN KYI v. MA E.

1916 MA E v. SEIN KYI.

Fox, C. J.—I hesitate to find that there was no marriage between the plaintiff and the defendant, and I refrain from differing from the decision on the first issue only because the plaintiff appears to be indifferent as to whether that issue is decided in her favour or not, and because there has been no child as a result of the connection between her and the defendant. The case to be dealt with is that of a man of 25 years born in Burma of a Chinese father and a Burmese mother the latter of whom is alive and the former dead, luring a Burmese woman into having connection with him under a formal promise of marriage from the time of connection, the woman not having been likely to consent to connection unless such promise had been given, and unless she believed at the time that she was then the man's wife.

Assuming that the man had been brought up to follow his father's customs, although this seems very doubtful, we have the case of one party following or being subject to one customary law, that of China, and the other governed by another customary law, that of Burma.

Primâ facie there is no strong reason why the customary law of the man should be applied, and the customary law of the woman utterly disregarded, at any rate up to and at the time of marriage. After marriage other considerations apply.

The decisions in this Province which have held that in order to constitute a valid marriage between a Chinaman and a Burmese woman it must be shown that certain formalities and ceremonies enjoined by Chinese Customary Law were gone through, and that the consent of the parents of the parties must have been given to the marriage overlook the rule of British Courts stated in *Brook v. Brook* (1) and other cases that the *lex loci contractus quoad solemnitatis* determines the validity of a marriage, and the *lex domicilii* the question of the capacity of the parties to marry. The principle was followed in *Brinkley v. Attorney-General* (2) in which the marriage in Japan of an Irishman with a Japanese woman according to forms required by Japanese law was recognized

(1) (1861), 9 H.L. Cases, 193. (2) 1890, L.R., 15 P.D., 76.

1916.

SEIN KYI v. MA E

1916.

MA E v. SEIN KYI.

as valid. *Sottomayar v. De Barros* (3) affords an example of the application of the law of domicile.

It may be noted that in this last case consent of parents required by the law of France was considered a part of the ceremony of marriage and not a matter affecting the personal capacity of the parties to contract marriage.

When there is divergence between the personal laws applicable to the parties to a marriage or alleged marriage, it appears to me that the principles acted on in the above cases should be followed in determining whether there has been a marriage or not.

Taking it however that there was not sufficient evidence to prove a marriage even according to Burmese ideas and law, there can be no question that the defendant promised to marry the plaintiff and that he broke that promise. The agreement is not open to the construction that the union of the parties contemplated was merely a temporary one. I agree in the award of damages to the plaintiff. My only doubt is whether she should not be given the full amount mentioned in the document as was done in *Ma E v. Maung San Da.* (4)

The appeal of Maung Sein Kyi is dismissed with costs. The appeal of Ma E is dismissed without costs as she has succeeded substantially, but she is ordered to pay the Court Fee which she would have had to pay if she had not been allowed to appeal as a pauper.

Civil 1st Appeal No. 117 *of* 1914.

January 17th, 1916.

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

MA PWA *v.* 1. YU LWAI, MINOR BY HIS NEXT FRIEND MA ME, 2. MA YIN *alias* MA NHAH.

Clifton—for appellant.
N. M. Cowasjee—for 1st respondent.
Bonnerji—for 2nd respondent.

Chinese Buddhist Law—inheritance—adoption—family house.

A, as next friend of B, a minor, brought a suit against C, the widow of D, a Chinaman who had been born and bred in Burma, for a declaration *inter alia* that B was D's adopted son. D had been a Chinese Buddhist and all the parties to the suit were or professed to be of the same religion.

(3) (1877), L.R. 3 P.D., 1.

(4) (1897) 3 Bur. L.R., 8 and 1. Chan Toon's L.C., 140.

Held,—that the law applicable to the case was as far as it could be ascertained he customary law of Chinese Buddhists. Adoption of children by childless married couples is of common occurrence in China, but care must be taken that an alleged adoption is properly proved.

A "family house" within the meaning of Chinese Buddhist Law would appear to be a house which has belonged to paternal ancestors or a house which a man has started for his family and their male descendants. Before a widow can be deprived of maintenance for leaving the house in which her husband had lived, it must be shown clearly not only that it was a family house, but also that she left it without cause.

Fone Lan v. Ma Gyi, (1903) 2 L.B.R., 95, followed.

Fox, C.J.—The relief claimed in the suit was—

(*a*) a declaration that the plaintiff is the adopted son of Wun Pain Wain, deceased, and his sole heir;

(*b*) a decree for the administration of Wun Pain Wain's estate by and under the directions of the Court, and for determination of the rights and shares of the parties in the estate;

(*c*) an order for accounts to be taken of the assets and liabilities of the estate;

(*d*) an order for appointment of a receiver of the estate;

(*e*) costs, and

(*f*) any further and other relief which might be proper.

The plaintiff is the second son of Wun Pain Khain, the elder brother of Wun Pain Wain. He is a minor, and the suit is brought on his behalf by Ma Me, wife of Leong Shain Sway: she is a sister of Wun Fain Khain and Wun Pain Wain. Their father's name was Wun Shan Shoke and their mother's Ma Po. There is another brother Wun Pain Wa who was a witness in the case.

The 1st defendant is the widow of Wun Pain Wain, having been his second wife. His first wife was Ma Phee who died in 1907. Wun Pain Khain died in 1909 leaving a widow Ma Ma and children. Wun Pain Wain died on the 10th January 1913. His mother Ma Po died in January of the following year. The 2nd defendant is a girl who is alleged in the plaint to have been adopted by Wun Pain Wain and Ma Phee. Although this adoption is denied by the 1st defendant in her written statement, she admitted it in her petitions to the elders whose assistance she sought, and it is clearly proved by Exhibit A. The 1st defendant denied the adoption of the plaintiff and adhered to her denial: the first issue in the case was "Was Yu Lwai, the plaintiff, the adopted son of Wun Pain Wain?"

1916.

MA PWA v. YU LWAI.

It lay upon the next friend of the plaintiff to prove affirmatively that Wun Pain Wain had adopted him.

The first question to be considered is the question as to what law is applicable to the parties. Wun Pain Wain's father was a Chinese who settled in Burma and married here: whether his wife was of mixed Chinese and Burmese blood does not appear. Their children were brought up to follow Chinese customs: funerals of members of the family have been according to rites observed by Chinese. The members who have given evidence profess to be Chinese Buddhists. The 1st defendant also professes to be a Chinese Buddhist: her father is Chinese. She herself has never indicated a desire to have any but the law applicable to Chinese Buddhists applied either on the question of adoption or inheritance, and the plaintiff's next friend claims to have that law applied. Under the circumstances I think the decision in *Fone Lan v. Ma Gyee* (1) should be followed and the customary law of Chinese Buddhists should be applied in both matters as far as it can be ascertained. A mass of evidence has been given in the case to show what the customary law in China is, and we have been referred to the works mentioned in the judgment of the Original Court.

Neither from the evidence nor from the works can an entirely confident conclusion be come to as to how the questions in issue would be decided in China.

According to Parker at page 4 of his Comparative Chinese Family Law, the Law Secretaries mentioned by Von Moellendorff are, whether Provincial or Metropolitan, the true and almost the sole depositaries in China both of the life of the law and the life of official language. They search out and apply the law in each case and draw up the records for submission to the Courts of appeal at Peking.

It is evident that the customs as to adoption and inheritance have no connexion with Buddhism, Confucianism, or Taoism, but they appear to be based to a great extent on the veneration of ancestors which existed before the first teachers of the above religions appeared, and which still is the strongest influence with the majority of Chinese whichever of the above faiths they profess.

(1) (1903) 2 L.B.R., 95.

Adoption of children by childless married couples would appear to be more prevalent in China than in Burma even. The dying out of a family appears to be regarded as disastrous. Jernigan says at page 124 of his work, "China in Law and Commerce"—"The dying out of a family should be prevented, as by the desolation of the house the dead lost their religious honours, the gods of the family their sacrifices, the hearth its flame, and the forefathers their name amongst the living." Adoption is resorted to to prevent these calamities, and the most frequent case is the adoption of a nephew by a childless uncle. According to most of the authors the adopted son takes exactly the same position as a natural son. The adoption of females would not with certainty avoid the calamity of the family in the paternal line dying out, for on marriage a woman becomes a member of the family of her husband, and severs connection with the family of her father. If Wun Pain Wain was strongly imbued with the traditions and feelings of his father's race, one would certainly have expected him to have adopted the plaintiff who is the second son of his elder brother. It is remarkable however that his first adoption was of a girl, and that it was clothed with a prominent characteristic of one form of adoption amongst Burmese, namely a declaration that the child should have rights of inheritance. This points to Wun Pain Wain not being so strongly imbued with the necessity of having a son as the ordinary childless Chinese married man is said to be. No doubt his elder brother had no second son in the year 1896 when the 2nd defendant was adopted, but the younger son of any one may be adopted, and it could scarcely have been difficult for a man of comfortable means to have found parents willing to give him one of their sons in adoption.

If the entries in the Municipal Register of Deaths relating to Ma Phee (Exhibit 4) are correct she must have been 31 years of age in 1896 when she and Wun Pain Wain adopted the 2nd defendant. Her parents' names seem purely Burmese. It is remarkable that one who held himself out as a Chinaman should adopt the child of pure Burmese parents. This again tends to show that Wun Pain Wain had leanings towards the customs of the country in which he was born and bred. Years went by and Ma Phee remained childless. Not until 1905 at the earliest

1916.

MA PWA v. YU LWAI.

is Wun Pain Wain said to have adopted a son, so that for many years of a childless married life the anxiety of his dying without a son cannot have weighed heavily on Wun Pain Wain's mind. Leong Shain Sway, husband of Ma Me, said at first that the adoption of the plaintiff took place in 1906, but as he afterwards said that it took place 3 or 4 months before Wun Shan Shoke's death, and Exhibit 5 shows that the old man died on the 19th June 1905, February or March 1905 must be intended to be put forward as the time when the alleged adoption took place. No special reason is assigned by any of the family for Wun Pain Wain having woken up to the fact that he must have a son. The account of what was done is bald. Wun Pain Wain and Ma Phee are said to have asked Wun Shan Shoke and Ma Po to allow them to adopt Wun Pain Khain's second son. The father sent for Wun Pain Khain, and he agreed, and his wife also agreed. Wun Shan Shoke sent for the other brother Wun Pain Wa and E Lim Shin, a son of Ma Po by a former husband, and the family was informed about the adoption.

Possibly this assembly may be considered an assembly of agnates, which Parker refers to at page 24 of his Comparative Chinese Family Law as generally taking place when adoption of an agnate is made, but no entry in a genealogical register of the family is produced to confirm the fact of the adoption: according to Parker such an entry is usually made. No change whatever was made in the boy's life. He remained with his natural parents who at that time appear to have been living neither in the house in which Wun Shan Shoke lived, nor in the house in which Wun Pain Wain lived. This absence of change in the boy's surroundings and bringing up is sought to be accounted for by his being only about 5 years old at the time, but this does not adequately account for a husband and wife anxious to adopt a son leaving the child after the adoption with its natural parents. Ma Phee had already taken and brought up a child who was only 4 years of age when taken: if the plaintiff was a child of ordinary health at the time, his age alone could not have afforded any reason for his not being taken by the adopters to live with them. The plaintiff was first sent to school in 1907: the name, occupation and residence

of the parent or guardian received into the school had to be registered. Exhibit 9 shows that Wun Pain Khain's name and residence were given. Two and a half years afterwards when the plaintiff was sent to another school his natural father's name and residence were again given. Wun Pain Wain is said to have paid all or contributed towards the school expenses of the boy, but there is nothing to support the statement, and even if he did so, the contribution by a well-to-do but childless brother to the school fees of one of his less well-to-do brother's many children would be by no means extraordinary. The fact however that it was not proved that from the time of the alleged adoption up to the time of his death Wun Pain Wain wholly supported the plaintiff goes strongly against the truth of the story. Again, although there probably would be good reasons for an adopted boy of 7 years of age remaining with his natural mother after Ma Phee's death, there could scarcely have been cogent reasons why he should remain with her after Wun Pain Wain married the 1st defendant. The latter was not a young inexperienced girl when they were married and presumably she was quite capable of looking after a boy of 10 years of age. Again Wun Pain Khain was not at all well off in his life-time, and he is said to have died penniless. From Exhibit B it would appear that counting in Yu Lwai he had six children: if Yu Lwai had been adopted by his brother, is it likely that Wun Pain Khain and after his death his wife Ma Ma would not have insisted on the well-to-do brother bearing the whole cost of the feeding, clothing and other expenses of their son whom he had adopted?

These considerations appear to me to lead forcibly to the conclusion that the story of the adoption of the plaintiff is an invention.

The other evidence in support of it is the evidence of the plaintiff having been put to do what is usually assigned to a son at the funeral of his parents and at the after ceremonies both at and after the funeral of Ma Phee and that of Wun Pain Wain. For those of the latter the arrangements were not made by the 1st defendant, but by others, and even if Wun Pain Wain chose the plaintiff to perform the acts for his first wife, it by no means follows that he thereby acknowledged him to be his adopted

1916.

MA PWA
v.
YU LWAI.

son. Some one had to do the acts, and in default of a son a nephew would be the most suitable person. What is done in China can be done even by some one hired to do the acts.

Another piece of evidence offered in support of the adoption is the "Public Proclamation of Injustice" Exhibit B which is in Chinese, and bears a date corresponding to the 19th April 1913. It is not clear how it came to be drawn up, and what instructions were given to the compiler. It contains a reference to the duty of the 1st defendant properly to look after and maintain the daughter left by Wun Pain Wain's previous wife, and also his adopted nephew (brother's son). The instructions to the writer are not proved to have come directly from the 1st defendant, and she does not know Chinese. I attach no importance to the statement in the document. The earlier document in Burmese (Exhibit 7) dated the 28th February 1913 appears to me to be much more likely to express correctly what she wanted to express, and it appears also to have the ring of truth about it.

According to it Leong Shain Sway and Ma Me behaved to her very disgracefully when she was in a distracted state on the loss of her husband only a few months after the loss of her first and only child.

Some of the statements may be exaggerated but there is likely to be substantial truth in the document considering that it was her appeal to the elders of her community to do justice as between her and her husband's family, and it was drawn up within six weeks of her husband's death in order to avoid litigation. This document contains no admission of a son having been adopted, but it mentions that the subject of adopting one of Wun Pain Kain's sons had been mooted, and that she herself wanted to adopt the youngest of them. On the whole evidence I am of opinion that the adoption of the plaintiff was not proved, and consequently I think that the appeal should be allowed and that the suit should be dismissed.

The judgment of the learned Judge disallowed the 1st defendant even the right to maintenance on the ground that by leaving the family house she lost such right.

I cannot agree in this view, for it appears to me that the house occupied by the plaintiff and her husband was not the

family house within the sense in which a house is regarded as a family house in China. I take it that what is referred to is a house which has belonged to paternal ancestors or one which a man has started for his family and their male descendants. The house according to Exhibit B was Ma Po's alone and was not Wun Shan Shoke's; if it had been it would on his death have devolved upon his sons. At times the sons lived there but they did not do so always. The root idea of a family living together continuously for years in a house regarded as the family house descending from father to sons does not apply to the house in question. Moreover in the absence of any guide as to what would be done in China if the other members of a family made themselves objectionable to a widow of a member, and made it impossible for her to live with them in the same house, I think that any rule there may be depriving the widow of maintenance unless she continues to live with her husband's relations should not be enforced.

That some of her husband's relations did behave badly to her is evident. It is not likely that she would have given up the key of the box containing her husband's papers and valuables unless she was deceived. There could have been no honest reason for the removal of the box from what according to the case for the plaintiff was the family house. It was taken to the house of a man who was no relation and whose wife even was according to Chinese ideas not a member of Wun Pain Wain's ancestral family. Even if the plaintiff had been adopted the 1st defendant had the right according to Chinese custom to administer her deceased husband's property during the plaintiff's minority, and she had the first claim to his guardianship—see pages 578 and 602 of Alabaster. Yet Leong Shain Sway and Ma Me get hold of the property, assert that the jewellery which Wun Pain Wain admittedly had at one time had been given to Ma Me after his first wife's death, and one of them attempts to justify their conduct by saying that the estate was all handed over to them before Wun Pain Wain's death. Not content with this Ma Me a few months afterwards applied for letters of administration of the estate valuing it at first at Rs. 15,070 which did not include the value of any jewellery. Even this valuation was too high for her subsequently, and by a further

1916.

MA PWA v. YU LWAI.

statement of the assets the value was brought down to Rs. 6,445. When the present suit was brought to assert the rights of a minor the person who comes forward as next friend is not one of the family of the deceased, but a sister of the deceased who had left his family and by marriage had entered another family. In no event could she have any possible claim to the guardianship of the plaintiff, and the facts give rise to the strong suspicion that she and her husband have been the moving spirits throughout, and that their object has been to obtain the property of the deceased not so much for the minor as for themselves.

The 1st defendant's application for letters of administration (Civil Regular No. 169 of 1913) was dismissed in consequence of the judgment in the present suit (Civil Regular No. 312 of 1913). On Ma Me's application for letters the order was also one dismissing her application, but the learned Judge ordered that letters should issue to the Administrator-General. In so doing he overlooked the fact that an order for letters to the Administrator-General can only be made on the application of that official or of one of the parties concerned, and as no one had applied the order was *ultra vires*: nothing further has been done on it.

In view of the decision on this appeal letters should issue to Ma Pwa if she again applies for them.

No decision can be now given on the rights of the 2nd defendant.

According to Jernigan at page 125 Ma Pwa has power to adopt a son for her deceased husband, but she should ask the consent of her late husband's nearest male relative who is Wun Pain Wa. Should an adoption be made the right of the 2nd defendant to share in the estate would be abrogated.

I would order Ma Me the next friend of the plaintiff to pay the 1st defendant's costs of the suit and of this appeal, and would make no order as to the 2nd defendant's costs in either the suit or appeal.

The advocates' fees in the suit should be allowed as settled in the original Court, and on the appeal at 5 per cent. on the amount Rs. 6,445 the value put on the suit and appeal, and a fee of six gold mohurs for each day after the first on which the appeal was heard.

Parlett, J.—I concur.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Twomey.

Civil 1st Appeal No. 150 of 1914.

January 25th, 1916.

TANA PEENA CHEENA PITCHAY MEERA ROWTHER *v.* 1. MAMAKKANTAKATH PATHUMAKUTTY UMA, 2. ACHORATH SALIMA, HEIRS AND LEGAL REPRESENTATIVES OF B. MOHAMED KAKA, DECEASED, 3. CASSIM IBRAHIM MALIM, 4. OFFICIAL ASSIGNEE.

A. C. Dhar—for appellant.

A. B. Banurji—for respondents.

Transfer of Property Act (1882), *sections* 58 (*a*), 66—*lease by mortgagor in possession*—"*English Mortgage.*"

A mortgagor in possession can *primâ facie* exercise the ordinary rights of an owner in possession and *inter alia* can lease the land. The only restriction imposed on him is that contained in section 66 of the Transfer of Property Act, that is to say, he must not commit any act which permanently injures the property mortgaged or renders it insufficient as security to the mortgagee.

Fox, C. J.—The relief claimed in the suit was (1) a declaration that a lease for three years of two separate plots of land made by one A. S. Mahomed Abu Backer to the defendant on the 27th September 1911 was void and of no effect, (2) an order for the delivery up by the defendant of the lease, (3) possession of the lands, and (4) costs.

Backer was adjudged insolvent on the 14th June 1912. Previous to granting the above lease he had mortgaged the lands. After the adjudication the mortgagee obtained an order for sale of the lands by the Official Assignee. At sales by the latter the first plaintiff bought one lot and the second plaintiff the other lot.

The grounds on which the plaintiffs claimed that the lease should be declared void were because it was a colourable and fraudulent transaction in which no consideration passed, and because Backer who was at the time he executed the lease mortgagor of the lands could not validly give a lease of them. The mortgage was undoubtedly an "English Mortgage" within the description of that kind of mortgage in section 58 of the Transfer of Property Act, and Backer remained in possession of the lands after making it, and was in possession when he granted the lease. For the plaintiff it was contended that one who mortgages his property by an English mortgage

1916.

TANA PEENA CHEENA PITCHAY MEERA ROWTHER v. MAMAKKAN-TAKATH PATHUMA-KUTTY UMA.

has no power to make a lease of it because by the mortgage he transfers the property to the mortgagee absolutely, and consequently he has no interest to transfer until the land is re-transferred to him by the mortgagee in fulfilment of the condition or proviso that this shall be done upon payment of the mortgage money. No doubt this contention would be correct if the English Common law were applicable to the case, but what has to be applied is the Transfer of Property Act, 1882. Under that Act a mortgage is a transfer of an interest in specific immoveable property for the purpose of securing (1) the payment of money advanced or to be advanced by way of loan, (2) an existing or future debt, or (3) the performance of an engagement which may give rise to a pecuniary liability. In whatever terms the document may be expressed nothing more than what is stated in section 58 (*a*) is effected, consequently although in the case of an English mortgage the mortgagor transfers the property absolutely to the mortgagee the Indian Law does not recognize that he does so in fact, and the mortgagor remains in Indian law owner of the property subject of course to the mortgage. The fictions of English law in regard to the legal and equitable estate have not been continued in India. A mortgagor in possession can *primâ facie* exercise the ordinary rights of an owner in possession. The only restriction imposed on him is that contained in section 66 of the Transfer of Property Act, that is to say he must not commit any act which is destructive or permanently injurious to the property if the security is insufficient or will be rendered insufficient by such act. In the present case the mortgagor is said by the document to have been paid the full three years rent in advance, but there is nothing to show that even if this was the case the security was thereby rendered insufficient within the meaning assigned to that term.

It was not proved that the lease was colourable benami, or fraudulent, and there was no ground for decreeing any part of the plaintiffs' claims. It is unnecessary to decide whether there was misjoinder of parties.

I would allow the appeal, set aside the District Court's decree and dismiss the suit with costs ordering the plaintiffs to

pay also the first defendant's costs of this appeal the representatives of the first plaintiff being made liable to the extent of the assets of his estate which have come to their hands.

Twomey, J.—I concur.

1916.

TANA PEENA CHEENA PITCHAY MEERA ROWTHER *v.* MAMAKKAN-TAKATH PATHUMA-KUTTY UMA

Before Sir Charles Fox, Chief Judge, and Mr. Justice Twomey.

1. MA MYO, 2. MA YON *v.* MAUNG KYAN.

Civil Miscellanous Appeal No. 139 *of* 1915.

January 31*st*, 1916.

R. N. Burjorjee—for appellants.

Leach—for respondent.

Guardian and Wards Act, section 19 *(b)--father, the father of legitimate child--interpretation of statutes.*

The term "father" in section 19 (*b*) of the Guardian and Wards Act applies only to the father of a child born in wedlock.

M. O. Rahman and another v. G. George and another, 2 U.B.R. (1892-96), 413 dissented from.

Fox, C. J.—One Maung Tha Htu applied to be appointed guardian of the person and property of a minor female Ma Ta Shin who at the time was about 12 years of age. She is the daughter of Ma Mya Thi. In 1903 Ma Mya Thi claimed maintenance for the child from Maung Kyan who she said was its father. Maung Kyan denied being the father of the child, and alleged that one Maung Sein was its father. An order for maintenance was made against Maung Kyan, and he paid maintenance up to Ma Mya Thi's death: at that time he was paying Rs. 25 per mensem which exceeded by Rs. 5 what he was bound under the maintenance order to pay. The child is admittedly illegitimate, Maung Kyan and Ma Mya Thi never having married. She lived with her mother in Thayetmyo: in the same house lived at times Ma Myo, a half sister of Ma Mya Thi. She says that she nursed the child in infancy, and took part in the bringing up of her. She has been for some time living separate from her second husband and had gone back to live with Ma Mya Thi for nearly two years before the latter's death. Her own adopted children are out in the world and do not live with her any longer. She gets Rs. 50 per mensem from her husband. About a year before her death Ma

1916.

MA MYO v. MAUNG KYAN.

Mya Thi sent the child in Ma Myo's charge to Rangoon to be seen by Maung Kyan with a view to inducing him to put the child into a school where she would get European education. This was the only occasion before Ma Mya Thi's death on which Maung Kyan saw or attempted to see the child. He has a wife and a number of legitimate children. He is a Government servant and has to live in whatever station he is posted to. Ma Mya Thi lived all along at Thayetmyo and acquired there a substantial amount of property including the house in which she lived.

Both Ma Myo and Maung Kyan objected to Maung Tha Htu's application. An old lady Ma Yon joined Ma Myo in applying to be appointed guardian of the child's person and property and Maung Kyan asked that he should be appointed. Maung Tha Htu's application was dismissed he having no possible claim. The District Judge has appointed Ma Myo and Ma Yon guardians of the property, and Maung Kyan guardian of the person of the minor.

He held that the father must be appointed guardian of the person of the child unless he was shown to be unfit. Ma Myo and Ma Yon appeal against this decision. Maung Kyan seeks to have it upheld, and it has been argued that clause (*b*) of section 19 of the Guardian and Wards Act, 1890, compels the Court to recognize him as the guardian of the person of the minor unless he is held to be unfit to be such.

The acceptance of this contention would involve holding that the word "father" in the clause includes the natural father of an illegitimate child as well as the father of a child born in wedlock. This was held in *M. O. Rahman and another v. C. George and another* (1).

This cannot in my opinion be the correct reading of the clause for it would involve the conclusion that the Legislature had either by design or by inadvertence made an important innovation in the personal laws of the peoples of the country by a sort of side wind.

It is axiomatic that the Legislature is most careful not to interfere with such laws, and in other parts of the Guardian and Wards Act itself, *e.g.*, the opening words of section 15, care is

(1) 2 U.B.R. (1892-96), 413.

taken to have the personal law of a minor applied. Both Hindu and Mahomedan law provide for the right to the guardianship of illegitimate children. Under the former a Hindu father has not, as against the mother, any right to the guardianship of his illegitimate off-spring—Trevelyan on Minors, 4th edition, page 52.* The Mahomedan law does not recognize the right of a putative father to the guardianship of the person or property of his illegitimate child—Trevelyan, page 57. In his comment on sub-section (4) of section 17 the learned author in the note on page 61 says that the word "parents" would, unless there be anything in the context to the contrary, which there is not in this section, apply only in the cases of children born in wedlock. Equally so, in my opinion, the word "father" in clause (*b*) of section 19 can only apply in the case of a child born in wedlock in view of the other construction involving an interference with the laws of the peoples of India which could not have been intended.

In this view there was nothing to prevent Ma Myo being appointed guardian of the person of the minor in this case.

The only question to be considered is whether it is more for the welfare of the minor that she should be appointed such guardian than that Maung Kyan should be.

It appears to me that the girl is likely to receive far more affection and attention from her mother's sister who has known her and cared for her from infancy than she is likely to receive from a father who repudiated her from her birth, and only contributed towards her support because he was compelled to do so. Moreover the child is arriving at an age when if she lives with her father's legitimate children the stigma of her own illegitimacy may possibly be strongly impressed or may strongly impress itself on her. It will be far better for her I think to live with a woman who in the ordinary course is more likely than any one else to treat her with affectionate care, and in a place where she is likely to get to understand what her property is, and how it should be dealt with. No doubt her mother may have wanted her to have European education, but Maung Kyan was not then willing to put her into a school where she would get it, and there is nothing to show that he is now prepared to offer any particular advantage for the child.

1916.

MA MYO v. MAUNG KYAN.

I would allow the appeal, set aside the part of the order which appoints Maung Kyan guardian of the person of Ma Ta Shin and would appoint Ma Myo such guardian.

I would order Maung Kyan to pay Ma Myo's costs in the District Court and in this Court—3 gold mohurs advocate's fee in this Court being allowed.

Twomey, J.—I concur.

Civil 1st Appeal No. 163 of 1914.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Twomey.

NAUK TO *v.* MA HNIN.

Ko Ko Gyi—for appellant.
Wiltshire—for respondent.

Civil Procedure Code, 1908, *Order* 6, *Rule* 17—*pleadings, amendment of—when admissible—incomplete sale—Transfer of Property Act, section* 59.

A sued **B** for the redemption of land alleged to have been mortgaged by her in 1908 for Rs. 1,400. **B** claimed that the land had been sold to him for Rs. 2,500. In course of the trial it was discovered that neither side could prove its case as there was no registered deed. The District Court allowed **A** to amend her suit from one for redemption to one for possession, and holding that **A** had sold the land outright for Rs. 2,500, ordered **B** to deliver up possession on payment of Rs. 2,500.

Held on appeal,—that the amendment should not have been allowed. Any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid, and there should be no departure from the state of facts and equities and ground of relief originally alleged and pleaded. A's suit as originally laid was to enforce a mortgagor's right under an alleged mortgage; as amended it was a suit to enforce a right as owner who had not made any transfer of interest in the property. The later case was inconsistent with the first.

Mukhoda Soondury Dasi v. Ram Churn Karmokar, (1882) I.L.R. 8 Cal., 871, and *Eshen Chundar Singh v. Shama Churn Bhutto*, (1866) 11 Moore's I.A., 7 followed.

Fox, C. J.—The plaintiff sued to redeem land for Rs. 1,400 alleging that it had been mortgaged only. The defendant resisted the claim alleging that the land had been sold to him for Rs. 2,500. The only issue originally fixed was "Was the land in dispute mortgaged for Rs. 1,400 or sold outright for Rs. 2,500?" It was subsequently discovered that the plaintiff could not prove the mortgage on which she sued, and the defendant could not prove the sale to him which he set up because no document had been executed and registered. The

1916.

NAUK TO v. MA HNIN.

plaint was allowed to be amended to a suit for possession on payment of Rs. 1,400. The following new issues were then framed "1—Should plaintiff be allowed to amend her plaint so as to change the suit from one for redemption to one for possession? 2—Was the amount actually paid by Nauk To to Ma Hnin Rs. 1,400 or Rs. 2,500?" Later on this last issue was struck out and the original issue restored and made the second issue.

The learned Judge found that Ma Hnin sold the land outright for Rs. 2,500, and he ordered Nauk To to deliver up possession of the land to her on payment of Rs. 2,500. The first ground of appeal is that the learned Judge erred in law in allowing the plaint to be amended so as to change the nature of the suit from one for redemption to one for possession, inasmuch as the amendment based it on a different legal relation and was allowed at so late a stage as greatly to prejudice the appellant's case.

It is unnecessary to go into the question of whether the appellant was in fact prejudiced.

The question is whether the amendment was permissible at all.

Rule 17 of Order 6 of the present Code is in more general terms than section 53 of the last Code. It leaves questions of amendment of pleadings to the discretion of the Court, but the discretion must be exercised in accordance with settled judicial principles. As stated in *Mukhoda Soondury Dasi v. Ram Churn Karmokar* (1) the general rule is that any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid, and that the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from. This is the rule laid down by the Privy Council in *Eshen Chunder Singh v. Shama Churn Bhutto* (2). The object of pleadings is to give opposing parties full and exact notice of what each has to meet. As originally laid the present suit was to enforce a mortgagor's right under an alleged mortgage: as altered it is a suit to enforce a right as owner who had not made any valid transfer of interest in the property.

(1) (1882) I.L.R., 8 Cal., 871. (2) (1866) 11 Moore's I.A., 7.

1916.

NAUK TO v. MA HNIN.

The later case is inconsistent with the first, and was not raised originally. The amendment was in my opinion not one which should have been allowed. The case is an example of the confusion which may arise if settled legal principles are not adhered to. The defendant could not prove the sale to him owing to there being no document of sale, but nevertheless the learned Judge went into the question whether the transaction between the parties had been a mortgage or a sale, and has held that the plaintiff sold the land when according to law no valid recognizable sale was effected, and it was not open to any Court to hold that there had been a sale. When it was discovered that no mortgage could be proved, the suit should have been dismissed, or leave should have been granted to withdraw the suit with liberty to file another suit for the same land if the plaintiff asked for this. The plaintiff's advocate on this appeal does not ask for such leave being confident that another suit based on the plaintiff's right to the land by virtue of her title will lie without any leave from the Court being necessary. Under the circumstances I think the only course for this Court to adopt is to allow the appeal, set aside the decree appealed against, and dismiss the suit, ordering the plaintiff to pay the Court Fees which she would have had to pay if she had not been permitted to sue as a pauper.

Twomey, J.—I concur.

Civil Revision No. 195 *of* 1915.

February 9th, 1916.

Before Mr. Justice Twomey.

M. E. MOOLLA *v.* K. C. BOSE.

Israil Khan—for applicant.

Master and servant—wrongful dismissal—damages claimable.

In the event of wrongful dismissal a servant can sue for damages and the amount of damages to be awarded will depend on the nature of the hiring contract and the wages agreed upon. Damages to the extent of a month's wages might be given in case of a menial or domestic servant and certainly would not be excessive in case of a clerk.

Smith's Law of Master and Servant, 6th Edition, cases cited at page 148.

Smith's Law of Master and Servant, 6th Edition, cases cited at page 60.

In this case the plaintiff-respondent was engaged as a clerk at Rs. 60 a month by the applicant and was dismissed summarily after he had served for only 13 days. He sued the

defendant-applicant for his wages for the 13 days and for a month's pay in addition in lieu of notice. The defendant-applicant pleaded that the man was only engaged on trial and that his work being unsatisfactory he was dismissed after 13 days. The defendant offered to pay the wages due for 13 days but plaintiff refused to take them.

The learned Additional Judge of the Small Cause Court found that the plaintiff had been irregular and unpunctual in his attendance but that the defendant had not proved incompetence or disobedience. The Judge apparently considered that the defendant discharged the plaintiff without due cause and this question cannot be reopened in revision. He held that though there was no agreement as to notice the defendant should have given plaintiff at least 15 days' notice, and a decree was granted accordingly for 28 days' pay in all.

When a servant is wrongfully dismissed he can sue for damages and the amount of damages to be awarded will depend on the nature of the hiring contract and the wages agreed upon (1). In the case of a domestic or menial servant damages amounting to a month's wages might be given, and it certainly could not be held that a month's wages would be excessive in the case of a clerk.

Moreover in the absence of any definite agreement or established custom the contract of service is terminable by a reasonable notice (2). In the case of a clerk hired by the month fifteen days' notice is certainly not unreasonably long.

It is clear therefore that the applicant has not been dealt with too severely and that his application in revision cannot be entertained. It is dismissed.

(1) See Smith's Law of Master and Servant, 6th Edition, cases cited at page 148.

(2) See Smith's Law of Master and Servant, 6th Edition, cases cited at page 60.

Civil Miscellaneous Appeal No. 21 of 1916.

February 9th, 1916.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Twomey.

Re THE ESTATE OF MOOLLA HASHIM, DECEASED.

MOOLLA CASSIM v. MOOLLA ABDUL RAHIM AND MOOLLA DAWOODJEE EXECUTORS OF THE WILL OF THE SAID MOOLLA HASHIM.

Hamlyn—for appellant.

Probate and Administration Act, section 98(3)—*Court not bound to demand an inventory—abuse of process of Court—Civil Procedure Code, section* 151—*Limitation Act,* 1*st Schedule, Article* 181.

A, a Mahomedan died in 1884. Two of his sons, B and C, obtained probate of his will in 1885. Litigation arose in regard to the estate, but the matters in dispute were referred to arbitration and settled by an award in 1888. The award allotted a certain share of the property to another son, but did not transfer it to him as he had disappeared. In 1901 D, this son's son, sued for his father's share, but as he was not able to prove that his father had survived his grandfather he failed. He now applied for an order to the executors to file an inventory of A's estate and an account. His application was rejected in the Original Court, as barred under Article 181 of the Limitation Act.

Held on appeal,—that even if an appeal from the original order lay, it should fail. A Court is not bound to require an inventory under sub-section (3) of section 98 of the Probate and Administration Act, and the present application was of the nature of an attempt to abuse the process of the Court.

Moolla Cassim Bin Moolla Ahmed v. Moolla Abdul Rahim and others, 4 L.B.R., 77; *Vithal Jana'rdan v. Vithojira'v Putla'jira'v,* (1882) I.L.R. 6 Bom., 586; *Madhabmani Dasi v. Lambert,* (1910) I.L.R. 37 Cal., 796 referred to.

Fox, C. J.—The order appealed against was one dismissing, as barred by limitation under Article 181 of the Limitation Act, an application by a grandson of Moolla Hashim asking the Court to order the executors of his will to file an inventory of his estate and an account showing the assets which came to their hands and the manner in which they applied and disposed of them.

Moolla Hashim died in 1884, and probate of his will was issued by the Court of the Recorder of Rangoon to the respondents and another of his sons on the 30th January 1885, they having undertaken to administer his estate and to make a true inventory thereof and to exhibit the same in the Court at or before the expiration of six months, and to render a true account of the same within one year from the date of the grant.

No inventory or account is upon the record of the case (Civil Miscellaneous No. 27 of 1885). It appears from it that in May 1888 the executors petitioned the Court for leave to transfer the property of the deceased (which they set out in a Schedule) for the purposes of the administration of the estate. Leave was granted to them to do so. From the record of Civil Regular Suit No. 150 of 1901 in this Court it appears that in 1885 one of Moolla Hashim's widows instituted a suit to have his will set aside and for administration of his estate by the Court. That suit was by consent withdrawn.

In 1887 the parties interested referred questions in dispute in connection with the will and the estate to the arbitration of one Moolla Ismail. He made his award dated the 21st February 1888.

It dealt minutely with the property of the deceased setting out in detail what each legatee and heir should get. Some property in Rangoon, *viz.*, 1st class lot No. 8 in square E and a small amount of cash was allotted to the plaintiff's father as his share, but it was not transferred to him because he had disappeared many years before, and it was not known whether he was alive or not. In 1901 the petitioner-appellant brought a suit (No. 150 of 1901) against the executors and the heirs of Moolla Hashim claiming the above mentioned immoveable property on the ground that his father was dead and that he as his only heir was entitled to it. The petitioner failed in his claim in the suit, in the appeal in this Court, and in an appeal to His Majesty in Council. It was held that the burden was on the petitioner to show that his father survived his grandfather, and that as he failed to do this the well-known principle of Mahomedan law under which if any of the children of a man die before the opening of the succession to his estate leaving children these grandchildren are entirely excluded from the inheritance by their uncles and aunts, see *Moolla Cassim Bin Moolla Ahmed v. Moolla Abdul Rahim* (1). This decision finally decided that the petitioner had no interest in the property which the award had set apart for Moolla Ahmed. It had allotted some shares in Bazaar Companies and some cash to Moolla Ahmed's children which presumably the petitioner

(1) (1905) 4 L.B.R., 77.

1916.

MOOLLA CASSIM v. MOOLLA ABDUL RAHIM.

received in whole or in part as he did not include a claim for this property in his suit in 1901. *Primâ facie* he has no further interest in the estate of his grandfather, yet in 1915 more than 30 years after the grant of probate to the executors, and after lengthy litigation about the estate in which it was shown what the estate consisted of and how it was to be distributed he puts in an application asking that the executors may be called upon to do what they should have done 30 years ago. He states no reason for his wanting the inventory and accounts, and it is not apparent how they could benefit him in any way.

It has been argued that the Court is bound to order the executors to perform the duty imposed upon them by law, and that consequently the Limitation Act does not apply to the case. No doubt it has been held that the Limitation Act does not apply to applications to a Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character—see *Vithal Jana'rdan v. Vithojira'v Putla'jira'v* (2) and *Madhabmani Dasi v. Lambert,* (3) but sub-section (3) of section 98 of the Probate and Administration Act, 1881, does not make it obligatory on the Court to require an executor or administrator to exhibit an inventory or account. Sub-section (1) of the section itself imposes the duty of doing this on the executor or administrator; if he does not do it the Court may require him to do it, but that is a matter for its discretion, and consequently the rulings referred to have no application.

Even if an appeal lies against the order and it is open to the Court to make an order under sub-section (3) of the section, it should not, in my opinion, do so in view of the circumstances of this case. It appears to me that the application was of the nature of an attempt to abuse the process of the Court.

I would reject the appeal.

Twomey, J.—I concur.

(2) (1882) I.L.R., 6 Bom., 586. (3) (1910) I.L.R., 37 Cal., 796.

Criminal Revision No. 347B of 1915.

February 15th, 1916

Before Mr. Justice Twomey.

TOK GYI *v.* KING-EMPEROR.

Robertson—for applicant.

Eggar—Assistant Government Advocate for King-Emperor.

Indian Penal Code, section 441—criminal trespass—possession must be actual not juridical.

The possession contemplated in section 441 of the Indian Penal Code is actual physical possession, not mere juridical possession. Where there is a person in actual physical possession of property, he is the only person whose feelings have to be considered under that section.

The accused Tok Gyi keeps cattle under one of the *kyaungs* in Thayettaw Kyaungdaik, Godwin Road. This is a group of many *kyaungs* on a piece of land measuring about 12 acres which was granted by Government in 1862 in trust for religious purposes. The prosecution for criminal trespass was instituted by U Pyinnya and U Pyinnya Thiha, the present trustees of the *kyaungdaik*, who are said to have been elected under a new trust scheme lately sanctioned by the Chief Court.

The allegations are that the accused was ordered by the trustees in June and September last year to leave the precincts of the *kyaungdaik*, that he refused to go, that his presence with his cattle in the *kyaungdaik* is an annoyance to the monks in general, and that he is staying on with the intention of insulting and annoying the trustees and other monks.

The Eastern Subdivisional Magistrate found these allegations proved and convicted Tok Gyi of an offence under section 447, Indian Penal Code, and sentenced him to a fine of Rs. 10 or rigorous imprisonment for 10 days in default.

It is admitted by the trustees that the accused has been keeping his cattle in the *kyaungdaik* for 10 or 15 years and that he has done so with the consent of the *pongyi* under whose *kyaung* the cattle are kept. The trustees say that some of the *pongyis* are trading in cow-dung and taking money from the cattle-owners. It is admitted that no complaints have been made by other monks in the *kyaungdaik* of annoyance owing to the keeping of the cattle.

The Eastern Subdivisional Magistrate remarks that it is gainst the Buddhist Ecclesiastical law for laymen and their

1916.

TOK GYI v. KING-EMPEROR.

property to remain within the precincts of monastic land and that a *pongyi* who tolerates such a state of affairs ought to be ashamed of himself.

But the only question in this case is whether the accused has committed the offence of criminal trespass under the Indian Penal Code.

The trustees who preferred the complaint are admittedly not in physical possession of the portion of the *kyaungdaik* where the accused keeps his cattle but are only in physical possession of their own individual *kyaungs*. The trustees have been invested with certain powers and duties under the trust scheme and according to one of its clauses they may evict any laymen or women residing in the *kyaungdaik*. But such eviction must be according to law and the trust scheme could not and does not empower the trustees to issue eviction orders, disobedience of which would amount to criminal trespass. Criminal trespass is an offence committed by entering into or remaining on property in the possession of another with intent to commit an offence or to intimidate, insult, or annoy any person in possession. The possession contemplated is actual possession and in my opinion is not merely a power of control such as the trust scheme vests in the trustees. As trustees they are the successors in title of the original trustees who received the grant from Government in 1862, but the possession of this document does not necessarily imply actual possession of the individual *kyaungs* within the *kyaungdaik*. Mr. Eggar, the learned Assistant Government Advocate, argues in support of the conviction that the trustees are in juridical possession of the whole *kyaungdaik* but it is not disputed that the *pongyi* under whose *kyaung* the accused's cattle are kept is in actual physical possession of that *kyaung* and its site, and where property is held in actual physical possession by one person I think that is the only person whose feelings have to be considered under section 441, Indian Penal Code. Otherwise we might have the juridical possessor prosecuting for criminal trespass and the actual possessor compounding the offence under section 345, Code of Criminal Procedure, a result which in my opinion could never have been contemplated by the Legislature.

1916.

TOK GYI v. KING-EMPEROR

I think it is clear moreover that the accused did nothing to insult or annoy either the trustees or the *pongyi* in actual possession. The latter admittedly authorised him to keep the cattle at the *kyaung*. As regards the trustees and other *pongyis*, the accused has only done what he has been doing for 10 or 15 years without let or hindrance and without complaint. It is not contended that his original entry was unlawful and the mere fact that notice of ejectment was issued by the trustees does not convert him into a criminal trespasser.

However undesirable it may be that cattle keepers and other laymen should remain within the *kyaungdaik* precincts, it is clear that the trustees have not taken the right course to remedy this state of affairs by prosecuting these undesirable denizens for criminal trespass.

The conviction and sentence are set aside and the fine paid by the accused Tok Gyi will be refunded to him.

Before Mr. Justice Maung Kin.

Special Civil 2nd Appeal No. 192 *of* 1915.

February 24th, 1916.

A. M. HASHIM ISPHANY *v.* N. A. P. K. CHETTY FIRM.

J. R. Das—for appellant.

N. S. Aiyer—for respondents.

Civil Procedure Code, 1908, *Order* 21, *Rule* 66—*execution—sale-proclamation—duty of Court—purchaser's remedy in event of improperly conducted sale.*

A having obtained a mortgage decree against B in respect of a piece of land alleged to measure 29·33 acres applied to the Court concerned for sale of the mortgaged property. Sale proclamation was duly issued, but before the sale B informed the Court that owing, *inter alia*, to a considerable portion of the land having been brought within Penwegon Town Lands, it was doubtful whether there were really more than 7 acres for sale. The Court held that its only concern was with the sale of such land as had been mortgaged by B and his interest in it. It did not apparently notify intending purchasers of the information given it by B and C bought the land at the sale on the assumption that it measured 29·33 acres. C when he discovered that he had only obtained possession of 7·61 acres, first brought a suit to set aside the sale, but failed in the Lower Appellate Court, and then filed the present suit for compensation.

Held,—that it is incumbent on a Court to be scrupulous in the extreme in the conduct of its sales and that though there was no fraud proved on the part of either A or B, the Judge conducting the sale of land now in question so neglected the duties imposed upon him by Rule 66 of Order 21 of the 1st schedule to the Civil Procedure Code that the purchaser was entitled to a remedy by way either of proportionate refund of purchase money or of cancellation of sale.

1916.

A. M. HASHIM ISPHANY v. N. A. P. K. CHETTY FIRM.

Sundara Gopalam v. Venkatavarada Ayyangar, (1893) I.L.R. 17 Mad., 228; *Shanto Chandar Mukerji v. Nain Sukh*, (1901) I.L.R. 23 All., 355 ; *Muhammad Rahmat Ullah v. Bachcho*, (1905) I.L.R. 27 All., 537 ; *Abdullah Khan v. Abdur Rahman Beg*, (1896) I.L.R. 18 All., 322; *Birj Mohun Thakur v. Rai Uma Nath Chowdhry*, (1892) I.L.R. 20 Cal., 8; *Sheo Gobind Singh v. Dhanukdhari Singh*, (1913) 21 I.C., 774; *Mahomed Kala Meah v. Harperink Smith and Co.*, (1907) 5 L.B.R. 25, followed.

Doyal Krishna Naskar v. Amrita Lal Das, (1901) I.L.R. 29 Cal., 370 referred to.

The facts stated in chronological order are as follows :—

On the 2nd April 1913 the 1st defendants sued the 2nd defendant for a mortgage-decree on a registered mortgage-deed whereby the 2nd defendant was alleged to have mortgaged two pieces of land, namely, holding No. 15 of 1906-07, measuring 25·66 acres and holding Nos. 3 and 5 of 1906-07 measuring 29·33 acres. The 1st defendants filed with the plaint the mortgage deed, and 4 plans relating to the mortgaged property.

On the 22nd May 1913, the 2nd defendant appeared and confessed judgment and a mortgage-decree was accordingly passed. The record shows that on that date the documents filed with the plaint and other documents consisting of plans and assessment-rolls relating to the mortgaged property were admitted in evidence and marked as A, B, C, D to K.

On the 24th November 1913 the 1st defendants applied for the sale of the mortgaged property. On the 8th of December 1913 the decree was made absolute and the sale ordered to take place on the 12th January 1914. On the 17th December 1913 in the presence of the 1st defendants' agent Latchaman Chetty the Court declared the proclamation of sale to have been duly posted.

On the 3rd of January 1913 the 2nd defendant in his capacity as judgment-debtor informed the Court by a petition in writing that of the holding Nos. 3 and 5 of 1906-07 which originally measured 29·33 acres there were then left only 19 acres, as a portion of it had been acquired for Town Lands; that even of the remaining 19 acres, there remained only 7 acres which might be sold as jungle land; and that the other 12 acres were within Penwegon Town limits and the petitioner did not think that the Court would have power to sell the same. Upon this petition, the Court passed the following order :—" Read appli-

cation of Po Hlwa. The property about to be sold is what was mortgaged by him and it is his interest in the property, whatever it is, that is about to be put up to auction. There is no use prohibiting sale of interests in lands in town. Petition rejected."

On the date fixed for the sale both the lands were knocked down to the plaintiff; holding No. 15 for Rs. 2,750 and holding Nos. 3 and 5 for Rs. 2,050. The next thing that happened was the plaintiff discovered that there was a considerable shortage in the area of the property sold when compared with the advertized area. The first lot measured only 19·61 acres and the other 7·61 acres, no less than 14·96 acres having been acquired for Town Lands and more than 6 acres having no existence. The plaintiff thereupon applied to have the sale set aside. He succeeded in the Subdivisional Court but on appeal by the other side his application was rejected.

The plaintiff then filed the present suit against the 1st defendants and the 2nd defendant praying for compensation to the amount of Rs. 2,166 for the missing 21·72 acres, alleging in paragraph 4 of the plaint as follows:—"That as the Government thus resumed (a portion of) the land which was sold at the auction and laid it out in building sites and granted leases for building purposes, the area of the land is not the same as it was when it was proclaimed for auction sale. That though the 1st and 2nd defendants were aware of this fact prior to the auction sale, the auction sale was made fraudulently without disclosing the fact."

This allegation was in reference to holding Nos. 3 and 5 which originally measured 29·33 acres.

The 1st defendants replied *inter alia* that the allegations in para. 4 of the plaint, even if true, would not constitute fraud.

The 2nd defendant did not appear, though substituted service was issued.

Now there is no doubt, in fact it is common ground, that there were 21·72 acres missing but the question is whether the plaintiff is entitled to get compensation as sued for.

What is the law on the subject?

The preponderance of authority is in favour of the proposition that a purchaser at a Court sale of immoveable property

1916.

A. M. HASHIM ISPHANY v. N. A. P. K. CHETTY FIRM.

buys at his own risk and that there is no warranty of title or guarantee that the property will answer to the description given of it, unless the sale is vitiated by fraud on the part of the decree-holder or the judgment-debtor; see *Sundara Gopalan v. Venkatavarada Ayyangar* (1); *Shanto Chander Mukerji v. Nain Sukh* (2); followed in *Muhammad Rahmat Ullah v. Bachcho* (3); *Abdullah Khan v. Abdur Rahman Beg* (4); *Birj Mohun Thakur v. Rai Uma Nath Chowdhry* (5) referred to in *Sheo Gobind Singh v. Dhanukdhari Singh* (6).

The contrary authority is the Calcutta case of *Doyal Krishna Naskar v. Amrita Lal Das* (7) in which the Allahabad case of *Abdulla Khan* (4) above cited was dissented from by Maclean, C.J., but the decision of the case on the question of fraud was not necessary, as the plaintiff could not prove that he suffered any loss from the misdescription of which he complained.

In the present case no fraud was alleged with reference to holding No. 15. The claim in regard to it may therefore be dismissed.

It remains to consider whether the allegations contained in para. 4 of the plaint constitute fraud and whether the 1st defendants, the decree-holders, were guilty of it.

Now it was not alleged, nor was it shown how the 1st defendants came to know that there were not so many acres of the holding Nos. 3 and 5 as were advertized for sale. Nor is there any evidence to show that the 1st defendants, having the knowledge of the shortage, concealed that knowledge. The plaint is defective in that it is not alleged therein how the 1st defendants came to know of the shortage.

It was argued before me that they must have known of it, because they were in possession of the exhibits abovementioned long before they filed the suit, the decree in which led to the sale and the learned counsel proceeded to show by comparison of the exhibit maps that there was a shortage as alleged by the plaintiff. I do not think that that is enough. Further, allowing that the defendants after comparing the plans must have

(1) (1893) I.L.R., 17 Mad., 228.
(2) (1901) I.L.R., 23 All., 355.
(3) (1905) I.L.R., 27 All., 537.
(4) (1896) I.L.R., 18 All., 322.
(5) (1892) I.L.R., 20 Cal., 8.
(6) (1913) 21 I.C., 774.
(7) (1901) I.L.R. 29 Cal., 370.

known of the shortage, I am unable to see how they can be held to have concealed their knowledge. On the date on which their decree was passed the exhibit maps were before the Court which passed the decree, for it or anybody concerned to see. I cannot find on the record anything to show that the decree-holders were a party to the preparation of the proclamation of sale and it is clear that with reference to the holding now under consideration the judgment-debtor informed the Court by petition that there were only 7 acres of it left to be sold and as for the rest part of it had been acquired for Town Lands and part had fallen within the Town Lands. We now know that all of it but 7·61 acres had been acquired for Town Lands. There was honesty displayed by the judgment-debtor, but the Court did not think it necessary to inquire into the matter and check the proclamation. Whoever may be to blame for all the confusion and trouble which has now arisen, I am unable to find that it is either the judgment-debtor or the decree-holders. The judgment-debtor's petition above referred to was rejected and there was nothing more for him to say.

I must therefore hold that there was no fraud on the part of either the judgment-debtor or the decree-holders.

But the question which occurs to me now is whether the plaintiff should be allowed to suffer without any remedy.

All the materials for drawing up a correct proclamation of sale showing the acreage of the lands as mortgaged and their acreage at the date of the suit were before the Court. Yet the presiding Judge did not avail himself of it. Therefore as held by the learned Divisional Judge, " the only thing proved in the case is inattention on the part of the presiding Judge to his duties." This brings me to a consideration of the ruling in the Privy Council case of *Mahomed Kala Meah v. Harperink Smith & Co.* (8) where their Lordships of the Privy Council observed: " It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, should at any rate not fall below the standard of honesty which it exacts from

(8) (1907) 5 L.B.R., 25.

1916.

A. M. HASHIM ISPHANY v. N. A. P. K. CHETTY FIRM.

those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and unconscientious as this."

By Order 21, Rule 66, a duty is cast upon the Court to use all possible materials before it in drawing up a proclamation of sale which will give such information about the property to be sold as may be as fair and as accurate as possible. I venture to think that where the presiding Judge has not availed himself of the materials before him, they being such as would have enabled him to avoid the trouble afterwards occasioned, the purchaser who has in fact been misled should have a remedy.

The remedy would be either for a proportionate refund of the purchase-money for the missing acres or for a cancelment of the sale.

The plaintiffs would be at liberty to ask for the one relief or the other and he would be entitled to the first remedy, were he able to prove that the price paid by him is in excess of the fair value of the property and that he has paid that price by reason of the misdescription. See Banurji J.'s judgment in *Doyal Krishna v. Amrita Lal Das* (7). Now we have it that the acreage advertized for sale was 29·33 and that what the plaintiff has actually got is only 7·61, for which he has paid Rs. 2,050. That is obviously very much in excess of a fair price of 7·61 acres of paddy land.

I will therefore allow the plaintiff a decree for Rs. 1,517-12-9 but, as the 2nd defendant has received Rs. 351-3-3 out of the sale-proceeds, Mr. Das for the appellant consents to have the amount apportioned between the defendants, that is to say, there will be a decree for Rs. 1,166-9-6 against the 1st defendants with costs on that amount and a decree against the 2nd defendant for Rs. 351-3-3 with costs on that amount. The appeal of the plaintiff as regards holding No. 15 is dismissed with costs on Rs. 648-3-3, that being the amount claimed in respect of that holding.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Twomey.

Civil 1st Appeal No. 159 of 1915.

February 29th, 1916.

MOOLLA MAHOMED BIN MOOLLA MAHOMED *v.* P. K. EBRAHIM.

J. R. Das—for appellant.

Landlord and tenant—perpetual tenancy—improvements—ejectment—compensation—Transfer of Property Act, (1882), *Section* 108—*lessor and lessee*—"*local usage.*"

The erection by a tenant of permanent structures on land leased to him, though effected to the knowledge of and without interference by the lessor, will not of itself suffice to raise an equitable right against the lessor preventing him from ejecting the tenant at the end of the tenancy. To raise such an estoppel the lessee must show that the conduct of the lessor was sufficient to justify the legal inference that he had by plain implication contracted that the right of tenancy should be changed into a perpetual right of occupation.

In the absence of contract explicit or implied or of local usage to the contrary the whole law as to the rights and liabilities of lessor and lessee is embodied in section 108 of the Transfer of Property Act. The lessor is not bound to pay his tenant compensation either for the buildings built by the tenant or for their removal. All to which the tenant is entitled is reasonable time for their removal.

Dattatraya Rayaji Pa'i v. Shridhar Narayan Pa'i, (1892) I.L.R. 17 Bom., 736; *Yeshwadabai v. Ramchandra Tukaram*, (1893) I.L.R. 18 Bom., 66; dissented from.

Beni Ram v. Kundan Lal, (1899) I.L.R., 21 All., 496; *Ismail Khan Mahomed v. Jaigum Bibi*, (1900) I.L.R. 27 Cal., 570; *Ismai Kani Rowthan v. Nazarali Sahib*, (1903) I.L.R. 27 Mad., 211; followed.

Ramsden v. Lee Dyson, (1865) L.R. 1 E. and I.A., 129; *Angammal v. Malick Mahomed Saeed Aslamis Sahib*, (1911) 11 Indian Cases, 745 *Angammal v. Malic Mahomed Sayed Aslami Sahib*, (1913) 21 Indian Cases, 583; In the Matter of *Thakoor Chunder Paramanick*, (1866) Ben. L.R. Full Bench, 595 referred to.

Fox, C. J.—The suit was brought by an owner of land to eject one of his tenants who occupied two plots of it on which he had two houses. Some years before suit he had bought the houses on the plots from a previous tenant. One of these houses had to be pulled down in consequence of orders from the Municipal Committee. The defendant built a plank house on this plot and in it he had a shop. This house he valued at Rs. 5,000. The older house he valued at Rs. 1,000. The whole of the plaintiff's land was similarly let out in plots, which had been built upon by the tenants. The plaintiff charged and collected a monthly rent for each plot. The collection of 230 houses on the land formed a basti or village. The plaintiff enhanced the rents from time to time, and when the defendant

1916.

MOOLLA MAHOMED BIN MOOLLA MAHOMED v. P. K. EBRAHIM.

built the superior house his rent was doubled. The defendant refused to pay this large increase, and the plaintiff failed to get it by a suit in the Small Cause Court. He then gave the defendant notice to quit, and brought the present suit claiming ejectment, arrears of rent, and damages for use and occupation at the enhanced rate. The defendant claimed that he had acquired a permanent right of occupancy so long as he paid the rent payable when he bought the houses, or the rent payable immediately prior to the suit, or in the alternative that the plaintiff was not entitled to a decree for ejectment without paying him compensation for his houses. The learned Judge has held that the plaintiff is entitled to an ejectment decree, but that he must pay the defendant compensation, as to which an enquiry was ordered.

The plaintiff appeals against this part of the decree. During the course of the case the plaintiff agreed to allow the defendant two months within which to remove his buildings and property from the plots.

The grounds on which the learned Judge found that the defendant was entitled to compensation were that the land had been let for building purposes, and houses had been transferred by owners to purchasers whom the landlord recognized, and he thereby encouraged expectation on the part of the tenants that they would be entitled to compensation if they were suddenly ejected. He therefore considered that the plaintiff was estopped from denying liability to grant compensation. As authority in support of this proposition he referred to *Datta'traya Ra'ya'ji Pa'i v. Shridar Na'ra'yan Pa'i* (1) and *Yeshwada'ba'i v. Ra'mchandra Tuka'ra'm* (2). These decisions were prior to that of His Majesty's Privy Council in *Beni Ram v. Kundan Lal* (3), and it may be doubted whether after this decision which is binding on all the Courts in India they would be followed even in the Courts of the Bombay Presidency. They were not followed in *Ismail Khan Mahomed v. Jaigun Bibi* (4). The facts in the case before the Privy Council were that in 1858 the landlords let the land for the term of the current settlement for the construction of a saltpetre factory;

(1) (1892) I.L.R., 17 Bom., 736.
(2) (1893) I.L.R., 18 Bom., 66.
(3) (1899) I.L.R., 21 All., 496.
(4) (1900) I.L.R., 27 Cal., 570.

this factory was carried on for four or five years only, and since then for many years the tenants had put the land to other uses. Shops had been on the land for 20 years, and pucca shops had been built on it 12 or 14 years previous to the suit. A considerable amount of money had been spent on other structures on the land. The owner of the land at the time saw the buildings and did not prohibit their construction. The plaintiff landlords put an end to the tenancy and brought the suit for ejectment and asking for a decree for removal of the material of the houses.

The appellate Courts in India affirmed the original Court's dismissal of the suit on the ground that the original lessor not having objected to the erection of the buildings, having continued to receive rents after their erection and after the saltpetre factory ceased to exist, was estopped from suing the lessees for ejectment. They adopted a principle stated in the following words:—"If a man permits another to build upon his land, and, with the knowledge that the building is being erected, stands by and does not prevent the other from doing so, then, no doubt, equity comes in, and by the rules of equity which in this respect are the same as the rules of law, he cannot eject that other person."

Their Lordships of the Privy Council described this statement as a "loose and inadequate statement of the rule of equity," and they proceeded to state what the rule was in the following words:—

"In order to raise the equitable estoppel which was enforced against the appellants by both the Appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation." Later on they say:—"The rule established in India is that of section 108 of the Transfer of Property Act which provides that the lessee may remove at any time during the continuance of the lease all buildings which he has attached to the earth, provided he leaves the

1916.

MOOLLA MAHOMED BIN MOOLLA MAHOMED v. P. K. EBRAHIM.

property in the state in which he received it." They adopted the following words of Lord Chancellor Cranworth in *Ramsden v. Lee Dyson* (5) : " If my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money on a title he knew would or might soon come to an end." They pointed out however that the maxim in English law *quicquid inaedificatur solo solo cedit* did not apply.

The result of the decision was that the plaintiffs obtained a decree of ejectment in terms of their plaint which involved an order for removal of the tenant's houses without compensation.

The case does not differ in essential respects from the present case, but no express letting of the plots of the land for building purposes is proved in this case. A reasonable inference from the circumstances is that tenants took their plots for the purpose of putting up houses on them, and that the plaintiff knew that they were taking them for this purpose. According to the decision the erection by a tenant of permanent structures on the land let to him to the knowledge of and without interference by the lessor will not of itself suffice to raise an equitable right against the lessor preventing him from ejecting the tenant at the end of the tenancy.

As regards the question of whether the landlord is bound to compensate the tenant for his buildings or for removal of them, it may be observed that in the Privy Council case Counsel for the tenants did not even suggest that his clients were entitled to compensation of any sort. The rule of equity stated by Their Lordships is a rule under which a tenancy for a limited time can under some circumstances be held to have been changed into a perpetual right of occupancy. It has nothing to do with compensation to the tenant for his property on the land.

The effect of the Privy Council decision and the whole question as to the rights of landlord and tenant to buildings erected by the latter has been elaborately discussed in the Madras High Court.

(5) (1865) L.R. 1 E. and I.A., 129.

In *Ismai Kani Rowthan v. Nazarali Sahib* (6) Bhashyam Ayyangar and Moore, J.J. held that a tenant who erects a building on land let to him can only remove the building, and cannot claim compensation. In that case there was a decree for ejectment but the tenant was allowed one month in which to remove his buildings.

In *Angammal v. Malick Mahomed Saeed Aslamis Sahib* (7) the plaintiff sued for a declaration that she was the owner of a house and for possession of it, or in the alternative to be paid compensation for it or to be allowed to remove the building. She had held the land under a document which created only a monthly tenancy. The house had been built many years previous to the determination of the tenancy. The ground landlord had obtained an ejectment order against her in the Presidency Small Causes Court, and she had not been allowed to raise her claims in that Court, nor had time been given by the decree to remove her building which she valued at Rs. 5,000. It had been erected with the knowledge of the ground landlord and without protest from him.

Wallis, J. in the original Court held (1) that a tenant has only a right to remove buildings during the continuance of the tenancy, and (2) that a tenant is not entitled to any compensation for his buildings, or to remove them after the determination of the tenancy, the only right of removal recognized being that in clause (*h*) of section 108 of the Transfer of Property Act. He consequently disallowed the plaintiff's claims and dismissed her suit.

On appeal Arnold White, C.J. agreed with him, but Sankaran Nair, J. after an elaborate examination of the authorities disagreed. His comment on clause (*h*) of section 108 of the Transfer of Property Act was that it was only an enabling provision, and it left untouched rights which the lessee may have otherwise than under the section. He held that under the law prior to the Act the tenant had the right to remove after the expiry of the tenancy superstructures erected by him during it or to claim compensation. His comment on the Privy Council case was that it did not deal with these questions. Another appeal in the same case under the names *Angammal*

(6) (1903) I.L.R., 27 Mad., 211. (7) (1911) 11 I.C., 745.

1916.

MOOLLA MAHOMED BIN MOOLLA MAHOMED v. P. K. EBRAHIM.

v. Malic Mahomed Syed Aslami Sahib (8) was heard by the same appellate Judges sitting with Miller, J. The Chief Justice adhered to his previous opinions and Miller, J. agreed with him that the plaintiff was not entitled to any of the reliefs she asked for. Miller, J. however held that according to the customary or common law of the land the lessor on determination of a lease has the option to take the lessee's buildings on paying compensation, but if he is unwilling to pay such compensation he must allow the tenant to remove his buildings. If he elects to allow the tenant to remove the buildings he must allow a reasonable time after the determination of the tenancy for the tenant to do so. If the tenant has had such reasonable time, and has not done so before he loses possession he has no further right to time for removal of the buildings. On the question of compensation he held that apart from estoppel or contract the tenant has no right to compensation for his buildings.

Sankarain Nair, J. held that if a landlord is not willing to pay the value of the tenant's buildings the tenant is bound to remove them either before he surrenders possession or within a reasonable time after expiration of the tenancy, but if he does not do so the ownership of the building is not transferred to the landlord. What is open to the latter is to restore the land to its old condition and to claim damages from the tenant if he incurs any loss.

Section 108 of the Transfer of Property Act saves rights derived from contract or local usage from the provisions of the section stating the rights and liabilities of lessor and lessee respectively.

Miller J.'s statement of the respective rights of lessor and lessee as regards buildings erected by the latter when the tenancy comes to an end was founded on the Full Bench's decision in the matter of *Thakoor Chunder Paramanick*(9) which professed to be a statement of what the law was according to the usages and customs of the country generally. Such customs can scarcely be said to be referred to in the words "local usage" in the opening words of section 108. It appears to me that the view that the whole law as to the rights and liabilities of lessor

(8) (1913) 21 Indian Cases, 583.
(9) (1866) Ben. L.R. Full Bench Rulings, 595.

and lessee respectively when no contract or local usage is proved and when the rule of equity stated in *Beni Ram v. Kundan Lal* (3) is not applicable is now embodied in section 108 of the Transfer of Property Act is the correct view. The section says nothing about the lessor being liable to compensate the lessee for his buildings on the land let, and in view of the Privy Council's decision it appears to me clear that the plaintiff in this case is not liable to pay compensation to the defendant either for his buildings or for their removal. The buildings however are the defendant's and at the time the decree was made he had not given up possession of the land. He is bound to give up possession: this involves removing not only himself but all his property from the land. Buildings such as the defendant has on the land cannot possibly be removed instantly, consequently it is necessary to fix a time in the decree within which he must obey it. I would therefore alter the main part of the decree to the following wording:—

" It is ordered and decreed that the defendant do quit, vacate and give up possession to the plaintiff of the plots of land hereinabove mentioned, and that he do remove all his property including the materials of his buildings thereon and that he do restore the land as far as possible to its original state before the expiry of two months from the date hereof, and that he do pay to the plaintiff the sum of Rs. 93-9-6 (Rupees ninety-three, annas nine and pies six only) being arrears of rent up to the date of institution of the suit, *viz.*, the 13th day of May 1915, and damages at the rate of Rs. 18 (Rupees eighteen only) a month until he vacates the said plots of land, and that he do pay the plaintiff his costs of the suit as allowed by the Court." It may be doubted whether the plaintiff was entitled to damages for use or occupation or mesne profits at Rs. 18 per mensem in the absence of evidence to show that such rate was fair and reasonable, but the defendant has not appealed or put in a cross-objection against it.

The defendant must also pay the plaintiff's costs of this appeal.

Twomey, J.—I concur.

(3) (1899) I. L. R., 21 All., 496.

Criminal Appeal No. 1 of 1916.

February 9th, 1916.

Before Mr. Justice Twomey.

1. POONA, 2. BOH WA, 3. BA THAW, 4. TWAKA, 5. MAN SHIN, 6. PO LUN *v.* KING-EMPEROR.

C. R. Connell—for appellants.

Indian Penal Code, section 499—defamation—eighth exception—good faith.

Certain paddy traders sent to the Traffic Manager of the Burma Railways a telegram, containing an allegation that A, a station master, was giving preferential treatment to charcoal dealers and setting forth particulars in support of their allegation. The Railway authorities after an inquiry into the allegation held that it was not substantiated, and A prosecuted the paddy traders for defamation. They showed that when they sent their telegram they had good reasons for supposing their allegation to be true.

Held on appeal,—that they were entitled to the protection of the eighth exception to section 499 of the Indian Penal Code.

Toogood v. Spyring (1834) 1 Cr. M. & R., 181 at 193; 40 R.R., 523 at 534; *Harrison v. Bush* (1855) 25 L.J.Q.B., 25 at 29; 5 E. & B., 344 at 349; *Waring v. M'Caldin*, Ir. Rep. 7 C.L., 282 at 288, referred to.

The six appellants have been fined by the Subdivisional Magistrate, Rangoon, sums aggregating Rs. 1,100 on conviction for defamation under section 500, Indian Penal Code. The appellants are all substantial rice and paddy traders at Minhla, Tharrawaddy District, and they were prosecuted by the Railway Station Master at Minhla, Maung Maung Gyi, for sending the following telegram on the 25th January 1915 to the Traffic Manager at Rangoon: "Station Master Maung Maung Gyi supplied waggon Nos. 7933, 7639, 7127 on 24th sending by 10 down train and waggon Nos. 7826, 8068 on 25th for charcoal bags taking Rs. 6 as bribe for each waggon he did not supply for rice and paddy charcoal are loaded 135 to 140 bags to each waggon he stated less bags in Railway receipt. Ko Poona Bokwa Twaka Hawlun Manshin Bathaw."

The accusation of taking bribes for unduly favouring the charcoal traders in the allotment of waggons and for allowing the charcoal traders to send charcoal in excess of the quantity for which freight had been paid is no doubt injurious to the Station Master's reputation. A charge of corruption such as this clearly would lower his character in respect of his calling. It is moreover an accusation of an offence under section 161, Indian Penal Code, because all Railway servants are public servants for the purposes of Chapter 9 of the Code. The

1916.

POONA v. KING-EMPEROR.

imputations in the telegram were certainly *primâ facie* defamatory. The Railway authorities caused an enquiry to be held into the subject-matter of the telegram by a Traffic Inspector named Peters who recorded the statements of the senders of the telegram and examined some witnesses. After considering Mr. Peters' report the Railway authorities decided that the charges against the Station Master were not substantiated and the Station Master was told that he was at liberty to take proceedings against his traducers. Maung Maung Gyi then instituted the present criminal case against the six accused.

The six accused admitted sending the telegram in their joint names. They produced certain evidence to show that the charges against the Station Master were well-founded but that evidence has been disbelieved by the Magistrate.

It was not necessary, however, for the accused to plead that the imputations in the telegram were actually true. It was open to them to take the less difficult course of proving that their action fell under the 8th exception to section 499 of the Code which runs as follows:—"It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of the accusation." This plea was actually advanced by the accused. The Magistrate, after considering the evidence offered by the accused as to the sources of their information, held that the plea was not established and that they had not acted in good faith in sending the telegram. Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention (section 52, Indian Penal Code). As the burden of proving that they were within the 8th exception to section 499 was on the six accused, they had to show that they acted with due care and attention or, in other words, that they had reasonable and probable grounds for making the imputations and did not act with negligence or recklessness.

The prosecution evidence shows that the distribution of waggons is left entirely to the Station Master, that the weighment of goods is under his control and that if a trader wishes to complain about the Station Master's actions in these matters the proper authority to apply to is the Traffic Manager.

1916.

POONA
v.
KING-EMPEROR.

Traffic Inspector Peters who held the enquiry for the Railway described what each of the accused said to him when he called upon them to substantiate the charges in the telegram. Ko Poona, 1st appellant, was the prime mover. He is a rice-mill owner of Minhla and appears to be the principal trader among the accused. If there was a shortage of waggons, he would probably feel it most. He relied on specific information received from his brother-in-law Po Hmi, a charcoal trader. It is clear that the six accused consulted together about sending the telegram. It may be assumed that they discussed the subject and learnt from one another the grounds which each of them had for bringing the charge of corruption against the Station Master.

For the defence, Po Hmi produced certain books of account. Ex. 2 is a day-book beginning in August 1914 and going on to September 1915 and giving details from day to day of his charcoal transactions. Ex. 3 covers the same period as Ex. 2 and is a register of loads of charcoal sent by rail giving the waggon number, capacity of each waggon, weight per waggon, and the various amounts spent on each load and working out the total expenses of each consignment and the profit derived from it. Another charcoal trader Nyasul Huq was also examined for the defence and he also produced his accounts. There were two other witnesses, Lu Hmon and Po Son, who are clerks of Po Hmi and Ko Poona respectively. The evidence of the defence witnesses, if believed, is sufficient to show that there was a long standing system at Minhla Railway Station by which the Station Master and the Station Clerks received sums of money from traders for giving them preference in the supply of waggons. Another man named Po Chit who used to act as broker to Po Hmi but who also traded himself in charcoal was examined for the prosecution but he gave evidence supporting the defence stating that he paid Rs. 5 for a charcoal waggon on the 25th January. This witness, however, was rightly regarded as untrustworthy, for his evidence conflicts with his earlier statement to Mr. Peters.

It is established that there was overloading, *i.e.* that the charcoal traders' consignment weighed considerably more than the weights which were paid for at Minhla. Exs. C and C1

1916.

POONA
v.
KING-
EMPEROR.

show that 4 out of the 5 waggons mentioned in the telegram were found on arrival at Kemmendine to contain each from 220 to 290 viss in excess of the quantity paid for. The entries in the remarks column of Exs. C and C1 show only 2 to 7 bags in excess in each case but these figures do not correspond with the excess weights entered in the body of the form. If the total excess in weight on these 4 waggons was 1,010 viss as shown in the form then the number of bags in excess would presumably be $\frac{1010}{14}$ or 72, *i.e.*, an average of 18 bags per waggon in excess. The Subdivisional Magistrate's argument that it was not worth while to bribe the Railway officials in respect of the overloading seems, therefore, to be incorrect. Moreover as the Subdivisional Magistrate points out, according to Po Hmi's account books, there was habitual overloading. The Subdivisional Magistrate could not see why the consignors should pay the Station Master bribes to allow 5 or 6 bags to be loaded in excess if the consignees had to pay for the extra bags at the other end. But it is not in evidence that the consignments are, as a matter of practice, weighed at the other end. From Peters' evidence, it seems to have come on him as a surprise to hear that these waggons were weighed on arrival. They were probably weighed in consequence of the appellants' telegram.

The Subdivisional Magistrate did not think that any reliance could be placed on Po Hmi's account-books and he came to the conclusion that the books had probably been written up for the occasion; yet the Subdivisional Magistrate notes certain facts which militated against the theory of faked accounts, as that they began in August 1914, five months before the telegram was sent, and that they contain 133 pages of manuscript, which is rather a large number of pages for a Burman to write up "unless he is exceptionally obliging or influenced by a considerable remuneration" and, moreover, the Subdivisional Magistrate regards as improbable the prosecution theory as to how Po Hmi got details of the numbers of the waggons for entry in his account-book, Ex. 3. The multitude of details in this account is indeed hardly consistent with the theory that they were written up specially to support the charge of bribery.

1916.

POONA
v.
KING-
EMPEROR.

The Subdivisional Magistrate remarks, on the other hand, that there are indications that the books have not been entered up from day to day but have been copied or dictated. After examining the accounts, I cannot find any marked indications of this nature. On the contrary, Po Hmi's accounts appear to me, on the whole, to be accounts kept with fair regularity. The Subdivisional Magistrate has compared several of the items here and there with the Railway records and with the oral statements of the defence witnesses and he has discovered certain discrepancies and inconsistencies to which he attaches great weight as indicating that the accounts are not genuine. Some of the discrepancies may well be due to mistake or inadvertence and the occasional delay in making the entries may also be due to carelessness. The Subdivisional Magistrate's remark as to the number of bags loaded in the waggon No. 7127 takes no account of the excess weight shown in Ex. C. According to this excess weight the number of bags in excess would presumably be not 5 but 17. As for the entry, "For the station," in Po Hmi's books I have no difficulty in believing that a trader would, as a rule, prefer to use a veiled or ambiguous form in entering in his accounts sums paid as bribes to Railway officials: for it is a criminal offence to give such bribes. Nor can I see anything improbable in the entry of Rs. 3 for charcoal bought by the Station Master. I am unable to derive from the discrepancies noted by the Subdivisional Magistrate the sinister inference that Po Hmi's accounts are faked. Nyasul Huq's accounts also show payments of money to the station officials. These accounts are in Urdu and have not been subjected to the same detailed examination as Po Hmi's accounts. The Subdivisional Magistrate, however, decided that Nyasul Huq's accounts were not genuine because he omitted to enter a certain payment alleged to have been made to the witness Po Yin. The reason can hardly be regarded as conclusive.

Assuming, however, that the genuineness of Po Hmi's and Nyasul Huq's accounts is not established and that these and the other witnesses for the defence have given false evidence as to the payments made to the Station Master, should it be inferred as a necessary consequence that Ko Poona and the

other accused had no reasonable grounds for sending the telegram? It seems to me that the inference is not warranted: it would still have to be proved that the accused knew or that they had good reason to believe that the statements of Po Hmi and the other charcoal traders and the account-books showing payments of money could not be relied upon. If the accused had the information which has been laid before the Court by the defence witnesses, it is, in my opinion, impossible to say that they had no reasonable grounds for sending the telegram, even if it should afterwards appear that that information was untrue in whole or part. The Subdivisional Magistrate saw no reason to think that the accused had, as a matter of fact, been treated unfairly in the allotment of waggons. That view may be correct but there can be no doubt, I think, that the accused believed that they were treated unfairly in comparison with the charcoal traders; for otherwise they would not have telegraphed as they did. No suggestion was made in the Magistrate's Court that the accused were actuated by any other motive in telegraphing. They bore no grudge against the Station Master. They telegraphed only because at the beginning of the paddy export season they found waggons being allotted, as they thought unfairly, to the charcoal traders and were thus prevented from taking advantage as fully as they otherwise might have done of the fluctuations of the market rate at Rangoon. They complained to the proper authority with a view to having their grievance redressed and they sent their complaint by telegram as the matter was urgent. They did not publish the imputation of bribery beyond sending the telegram to the Traffic Manager. The imputation has now acquired great publicity but this is only the consequence of the Station Master's action in prosecuting the accused.

Even if the defence witnesses have given false evidence, it is quite clear that in the matter of overloading the allegation in the telegram was well-founded.

In the English case of *Toogood* v. *Spyring* (1) Baron Parke said "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, unless fairly made by a person . . . . . .

(1) (1834) 1 Cr. M. & R., 181 at 193; 40 R.R., 523 at 534.

1916.

POONA v. KING-EMPEROR.

in matters where his interest are concerned . . . . . If fairly warranted by a reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits." Again in *Harrison v. Bush* (2) Lord Campbell, C.J., remarked: "In this land of law and liberty all who are aggrieved may seek redress; and the alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and the duty to inquire into, and to take steps which may prevent the repetition of it." The words of Fitzgerald, B., in *Waring v. M'Caldin* (3) may also be cited: "If, without express malice, I make a defamatory charge which I *bonâ fide* believe to be true, against one whose conduct in the respect defamed has caused me injury, to one whose duty it is to inquire into and redress such injury, the occasion is privileged; because I have an interest in the subject-matter of my charge, and the person to whom I make the communication has on hearing the communication a duty to discharge in respect of it." These principles of the English law are embodied in the exceptions 8 and 9 to section 499, Indian Penal Code, and they show the necessity of distinguishing *bonâ fide* complaints of grievances from defamatory statements maliciously made with the object of injuring another person. In this country even more than in England it is very undesirable that the Courts should take any action which may have the effect of stifling legitimate complaints. I do not agree in the Magistrate's finding in the present case that the accused persons have not shown that they acted in good faith in sending the telegram of 25th January. I think they are entitled to the benefit of the 8th exception to section 499.

The convictions and sentences are set aside and the fines paid by the six accused will be refunded to them.

(2) (1855) 25 L.J.Q.B., 25 at 29; 5E. & B., 344 at 349.
(3) Ir. Rep. 7C.L., 282 at 288.

Before Mr. Justice Twomey.

KING-EMPEROR v. PO KET.

Criminal Revision No. 45B of 1916.

March 3rd 1916.

Criminal Procedure Code, sections 337, 339—pardon how forfeited—approver, whose pardon is alleged to have been forfeited, procedure in trying.

At the conclusion of a dacoity trial in which evidence had been given by an approver who had been granted a pardon under section 337 of the Criminal Procedure, the Sessions Judge holding that the approver had forfeited his pardon, directed his commitment to Sessions on a charge of dacoity. The approver was committed accordingly, but as the Sessions Judge was doubtful as to the validity of his previous order he referred the matter to the Chief Court.

Held,—that the Sessions Judge's order declaring the pardon forfeited was illegal and that the commitment must be quashed. The proper authority to decide whether or not an approver should be prosecuted for the offence with regard to which he has been granted a pardon is the District Magistrate. If a prosecution is instituted, it is open to the approver to plead his pardon as a bar to prosecution first in the committing Magistrate's Court, then in the Sessions Court. The Magistrate before inquiring into the offence charged must, as laid down in *To Gale v. King-Emperor* (VII L.B.R., 3), give the approver an opportunity of proving that he has not forfeited the pardon granted, and must satisfy himself that there is *primâ facie* ground for holding that it has been forfeited.

Similarly, if committed to Sessions, the accused may plead his pardon in bar of prosecution there, and the Sessions Judge must entertain and decide the plea before putting him on trial for the substantive offence.

To Gale v. King-Emperor, (1912) 7 L.B.R., 1, referred to.

Emperor v. Kothia, (1906) I.L.R. 30 Bom., 611; *Emperor v. Abani Bhushan Chuckerbutti*, (1910) I.L.R, 37 Cal., 845; *Emperor v. Gangua*, (1915) I.L.R. 37 All., 331, followed.

The Order of Reference in this case by the Sessions Judge, Toungoo Division, is as follows:—

In Sessions Trial No. 37 of 1915 of this Court Nga Po Ket was examined as approver. After the trial was concluded, I opened out Criminal Miscellaneous No. 26 of 1915, in which I called upon Po Ket to show cause why he should not forfeit his pardon on grounds stated fully in the proceedings. His answer was recorded, and on the 28th July I passed an order, in which I held that Po Ket had forfeited his pardon and I directed his commitment to Sessions. Po Ket has been committed to Sessions by the Subdivisional Magistrate, Nyaunglebin (Criminal Regular No. 73 of 1915), and the proceedings are now before me. I am of opinion that in view of my proceedings, I ought not in any case to try Po Ket. But this is not the only point I wish to raise. At the time I wrote my order in Criminal Miscellaneous No. 26 of 1915, I had before me the case of To Gale *v.* King-Emperor (L.B.R. VII, page 3) in which Mr. Justice Twomey said: " The mere expression of opinion by the Sessions Judge is not enough. The approver should be given an opportunity of meeting the allegation that he has failed to make the full and true disclosure required under section 337. The proper course was to draw up an order setting forth specifically the alleged breach of the condition of pardon and to call

1916.

KING-EMPEROR v. PO KET.

upon the approver to show cause on a future date why he should not be tried for the dacoity as provided in section 339. On the date fixed for the hearing, unless the approver admits the alleged breach of condition, the Magistrate or *Judge* should hear the evidence relied upon as establishing the breach and any rebutting evidence that the approver may offer, and should then record a definite finding as to whether there has been a breach or not. A definite finding arrived at in this manner is essential *before the approver can be placed on his trial for the original offence.*" From this ruling I concluded that the learned Judge intended to lay down the proposition that the Magistrate or Judge having seisin of the case in which the approver was giving evidence, is the authority who should decide whether the pardon is forfeited. In view however of two Indian Rulings which I have since seen, I am doubtful whether my interpretation is correct or not. Those rulings are I.L.R. XXX Bombay, 611 and I.L.R. 37 Allahabad 331. I may also refer to I.L.R. 37 Calcutta, 847, and there is also a case reported in I.L.R. XL., Calcutta. If those rulings are followed, my proceedings appear to have been *ultra vires*. In the Allahabad case it was said that the proper course for the Sessions Judge to take is merely to record an opinion that the approver had forfeited his pardon and to invite the attention of the District Magistrate to such opinion, or possibly to suggest the propriety of a prosecution. I therefore submit the proceedings to the Chief Court for such orders as may be deemed fit, both on the question of the legality of my proceedings, and on the transfer of the case to another Court for trial, if the commitment is not quashed.

In *To Gale v. King-Emperor* (1) it was not intended to rule that the Magistrate or Judge trying the case in which the approver was giving evidence is the proper authority to decide whether the pardon is forfeited. The question as to which authority should decide this point was not specially considered but the present reference shows the need of definite instructions.

The question has been fully discussed by the Indian High Courts. In the Bombay case *Emperor v. Kothia* (2) the accused was one of several persons accused of murder. He accepted a tender of pardon under section 337 and made a full disclosure before the committing Magistrate. In the Sessions Court he resiled from his statements in cross-examination. At the close of the trial the Sessions Judge ordered the accused to be committed for trial for the same murder and he was tried and convicted. The High Court on appeal from the conviction held that the Sessions Judge's procedure was illegal and that he had no authority to direct the commitment of the accused on the ground that he had forfeited his pardon. Beaman, J., said: "At the termination of the trial in which the pardon was given

(1) 7 L.B.R., 1. (2) (1906) I.L.R., 30 Bom., 611.

the accomplice (sc. the approver) must be discharged by the Court. Then if so advised the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put on his trial for that offence he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence." The conviction and sentence were set aside and it was left to the Crown if so advised to institute a prosecution in proper form against the accused appellant.

The Bombay ruling was cited with approval in the Calcutta case *Emperor v. Abani Bhusan Chuckerbutty*. (3)

The Allahabad High Court in *Emperor v. Gangua* (4) also followed *Emperor v. Kothia* (2) in holding that a Sessions Judge before whom an approver is examined has no power to direct the prosecution of the approver. He can only record his opinion that the approver has wilfully concealed something essential or given evidence which is positively false, and let the District Magistrate take action to prosecute the approver under section 339, Code of Criminal Procedure, if he thinks fit.

In the present case the commitment proceedings against the approver Po Ket were initiated by the Sessions Judge's order of 23rd July 1915 declaring Po Ket's pardon to be forfeited and directing his commitment. For the reasons stated in the Bombay and Allahabad cases I think it is clear that the order was illegal and that the proceedings which followed were without jurisdiction.

The approver Po Ket should have been discharged at the close of the Sessions trial in which he was examined as a witness. In discharging him it was open to the Sessions Judge to express his opinion on the question whether the approver had forfeited his conditional pardon under section 339. It would then have been for the District Magistrate on behalf of the Crown to take action for the prosecution of Po Ket if he thought fit. On being brought before the Magistrate with a view to committal to Sessions Po Ket could plead his pardon in bar and thereupon the Magistrate would have to proceed as

(3) (1910) I.L.R. 37 Cal., 845. (4) (1915) I.L.R., 37 All., 331.
(2) (1906) I.L.R., 30 Bom., 611.

1916.

KING-EMPEROR v. PO KET.

indicated in *To Gale v. King-Emperor* (1) and in *Emperor v. Gangua.* (4)

The Magistrate would have to satisfy himself that there was *primâ facie* ground for holding that Po Ket had forfeited his pardon and to include in his commitment order a statement of the evidence on which he relied as establishing this fact. On the case reaching the Sessions Court the accused could again plead his pardon and the Sessions Judge would have to entertain this plea and decide it before putting the accused on his trial for the substantive offence.

The Sessions Judge's order of the 23rd July 1915 is set aside as illegal. It follows that the commitment proceedings were held without jurisdiction and the order dated 29th January 1916 of the Subdivisional Magistrate, Nyaunglebin, committing the accused Po Ket to Sessions is therefore quashed under section 215, Criminal Procedure Code.

The accused Po Ket will be discharged forthwith. It will be for the District Magistrate to decide on behalf of the Crown whether fresh proceedings should be instituted against him.

Before Sir Charles Fox, Chief Judge.

Civil 1st Appeal No. 149 *of* 1910.

March 6th, 1916.

BADIER RAHMAN CHOWDHRY, *Judgment-debtor v.* M. A. R. R. M. R. M. CHETTY FIRM, *Decree-holders.*

J. R. Das—for applicant.
Connell—for respondent.

Civil Procedure Code, 1908, *Order* 34, *Rule* 6—*equitable mortgage, effect of—mortgage, recovery of balance due on—Transfer of Property Act* (1882), *section* 59.

In towns where equitable mortgages are permitted, a deposit of title deeds is to be regarded as an agreement to execute a legal mortgage and as carrying with it all the remedies incident to such a mortgage. A mortgagor is personally responsible for all the money borrowed on his mortgage.

Before a final personal decree is passed under Rule 6 of Order 34 of the 1st schedule to the Civil Procedure Code, notice should ordinarily be issued to the judgment-debtor.

Carter v. Wake, (1877) L.R. 4, Ch.D., 605, followed.

This application presented on the 20th January 1916 is to amend the appellate Court's decree which is dated the 8th July 1912 so as to bring it into accordance with the judgment.

(1) (1912) 7 L.B.R.,1. (4) (1915) I.L.R., 37 All., 331.

The part of the decree objected to is that which orders that if the net proceeds of sale of the mortgaged property should be insufficient to pay the amount due on the mortgage, and subsequent interests and costs, the plaintiff should be at liberty to apply for a personal decree for the amount of the balance.

It is argued that the judgments did not authorize or contemplate this clause because they held the defendant not liable on the promissory note sued on, and only held him liable on the equitable mortgage.

According to the practice of the Court the defendant's advocates must have had an opportunity for examining the draft of the decree before it was signed, but they did not avail themselves of it.

The judgments gave the plaintiff a mortgage decree for Rs. 10,000 with interest calculated according to the practice of the Court. The plaintiff had asked for sale of the mortgaged property in default of payment of the amount due. The decree was drawn in a form which complies with Rule 4 of Order 34, and the part objected to merely indicates what Rule 6 states would be open to the decree-holder in case the sale proceeds should turn out to be insufficient to meet the amounts decreed.

Although the defendant was not liable on the promissory note, he was liable for the money borrrowed by his agent on the mortgage.

As stated by Jessel, M.R. in *Carter v. Wake* (1) when there is a deposit of title deeds the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. The appropriate remedy in this Province is a decree for sale—see *Oo Noung v. Maung Htoon Oo* (2), as it is in Bengal—see *Rajah Sree Nath Roy v. Gadadhar Das* (3). There is in my opinion no error in the decree, and consequently nothing in it to amend or rectify.

I accordingly dismiss the application with costs—2 gold mohurs being allowed as advocate's fee.

The applicant's advocate stated that the applicant only became aware that a final decree ordering payment by him personally had been passed when about four weeks before the

(1) (1877) L.R. 4 Ch. D., 605.
(2) (1886) I.L.R. 13 Cal., 322. (3) (1897) 1 Cal. W.N., 225.

1916.

BADIER RAHMAN CHOWDHRY *v.* M.A.R.R. M.R.M. CHETTY FIRM.

application the respondent attempted to execute that decree. The record shows that the plaintiffs filed an application for it on the 6th or 7th October 1913. No notice of the application was issued to the judgment-debtor before the application was granted on the 19th November 1913. In view of Rule 6 of Order 34 permitting a Court to pass a final personal decree only when the balance due after sale of the mortgage property is legally recoverable from the defendant otherwise than out of the property sold, it would appear right to issue notice to the judgment-debtor to show cause before making a decree under the rule, except possibly in cases in which the judgment and preliminary decree have expressly made him liable personally.

If the applicant in this case is aggrieved at the Final decree having been made against him *ex-parte*, the Original Court which made it is the Court for him to apply to if he wishes it set aside.

FULL BENCH.

Before Sir Charles Fox, Chief Judge, Mr. Justice Twomey, Mr. Justice Parlett and Mr. Justice Young.

Criminal Reference No. 9 of 1916.

March 21st, 1916.

In re. PO CHEIN, MAGUNIA, PO AUNG *v.* KING-EMPEROR.

Ginwala—Assistant Government Advocate for King-Emperor.

Indian Arms Act, sections 19 (f), 20 and 29—sanction when necessary—irregularity, when not curable—Criminal Procedure Code, section 537.

Proceedings may be instituted against any person under section 20 of the Arms Act for the secret possession of arms in contravention of the provisions of section 14 or section 15 without the previous sanction of the District Magistrate under section 29. If the Magistrate finds that the intention to conceal the possession is not made out he should discharge the accused under section 20. Proceedings under section 19 (*f*) may then be instituted if and when the necessary sanction is given under section 29. The absence of sanction when required under section 29 is a defect that cannot be cured by section 537, Criminal Procedure Code.

Ahmed Hussein v. Queen-Empress, (1900) I.L.R., 27 Cal., 692; *Shunshanisa v. King-Emperor*, (1904) 2 L.B.R., 244; *Bawdu Wadein v. Queen-Empress*, (1899) 5 Bur. L.R., 171, referred to.

Criminal Appeals Nos. 21, 22 and 23 of 1916.

February 21st, 1916.

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

In this case one person has been sentenced to suffer rigorous imprisonment for 7 years and two others have been sentenced to 3 years each under section 20, Indian Arms Act.

The prosecution case is that the three appellants were going about with a 12-bore gun and cartridges concealed in a bundle of bedding. They were found by the Township Officer, Zalun, seated under a tree with the bundle of bedding close by. The Township Officer caused the bundle to be searched and found the gun and cartridges in it.

When the police investigation was completed the case was sent to the Township Magistrate for trial and it was submitted to the District Magistrate for orders. The District Magistrate wrote on the diary "the Special Power Magistrate will please dispose of this case," and the Special Power Magistrate did so convicting the accused as stated above.

The District Magistrate on being asked to report whether the proceedings were instituted with his previous sanction as required by section 29 of the Arms Act reports "the proceedings were instituted without my previous sanction as such is not necessary under the provisions of Judicial Department Circular No. 20, dated the 19th October 1892, page 104, Burma Arms Manual." The circular referred to was issued under the orders of Government and it lays down that sections 29 and 30 of the Arms Act do not apply to cases falling under section 20 of the Act. The correctness of this statement seems at least doubtful and a definite ruling on the point is desirable, for if sanction is necessary the want of sanction would not be curable by section 537 of the Code of Criminal Procedure and the whole proceedings would therefore be invalid.

In the Calcutta case *Ahmed Husein v. Queen-Empress* (1) Chief Justice Maclean remarked that "sections 19 and 20 are so closely interwoven that it is difficult to see how an offence can be committed under the first para. of section 20 unless an offence under one of the enumerated sub-sections of section 19 has also been committed." Yet in that case the conviction under section 19 (*f*) was confirmed though there was no proper sanction. I do not understand how the conviction under section 19 (*f*) was sustained.

In two Burma cases (2) the view taken in the Chief

(1) (1900) I.L.R., 27 Cal., 692.

(2) *Shunshanisa v. King-Emperor*, (1904) 2 L.B.R., 244.
Bawdu Wadein v. Queen-Empress, (1899) 5 Bur.L.R., 171.

1916.

PO CHEIN v. KING-EMPEROR.

Commissioner's Circular of 1892 appears to have been accepted without question. According to Birks, J, all that is necessary to validate a prosecution instituted without sanction is to record that concealment was practised and then "to convict under section 19 (*f*) read with section 20." On a question of this kind the views of the executive Government are entitled to great respect but I think the Court is bound to examine the question for itself and pronounce definitely as to the proper judicial interpretation of section 29. It is clear in my opinion that "any act mentioned in clause (*f*) of section 19" is "an offence punishable under section 19, clause (*f*)" and therefore that previous sanction is requisite under section 29, whether the act is done in such manner as to indicate an intention to conceal it from the authorities or not. The only difference is that if the act is done in such manner as to indicate that intention the offender is liable to higher punishment.

In order that the question may be definitely settled it seems proper to refer it to a Bench and I accordingly refer the following question:—

Is the previous sanction of the District Magistrate necessary under section 29, Indian Arms Act, 1878, before proceedings can be instituted in respect of an act mentioned in clause (*f*) of section 19 punishable under the first part of section 20?

The opinion of the Full Bench is as follows:—

Parlett, J.—The question referred is: Is the previous sanction of the District Magistrate necessary under section 29, Indian Arms Act, 1878, before proceedings can be instituted in respect of an act mentioned in clause (*f*) of section 19 punishable under the first part of section 20? At the hearing of the reference the further question was added and argued whether, if such previous sanction is necessary, its absence is a defect fatal to the prosecution.

Clause (*f*) of section 19 provides that whoever has in his possession or under his control any arms, ammunition or military stores in contravention of the provisions of section 14 or section 15 (which prescribe certain licenses permitting such possession and control) shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

The parts of section 20 which are material to the present reference run "whoever does any act mentioned in clause (*f*) of section 19, in such manner as to indicate an intention that such act may not be known to any public servant as defined in the Indian Penal Code, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both." Section 29 provides that where an offence punishable under section 19, clause (*f*) has been committed, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the District. The question is whether this section requires the District Magistrate's previous sanction to the institution of proceedings in respect of an offence punishable not under section 19 but under section 20. The words of the section on the face of them appear to me to show that it does not, nor do I see any reason to interpret them otherwise than according to their plain meaning.

As indicated by the marginal notes section 19 renders punishable breaches of certain sections of the Arms Act and section 20 renders more heavily punishable what are called secret breaches of some of those clauses. Thus section 20 treats certain acts which by themselves constitute offences under section 19 as offences of a graver nature when accompanied by certain attendant circumstances, in this case the intention of concealment from the public authorities. The Criminal law furnishes numerous instances of similar provisions, *e.g.*, sections 193 and 194; 323 and 325; 379 and 382; 392 and 394; 406 and 408; 448 and the three following sections, and many other sections of the Indian Penal Code. In such cases though the commission of the graver offence includes also the commission of one less grave, the graver offence is distinct from and is punishable more heavily than and under a different section to the minor offence. Some reference was made in the arguments to sections 397 and 398 of the Indian Penal Code, but they appear to me to bear no analogy to the sections of the Arms Act now under consideration. They merely prescribe a minimum sentence of seven years' imprisonment to be passed upon an offender convicted of an offence under one of the sections 392 to 395 inclusive, when he is armed

1916.

PO CHEIN v. KING-EMPEROR.

with a deadly weapon or attempts to cause death or grievous hurt. They neither create graver offences nor render existing offences liable to an enhanced punishment. The offences are punishable under and their maximum penalties are fixed by sections 392 to 395 and in no instance are they less than seven years' imprisonment. A first offender who commits robbery by day can be sentenced to ten years' imprisonment, although he is not armed; he can be sentenced to no more however he is armed, and it appears to me that sections 397 and 398 merely ensure that if armed he shall be substantially punished. On the other hand in my opinion distinct offences are created by and are punishable under section 20 of the Arms Act, and such offences cannot be said to be punishable under section 19. Section 29 accordingly does not apply to such offences and I would answer the first question referred in the negative.

The second question should I think be answered in the affirmative. The want of sanction to the institution of proceedings, when such sanction is required, could only be cured, if at all, by clause (*a*) of section 537 of Criminal Procedure Code, as being an omission in the proceedings before trial. If clause (*a*) were intended to apply to such cases not only would clause (*b*) be unnecessary and redundant, but the want of sanction required by other sections of the Criminal Procedure Code such as 197 would be a mere irregularity curable under section 537 unless it had in fact occasioned a failure of justice. The very enactment of clause (*b*) clearly shows that it is the want of sanction required by section 195 alone which is curable under section 537 and that the absence of sanction required by any other provision of law cannot be so remedied. To take the contrary view would, I consider, render almost nugatory the requirements of the law regarding sanction. The legislature has enacted with respect to certain offences that no Court shall take cognizance of them or, in the case of section 29 of the Arms Act, that no proceedings shall be instituted against any person in respect of them, without the previous sanction of a specified authority. Without such sanction a Court is not competent to take cognizance of or to hold any proceedings in respect of such offences, and if it does so its proceedings,

unless covered by clause (*b*) of section 537, are entirely without jurisdiction and invalid. In my opinion the absence of sanction when required under section 29 of the Arms Act is a defect fatal to any proceedings held without such sanction.

Taking the two questions referred together my view is that proceedings may be instituted against any person under section 20 of the Arms Act for the secret possession of arms in contravention of the provisions of section 14 or section 15 without previous sanction under section 29. If however in such a case a Magistrate finds that the intention to conceal the possession is not made out he should discharge the accused under section 20. Proceedings under section 19 (*f*) may then be instituted if and when the necessary sanction thereto is given under section 29.

Fox, C. J.—I concur.

Young, J.—I concur.

Twomey, J.—It was probably the intention of the Legislature to confine the operation of section 29 to cases in which no concealment is practised. Such a restriction is commended in the Government Circular of 1892 as "not only harmless but beneficial." It is easy to understand that while allowing prosecutions to be instituted freely when the accused is found to have hidden arms or ammunition, the Legislature may have intended the district authorities to proceed with more deliberation in cases where the arms, etc., are held openly, and where the initial presumption of innocence is therefore much greater.

We have to see whether the actual provisions as enacted give effect to the above intention. I think Parlett, J., has shown that the first part of section 20 may be regarded as creating a distinct offence punishable under that section, and that the operation of section 29 may lawfully be restricted to offences punishable not under section 20 but only under section 19 (*f*). It is true that according to this view sanction would be necessary for a minor offence while proceedings could be instituted without sanction for a major offence which includes such minor offence. But I do not think that this anomaly need prevent us from adopting the construction proposed by Parlett, J. I therefore concur in answering in the negative the first part of the reference.

1916.

PO CHEIN v. KING-EMPEROR.

I also agree with him in thinking that if sanction were necessary under section 29 before the institution of proceedings under section 20 the absence of such sanction would be a fatal defect.

PRIVY COUNCIL.

ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

Privy Council Appeal No. 89 of 1915.

Before Lord Shaw, Sir John Edge and Sir Lawrence Jenkins.

PRANJIVANDAS JAGJIVANDAS MEHTA *v.* CHAN MAH PHEE.

Transfer of Property Act (1882), *Section* 59—*equitable mortgage—transfer of title-deeds.*

Where titles of property are handed over with nothing said except that they are to be security, the scope of the security is the scope of the title. If the title-deeds are accompanied by a bargain, that bargain must rule, and if the bargain is a written bargain, it and it alone must determine the scope and extent of the security.

Shaw v. Foster, L. R. 5 E. and I. Appeal, 321 at 340 referred to.

This was an appeal from a judgment of the Chief Court of Lower Burma on its appellate side.

The judgment of their Lordships of the Privy Council was delivered on the 21st March 1916 by:—

Lord Shaw.— Their Lordships think it unnecessary in this case to call upon learned Counsel for the respondent. They are of opinion that the judgment of the Chief Court of Lower Burma appealed from is correct.

The rights of the parties have to be determined, in their Lordships' opinion, by a written agreement, which is, in their Lordships' view, the limit and standard fully measuring the obligations of Mah Saw, who obtained an advance of 13,000 rupees from the respondent on the 1st June 1906.

On that date there was a notandum put upon the back of a promissory note then granted, and the notandum is to this effect: "As security, grant of a house in 14th Street, Rangoon." Their Lordships take no stock of an alteration made after that notandum was signed, by which there was an interpolation of the words "Strand Road and," which words would have, in appearance at least, extended the scope of the security from "a house in 14th Street, Rangoon," to "a house in Strand Road and 14th Street, Rangoon." Had an argument been

raised as to whether, this alteration having been made, any rights in law could now be founded upon this document, that argument would have been considered: but it is unnecessary to make any pronouncement upon this topic, and accordingly their Lordships deal with the document signed by Mah Saw on the 1st June 1906, as definitely limiting and describing the scope of the security. It was a "grant," in the singular, "of a house," in the singular, "in 14th Street, Rangoon."

The law upon this subject is beyond any doubt: (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security. In the words of Lord Cairns in the leading case of *Shaw v. Foster* (1):—

> "Although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth will create in equity a charge upon the property referred to. I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

Their Lordships accordingly have admitted in argument the only possible question which remains (standing the document specifying the security and signed by Mah Saw), namely, the question of identification of the term "grant of a house in 14th Street, Rangoon." To identify this grant, a reference has been made by learned Counsel for the appellant, to the various title-deeds of the properties called Plots 65, 66, 66A, and 67. These deeds are as follows: With reference to Plot 65, there is a lease of land in favour of a person named Ma Thit, who was the mother of Mah Saw. With reference to Plot 66, and apparently also to 66A, there is a document for sale of a house and of land in favour of Ma Thit. But then, with reference to the last document, namely, as to Plot 67, there is a "grant of a house," a conveyance of a house on the 3rd January 1901, in favour of Ko Tha Gywe. Ko Tha Gywe was the husband of

(1) L.R. 5, E. & I. Appeals, 321 at 340.

1915.

PRANJIVANDAS JAGJIVANDAS MEHTA v. CHAN MAH PHEE.

the grantee, or lessee, of the other plots of ground covered by the other documents. He was the father of Mah Saw, and it does occur as a matter of interest that this person, the father of Mah Saw, who had a conveyance of a house, that on Plot 67, was himself a borrower from the persons who are interested in this suit, who were bankers and money-lenders in the district. On the 10th October 1902, he borrowed a sum of 5,000 rupees from them; and a somewhat curious transaction took place, namely, that he deposited with the money-lenders, not only the title of the property belonging to himself, namely, the grant of the house, but also the title-deeds of the other three properties which belonged not to himself, but to his wife. It was on this occasion that all these titles found their way into the hands of the lenders. Mah Saw succeeded to Ko Tha Gywe in the ownership of the house on Plot 67.

Their Lordships have, in these circumstances, no doubt whatsoever that the identification of the "grant of a house in 14th Street, Rangoon," by her is accomplished by a reference to the conveyance of the house in favour of Ko Tha Gywe, which house had been his property when the original advance of 5,000 rupees, some years before, was obtained by him.

Their Lordships finally remark that, as against this identification of the house in 14th Street there is no evidence at all satisfactory in this case, and it was for the persons holding this security clearly to satisfy the Court of the scope thereof. They have not done so. There is nothing in the case which confirms the view that, under the term "grant of a house" which would be a singular term applicable to a singular title, there was included the subject of three other plots of land under leases. Their Lordships cannot assent to such a construction. They think the security is distinctly and by contract limited, and they cannot extend it as desired. They have no doubt that the Chief Court of Lower Burma has reached a proper conclusion.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Before Mr. Justice Twomey.

NGA HLA *v.* KING-EMPEROR.

Criminal Appeal No. 444 *of* 1916.

May 29th, 1916.

Criminal Procedure Code, sections 221 (7) 537—*previous convictions, to be set forth in charge—irregularity, when curable.*

The provisions of section 221 (7), of the Criminal Procedure Code should be complied with strictly. Omission to comply with them may however be cured by section 537 if the irregularity has not actually prejudiced the accused.

After reading the petition of appeal and the proceedings of the trial I see no reason to interfere with the conviction under section 379—75, Indian Penal Code, or the sentence of rigorous imprisonment for 7 years and I dismiss Nga Hla's appeal summarily.

The District Magistrate's procedure was irregular. He was bound by section 221 (7), Code of Criminal Procedure, to state the fact, date and place of previous conviction on the charge and omitted to do so. The omission is however not material as the previous convictions were put to the accused and admitted by him before judgment was passed. It is covered by section 537, Criminal Procedure Code. The District Magistrate should be careful to comply with the provisions of the Code in future. The use of Criminal Form 80 does not dispense with the procedure laid down in section 221 (7). It is not sufficient to use Criminal Form 80 alone, except in cases of the kind described in paragraph 241 Lower Burma Courts Manual. Where it is intended to prove the previous conviction "for the purpose of affecting the punishment which the Court is competent to award," Criminal Form 79 should invariably be used. There is no objection to using Criminal Form 80 as a *Supplementary* form in such cases.

Before Mr. Justice Ormond.

ALI ASGHAR *v.* MI KRA HLA U.

Special Civil 2nd Appeal No. 39 *of* 1916.

J. E. Lambert—for appellant.

Maung Gyi—for respondent.

June 21st, 1916.

Mahomedan Law : Marriage—restitution of conjugal rights—effect of apostasy.

There can be no valid marriage between a Mahomedan and a Burmese Buddhist. If a woman, who has become a Mahomedan and been married according to Mahomedan ceremonies, subsequently apostatises, the marriage is cancelled by the apostasy.

1916.

ALI ASGHAR v. MI KRA HLA U.

Hussain Unwar v. Fatima Bee, (1885) S.J.L.B., 368; followed.
Kumal Sheriff v. Mi Shwe Ywet, (1875) S.J.L.B., 49 dissented from.

The plaintiff a Mahomedan sued for restitution of conjugal rights. The Township Court gave him a decree but on appeal the District Judge found that there was no marriage and that the plaintiff had bought the girl for a temporary purpose. The defendant is a Burmese Buddhist.

Plaintiff's case is that at the time of the marriage the defendant was converted to the Mahomedan religion and was married to him according to Mahomedan rites.

It is not clear what the defence really is. The written statement states that there was no marriage ceremony and no marriage. But it is clear that the defendant after living with the plaintiff for 7 days left him on the ground that she refused to become a Mahomedan. It is not contended by the plaintiff's advocate that a marriage between a Mahomedan and a Burmese Buddhist is valid. According to the decision in *Hussain Unwar v. Fatima Bee* (1), a Mahomedan cannot get a decree for restitution of conjugal rights against his wife who has apostatised from Mahomedanism. I am referred to the case of *Kumal Sheriff v. Mi Shwe Ywet* (2) decided in 1875. In that case a Burmese woman professing the Buddhist faith but who at the time of her marriage stimulated conversion to Islam, and was married with Mahomedan ceremonies, was estopped from saying that she was still not a Mahomedan; and she was not allowed a divorce there being no fault established on her husband's side. That case was not cited in *Hussain Unwar's* case which was decided 10 years later. I doubt if a Burmese woman, who is converted to Mahomedanism for the purpose of a marriage with a Mahomedan, can by estoppel be placed in a worse position than if she had been a real Mahomedan at the time of the marriage. In *Hussain Unwar's* case it was admitted that an apostate Mahomedan wife by the apostasy cancels the marriage.

If the plaintiff's case is true that the defendant was married according to Mahomedan ceremonies and became a Mahomedan she has apostatised and the marriage is thereby cancelled. If the defendant's case is true that she never became a Mahomedan

(1) (1885) S. J.L.B., 368. (2) (1875) S. J.L.B., 49.

1916.

ALI ASGHAR v. MI KRA HLA U.

and was not married according to Mahomedan ceremonies, the plaintiff's Advocate admits that there would be no marriage. In either case therefore the plaintiff is not entitled to restitution of conjugal rights.

This appeal is dismissed with costs.

Before Mr. Justice Twomey.

Criminal Revision No. 210B of 1916.

July 6th, 1916.

ITALA v. KING-EMPEROR.

Bench of Honorary Magistrates—Magistrates who have heard all evidence to decide the issue—Criminal Procedure Code, section 350.

The constitution of a Bench of Honorary Magistrates cannot be changed in the middle of a case. The case must be decided only by those Magistrates who have heard all the evidence.

Damri Thakur v. Bhowani Sahoo, (1895) I.L.R., 23 Cal., 194; *Hardwar Singh v. Khega Ojha*, (1893) I.L.R., 20 Cal., 870 followed.

In this case the prosecution evidence was heard by two Honorary Magistrates who took no further part in it. The defence evidence was heard by two other Honorary Magistrates of the same Bench and the accused was convicted and sentenced by these two Magistrates.

The procedure was illegal. Section 350 of the Criminal Procedure Code does not apply to cases tried by Benches of Magistrates. As pointed out in *Damri Thakur v. Bhowani Sahoo*(1) see also *Hardwar Singh v. Khega Ojha* (2).

There is no provision of law which provides for a change on the constitution of Benches of Magistrates and in the absence of any such provision it must be held that only those Magistrates who have heard the whole of the evidence can decide the case.

The conviction and sentence are set aside and it is left to the District Magistrate to decide whether there should be a new trial of the charge under section 323, Indian Penal Code, against the accused.

Before Mr. Justice Twomey.

Criminal Revision No. 222B of 1916.

July 19th, 1916.

SIT HON v. KING-EMPEROR.

Criminal trespass—house (trespass—Indian Penal Code, section 441—Criminal Procedure Code, section 106—breach of peace.)

Criminal trespass on the "panat-chut" or outer verandah where shoes are taken off of a Burmese house is house-trespass.

(1) (1895) I.L.R. 23 Cal, 194. (2) (1893) I.L.R. 20 Cal, 870.

1916.

SIT HON v. KING-EMPEROR.

Criminal trespass may be an offence involving a breach of the peace within the meaning of section 106 of the Criminal Procedure Code.

Tarni Charn Mundle v. Gourikant Biswas, 7 C.W.N., p. 25, followed.

The *Panat-chut* or outer verandah where shoes are taken off is part of a Burmese dwelling house and I see no reason to doubt that a person who commits criminal trespass on a *panat-chut* under the circumstances set forth in section 441, Indian Penal Code, commits house-trespass.

The learned Sessions Judge in his order of reference raises the further question whether the order requiring security to keep the peace under section 106, Criminal Procedure Code, is valid seeing that the offence of which the accused was convicted *i.e.*, house-trespass, is not an offence of which breach of the peace is a necessary ingredient. It is clear however in the present case that the criminal trespass was committed with the sole object of causing hurt to one of the persons in the house and I think it is therefore correct to hold that the particular offence committed by the accused in this case was one "involving a breach of the peace" within the meaning of section 106, Criminal Procedure Code. I am fortified in this opinion by the ruling of the Calcutta High Court in *Tarni Charn Mundle v. Gourikant Biswas*(1) in which the facts resembled those of the present case.

Proceedings are returned.

FULL BENCH.

Criminal Reference No. 25 of 1916.

August 7th, 1916.

Before Sir Charles Fox, Chief Judge, Mr. Justice Ormond and Mr. Justice Twomey.

In re KING-EMPEROR *v.* 1. NGA PYU. 2. NGA LUN.

Higinbotham—Government Advocate for the King-Emperor.

Excise Act, section 51—joint possession—General Clauses Act, section 13.

Section 51 of the Excise Act prevents the joint possession by several persons of more fermented liquor than can be sold retail to one.

Queen-Empress v. Rajia, P.J.L.B., 405, followed.

The following reference was made to a Full Bench by Mr. Justice Parlett under section 11, Lower Burma Courts Act:

Criminal Revision No. 58B of 1916.

May 6th, 1916.

Two persons were found carrying a pot containing eight quarts of country fermented liquor, and were prosecuted under section 51 of the Excise Act. When the particulars of the

(1) (1902) 7 C.W.N., p. 25.

offence were explained to them they said that each of them had bought four quarts from the licensed shop and that they were carrying it home for a *nat* festival. The Magistrate thereupon convicted, holding that section 51 prohibited the joint possession of more country fermented liquor than could be sold retail to one person, *viz.*, four quarts. In this he was right, being bound by the ruling in *Queen-Empress v. Rajia.* (1) The District Magistrate has referred the case and has raised the question of the correctness of that ruling. It will be seen that it proceeded upon the reasoning that according to the General Clauses Act words in the singular include the plural unless there is something repugnant in the subject or context, and consequently in section 30 of the Excise Act the words "No person" are to be read in the plural as well as in the singular and the section therefore is to be understood to prohibit several persons having in their joint possession more spirit or fermented liquor than that specified in section 3, sub-section (1), clause (*n*). It appears to me at any rate arguable that section 30 is just one of those cases where the subject and context are repugnant to reading the words in the singular as including the plural. Their subject is the fixing of a maximum quantity of spirit or fermented liquor beyond which no person shall possess without a license and at first sight they appear to refer to a single individual. I think the point should be further considered and I refer to a Bench the question whether the plea of the accused in this case, if it had been established, would have been a good defence.

The opinion of the Full Bench was as follows :—

Ormond, J.—In my opinion the case of *Queen-Empress v. Rajia* (1) was rightly decided. I would answer the question referred in the negative.

Twomey, J.—I am of the same opinion. But I do not think it necessary to rely on the General Clauses Act. If two persons having each bought 4 quarts of liquor put them together and carry them home, each of them is in the contemplation of law in possession of the whole.

Fox, C.J.—I agree in thinking that an answer in the negative should be given to the question referred.

(1) P.J.L.B., 405.

Criminal Revision No. 227-A of 1916.

September 9th, 1916.

Before Mr. Justice Twomey.

KING-EMPEROR *v.* PO WUN.

Whipping Act, IV of 1909, section 3—whipping in lieu of other punishment—Criminal Procedure Code, 1898, section 423.

Under section 3 of the Whipping Act a whipping can only be imposed in lieu of any other punishment, and it is not open to an Appellate Court to order a man to be whipped if he has already served part of a sentence of imprisonment.

The Magistrate sentenced the accused to suffer rigorous imprisonment for six months, the offence of which he was convicted being theft under section 379, Indian Penal Code.

On appeal the Sessions Judge altered the sentence to one of whipping. On the date of the Sessions Judge's order the accused had already served 14 days of the sentence of imprisonment.

The effect of the appellate order is that the accused has suffered a whipping in addition to imprisonment. Under the Whipping Act, 1909, section 3, a whipping can be imposed only in lieu of any other punishment, and the intention of the law is clearly infringed by ordering a man to be whipped after he has already served part of a sentence of imprisonment.

FULL BENCH.

Civil Reference No. 4 of 1913.

June 22nd, 1915.

Before Sir Charles Fox, Chief Judge, Sir Henry Hartnoll, P.J., Mr. Justice Ormond and Mr. Justice Twomey.

In re 1. YE NAN O, 2. NYEIN E. *v.* AUNG MYAT SAN.

Maung Kin, Maung May Oung and Maung Pu—for appellants.
Rahman, Maung Gyi and Maung Chit Hlaing—for respondent.

Buddhist law: Inheritance—pre-emption, no right of pre-emption as regards partitioned property.

The following question was referred to a Full Bench under section 11 of the Lower Burma Courts Act:—

"Have the co-heirs who take part in the partition of immoveable ancestral property a right of pre-emption as regards such property after the partition has been effected?"

Held, (Hartnoll, J. dissenting)—that they have not.

Shwe Eik Ke v. Tha Hla Aung, 1 L.B.R., 144; *Ebrahim v. Arasi*, P.J.L.B., 26; *Apana Charan Chowdry v. Shwe Nu*, 4 L.B.R., 124 followed.

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

Ma Ngwe v. Lu Bu, S.J.L.B., 76; *Mo Thi v. Tha Kwe*, 4 L.B.R., 128 dissented from.

Ibrahim Saib v. Muni Mir Udin Sahib, (1870) 6 Mad. H.C.R., 26 distinguished.

Shwe Nyun v. Ma So, 2 U.B.R. (1897—01), 155; *Nga Tin v. Shwe On*, 2 U.B.R. (1907—09), Buddhist Law—Inheritance—Pre-emption, 1; *Gobind Dayal v. Inayatullah*, (1885) I.L.R., 7 All., 775 at 815; *Nga Myaing v. Mi Baw*, S.J.L.B., 39; *Ma Hnin Bwin v. U Shwe Gon*, 8 L.B.R., 1; *Maung La Dok v. Ma Po*, 2 U.B.R. (1897—01), Buddhist Law—Inheritance, 162; Preface to *Manu Wunnana*, U Tet To's edition, 1878, page 4; *Jardine Prize Essay*, page 103; *Thein Pe v. U Pet*, 3 L.B.R., 175; U Tet To's editions of *Manu Wunnana* and *Manu Thara Shwe Myin* printed in 1878 and 1879 referred to.

Special Civil 2nd Appeal No. 1 of 1912.

May 13th, 1913.

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

The second plaintiff Ma Nyein E, and the first defendant Maung Tha E are first cousins, being the grand-children of Po Da Lu and Ma Nyein. Upon the death of Po Da Lu and Ma Nyein certain trees devolved in equal shares upon their son Di Lan, and their two grand-children Tha E and Ma Nyein E. The property was divided 5 or 6 years before the suit. Di Lan sold his share to Tha E who thus became possessed of two-thirds of the property. Tha E sold his two-thirds share to the third defendant, who is a stranger. The plaintiff, Ma Nyein E and her husband claimed the right of pre-emption. The Township Court held that they had the right, but upon appeal by the third defendant the District Court reversed this decision, and the plaintiffs now prefer this second appeal.

The District Court based its decision upon the case of *Shwe Eik Ke v. Tha Hla Aung and three* (1) where it was held that upon the division of property amongst children each child took the particular lot or lots which fell to him or her free from all obligation as regards pre-emption. It is now contended that that case is distinguishable from the present in that there the litigants were not, as here, the co-heirs who divided the joint property among them, but their descendants, and that the decision was merely that there is no authority for holding that before a Burman Buddhist can sell his property to others he is bound to offer it first to every one of his relations including those of remote degree. This appears to be the case, but

(1) 1 L.B.R., 144.

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

at the same time the expression of opinion referred to above by which the District Judge held himself bound cannot be regarded as an *obiter dictum* inasmuch as it formed the basis of the decision that the descendants of the co-heirs who divided the property were free of all obligation as regards pre-emption.

The previous case of *Ma Ngwe v. Lu Bu and one* (1) was not referred to in the judgment, and was certainly not expressly dissented from. In that case the learned Judicial Commissioner held that after division of ancestral estate the holder thereof, being a member of the family, wishing to sell the land falling to his share, must offer it first to his co-heirs, and a sale to a stranger, without such offer being made, is invalid. A similar decision had also been come to in Upper Burma in *Maung Shwe Nyun and two v. Ma So and one* (2) which has been affirmed in the later case of *Nga Tin v. Shwe On and one* (3) where it was held that a widow has the right of pre-emption if her co-heirs to her deceased husband's estate wish to sell. The actual decision in *Shwe Eik Ke v. Tha Hla Aung* (4) has not, so far as I am aware, ever been challenged, but the ground on which it was based, namely that the right of pre-emption is extinguished by partition of the property appears to me to conflict with the earlier decision in *Ma Ngwe v. Lu Bu* (1) and with the Upper Burma decisions. I therefore refer for the decision of a Bench of this Court the question—

Have the co-heirs who take part in the partition of immoveable ancestral property a right of pre-emption as regards such property after the partition has been effected ?

The opinion of the Full Bench was as follows :—

Hartnoll, J.—The question which has been referred to us for decision is—

Have the co-heirs who take part in the partition of immoveable ancestral property a right of pre-emption as regards such property after the partition has been effected?

The facts as set out in the reference show that the question refers to the case of Burman Buddhists, and that the reference

(1) S.J.L.B., 76. (2) 2 U.B.R. (1897—01), 155.
(3) 2 U.B.R. (1907—09), Buddhist Law—Inheritance—Pre-emption, 1.
(4) 1 L.B.R., 144.

has been considered necessary, in that the learned Judge considered that there is a conflict of authority between the cases of *Shwe Eik Ke v. Tha Hla Aung* (1) and *Ma Ngwe v. Lu Bu.* (2) He has also pointed out that the decision in the case of *Ma Ngwe v. Lu Bu* has been followed in the cases of *Shwe Nyun v. Ma So* (3), and *Nga Tin v. Shwe On.* (4)

It has been urged that the matter is not one for decision according to the rule of Buddhist law but that it should be decided according to the ordinary civil law Having regard to the provisions of section 13 (1) of the Burma Laws Act, 1898, the point arises as to whether the matter is one of inheritance or not. If it is, by the provisions of that section the Buddhist law must form the rule of decision, and the general considerations put forward by Holloway, C.J., in the case of *Ibrahim Saib v. Muni Mir Udin Saib* (5) cannot in my opinion be allowed to prevail. If the rule of Buddhist law is applicable and the present conditions of society in Burma are unsuited to such rule of law it is open to the Government to legislate and alter the law; but where the rule of Buddhist law is to be followed as laid down in the Burma Laws Act this Court has no option but to follow such rule. The question of whether the right of pre-emption as claimed by Burman Buddhists is one concerning inheritance has been pronounced on in several cases namely *Ebrahim v. Arasi* (6), *Apana Charan Chowdry v. Shwe Nu* (7), *Shwe Nyun v. Ma So* (3), and *Maung Tin v. Shwe On* (4). The second case quoted is one of my own. The right of pre-emption need not necessarily be one concerning inheritance at all. For instance, in Mahommedan law according to the definition of it given by Petheram, C.J. in the case of *Gobind Dayal v. Inayatullah* (8) the matter cannot be said to be one of inheritance; but the right as claimed by Burman Buddhists as co-heirs seems to me to be beyond doubt one that concerns inheritance. It is not claimed by co-heirs on the ground that they possess neighbouring lands but on the ground that they are co-heirs, and it relates to inherited property—property that has descended from a common ancestor or that has

(1) 1 L.B.R., 144. (2) S.J.L.B., 76. (3) 2 U.B.R. (1897—01), 155.
(4) 2 U.B.R. (1907—09) Buddhist Law—Inheritance—Pre-emption, 1.
(5) (1870) 6 Mad. H.C.R., 26. (6) P.J.L.B., 26. (7) 4 L.B.R., 124.
(8) (1885) I.L.R. 7 All., 775 at 815.

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

come from a common relative. It is by virtue of relationship to such a person and co-heirship that such a right is claimed and therefore the right seems to me to be an incident of the law of inheritance. I therefore consider that the Buddhist law should form the rule of decision in deciding the question asked us.

It was then urged that the property to be dealt with in the reference is trees and the rule of Buddhist law only applied to land and not to trees. The property in dispute is not the produce of the trees but the trees themselves which are immoveable property being permanently attached to the earth.

The texts on which the Burman Buddhist right of pre-emption is based may be said to be as follows:

(1) *Manukye*—the 36th section of the 7th Book and the first section of the 8th Book;

(2) a passage from the *Manu Wunnana*;

(3) a passage from the *Manu Thara Shwe Myin*;

(4) a passage from the *Winicchaya Pakasani*;

(5) the texts collated under section 309 of the Kinwun Mingyi's Digest, Volume I.

Translations of the passages from the *Manu Wunnana* and *Manu Thara Shwe Myin* will be found in the case of *Nga Myaing v. Mi Baw* (1). A translation has been made of section 93 of the *Winicchaya Pakasani* Dhammathat and is attached to this judgment.

As has been laid down recently by their Lordships of the Privy Council in the case of *Ma Hnin Bwin v. U Shwe Gon* (2) most weight has to be attached to the *Manukye* Dhammathat. The wording of the Dhammathat is not too clear in its meaning in section 1 of the 8th Book; the important passage is that beginning with the words "Excellent King. As regards the lands called *Myethe* and *Myeshin* . . . . . " They are explained and amplified by the passages from the other Dhammathats. According to Dr. Forchhammer's Essay on the sources and development of Burmese law from the era of the first introduction of the Indian law to the time of the British occupation of Pegu, the *Manukye* was compiled about the year 1756 A.D. by Mahasiri Uttamajaya, minister of military works,

(1) S.J.L.B., 39. (2) 8 L.B.R., 1.

and the *Manuthara Shwe Myin* in 1771 A.D. by the nobleman Kyaw Din, the same author compiling the *Wunnana* a few years later and also the *Winicchaya Pakasani*. The latter three books were therefore compiled not long after the *Manukye*. Taking the texts together the general principle apparent is that the land is to be kept in the same family if possible. Even an original purchaser or his children are to sell the land back to the family of the original vendor. It is not claimed that so wide a custom as this last one now exists—indeed learned counsels Maung May Oung and Maung Kin who appear to support the right state that it has fallen into desuetude; but it is claimed that if a man wishes to sell inherited property, the custom that he must give his co-heirs the option of purchasing it first whether the property is joint undivided property or partitioned estate, still exists, and it is urged that such a custom has not fallen into desuetude. The passage in the 1st section of the 8th Book of the *Manukye* beginning with the words I have set out above as explained by the passages in the different Dhammathats but especially that of the *Winicchaya Pakasani* seems to me to support the contention that the Buddhist law in the Dhammathats is as claimed. It should be noted that the 1st section of the 8th Book of the *Manukye* makes *Myethe* and *Myeshin* lands include all sorts of inherited lands. The words of the section are no doubt involved but the passage I have referred to above seems to me to give co-heirs a right of pre-emption and this is the more apparent when the words are compared with the passages from the other Dhammathats. There is no indication that I can see that the right is confined to undivided estate; indeed the indications are the other way. Each and every relative is to be asked, and the right is extended to a purchase by the heirs of the original seller from the heirs of the original buyer. As regards the custom having fallen into desuetude the case of *Mi Ngwe v. Lu Bu* (1) is one relating to partitioned estate. It is not quite clear whether the case of *Shwe Nyun v. Mi So* (2) applied to partitioned estate: but in all probability it did. That of *Nga Tin v. Shwe On* (3) clearly refers to partitioned estate. As far as my

(1) S.J.L.B., 76. (2) 2 U.B.R. (1897—01), 155.
(3) 2 U.B.R. (1907—09), Buddhist Law—Inheritance—Pre-emption, 1.

1915.

In re YE NAN O *v.* AUNG* MYAT SAN.

knowledge of the custom goes (and I have been in the province since 1883 being an administrative officer up to 1906) I have heard of the custom from time to time, and though I cannot give specific instances where it has been applied to partitioned estate other than judicial decisions I have certainly had the impression that it is not confined to the case of undivided ancestral property and that the desire to keep the property in the family is widespread and acted on by Burman Buddhists. I would therefore hold that the fact that inherited property has been the subject of partition should not operate to prevent it being subject to the right claimed.

The word "ancestral" used in connection with the right seems to be a misnomer ; for the word "ancestral" should be substituted the word 'inherited." It was also allowed at the hearing that the head-note to the case *Ma Ngwe v. Lu Bu* (1) is too wide in declaring that a sale to a stranger without the offer first being made to co-heirs is invalid. This appears to be the case. The sale is only voidable at the option of co-heirs as long as they object to the sale within a reasonable time and offer to pay and pay the price for which the property has changed hands. Otherwise the sale is valid and cannot be impugned. The provision that the right must be claimed promptly and without unreasonable delay is the great safeguard against injustice and the abuse of it. The question of what persons should be included under the term co-heirs as possessing the right remains for consideration, and is not an easy one to decide generally; but for the purpose of this reference it is not a difficult one. In the present case we are only concerned with persons who have jointly divided ancestral property.

As regards the point whether the right should be extended to trees as well as land, considering that trees are permanently attached to the land I think it reasonable and convenient to hold that if the right exists at all it should also extend to trees.

I would therefore answer the reference as follows :

In the case of inherited lands inclusive of trees permanently attached to the land a joint inheritor of such property has a

(1) S.J.L.B., 76.

right of pre-emption in respect of such inherited property in the event of one of the joint inheritors desiring to sell his share of such property, or such part of the inherited property as he has obtained possession of, in whole or in part and whether it is joint undivided or partitioned estate: but in the event of a sale having taken place such right must be asserted promptly and within a reasonable time or it is lost for ever. In asserting such a right against a buyer the sum offered must be the sum which the land has cost him.

Appendix to Sir Henry Hartnoll's Judgment.

(Translation of the 1st paragraph at page 107 in Winicchaya Pakasani Dhammathat.)

SECTION 93.

Close relatives, neighbours and (owners) of paddy lands close to each other say among themselves:—"This man lives in a house near ours—in the same quarter," or "This field or *ya* or garden or land is close to our field." If such a man desires to sell or mortgage this field or garden which is next (to ours), the proper thing for him to do will be to sell or mortgage to us or to the co-heirs; for, likewise he is our relative." Again "This land or garden is kindred to ours. If this person wants to sell or mortgage this field or garden or *ya*, it will be proper for him to sell or mortgage to us only." Again "We only are the proper persons to whom the sale or mortgage should be made. We want these fields—which are common inheritance property—or these *yas* or lands or houses or pools. (We) have the right to buy or accept in mortgage." When there is a triple dispute in this manner and if all of them are right in their contentions, the sale or mortgage should be made to the co-heirs. No sale or mortgage should be made to either the neighbouring landholders—living in the same quarter—or to any outsider. If there be no co-heirs, mortgage or sale is allowable to a neighbour or a neighbouring landholder. If there be no neighbour or neighbouring landholder, or if there be such and they refuse (the offer), it is permissible to sell or mortgage to any one as desired. For there is a common interest—for good or evil—among people living in the same quarter and holding lands near each other.

Ormond, J.—The question referred is :—Have the 'co-heirs' who take part in the partition of immoveable inherited property a right of pre-emption as regards such property after the partition has been effected? From the case submitted, it is clear that the question refers to the right of pre-emption in respect of a sale by a 'co-heir'; and does not refer to a sale by a purchaser from a 'co-heir.' It is admitted that in respect of a sale by a purchaser from a co-heir any right of pre-emption would not now be recognized.

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

In 1877 Mr. Sandford, the Judicial Commissioner of Lower Burma, in *Ma Ngwe v. Lu Bu* (1) held that ancestral immoveable property that had been partitioned was liable to the right of pre-emption in the same manner as if it had not been partitioned.

In 1901 Mr. Justice Fox in *Shwe Eik Ke v. Tha Hla Aung* (2) held that there was no right of pre-emption after partition. *Ma Ngwe's* case was not cited, but the case upon which it was based, *viz.*, *Nga Myaing v. Mi Baw* (3) was cited.

In 1905 Mr. Justice Hartnoll in *Mo Thi v. Tha Kwe* (4) followed the decision in *Ma Ngwe's* case and held that where a widow after partition sold her share to a stranger, her son had the right of pre-emption as to the whole.

Ma Ngwe's case has been referred to apparently with approval (in *obiter dicta*) in other cases; but *Mo Thi's* case is the only reported case that I can find in Lower Burma (besides *Ma Ngwe's* case) in which it has been actually held that there is a right of pre-emption in respect of partitioned inherited property.

In Upper Burma, *Ma Ngwe's* case has been followed by Mr. White, Judicial Commissioner, in *Maung Shwe Nyun v. Ma So* (5) and by Mr. Shaw in 1906 in *Nga Tin v. Nga Shwe On* (6) who disregarded the decision in *Shwe Eik Ke's* case because *Ma Ngwe's* case had not been considered. In *Nga Tin's* case it was held that where three sons inherited property which was partitioned and two of them sold their portions to a stranger the widow of the other son had a right of pre-emption. The fact that the widow had a son who was a grandson of the father of the three sons, is mentioned; but it does not affect the principle of the decision.—In the case of *Maung La Dok v. Ma Po* (7) (which related to the sale of an undivided share) Mr. White held that the fact that portions of the estate had been previously sold to strangers, without protest, did not affect the right of pre-emption in respect of subsequent sales. From these decisions it would seem that if, say three sons inherited property, one of whom died leaving only a widow who married again and

(1) S.J.L.B., 76.
(2) 1 L.B.R., 144.
(3) S.J.L.B., 39.
(4) 4 L.B.R., 128.
(5) 2 U.B.R., (1897—01), 155.
(6) 2 U.B.R. (1907—09) Buddhist Law—Inheritance—Pre-emption, 1.
(7) 2 U.B.R. (1897—01), 162.

then died, this 2nd husband would have the right of pre-emption in the case of a sale by either of the other two sons; although he is in no way connected with the family and although he or his deceased wife or her former husband may have sold to a stranger the whole or part of the former husband's partitioned share in the ancestral property :—and this clog is put upon the free transfer of land because of the principle enunciated by Mr. Sandford in *Ma Ngwe's* case of maintaining intact the family estate. And if a Burman who has inherited land wishes after partition to sell his land, he must either obtain the consent of all those who inherited other lands from the same previous owner and their successors, by inheritance and the prospective heirs of these persons :—or the purchaser takes the land subject to the right of pre-emption in any of these persons. Mr. Sandford at page 77 says "Although I am unwilling to extend this doctrine of pre-emption beyond its strict limits, yet I cannot see my way to disallow the appellant's argument." His reasoning is confused, for he speaks of land sold by an original owner as "once ancestral and separated from the family estate by the sale to the purchaser from the original owner." If property once ancestral had become separated from the family estate by a sale to a stranger, the vendor must have been—not the original owner—but an heir, and the property sold must have been partitioned. But if co-heirs have a right of pre-emption after partition, they had the right at the time of the sale to the stranger.

The *ratio decidendi* in *Ma Ngwe's* case was as follows :—A purchaser, if he wishes to sell, must offer the land to the heirs of the original owner ;—an heir after partition is in the position of a purchaser; therefore if he wishes to sell, he must offer it to the heirs of the last owner, *i.e.*, to his co-heirs.

But it is only the purchaser from an original owner that has to offer the land to the 'successor' or 'descendants' of his vendor—if he wishes to sell. The purchaser from a derivative owner takes the land outright and free from any right of redemption : which would shew I think that he takes it free from any right of pre-emption. It cannot be held therefore by analogy that an heir, if he wishes to sell his partitioned share of inherited land, is under a duty to offer it first to his co-heirs.

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

The texts upon which Mr. Sandford bases his decision have not been discussed in later decisions; but in my opinion they show—as regards *Myeshin* land, with which alone we have to deal—that it is only the purchaser from an original owner that has to offer the land (if he wishes to sell) to the successor or descendants of the original owner—and that in all other cases (which would include a sale by an heir after partition), the purchaser has a full right to the land. The texts relied on by Mr. Sandford are the 36th section of the 7th Book of the *Manukye* Dhammathat, the 1st section of the 8th Book and passages from the *Manu Wunnana* and *Manu Thara Shwe-myin* Dhammathats. They are set out in the S.J.L.B. at pp. 39 to 41.

I have had the 1st section of the 8th Book translated as literally as possible and the following is an epitome, so far as the section affects the question before us, which I have arranged in paragraphs for the sake of convenience.

1. It specifies what are *Myethe* lands and what are *Myeshin* lands. *Myethe* lands are redeemable at any time by the true sons or descendants or partner of the former owner: though if the original grantees sell the land outright or mortgage it, they have the right to do so.

2. *Myeshin* lands are of 6 kinds:—(i) inherited lands which are not *Myethe*, (ii) lands purchased, (iii) lands obtained on another's going away and abandoning them, (iv) lands obtained by open occupation without interruption for 10 years, (v) lands obtained by clearing the forest and cultivating them and (vi) lands obtained by allotment from a public authority, *e.g.*, a Thugyi or land measurer, etc.

3. If the original owner of *Myeshin* land of the last four descriptions sells them the seller, or if he is dead and has left a successor, his 'successor' may redeem them at the buyer's death, but not during the lifetime of the buyer.

4. As to *Myethe* and *Myeshin* lands generally (subject presumably to what has been stated above) if lands are sold outright, the buyer has a full right to them, according to the terms of his contract of sale—they are not redeemable by the relations or descendants of the original owner.

5. If any of the aforesaid lands are to be sold even among relations, let the vendor offer the land to every one of his

relations who is an heir. If it is sold to one relative, and another relative having previously refused to buy comes in within a year and wishes to buy, he may join in the purchase 'as they are relatives and the sale must be effected as among relatives.'

6. If a sale of land is to be made to one having an interest the vendor should offer it to all who have an interest; they shall decide which of them is to buy and the vendor shall not sell to any one else.

7. If 'this paddy land' has been mortgaged to one, all those interested may take over the mortgage in equal shares, provided they come in within a year if the mortgage was made openly.

8. If 'this land' after having been mortgaged for a long time with one, is sold, let all those that have an interest buy it outright.

The rules relating to *Myethe* land are different from *Myeshin* land. And a sale by an original owner is on a different footing to a sale by a person who has acquired the land by inheritance or by purchase. Thus in the case of a sale of *Myethe* land, it is redeemable at any time by the descendants or by the partner of a former owner, unless it was sold by the original grantee. In the case of a sale of *Myeshin* land by a person who had obtained it as an original owner in any of the following ways, *viz.*, on another's going away and abandoning it; by open occupation without interruption for 10 years; by clearing the forest and cultivating it; or by allotment from a public authority the land is redeemable by the vendor or by his 'successor' at the buyer's death—and in all other cases (paragraph 4 above) the buyer has a full right to them.

In the present case we are dealing with a sale of *Myeshin* land which the vendor obtained by inheritance.

The first part of the above section (represented by the first four paragraphs above), deals with the right of redemption and not with the right of pre-emption. The right of redemption is of course different to the right of pre-emption:—it is a right to buy back the land at the original price though the owner may not wish to sell it. But this part of the section throws some light on the law of pre-emption;—for the original owner or his

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

successor, having the right of redemption at the purchaser's death, would naturally have the right of pre-emption in respect of a sale by the purchaser in his lifetime. The latter right would be merely a corollary of the first. And the passage from the *Manu Wunnana* reads as if the right of pre-emption during the purchaser's lifetime is dependent upon or is derived from the right of redemption after his death. Both this passage and the 36th section of the 7th Book of the *Manukye* clearly refer to a contemplated sale by a purchaser from an original owner only. The passage from the *Manu Thara Shwe-myin* expressly states that it refers to the law on the sale and purchase of *Myethe* land—with which we are not concerned.

There is therefore nothing in these passages to show that a purchaser of *Myeshin* land from a derivative (*i.e.*, not an original) owner, cannot sell to whom he chooses.

It is stated in section (1) that the purchaser of *Myeshin* land takes it free from any right of redemption during his lifetime, if he bought from an original owner; and takes it absolutely free from any right of redemption in all other cases. At the time that he buys it, therefore, whether from an original owner or from a derivative owner (*e.g.*, an heir after partition) there can be no right of pre-emption in anyone; for that would be in effect a right of redemption as against the purchaser at the time of his purchase. If this view is correct the first portion of the section shews that there was no right of pre-emption as contended for in this case.

The matter dealt with in paragraph 5 above is quite distinct I think from the matter dealt with in paragraph 6. The first deals with a sale (presumably by a sole owner) to a relation; the seller is directed to offer the land to everyone of his relations who is an heir; if the land is sold to a relation, any other relation of the seller (who is an heir) may come in within a year and join in the purchase, but there is nothing to prohibit the seller from selling to a stranger instead of a relation, if he wishes. The object of this provision is apparently to prevent family disputes and jealousies which might arise if the seller was allowed to sell to one relation (who is an heir) in preference to another.

The second case (paragraph 6) deals with the sale of a

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

partial interest in land; the seller is directed to offer it to all the others who are interested in the land, and they are to decide who is to buy: if the seller refuses to sell to their nominee, he is expressly precluded from selling to another. This provision would apply to joint owners, *e.g.*, co-heirs before partition; and it is I think the ground for the rule of pre-emption in respect of a sale by an heir before partition. After partition the former co-heirs cannot be said to be interested in the shares of the other former co-heirs, and therefore this passage would not apply to a sale of partitioned inherited property. An heir after partition is virtually in the position of a stranger who has purchased part of the inherited lands with the consent of all those interested in the inheritance. Ordinarily in a partition one co-sharer, in consideration of his giving up his rights over the whole, is allotted by the other co-sharers a portion which he is to enjoy separately and without interruption or interference by them;—and I see no reason why this should not be the case in a partition of inherited property.

The passage from the *Vinnichaya Pakasani* Dhammathat cited by Mr. May Oung does not I think throw any light on the question before us. It merely shows that where co-heirs have a right of pre-emption, their right of pre-emption takes precedence of a right of pre-emption in adjoining or neighbouring owners.

The case in support of the right of pre-emption, as contended for in this reference, is based upon the passage referred to in paragraph 5 above:—the passage is taken as referring only to the case of a sale by an heir of inherited property; and because an heir wishing to sell 'even' to a relation, is directed to offer the land to everyone and all of his relations who are heirs—(the word 'heirs' is taken to mean 'heirs of the previous owner')—a general right of pre-emption is taken to be implied in co-heirs when an heir is about to sell to a stranger. If this is correct, the right of pre-emption would not be in the co-heirs generally but in such of the co-heirs only as were related to the seller.

But the passage expressly applies to a sale of 'any of the aforesaid lands' and in my opinion it applies equally to a sale by a purchaser as to a sale by an heir. If so, it is clear that the word 'amwezaing' must mean the heirs of the seller. The word

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

'relations' clearly means the relations of the seller and grammatically the word 'heirs' would also mean heirs of the seller:—and it has been so construed I think both by Mr. Sandford at p. 41, S.J.L.B., and also by Mr. Richardson in his translation of the *Manukye*. It is clear also that neither Major Sparks in 1860 nor Mr. Sandford deduced from this passage any right of pre-emption in co-heirs. If there had been a recognized right of pre-emption in co-heirs after partition, it is almost impossible to suppose that the compiler of section 1, Chapter VIII, when laying down directions in the case of a seller to a relation, should not have enunciated the rule in a direct manner; or that Major Sparks in his Code of Burmese Law should not have stated the rule of pre-emption as applying to all sales of inherited property. The effect of the word 'even' is I think to shew that the rule there laid down is a special rule which is applicable only in the case of a sale to a relation. There is nothing in this passage to shew that a seller (including an heir) may not sell to a stranger in preference to a relation or heir, if he wishes to do so.

For the reasons stated above, I do not think there is any right of pre-emption in respect of a sale of inherited land after partition and I would answer the question referred to us in the negative.

Twomey, J.—It is only if the right of pre-emption by co-heirs is a matter relating to inheritance that the Buddhist Law forms the rule of decision under section 13, Burma Laws Act. Such a right was first authoritatively recognized by our Courts in the rulings of Mr. Sandford, Judicial Commissioner, and he seems to have taken for granted that it was a matter of inheritance. In all subsequent rulings also the applicability of the Buddhist Law has been regarded as beyond dispute. Mr. Hosking, Judicial Commissioner, in *Ebrahim v. Arasi* (1) said definitely: "The right of pre-emption among Buduhists is an incident of the law of inheritance and succession and cannot be separated from it." At the hearing of the present reference some arguments were brought forward in opposition to this assumption. It was contended that a sale of land by a co-heir is a matter relating not to inheritance but to the transfer of

(1) P.J.L.B., 26.

1915.

In re YE NAN O v. AUNG MYAT SAN.

immoveable property. The same might be said with nearly as much force of a sale of land by a Burmese Buddhist widow. Yet if she sells without the consent of her eldest son he has a right under the law of inheritance to avoid the sale as regards his one-fourth share. In both cases the matter is primarily one of transferring immoveable property but in the one case as much as the other it may be said that the matter also relates to inheritance inasmuch as the transfer can be impugned by a co-heir other than the transferor. Then it is pointed out that the rules as to pre-emption are not found in Book X of the *Manukye* which deals specially with inheritance, but in Book VIII, and that the Kinwun Mingyi in compiling his Digest of the Dhammathats omitted to include any texts on the subject of pre-emption (except in section 309 of the Digest to which I will refer later on). No inference can be drawn from the fact that the rules in question are in one book rather than another. Colonel Horace Browne, Commissioner of Pegu, pointed out that the *Manukye* is destitute of all attempt at arrangement, resembling other Dhammathats in this defect. "The provisions relating to adoption, for example, are found in four or five different parts of the work, those on divorce in a dozen different places in juxta-position with some other uncongenial subjects such as debts or bailments, as if the book were simply a collection of *placita* or different judgments given in chronological sequence and not according to the subject matter of the judgments (1)." Professor Forchhammer in the Jardine Prize Essay also commented on the "variegated appearance" of the *Manukye* and pointed out that "it does not attempt to arrange the subject matter or to explain or reconcile contradictory passages (2)." As a matter of fact Book X is clearly not exhaustive for there are further rules for the partition of property after the owner's death in Book XI. To explain the omission from the Inheritance Digest of the rules about pre-emption in *Manukye* Book VIII and the cognate rules in other Dhammathats, it may be conjectured that the Kinwun Mingyi regarded them as matters relating to inheritance only in a secondary sense and wished to confine his compilation to the

(1) Preface to *Manu Wunnana*, U Tet Toe's Edition, 1878, 4.
(2) Jardine Prize Essay, 103.

1915.

In re YE NAN O v. AUNG MYAT SAN.

texts dealing with the partition of property on the owner's death. The same remark applies to the Kinwun Mingyi's *Attathankepa Wunnana*, the latest of all the Dhammathats which contains no reference at all to the subject of pre-emption. In my opinion the view hitherto taken by this Court and the Judicial Commissioner's Court of Upper Burma is correct. The right of a co-heir as such to demand that another co-heir shall sell to him in preference to a stranger is part of his inherited rights and may properly be classed as a matter of inheritance.

The law to be applied is the "Buddhist Law." As to what that law is the following passage from Colonel Horace Browne's preface to the *Manu Wunnana* (U Tet To's Edition printed in 1878) is of interest :—

"The Buddhist Law, properly so called, is contained in the 'Pie-ta-gat-thoon-boon' (the three baskets) divided into the *Thoot-tan*, *Wie-nee* and *Abhie dhamma* (or Discourses, Discipline and Pre-eminent Truth). Of these, the *Wie-nee* contains many passages that are law with regard to the religious usages of the people, but the rules that govern inheritance, marriage, divorce, etc., among the laity, are contained in a totally distinct work known generally as 'the Dhammathat' or the 'Dhammathat of Manoo' which form no portion of the Buddhist Law. These works in fact, as stated before, are more Brahminical than Buddhist, and the term 'Buddhist Law' when applied to them is a misnomer."

Mr. Justice Irwin also dealt with the matter in *Thein Pe v. U Pet* (1) and remarked that the Buddhist Law to be administered under section 13, Burma Laws Act, is "not the Dhammathats pure and simple, but on the contrary that it is a customary law, or in other words it is the body of customs observed by the Burmese Buddhists, and that the Dhammathats form one of the most important sources of information about that body of customs. Further, customs have a tendency to change, and the text of a Dhammathat cannot be assumed to be a perfectly correct exposition of existing customs."

(1) 3 L.B.R., 175.

In his preface to the Inheritance Digest the Kinwun Mingyi defines a Dhammathat as a "collection of rules which are in accordance with custom and usage and which are referred to in the settlement of disputes relating to persons and property." This is in accordance with Professor Forchhammer's description of the *Manukye* as a careful record of the laws, usages, customs and habits actually existing in the dominions of Alompra (1).

It is not necessary to consider how far the Dhammathats are of Buddhistic origin. The Burmese certainly regard them as the chief repository of their personal law as Buddhists and they will no doubt continue to be the main guide of the Courts in deciding matters covered by section 13, Burma Laws Act, with the reservation however that a rule or practice which is shown to have fallen into desuetude will not be enforced.

It has also been argued that the right of pre-emption hitherto recognised by the Courts has no real basis in the Buddhist Law and it is necessary to deal with this point at some length. Mr. Sandford's two chief rulings on the subject are *Nga Myaing v. Mi Baw* (2) and *Ma Ngwe v. Lu Bu.* (3) In the former the learned Judicial Commissioner held (*a*) that when ancestral land has passed into the hands of third persons, the heirs of the original owner have a right to the first offer should the possessor wish to sell and (*b*) that one of the co-heirs of an ancestral undivided estate, should he wish to sell his share, is bound to offer it first to his co-heirs. In the second decision the application of the rule was extended to land which has been actually partitioned amongst the co-heirs. The Judicial Commissioner relied on section 36 of Book VII and section 1 of Book VIII, *Manukye*, section 458, *Manu Wunnana* and section 211, *Manu Thara Shwe-myin.* (4) These Dhammathats do not lay down explicitly that a man wishing to sell inherited land to an outsider must first offer it to his co-heirs. But section 56, Book VII, *Manukye* certainly provides that when a man who has bought land wishes to resell it he is bound to give the first refusal to the sons and grandsons of the

(1) Jardine Prize Essay, 103. (2) S.J.L.B., 39. (3) S.J L.B., 76.
(4) *See* U Tet To's Editions of *Manu Wunnana* and *Manu Thara Shwe-myin*, printed in 1878 and 1879.

1915.

In re YE NAN O v. AUNG MYAT SAN.

original owner. Mr. Sandford considered that it would be illogical to hold that a member of the family is less bound to regard the family interests in preserving the family estate than a stranger. Hence his ruling in *Ma Ngwe's* case. Though the rule requiring a stranger to give the first refusal to the descendants of the original owner is mentioned in the above cases the question of the validity of the rule did not actually arise as they were cases in which the seller was a co-heir. The rule had never been authoritatively recognized by our Courts as having validity at the present day and it is admitted by the learned counsel in the present case to be no longer part of the custom of the country. However explicitly a particular rule may be laid down in the Dhammathats it is clear I think that our Courts will not adopt it if it is admitted on all hands to have fallen into desuetude. The rule binding strangers being therefore no longer enforceable it becomes a question whether the rule which Mr. Sandford deduced from it so as to restrict a co-heir alienating his share should not also be abrogated. There might be good grounds for abrogating it if it depended only on section 36 of Chapter VII. But the effect of Chapter VIII, section 1, has also to be considered. It is true that this section provides no more than section 36 of Chapter VII for the case of a co-heir selling to a stranger, but it clearly curtails a co-heir's power of alienating to another co-heir, by requiring him to offer the land first to the general body of co-heirs and to let them decide which of them is to buy or whether more than one should buy in equal shares.

It is noteworthy that the law of pre-emption based on Chapter VIII, section 1, was officially recognized by the British Government in 1860 when Major Sparks' Code was issued in a Government publication called "Civil Code of the Province of Pegu." It is described in the preface "as an attempt to combine into one harmonious Code the written law (*i.e.*, as contained in the *Manukye* Dhammathat) with the *lex loci* or local customs." The preface goes on to say that "experienced natives have been consulted, former judicial proceedings and precedents have been considered, and every endeavour has been made to prepare such a code of law as will be welcomed by the people and become the standard law of the province."

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

Section 97 of Major Sparks' Code is as follows:—

Sale and right of pre-emption.

"If a person wish to sell his share in an undivided ancestral estate, he should first offer it to all the co-heirs. They may buy his share jointly, or each buy his separate portion of the share, or one may buy in trust for the whole, according as the co-heirs shall decide among themselves; the seller shall have no voice in the decision, and shall not be at liberty to sell his share otherwise than they, or a majority of them, shall decide."

There is a reference to *Manukye*, Book VIII, section 1, in the margin as the authority on which section 97 is based. It will be noticed that Major Sparks' Code applies the rule only to *undivided* ancestral estate. Also it may be noted that section 97 is not included in Major Sparks' Chapter on Inheritance (Chapter VI) but in a Chapter headed "of immoveable property" (Chapter VII): I mention this matter only as showing that shortly after the annexation of Pegu the law of pre-emption was regarded by the British authorities as part of the existing customary law.

Section 1 of Chapter VIII *Manukye* begins with a classification of lands into *Myethe* (literally *dead land*) and *Myeshin* (literally *live land*). *Myethe* lands are those which were held as an appanage or emolument of some office, *e.g.*, lands attached to the office of village headman or by some feudal tenure (*e.g.*, lands assigned to a company of soldiers for their subsistence). *Myeshin* lands are all kinds of private land. The *Myethe* lands were impartible descending lineally, whether in the male line or female line, with the office or service in respect of which they were allotted and they were not liable to partition among the heirs of a deceased holder. The distinction between *Myethe* and *Myeshin* is now of merely historical interest. There are still *Thugyisa* lands (headmen's allotments) but such lands are altogether inalienable. In Upper Burma they are a species of State land, while in Lower Burma they are held by the headmen as lessees from Government on special conditions. In the present case as in all cases where a right of pre-emption is claimed we are concerned only with private land which in former times would have fallen in the category of *Myeshin*.

The section deals with two cases in which a right of pre-emption is given. The first is a case of sale amongst blood-relations (ပေါက်ဖော်ချင်းချင်းပင်ဖြစ်စေ). In such a case the land has

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

to be offered to all those of kindred (အမျိုး Amyo) with the seller who have an interest in the inheritance (အာဇွေဆိုင် Amwe-zaing) *i.e.*, the inheritance to which the land appertains. I think the seller's co-heirs are clearly indicated by the term *Amyo Amwe-zaing*. If one of them has bought while another has refused, the latter can still come in within a year and claim an equal share (မျည်) in the purchase. From the concluding words (ပေါက်ဖော်ချင်းဘဲညီး ပေါက်ဖော်ချင်း အထိုက်ဆိုင်ရောရေးဝယ်စေ) as well as the opening words cited above it is clear that the seller and the purchasers all belong to the same family. The second case relates to transactions between "persons interested" (ဆိုင်သူ). The seller cannot sell to one of the persons interested without first offering to all of them and they are to decide amongst themselves which of them is to purchase. In this case also it seems that the transaction contemplated is between consanguineous relations for it is provided that if the seller refuses to abide by the decision of the "persons interested" as to who should buy he must bear all the expenses of the resulting litigation and "may not plead (as an excuse) descent from a common great-grandfather (1)"(အတေးဆုံမဆိုသာ). The passage "he may not sell to another"(သူထပါးသို့လည်းမရောင်းသာချေ) appears to be merely an amplification of what precedes. By "another" (သူထပါး) in this context I understand the writer to mean another of the "persons interested." It is not equivalent here to (သူစိမ်း) a stranger.

I cannot understand the writer's object in stating the second of the two cases, for it seems to be already covered by the first. "Relations interested" are all included in "Relations interested in the inheritance."

It is necessary to note that according to the Kinwun Mingyi's palm-leaf text in the Bernard Free Library the case which I have referred to as the second case does not relate exclusively to land but to "animate or inanimate property."

Richardson's translation of section 1, Book VIII is incorrect and the translation given in S.J.L.B. 39 also contains mistakes.

(1) Or "Common ancestor."

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

I have prepared a fresh translation of the relevant parts of the section and append it to this judgment.

It is remarkable that while a co-heir is expressly restricted if he proposes to sell to another co-heir, there should be no express rule curtailing his power of alienation to strangers. The explanation is probably that the case of a sale among relations is to be taken as an extreme case and this conjecture is to some extent supported by the occurrence of the word (ပင် even) in the introductory clause. The clause (ပေါက်ဖော်ချင်းချင်းပင်) means "*even* amongst blood relations" and Mr. Sandford was I think justified in inferring that if such a restriction is imposed on a co-heir selling even to another co-heir the same principle should apply with added force where he proposes to sell it to a stranger. This seems to be a reasonable and equitable construction having regard to the want of precision in the Dhammathats and the elliptical language of this and many other passages.

The extracts given in *Nga Myaing's* case from the *Manu Wunnana* and the *Manu Thara Shwe-myin* are hardly relevant for the actual texts show that they relate only to *Myethe* land. It may well have been the policy of the Ministers and others who compiled the Dhammathats to give special facilities for pre-emption in the case of *Myethe* lands which formed the means of subsistence of large classes of State servants. Moreover these texts do not touch the case with which we are immediately concerned, namely, that of a co-heir selling his property to an outsider. The *Wunnana* text relates to the case of an outside purchaser's children who desire to re-sell the land. The *Thara Shwe-myin* deals with the right of *redemption* from the outside purchaser by the children of the original owner, a right which admittedly does not exist at the present day.

Section 93 (1) of the *Winisaya Pa Ka Sani* is relied upon by Mr. May Oung as supporting the view taken in Mr. Sandford's rulings. But no great weight can be attached to it. It provides in general terms that if the land is to be sold the co-heirs (အမွေစားဆက်ထိုသားချင်းပေါက်ဖော်) should be preferred as purchasers to neighbouring householders and landowners. But it lays down no procedure for pre-emption like the procedure in

(1) U Tet To's Edition, 1880.

1915.

In re YE NAN O v. AUNG MYAT SAN.

the *Manukye*, Book VIII, section 1 and it reads more like a moral precept than a positive rule of law.

The only other authority cited at the hearing is section 309 of the Inheritance Digest which gives an abstract of *Manukye*, Book X, section 56, and of the cognate texts in other Dhammathats. The texts in section 309 provide that when a childless husband and wife die one after the other, *i.e.*, at a considerable interval, certain distant relatives of the last to die shall inherit the whole of the joint estate, but the relatives of the first to die are given a right of pre-emption as regards his or her hereditary property. The words "hereditary property" in the English translation of the *Manukye*, X, 56, correspond to the expression (ဥစ္စာရိုး) in Burmese, and the same expression occurs in the *Dhamma* and *Amwebon* extracts, while the *Dayajja* uses the form (အာဇီဝရိုးတိုင်ဥစ္စာ). From the use of the word (ရိုး) (meaning in this context "line of succession") I think that the hereditary property referred to here is the impartible property which descends from father to son as an appanage or emolument of office (*cf.* texts in section 30 of the Digest). In the case of land this would of course be *Myethe*. It may therefore be inferred that the right of pre-emption spoken of in section 309 applies only to *Myethe* and as already remarked we are not now concerned with rights of pre-emption which existed in respect of such land.

It may be said therefore, to sum up this branch of the matter, that the *Manukye*, Book VIII, section 1, is the only text which furnishes a substantial basis for Mr. Sandford's rulings about pre-emption so far as *Myeshin* lands, *i.e.*, ordinary heritable and transferable lands, are concerned. But looking to the pre-eminent authority of the *Manukye* I think the Courts should continue to recognize the right as an integral part of the Buddhist Law of inheritance.

It has been urged that the custom is archaic and that it is unsuited to the present order of society. It is archaic in the sense that it is of ancient origin but there is no reason to hold that it has become obsolete. With reasonable limitations the custom should not operate as a serious clog on transfers of lands, and in any case we cannot reject it merely on this ground if it is found to be an integral part of the Buddhist Law.

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

Touching the origin of the right I doubt whether it is derived from the alleged desire to keep the family estate in the possession of the family (except perhaps in the case of *Myethe* lands). The ordinary rules of inheritance in the Dhammathats do not specially favour the concentration of land in the same family. They provide for the partition of the estate among sons and daughters on the death of their parents. Each son who marries starts a new household of his own and the married daughters leave their original family altogether and become merged in the families of their husbands taking their shares of the land with them. And so the family estate in the ordinary course is broken up. It seems more likely therefore that the rules as to pre-emption and the rules (now admittedly obsolete) relating to re-purchase by relatives of the original seller were founded on a general equitable notion that members of the original owner's family ought to be preferred to mere strangers. The wording of section 93, *Winisaya Pakasani* gives colour to this view. "This man is our kith and kin; this land is land of our family. If he desires to sell he should sell to us (rather than to strangers)." Or it may be that the law of pre-emption was taken bodily from the Hindus and incorporated in the Dhammathats without any distinct perception of its object or effect.

Turning now to the particular question raised in Mr. Justice Parlett's order of Reference, I think the decision must depend on the construction of the *Manukye*, Book VIII, section 1. Mr Sandford's ruling in *Maung Myaing's* case admittedly goes too far in recognizing the archaic rule in Book VII, section 36, as existing law and we have to decide whether he went too far also in *Ma Ngwe's* case in recognizing a right of pre-emption as regards family property after it has been partitioned among the co-heirs. Mr. Sandford cited no express authority for this decision. He appears to have thought that the right of a member of the family to re-purchase land that was formerly part of the family estate was a necessary corollary of the now obsolete rule requiring a stranger who wishes to re-sell to give the first refusal to members of the former owner's family. In *Shwe Eik Ke v. Tha Hla Aung* (1) Mr. Justice Fox refers only to *Nga Myaing's* case and does not mention Mr. Sandford's ruling

(1) 1 L.B.R., 144.

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

in *Ma Ngwe's* case at all. He held that "upon the division of the property amongst the children of the plaintiff's grand-parents each child took the particular lot or lots which fell to him or her free from all obligations as regards pre-emption and à *fortiori* the descendants of each child also took the lot or lots which devolved on each of them respectively free from such obligation." But it was not necessary to go to this length in *Shwe Eik Ke's* case for the plaintiff was not a co-heir with the defendants and had no right of pre-emption even according to the principles deduced by Mr. Sandford. The subject was again discussed in the Upper Burma Judicial Commissioner's judgment in *Nga Tin v. Shwe On* (1), Mr. Shaw dissented from the decision in *Shwe Eik Ke's* case and decided that the Dhammathats contain provisions which gives a right of pre-emption to co-heirs in respect of divided as well as undivided property. The learned Judicial Commissioner did not mention the portions of the Dhammathats on which he relied as establishing this proposition. The only texts referred to in the judgment are those abstracted in section 309 of the Digest and as remarked above these texts contain internal evidence that the right of pre-emption which they give relates only to impartible property falling under the heading of *Myethe.* For pre-emption as regards *Myeshin* land we have to fall back on the *Manukye,* Book VIII, section 1. The persons who are given the right in that section are all those of the same family "interested (or concerned) in the inheritance" (အမျိုးအစဉ်ဆိုင်တို့). I would translate these words compendiously by the English term "co-heirs." It would include all the relations of the seller who have inherited the property jointly with him from a common ancestor. Ordinarily each co-heir has an interest in the common inheritance until the separate shares are ascertained and distributed. But once he has acquired his individual share his interest in the rest of the inheritance is at an end. It might possibly be held that the words of the Dhammathat are not inconsistent with the survival after partition of a contingent interest in the other co-heirs' shares limited to the exercise of the right of pre-emption in case of sale. But this would certainly be a strained interpretation, and I am not prepared to say that we should be

(1) 2 U.B.R (1907—09) Buddhist Law—Inheritance—pre-emption, 1.

justified in acting upon such a very slender basis. As noted above the rule as embodied in Major Sparks' Code applies only to undivided property. In *Ma Ngwe's* case Mr. Sandford extended the rule to partitioned property because under the Dhammathats a stranger who has obtained possession of land by purchase was bound when re-selling it to offer it first to the original owner's heirs, and because it seemed illogical to apply a different rule to a co-heir selling land which he had acquired by partition. He thought that the principle of the rule, namely, the maintenance intact of a family estate, applied equally to both cases. But the rules requiring a purchaser of land who re-sells to offer it first to the original owner's heirs is admittedly obsolete and was probably obsolete at the time of Mr. Sandford's judgment. Also I have mentioned some reasons for thinking that the supposed principle—the maintenance intact of the family estate—has no real existence. In the absence of any clear authority to the contrary in the Dhammathats I think it should be held that a co-heir on partition acquires his individual share free from any obligation as regards pre-emption.

I would therefore answer Mr. Justice Parlett's reference in the negative.

As the existence of any right of pre-emption has been questioned in this case it appears desirable to lay down explicitly the extent to which the Courts can recognize such a right. Premising that it applies only to undivided inherited lands I would deduce from the *Manukye* that it is exerciseable by the co-heirs collectively. The following remarks of the Judicial Commissioner, Upper Burma (Mr. Thirkell White), on this point appear to me to express the intention of the *Manukye* correctly: "The law does not expressly allow one of several co-heirs to require a proposed sale of land to be made to him individually. The offer has to be made to the co-heirs and they must decide among themselves whether they or any of them will exercise the right. If they cannot agree apparently the owner would be free to sell as he thinks fit. But no doubt one of several co-heirs can sue to set aside a sale to a stranger and to enforce the right to pre-empt making all the other co-heirs parties to the suit (1)."

(1) *Shwe Nyun v. Ma So*, 2 U.B.R. (1897—01), p. 155.

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

I would deduce further that the right can be enforced only against the person who inherited the land jointly with the claimants, that it lapses on his death and that his heirs take the land free from all obligation as regards pre-emption. The persons who can claim pre-emption are the surviving joint inheritors and the heirs of any who have died. The right must be asserted promptly and the full price paid by the purchaser must be tendered. A sale to an outsider is not invalid *ab initio;* it is valid and holds good unless avoided by the co-heirs in the exercise of their right of pre-emption as above.

Appendix to Mr. Justice Twomey's Judgment.

(Translation of relevant passages from *Manukye*, Book VIII, section 1.)

Excellent ruler, lands are of two kinds as regards rights of ownership in them, *viz.*, *Myethe* (*i.e.* dead land) *Myeshin*, (*i.e.* live land). *Myethe* lands are soldiers' lands, lands given to companies of soldiers, lands allotted with definite boundaries by the monarch for the subsistence of headmen, governors, land measurers, forest officers, clerks, and other officials, lands worked and enjoyed by superior officials and descending lineally from father to son for many generations. *Myeshin* lands are lands other than the aforesaid *Myethe* lands. They comprise ancestral lands obtained by inheritance, lands obtained on the former occupier running away, land which has been worked openly and without interference for ten years, (waste) land obtained by clearing the jungle, land allotted (*lit.* given) by revenue officials, land measurers or superior officials. Thus it is said. As regards land allotted by revenue officials, land measurers or superior officials, land worked without the (former) owner's interference, land worked after clearing the jungle, if the owner of any such land sell it outright, let the buyer have the right to work and enjoy it. During the sellers' life-time he shall not redeem. If however the buyer dies in the seller's life-time the seller may redeem. If the seller has died (*i.e.*, before the buyer) and there is an office-bearer (အရာထမ်း) let him redeem if he wants to (*i.e.* after the buyer's death).

* * * * *

* * * * *

* * * * *

Excellent ruler, as regards the aforesaid *Myethe* and *Myeshin* lands even if (the claimants are) parents, grand-parents, relations, children, grandchildren, great-grandchildren, brothers or sisters, they shall not redeem (any such land). If the land has been sold outright let it be owned (by the buyer). Although (the claimants are) truly within the seven degrees of kindred or sons or grandsons they shall not redeem the land. As it has been sold, so let it be owned.

If there be a sale of (any of) the aforesaid lands even among relations (ပေါက်ဖော်) let every one of the related co-heirs (အမျိုးအမွေဆိုင်တို့) be asked. Whichever says he will not buy let him remain. Whichever

says he will buy let him buy. If any of the relations who on being asked said he would not buy says after another (of the related co-heirs) has bought " let me share equally in the purchase "—if a year has elapsed since the time of buying and working (the land) let only the person who orginally bought own (the land). Owing to the delay let the person who said he would not buy have no claim to share in the purchase. If only a day or a month has elapsed since the buying and selling and one of the related co-heirs says " I said formerly that I would not buy. Now I will buy, " the person who has bought shall not refuse to sell on the ground that there was formerly a public refusal to buy. (The two parties) are relations; let those concerned buy and sell as becomes relations.

A person interested (ဆိုင်သူ) is about to sell animate or inanimate property * and he says to all those who are interested :—" please buy. I am in debt and have to pay up." If there is to be a purchase (in such circumstances) let all who are interested purchase in equal shares. Otherwise, if one should say :—" it is well to sell to me alone. I alone should buy," let the purchasers decide among themselves who should buy and who should not buy. He (*i.e.* such an individual claimant) shall not address himself to the seller. Otherwise, if there is a sale to one only (of those interested) without the knowledge of the others, the seller is at fault. (In such a case) the buyer having been ejected let them (*i.e.* all those interested) decide whether he should buy or not, and let the seller take back his own. Let (those interested) decide who should buy and let there be a sale according to their decision. If the seller then says he will not sell (*i.e.* to the person so selected) and a law suit follows, let him bear the costs. Let him not sell to another. As to the costs, he shall not plead descent from a common ancestor, let him pay them.

* * * * *
* * * * *
* * * * *

Fox, C.J.—We have had the advantage of having had the question referred, argued by six learned advocates.

Those who argued in favour of a negative answer contended that there was no right of pre-emption among Burmese Buddhists either before or after partition, and that the rulings which recognise such right were based on misunderstanding of the texts on which they were based, and they were not justified by the texts. They contended further that a right of pre-emption was not a matter of inheritance, and that it was not a right which should be enforced in the exercise of justice, equity and good conscience.

It is clear that no text of any Dhammathat explicitly provides for such right, whether it is called a right of a co-heir

* The words " animate or inanimate property " (သက်ရှိသက်မဲ့ကို) do not occur in Richardson's text. These words however are in the Kinwun Mingyi's palm-leaf copy of *Manukye* which is probably authentic.

1915.

In re YE NAN O v. AUNG MYAT SAN.

as such to demand that another co-heir shall sell to him in preference to a stranger to the family, or a right of a co-heir to enforce against one who is not a co-heir a resale to him of jointly inherited land sold to him by another co-heir.

The first reported ruling of a Court affirming the right, *viz. Nga Myaing v. Mi Baw* (1), on the face of it professed to be the learned Judge's conclusion from certain passages in the *Manukye* Dhammathat which do not directly deal with the matter. The first text quoted in the judgment enjoins one who has bought land to sell it, if he has to sell it, to the sons and grandsons of the original owner (meaning, I take it, the person from whom he bought) and not to sell to others unless these do not wish to buy it.

This was the customary law of the land in 1756 when the *Manukye* was compiled or issued, but no instance has been cited of any son or grandson of a seller having claimed to exercise at any time within living memory or since the annexation of any part of Burma by the British Sovereign a right such as the text would appear to involve. Such a right had nothing to do with inheritance or rights of co-heirs or inherited property. It applied to all property which had been sold and bought, whether the seller acquired it by his own exertions, or whether he inherited it either solely or jointly with others. In the case of inherited land sold by a co-heir the injunction in the text would apply not to the first seller the co-heir but to the second the buyer from him. It is to me difficult to see how this text could form the basis or even part of the basis of a conclusion that a co-heir as such had a right to demand that a co-heir shall sell to him in preference to a stranger. It was admitted by the learned advocates arguing for an affirmative answer to the question referred that the law or custom embodied in this text was not an enforceable law or custom at the present time.

Whatever meaning the author of the passage in the 1st section of the 8th book of *Manukye* intended to convey, it is clear that he did not in any part of this section state that a co-heir was not at liberty to sell land he had inherited with

(1) S.J.L.B., 39.

others to a stranger without first offering it to his co-heirs and giving them the refusal of it.

This text again does not purport to be confined to inherited property: it embraces all property which a person may have obtained in any way whatever. The second paragraph deals with the case of a sale to the seller's relations and to a sale to persons interested "(whatever the expression may mean)" and imposes on the would be seller the duty of first offering it to all these respectively. The law in 1756 was that an owner of land, however he may have obtained it, was obliged, in case he proposed to sell it to any of his relations or to "persons interested" to offer it to every one of these respectively.

From these texts which did not deal directly with the question before him, Mr. Sandford concluded that in 1874 the possessor of land bought or obtained from a person who had inherited it was obliged, if he wished to sell it, to offer it first to those who had a right of inheritance in the land. What he exactly meant by "a right of inheritance in the land" is not explained. He went on to draw the further conclusion that a co-heir of undivided ancestral property was bound under the law contained in the passages he cited to first offer any such property he wished to sell to those who had a joint right of inheritance with himself. Three years later in *Ma Ngwe v. Lu Bu* (1) he drew the further conclusion that even after division of ancestral estate the holder of land who obtained portion of it was bound, if he wished to sell it, to offer it first to his co-heirs.

The question before him was whether a right of pre-emption existed amongst Burmese Buddhists at the time the case was before him. It could only exist by reason of it being part of their customary law. He had no evidence before him proving such a custom, nor had he before him any other materials recognized by the Evidence Act or by rulings of Courts as materials on which a decision as to the existence of a custom can be based except two texts which dealt with the rights of alienating property in the Burmese Kingdom more than a century before. He assumed that this part of the customary law had continued under both the Burmese and British rules, and

(1) (1877) S.J.L.B., 76.

1915.

In re YE NAN O v. AUNG MYAT SAN.

that it was still prevalent. From this unsound premise he drew the conclusion that co-heirs had a right which later on one of his successors confidently asserted was a right of inheritance.

If the question of the right of pre-emption among co-heirs depended solely on the reasons given in favour of it in Mr. Sandford's judgments, I should be prepared to hold that these were decisions which should not be followed, because they were not founded on materials recognized by law as the basis for a decision that a binding custom prevailed at the time the question as to its existence had to be decided.

There was however at the time material upon which he might have legitimately held that our Courts must recognize a right of pre-emption amongst Burmese Buddhist co-heirs to a limited extent. After the annexation of the Province of Pegu to the British Dominions the British authorities instituted enquiries as to the prevailing customs of the people of the country with a view to affording some guide to the Courts in the administration of justice among them. The result appears in what is known as Sparks' Code the correct title of which is "Civil Code of the Province of Pegu sanctioned by resolutions of His Honour the President in Council recorded on the 4th November 1859 and 17th January 1860." The rules embodied in it were at the time equivalent to legislation. It may be taken as certain that they were followed by the Courts. In clause or section 97 of Part II, which professed to be a Code of Burmese Law and of the *lex loci*, it is laid down that if a person wish to sell his share in an undivided ancestral estate, he should first offer it to all the co-heirs. They may buy his share jointly or each buy his separate portion of the share, or one may buy in trust for the whole according as the heirs may decide among themselves; the seller shall have no voice in the decision, and shall not be at liberty to sell his share otherwise than they, or a majority of them, shall decide.

In view of the British authorities having at an early stage recognized and adopted these rules as being part of the customary law of the land I am of opinion that to the extent laid down in this section of Sparks' Code, but to this extent only, the right of pre-emption amongst co-heirs must be recognized by our Courts. If any one claims to have it further extended he must prove in

1915.

In re YE NAN O *v.* AUNG MYAT SAN.

one or more of the recognized methods of proving a custom that the right is now greater than what it was declared to be in that Code. I may remark that in the case in which this reference has been made the Burmese District Judge who dealt with the case was at the time one of the oldest of the Burmese officials. His view was that the right of pre-emption among co-heirs ceased after partition of the inherited or ancestral property.

It appears to me unnecessary to enter into the question of whether the matter is one of inheritance. Even if it is not, it is one in which the customary law must be applied.

In regard to the contention that the right is not one which should be enforced in the exercise of justice, equity and good conscience, the case is not on all fours with the case which the Madras High Court had to deal with in *Ibrahim Saib v. Muni Mir Udin Saib* (1). In that case the learned Judges entered into the question of whether the Mahomedan Law of pre-emption was consistent with equity and good conscience only because they stated that the Mahomedan Law had not been received in that Province as one of the sources of law in regard to the rights of alienating land. In this Province the customary law as regards pre-emption has been received and adopted, and it is not open to this Court to disregard it on the ground that t is opposed to justice, equity and good conscience.

For the reasons I have previously given I answer the question referred in the negative.

Before Mr. Justice Maung Kin.

C.T.R.M.A. SOMASUNDARAM CHETTY *v.* SHWE NYUN.*

Special Civil 2nd Appeal No. 147 *of* 1915.

January 24th, 1916.

Xavier—for appellant.
Sin Hla Aung—for respondent.

Buddhist Law : Inheritance—pre-emption—sale of share of undivided estate.

One of several co-heirs of an undivided ancestral estate may sell his share in it, and if the other heirs do not promptly assert their right of pre-emption, the sale is valid. The purchaser of the share cannot however enforce his claim against any specific portion of the estate until the share has been ascertained and separated by division of that estate.

(1) (1870) 6 Mad. H.C.R., 26.

1916.

C.T.R.M.A. SOMASUNDARAM CHETTY v. SHWE NYUN.

Mi Tè v. Po Maung, S.J.L.B., 41; *Nga Myaing v. Mi Baw*, S.J.L.B., 39; *Ma Ngwe v. Lu Bu*, S.J.L.B., 76—overruled.

Maung Ye Nan Oh v. Aung Myat San, 8 L.B.R., 466; *Maung Shwe Nyun v. Ma So*, 2 U.B.R. (1897—01), 155; *Ma Pa U v. Maung Tha Lu*, P.J.L.B.; 189 and *Yelumalai Chetti v. Srinivasa Chetti*, (1906) I.L.R. 29 Mad., 294—followed.

This is a suit for ejectment from a house and its site now in the occupation of the defendant.

The plaintiffs claim to be the owners of the property as they had bought it in 1912 under a registered deed from C.T.V.R.M. firm who in 1909 had bought it from one Maung San Baw (since deceased) also under a registered deed. They allege that before they bought it, their vendors had allowed the defendant to stay in the house for a temporary measure on her promising to leave it whenever she was required to do so. But she has now refused to quit the house in spite of all demands.

The defendant replies that the house forms part of her grandfather's estate, which has not been divided, and that the sale by Maung San Baw, one of the heirs, was not valid, as it was not made with the consent of all the co-heirs.

There can be no doubt on the evidence that the estate in question has not been divided yet. And the plaintiffs have failed to prove the leave and license alleged by them.

But the Township Court held that the sale was valid inasmuch as the other heirs must be held on the evidence in the case to have acquiesced in it and made a decree as prayed for.

The District Court on appeal held that there was no reliable evidence of acquiescence, and relying on the judgment of Mr. Sandford, Judicial Commissioner, in *Mi Tè v. Po Maung* (1) held that the sale was wholly invalid, as it was not made with the consent of the co-heirs, and dismissed the suit.

I agree with the District Judge in holding that there is not sufficient on the record for the conclusion that the other heirs had acquiesced in the sale.

But I have to consider the question whether the sale is wholly void.

In *Mi Tè v. Po Maung* (1) the learned Judicial Commissioner held that consent of all the co-heirs is necessary to the sale of undivided ancestral property and a sale effected without

(1) S.J.L.B., 41.

such consent is invalid even to the extent of the vendor's own share. This decision was based upon a previous ruling in *Nga Myaing v. Mi Baw* (1) where it was held that one of the co-heirs of ancestral undivided estate, should he wish to sell his share, is bound to offer it first to his co-heirs and that a sale to strangers effected without such offer is invalid, if the co-heirs promptly assert their right. The same proposition was re-iterated in *Ma Ngwe v. Lu Bu* (2) decided by the same learned Judge, where the right of pre-emption was extended to the land which had been partitioned amongst the co-heirs. I may in passing state that this extension has been overruled by a Full Bench of this Court in *Maung Ye Nan Oh v. Aung Myat San* (3). It is clear to my mind that the learned Judicial Commissioner stretched the law when he came to decide Mi Tè's case, for to say that a sale to a stranger effected without a previous offer to the co-heirs is invalid, if the co-heirs promptly assert their rights, is not so wide as the proposition that a sale effected without the consent of the co-heirs is invalid even to the extent of the vendor's share.

In my opinion the extension is wholly unjustified. Even the proposition in *Nga Myaing's* case (1) is too wide. All these three cases by Mr. Sandford have been before a Full Bench of this Court in *Maung Ye Nan Oh's* case (3).

There the learned Counsel, who argued the affirmative of the question referred, admitted that the proposition regarding the validity or otherwise of the sale in question as therein laid down was far too wide and unjustified by the texts cited in support of it. And Mr. Justice Hartnoll in his judgment said:—"It was allowed at the hearing that the head-note to the case of *Ma Ngwe v. Lu Bu* (2) is too wide in declaring that a sale to a stranger without the offer first being made to co-heirs is invalid. This appears to be the case. The sale is only voidable at the option of co-heirs as long as they object to the sale within a reasonable time and offer to pay the price for which the property has changed hands. Otherwise, the sale is valid and cannot be impugned. The provision that the right must be claimed promptly and without unreasonable delay is the great safeguard against injustice and the abuse of it."

(1) S.J.L.B., 39. (2) S.J.L.B., 76. (3) 8 L.B.R., 466.

1916.

C.T.R.M.A. SOMASUNDARAM CHETTY v. SHWE NYUN.

Mr. Justice Twomey who took part in the decision of the reference quotes in his judgment the following remarks of the Judicial Commissioner of Upper Burma (Mr. Thirkell White) as expressing the intention of the *Manukye* correctly :—"The law does not expressly allow one of the several co-heirs to require a proposed sale of land to be made to him individually. The offer has to be made to the co-heirs and they must decide among themselves whether or any of them will exercise the right. If they cannot agree, apparently the owner would be free to sell as he thinks fit. But no doubt one of several co-heirs can sue to set aside a sale to a stranger and to enforce the right to pre-empt making all the other co-heirs parties to the suit " (1).

This is virtually the same as the observation of Hartnoll, J., quoted above.

It would therefore appear that the sale in question cannot be held to be wholly void. It must be held to be valid to the extent of the vendor's share, and had the co-heirs exercised the right of pre-emption promptly by offering to pay the price paid by the plaintiff's predecessors in title, they would have got back that share into their family. But there has been no attempt to exercise the right of pre-emption on the part of any of the other heirs, and as the sale was made in 1909, they would be too late, even if they wished to assert the right now. The sale by Maung San Bwin must be held to be valid to the extent of his share.

The next question to consider is to what relief the plaintiffs are entitled. Can they get a decree for the possession of the share of their vendor? In my opinion they cannot. The case of *Ma Pa U v. Maung Tha Lu* (2) is analogous to the present. There it was held that a mortgage of his joint interest by one of several coparceners in an estate does not entitle the mortgagee to possession of such an estate. The mortgagee's claim cannot be enforced against any specific portion of the estate as the specific share of the mortgagor, until the share has been ascertained and separated by division of such estate.

(1) *Maung Shwe Nyun v. Ma So*, 2 U.B.R. (1897—01), 155.
(2) P.J.L.B., 189.

1916.

C.T.R.M.A. SOMASUNDARAM CHETTY v. SHWE NYUN.

In another case, *Yelumalai Chetti v. Srinivasa Chetti* (1), which I think is also analogous to the present, it was held by the Madras High Court that the purchaser at a Court sale of the share of an undivided member of a joint Hindu family acquires only a right to sue for partition and for delivery of what may be allotted as the share of such undivided member.

For the reasons above stated I would hold that, though the sale set up by the plaintiff was valid to the extent of the vendor's share, a decree for the possession of that share cannot be passed. The suit as framed must fail.

The appeal is therefore dismissed with costs.

FULL BENCH.

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

In re 1. MA SEIN TON, 2. MA THEIN, 3. MA NYEIN *v.* MA SON.

Civil Reference No. 1 of 1915.

August 10th, 1915.

D. N. Palit—for appellants.
N. C. Sen—for respondent.
May Oung—(Amicus Curiæ).

Buddhist Law: Inheritance—joint property—widow's power of disposal.

Subject to any claim by the eldest son to certain specified property and to a quarter share of the joint property, and to any claim by the eldest daughter to certain specified property, a Burmese Buddhist widow has an absolute right of disposal over the whole of the joint property of herself and her late husband as against the children of their marriage.

Ma On and others v. Ko Shwe O and others (1886) S.J.L.B., 378, overruled.

Mi Saw Myin and one v. Mi Shwe Thin and one, 1 U.B.R. (1910—13), 125, followed.

Maung Po Lat v. Mi Po Le, S.J.L.B., 212; *Ma Min Tha v. Ma Naw*, 2 U.B.R. (1892—96), 581; and *Thakur Vasonji Mararji v. Musammat Chanda Bibi*, (1915) 18 C.W.N., 873—referred to.

Special Civil 2nd Appeal No. 207 of 1913.

February 24th, 1915.

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

In 1908, Ma Dun, the widow of U E, mortgaged a certain house and a piece of garden land measuring 6·60 acres to one J. D'Cruz *alias* Po Maung. Both house and land were the joint property of Ma Dun and U E, having been acquired during

(1) (1906) I.L.R. 29 Mad., 294.

1915.

MA SEIN TON v. MA SON.

their married life. The mortgagee brought a suit on the mortgage and obtained a decree for sale against Ma Dun.

The four children of Ma Dun and U E then brought this suit against D'Cruz' widow, Ma Son (who has letters-of-administration to his estate), praying for a declaration that one-half of the mortgaged property is the ancestral property of the four children. They pleaded that as the property was mortgaged without their consent and without "necessity," their interest in the property is not affected by the mortgage. The widow Ma Dun was joined as co-defendant.

The Township Court decided that the property was the joint property of Ma Dun and her husband, that on her husband's death Ma Dun had absolute power of disposal over only one-half of the property except in case of necessity, that the mortgage in this case was not for necessary subsistence, that the eldest daughter, Ma Hmwe On, was aware of and assented to the mortgage and was therefore bound by the transaction, but that the remaining three children (a son and two daughters) did not assent and were not bound. A decree was given declaring the rights of these three children in the property. Ma Hmwe On did not appeal, and so far as she is concerned there is an end of the matter. But the mortgagees' representative Ma Son appealed to the District Court, which decided in her favour that the three younger children also were privy to the mortgage and that they were bound by it as much as their elder sister Ma Hmwe On. These three younger children have now appealed to this Court.

On the facts I think the District Judge has come to a wrong conclusion. It is beyond dispute that the three appellants were not parties to the mortgage, and even if they took no steps immediately when they heard of the transaction that would not deprive them of any rights they may have had in the property. One of them was a minor at the time of the mortgage, and as regards her the District Judge says "her mother's acts if not contrary to her interest might be taken as binding her." But Ma Dun did not purport to mortgage the property on her own behalf and on behalf of her children. She mortgaged it as sole owner. Moreover, the respondent did not plead that Ma Dun's children assented to the mortgage. Her plea was that the

property was mortgaged to raise money for the necessary subsistence of the family. The District Court did not deal with the question of necessity at all, but there is no reason to question the finding of the Township Court on this issue. According to Ma Dun herself the mortgage money was required for her step-brother Maung Di, while Ma Son, the respondent, says that it was for Ma Dun's son-in-law, Maung Nyein. Ma Son failed to prove that it was spent for necessary subsistence. Her case was that she believed Ma Dun to be sole owner. It is clear therefore that if Ma Dun's absolute right of disposal was restricted to one-half of the property, it would be necessary to set aside the decree of the District Court.

But the correctness of the rule laid down thirty years ago in *Ma On and others v. Ko Shwe O and others* (1) has lately been questioned in the Upper Burma case *Mi Saw Myin and one v. Mi Shwe Thin and one* (2) in which the learned Officiating Judicial Commissioner (Mr. McColl) held "that under Buddhist Law on the death of a husband his widow succeeds to the estate with the exception of certain specified property and one-fourth of the estate which go to the eldest son and of certain specified property which goes to the eldest daughter, that with the exception of this portion the widow is at liberty to spend the whole of the estate, if she chooses to and not merely for necessities, and that the texts of the Dhammathats on which the doctrine that the widow can only spend the estate for necessities is based, refer to the spending of the specified property set apart for the eldest daughter and not to the spending of the bulk of the estate." The Lower Burma rule as stated in Ma On's case is that "a Burmese Buddhist widow has not an absolute interest in the whole of the family property on the death of her husband, but she has an absolute right in respect of her own share (*i.e.* one-half) and a life interest in the remainder and she has not the right of absolute disposal of the remainder but only a power of sale in case of necessity." That rule was to a great extent based on the authority of an earlier case, *Nga Shwe Yo v. Mi San Byu and others* (3), in which the Judicial Commissioner, Mr. Jardine, held that on the death of the father the children take an interest in the family property

(1) S.J.L.B., 378. (2) 1 U.B.R. (1901—13), 125. (3) S.J.L.B., 108.

1915.

MA SEIN TON v. MA SON.

and that the widow cannot dispose of the interests of the children except in case of necessity. But, as Mr. McColl points out, the learned Judges who decided *Ma On's* case seem to have overlooked the fact that Mr. Jardine in the later judgment (1) expressed considerable doubt as to the correctness of the doctrine he had laid down in *Nga Shwe Yo's* case. It appears indeed that the doctrine was evolved from Richardson's incorrect translation of section 5, Book X of the *Manukye*. In the passage " if the mother uses the property for necessary subsistence let her have the right to do so " the words " for necessary subsistence " are an interpolation. The Burmese text is အမိသုံးစားထုန်လျှင်။ ထုန်ပိုင်စေ။. Similarly, the words " from necessity " are interpolated in the translation of section 3, Book X (which is referred to by the Judges in Ma On's case, p. 381, S.J.). The Burmese words are အဖစားသောက်၍ထုန်လျှင်။ ထုန်ပိုင်စေ။. Section 5 deals with partition between a widow and the eldest son ; section 3 with partition between a widower and the eldest daughter. It is only in section 4, dealing with partition between a widow and the eldest daughter, that the words regarding necessity (မစားသောက်၍။) occur. There is nothing to show how the interpolations in the English translation of sections 3 and 5 came about. But the opinion may be hazarded that the words relating to necessity were introduced by the translator merely to effect a specious symmetry in the three sections 3, 4 and 5. I think Mr. McColl has given very good reasons for his opinion that in section 4, Book X of *Manukye*, and in the *Dhamma* and *Amwebon* extracts given in section 31 of the *ex*-Kinwun Mingyi's Digest, the restriction as to spending only in case of necessity applies merely to the specific property (female slaves, cattle, etc.) which is mentioned in these texts as the share of the eldest daughter, and does not apply at all to the residue of the property which goes to the widow. This appears to me to be a reasonable interpretation of the texts, and I am in favour of adopting the rule as propounded in Upper Burma. Apart from these texts there is nothing in the Dhammathats to warrant the inference that the surviving parent is restricted to a life interest as regards any

(1) S.J.L.B., 212, *Maung Po Lat v. Mi Po Le.*

portion of the family property. On the contrary, Mr. Burgess in *Ma Min Tha v. Ma Naw* (1) quoted the following passage from *Manu Wunnana* as indicating clearly that children cannot stop their parents from doing as they choose with their property:—

> And if, during the life-time of heirs, sale and purchase be effected by parents against the will of heirs, and if after the land shall have come to the possession of others, and after the death of the parents, the heirs are desirous of redeeming the land, they shall have the right to do so.

It was held in that case that the heir of the deceased husband under Buddhist Law is his widow and not any of his children (except the eldest son in respect of a fourth of the estate) until the death of the widow, and that the children have no such interest in the estate as is contemplated in section 91, Transfer of Property Act. Mr. Burgess clearly considered moreover that this view was in accordance with the spirit of the Dhammathats which give great prominence to the parental authority.

The question arises therefore whether the ruling in S.J. L.B., 378, restricting the widow's right of disposal of the family estate should not be reconsidered and whether the conclusion arrived at in 1 U.B.R. (1910—13), p. 125, should not be accepted as regards Lower Burma also.

The matter is one of great importance to Burmese Buddhists and I therefore refer the following question to a Bench of the Court:—

What right of disposal has a Burmese Buddhist widow in the joint property of herself and her late husband?

The opinion of the Full Bench was as follows:—

Twomey, J.—Mr. May Oung appeared as *amicus curiæ* at the hearing of this reference and gave the Court the benefit of his wide knowledge of Buddhist Law. He pointed out that the terms of the reference are wider than the facts of the case warrant, and it has been agreed that the question for decision should be narrowed down as follows:—

What right of disposal has a Burmese Buddhist widow in the joint property of herself and her late husband as against the children born of their marriage?

(1) 2 U.B.R. (1892—96), 581.

1915.

MA SEIN TON v. MA SON.

The matter was decided in 1885 by the Special Court's ruling in *Ma On v. Shwe O* (1) which has been followed ever since in Lower Burma, but the correctness of that ruling has been seriously questioned and further consideration of the Buddhist Law on the subject has become necessary.

According to the Special Court's ruling the widow's absolute right of disposal would be restricted to " her own share," and as regards the remainder she would have only a " life interest " with a power of sale in case of necessity.

At the outset it may be noted that the use of the term " life interest " to describe the widow's interest in the remainder is open to criticism. The following passages from Mr. Mayne's Hindu Law (8th Edition, pp. 846 and 870) have been quoted with approval by their Lordships of the Privy Council (2) in dealing with the subject of a Hindu widow's interest in property inherited from her husband :—

> Hindu Law knows nothing of estates for life or in tail or in fee. It measures estates not by duration but by use. The restrictions upon the use of an estate inherited by a woman are similar in kind to those which limit the powers of a male holder but different in degree. The distinctive feature of the estate is that at her death it reverts to the heirs of the last male owner. It is not a life-estate, because under certain circumstances she can give an absolute and complete title. Nor is it in any sense an estate held in trust for the reversioners. Within the limits imposed upon her, the female holder has the most absolute powers of enjoyment.

Much the same arguments might be used with regard to a Burmese Buddhist widow's interest in the moiety of the joint property inherited by her from her husband. This has already been pointed out in Mr. Burgess's judgment in *Ma Min Tha v. Ma Naw* (3).

The grounds of the Special Court ruling may be briefly examined. A great part of the judgment is devoted to disposing of the extreme proposition that the surviving parent takes nothing but a life-interest in *any* part of the joint property and cannot alienate any of it without the children's consent. The learned Judges thought that none of the authorities went to this length and they decided that after giving the eldest son or

(1) S.J.L.B., 378.

(2) (1915) 18 C.W.N., 873, *Thakur Vasonji Morarji v. Musammat Chanda Bibi.*

(3) 2 U.B.R. (1892—96), 581.

1915.

MA SEIN TON v. MA SON.

daughter his or her share of the property the remainder vests in the surviving parent for himself or herself and the younger children under *Manukye*, sections 4 and 5 of Book X. They held that the surviving parent has "an ascertainable interest" in this remainder and apparently thought on the authority of *Manu Wunnana*, section 26, that this interest was one-half. This half is at the absolute disposal of the surviving parent but he or she could not dispose of the other half of the remainder without necessity. They accepted Mr. Jardine's ruling in *Shwe Yo v. Mi San Byu* (1) as showing that without necessity the surviving parent cannot dispose of the interests of the children (*i.e.* the interests of the younger children in the remainder).

Mr. Jardine's ruling in *Shwe Yo's* case dealt with the right of a widow to alienate the joint property. On the authority of *Manukye*, he was of opinion that the younger children take an interest in the property and that the widow cannot dispose of it except for necessary subsistence or for the children's benefit. He did not arrive at this conclusion without hesitation, as the views of the two assessors consulted were diametrically opposed to one another. The Judicial Commissioner relied on Richardson's incorrect translation of section 5 in which the words "for necessary subsistence" are interpolated between the words "if the mother uses the property" and the words "let her have the right to do so." The Burmese reads simply as follows:— အမိသုံးစားရှိထုန်ထျင်ထုန်ပိုင်စေ။ which means, "if the mother consumes and it is exhausted let her have the right to exhaust it." The restriction မစားလောက်လို့ (=if there is not enough for subsistence) occurs only in section 4 which provides for the case of a widow left with daughters only. In the Upper Burma ruling, *Mi Saw Myin v. Mi Shwe Thin* (2), Mr. McColl has reopened the question and has discussed *Manukye*, section 4, and the cognate texts in section 31 of the Kinwun Mingyi's Digest relating to partition between a widow and the eldest daughter. I think he gives good reasons for thinking that the restriction as to necessary subsistence applies only to certain specified property enumerated as the eldest daughter's portion and does not apply to the remainder of the property which is left with the widow and younger daughters.

(1) S.J.L.B., 108. (2) 1 U.B.R. (1910—13), p. 125.

1915.

MA SEIN TON v. MA SON.

This is clearly the intention in the *Dhamma* text and I agree with Mr. McColl in thinking that it is a reasonable interpretation also of the *Manukye* and *Amwebon* texts. These three—*Dhamma, Manukye* and *Amwebon*—are the only texts which contain the limitation as to necessary subsistence. On the other hand section 31 of the Digest gives 23 other texts in which the widow is subjected to no restriction whatever and 11 of these expressly provide that she may exhaust the property and that the daughter shall get only what is left unexhausted. The *Manu Wunnana* goes so far as to say that in the case of a daughter who lives with her widowed mother the latter takes the whole property and that the daughter gets only what is left unexhausted on her mother's death. There are other texts to the same effect in section 38 of the Digest. But the general rule deducible from the Dhammathats (except the *Manukye, Amwebon* and *Dhamma*) is that the daughter gets certain specified property as her portion, and that the rest goes to the widow absolutely. Turning to the case of a widow's partition with her son the clause about necessity, as noted above, does not appear at all in *Manukye*, section 5, and it is absent from all the cognate texts, 33 in number, which are extracted in section 30 of the Digest. This invaluable Digest was first published in Burmese in 1898 and in English in 1902. If such an array of authority had been forthcoming in 1880, the year of Mr. Jardine's judgment in *Shwe Yo's* case, the learned Judge would probably have come to a different conclusion. The error in Richardson's translation which destroys the foundation of Mr. Jardine's ruling was not brought to the notice of the learned Judges of the Special Court when they heard *Ma On's* case in 1885 and they overlooked the fact that Mr. Jardine himself in a later judgment (*Maung Po Lat v. Mi Po Le*) (1) had expressed doubt about the correctness of his ruling in *Shwe Yo's* case. Alluding to the doctrine that a widow may not without the children's consent, unless for sufficient cause, alienate the joint property, he said he "would hesitate to apply that doctrine except very cautiously and to particular circumstances."

(1) S.J.L.B., 212.

But there can be no doubt that in restricting a widow's power of alienation both Mr. Jardine and the Special Court were greatly influenced by the wording of *Manukye*, sections 4 and 5, by which the remainder of the joint property (after providing for the shares of the eldest son or the eldest daughter) is left not to the widow alone but to the widow and the younger children. This aspect of the question is not discussed in Mr. McColl's judgment, for there were no younger children in the case before him. In section 31 of the Digest (mother and daughter) 3 of the 26 Dhammathats, namely, *Dhamma*, *Manukye* and *Amwebon*, prescribe that after providing for the eldest daughter's share, the mother and the younger daughters shall get the remainder of the property. All the other Dhammathats in section 31 say that the mother shall get it. In section 30 of the Digest (mother and son) out of 33 Dhammathats two, namely *Dhamma* and *Manukye*, say that after providing for the eldest son's quarter share and his specified property, the mother and younger children shall get three shares. All the other Dhammathats in section 30 give the three shares to the mother alone. It cannot be argued that these Dhammathats relate to families consisting of only a widow and one son, for several of them say expressly that even if there are ten sons the rule of partition is the same, and one text (*Pyu*), after saying that the mother shall get three shares and the *orasa* son one share, goes on to say that "the younger children shall be given small amounts to satisfy them"—a provision which is so indefinite that no effect can be given to it; it can hardly have been intended as more than a moral precept. What force then should be given to the exceptional words in *Manukye*, *Amwebon* and *Dhamma*? They cannot mean that the widow and the younger children take the three shares as joint co-sharers, for in that case the younger children would be entitled to claim partition, and this it is clear they cannot do. There is no clearer rule than that the younger children must wait till after the widow's death (*vide* section 34 of the Digest and texts cited in Special Court judgment at page 383). It is true that there are certain texts (*Vilasa* and *Vannana* and *Rasi*) which at first sight would seem to be to the contrary effect. They are given in section 46 of the Digest but the *Rasi* extract in section 46

1915.

MA SEIN TON v. MA SON.

shows that on partition the widow is to get three shares and the children one share, and as nothing is said about a special share for the eldest son it may be conjectured that this one-fourth share which goes to the children is the one-fourth share which the great majority of the Dhammathats gives to the eldest son. Some colour is given to this view by the extract from *Vilasa* in section 30 which says that "even if there are ten sons only one-fourth shall be given them." The case of a widow who re-marries is provided for in the texts in section 44 of the Digest. It does not concern us directly in the present reference, but I would point out that the texts in section 44 support the view that after the widow has set apart the specific property which descends to the eldest son, and the specific property that the eldest daughter gets, the remainder of the property is divided into four shares, of which the widow gets three. It is true that the *Yazathat*, the first Dhammathat cited in section 44, says the "younger children should be given half the deceased parent's share because the surviving parent has not remained single controlling the children as he or she ought to do." But this is shown to be only a moralp recept, for even this Dhammathat expressly states that the actual law is different, namely, that the younger children cannot share in the property till after the surviving parent's death. This rule is laid down in unmistakable terms in the texts in sections 34, 35, 47 and 48 of the Digest. The same rule is discernible in section 11 of the *Manukye*, Book X. In that section the consanguineous relations (*Pauk Paw*) who have to wait for the residue till the mother's death are clearly the younger children. It has been pointed out that section 11 is inconsistent with section 5 as it makes no provision for the eldest son's quarter share and the heading of section 11 speaks of "one-fourth which is to be divided amongst the children on the son's demanding his inheritance from his mother on the father's death." It can only be surmised that the compiler omitted inadvertently to provide in the body of the section for the eldest son's quarter share in addition to the specific property which goes to the eldest son. The eldest son's right to a quarter share in addition to the specific property is placed beyond doubt by *Manukye*, section 5, and the cognate texts in section 30 of the Digest.

In considering the extent of the widow's interest in the joint property, the learned Judges of the Special Court were apparently much influenced by section 26 of *Manu Wunnana*, which is translated on page 381 of the Selected Judgments. It provides that if a widow divides the joint property equally with her children and then re-marries, the children have no further claim to the property on her death. It goes wholly to the second husband. The cognate texts are to be found in sections 213 and 214 of the Digest. This rule is a very misleading guide for ascertaining the widow's interest in the joint property. It is merely a compromise. The texts in section 211 show that if the widow re-marries without partitioning the property her children by the first marriage could on her death claim from their step-father three-fourths of the property that was brought by her to the second marriage. In the case described in *Manu Wunnana*, section 26, in consideration of getting one-half immediately the children of the first marriage abandon their contingent claim to get three-fourths on their mother's death. This provision by no means shows, as the learned Judges of the Special Court seem to have thought, that the widow's interest in the joint property is confined to one-half. A safer guide in ascertaining the widow's interest was available to the learned Judges in section 29 of the same Dhammathat which is translated as follows on page 15 of Mr. Jardine's Notes on Buddhist Law, Ch. V, Inheritance and Partition, published in 1883 :—

"When the son and the father are dead, the surviving wife alone is entitled to the whole estate, and it is her duty to liquidate debts. She must also lay aside (a portion) for offerings, and if there be sons (children) unmarried, she must reserve a sufficient portion for the ceremony of washing the head, and such like purposes. Whatever remains the wife alone may apply to her own use" (1).

(1) The same section appears in section 48 of the Digest where the last sentence is translated as follows :—"Over the rest of the property she has merely the right of use." This would seem to imply that the widow cannot exhaust the property. But the Digest version of section 29 is not a correct translation of the Burmese or of the Pâli *gàtha* preceding it. The Pâli means—"The rest goes to her for consumption," the word used implying absolute ownership.

1915.

MA SEIN TON v. MA SON.

It may be noted that the *Manu Wunnana* was written in Pâli and Burmese about A.D. 1772 by Kyaw Din, an *Amat* or noble of the Court of King Sinbyuyin (3rd in succession from Alompra), and it is thus 20 years later than the *Manukye*. Mr. Jardine noted (Notes on Buddhist Law, Ch. V, Inheritance and Partition, p. 1) that it is extremely valued by the Burmese as a recent and authoritative statement of their law. It is less popular than the *Manukye* but only "for the obvious reason that it is written in the language of classical learning and a more difficult Burmese" (Forchhammer's Prize Essay, p. 105).

To sum up—the younger children are referred to as receiving the remainder of the joint property with the widow in only two of the texts in section 30 of the Digest and three in section 31; many of the texts say that the widow may exhaust the property in her life-time; only three of the texts in section 31 restrict the widow's power of disposal to necessitous circumstances and it is at least highly probable that the restriction in these texts applies only to the specified property assigned to the eldest daughter; the Dhammathats expressly debar the younger children from sharing in the inheritance till their mother's death and the *Manu Wunnana*, a Dhammathat of the highest authority, lays down that the widow has not to share with the younger children but has only to provide for them in a suitable manner; it is nowhere laid down that the younger children have "an ascertainable interest" in the joint property while their mother lives.

Although the *Manukye* and two other Dhammathats associate the younger children with the widow in taking three shares out of four when the eldest son claims partition, this provision must I think be interpreted as merely emphasizing the widow's natural duty of bringing up the younger children in a becoming manner, not as conferring on them any vested right in the joint property or as constituting the widow a trustee of some unascertained part thereof for their benefit.

Mr. May Oung draws attention to the extract from *Kungya* in section 30 of the Digest as explaining why the widow gets 3 shares out of 4. It runs as follows:—

"Husband and wife own property equally, that is to say, the husband is entitled to half the property and so is the wife.

On the death of either husband or wife, the survivor is entitled to half the share of the deceased. The other half is inherited by the children. In view of the above principle it is said that when the mother gets three shares out of four, the children shall get one share."

This statement of principles is however at variance with the general rule by which the one-fourth share is assigned to the eldest son and not to the children generally.

The real principle appears to be that the widow, who owned one-half of the joint property in her husband's life-time, inherits his half when he dies, and having thus become possessed of the whole can do as she likes with it subject to the claims of the eldest son and the eldest daughter.

As regards the eldest son, the Dhammathats allot to him certain specified property (his father's elephant, pony, betel box, etc.), property appertaining to the head of the family, in addition to a quarter share of the bulk of the joint property. There appears to be no reported case of an eldest son claiming anything more than his quarter share and it may be doubted whether the rule as to the specified property is not now obsolete. The question has not yet been judicially considered. It must also be noted that the eldest son can claim a quarter share from his mother only if he has attained the full status of *orasa* at the time of his father's death. Also, even if there is a son who is a competent *orasa* the widow has to give him the quarter share only if he claims it from her in time and does not elect to wait till her death and then share with the younger children.

As regards the eldest daughter's specified property also there is no reported case of any such claim and the extent to which such a claim could be judicially recognized has yet to be decided. The provisions of the *Manukye* and other Dhammathats in section 31 of the Digest are definitely in favour of such a claim; but there is reason to doubt whether the specified property was intended to be given in all cases. The nature of the property (slaves, cattle, seed, grain and, according to some texts, a *pe* of land) seems to indicate that the daughter would get it only on marrying and setting up house apart from her mother and not so long as they live together, and I have

1915.

MA SEIN TON v. MA SON.

referred to certain texts which support this view (including the *Manu Wunnana*). As noted above it seems that the mother is allowed to exhaust the specified property for necessary subsistence and from this it would follow that the mother can retain it in her possession in case the necessity for consuming it should arise. The daughter's claim is therefore at best a precarious one, and there are some texts in sections 36 and 38 of the Digest which go so far as to say that the daughter is entitled only to what has been actually given to her by her parents.

I would answer the reference in this case as follows :—

Subject to any claim by the eldest son to certain specified property and to a quarter share of the joint property, and any claim by the eldest daughter to certain specified property, a Burmese Buddhist widow has an absolute right of disposal over the whole of the joint property of herself and her late husband as against the children of their marriage.

Parlett, J.—Having had the advantage of reading Mr. Justice Twomey's judgment I can find but little to add to his exhaustive analysis of the texts of the Dhammathats dealing with the question referred. Those which have the most important bearing upon it are collected in sections 30 to 33 of the Kinwun Mingyi's Digest. Those in sections 30 and 31 are directly in point, dealing as they do with partition between respectively mother and son and mother and daughter on the death of the father. The texts not only prescribe the manner in which the partition should be effected but also indicate the conditions under which the right to claim it arises, and show, I think, clearly that the death of one parent is not the only condition necessary. Several of those in section 30 commence with some such proviso as 'if the son is the *orasa*' or 'if the son is one who is competent to assume the duties and responsibilities of his father.' The nature of the property to be given to him also shows that the rule presupposes that the son succeeds to his father's position as head of the family and to his office if he held one. Thus he is allotted the household furniture and, according to *Manu Wunnana*, the family house and house-site; he also gets land held as an emolument of office. In this connection I may note that most of the texts

specify no other classes of lands than these, though some of them give the son in addition the lands worked by his father and some refer merely to lands in general. On the other hand I find only two texts, *Dhammathat Kyaw* and *Kyannet*, which mention any land at all as going to the mother. I think this points to a condition of affairs, not, I believe, very remote in some parts of Upper Burma, when all land was held either in return for service to the state or on a village communal system, in either of which cases it would naturally pass to a son succeeding to his father's position.

Similarly in several of the texts in sections 31, 32 and 33, in more of them than the English version indicates, the son or daughter entitled to partition is given as the eldest. Section 32 explains that the reason for allowing the son a share is to give him a fitting start in life. Nothing I think could be plainer than that these texts give no right to claim a partition to any but a grown up son or daughter and that the eldest. Several of them distinctly refer to the existence of other children than the one whose right to a share is declared. In some the English translation does not accurately reproduce the plural number which is used in the Burmese version. It appears therefore that the rule they lay down applies whatever the number of children may be and that none but the eldest, and that only if grown up, can claim a partition. This I think is made even clearer by the provisions of sections 34 and 35 which lay down that children other than the eldest son or daughter are entitled to a partition only when both parents are dead; an exception to this is however made when one parent having died the survivor remarries, sections 44 to 46.

Sections 36 to 43 profess to deal with partition between a surviving parent and children living together or separately, but it can hardly be said that they really confer any such right. In the case of children living with the parent they can get nothing whilst he or she lives, nor can they protest if the estate is exhausted and nothing is left for them to inherit on the second parent's death. A son or daughter living separately is merely allowed to retain property already given by both parents; the surviving parent obtains all the joint property

1915.

MA SEIN TON v. MA SON.

and any residue there may be on that parent's death goes to the children living with him or her.

I think therefore that the following rules may be deduced. On the death of one parent the surviving parent inherits all their joint property; if however the eldest son or daughter is grown up he or she is entitled to certain specified property of the deceased parent and in the case of the eldest son to a one-fourth share of the bulk of the estate; unless the surviving parent remarries none of the other children are entitled to claim anything until that parent's death; nor do the texts indicate that such children have an interest in the property, though their right to partition is postponed till the death of the surviving parent; such a principle would I think be foreign to Burmese Buddhist Law and on the contrary many of the texts make it clear that the children cannot protest if the property is exhausted before the right to claim a partition accrues.

I concur in Mr. Justice Twomey's answer to the reference.

Fox, C.J.—I also concur in the answer proposed by Mr. Justice Twomey to the modified question under reference.

My learned colleagues are in a more advantageous position by reason of their knowledge of the Burmese language than Sir John Jardine, Mr. Meres and Mr. MacEwen were in when they had to consider the meaning of texts bearing on the question. The Kinwun Mingyi's collection of texts from various Dhammathats was not available when the hitherto leading case of *Ma On v. Ko Shwe O* was decided. Errors in Richardson's translation of the *Manukye* have been discovered. Under the circumstances I do not think we are offending against any principle or rule of law in reconsidering the question decided in that case.

The exhaustive examination of the texts in the judgments of my learned colleagues justifies departure from a ruling which, although given nearly thirty years ago and followed in Lower Burma ever since, is now shown not to be accurate in all respects.

PRIVY COUNCIL.

(ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.)

Before Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

Privy Council Appeal Nos. 79 and 80 of 1914.

MAHOMED ISMAIL ARIFF AND OTHERS *v.* HAJEE AHMED MOOLLA DAWOOD AND ANOTHER.

MAHOMED ISMAIL ARIFF AND OTHERS *v.* MAHOMED SULEIMAN ISMAILJEE AND OTHERS.

Civil Procedure Code, 1908, *section* 92—*trust scheme—Mussulman Law—wakf.*

Alike under Mussulman law and the provisions of section 92 of the Civil Procedure Code (1908), the Court has a very wide discretion in dealing with questions of "wakf" or trust. It is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the trust institution, and the way in which the management has been carried on hitherto, in conjunction with other existing conditions that may have grown up since its foundations, and it may lay down any rules which may facilitate the work of management.

Ibrahim Esmael v. Abdool Carrim Peermamode, L.R. 35 I.A., 151, distinguished.

The judgment of their Lordships of the Privy Council was delivered on the 15th May 1916.

Mr. Ameer Ali.—The suit which gives rise to these consolidated appeals was brought in the Chief Court of Lower Burma in its original civil jurisdiction, under the provisions of section 539 of Act XIV of 1882, for the appointment of trustees and the settlement of a scheme of management in respect of a mosque, situated in the city of Rangoon. The plaintiffs in the action are five Mahomedan worshippers at the mosque, who trace their origin to a place called Randher, said to be a suburb of the city of Surat in the Bombay Presidency, and in the earlier stages of these proceedings they appear to have claimed it as a Randheria mosque. It is, however, conceded now that it is a public mosque dedicated to the performance of religious worship by all Sunni Mahomedans without restriction as to place of origin, and that it is commonly known as the Sunni Juma Musjid.

To explain the contest between the parties it is necessary to give a short summary of the circumstances that have led to this unfortunate litigation. Like many other places

1914.

MAHOMED ISMAIL ARIFF v. HAJEE AHMED MOOLLA DAWOOD.

MAHOMED ISMAIL ARIFF v. MAHOMED SULEIMAN ISMAILJEE.

in Burma, Rangoon is inhabited by a large number of Mahomedan emigrants from various parts of India who have domiciled themselves in the country for purposes of trade, and are generally known by the names of the towns or villages whence they originally came. For example, the plaintiffs, as already stated, derive their origin from Randher and, therefore, call themselves Randherias: whilst the larger community of Suratis or Soortees come either from the city or district of Surat. It is necessary to bear this in mind, as the mosque in question is sometimes called the Surati mosque. The Randherias, though trying to differentiate themselves from the others, form in reality a section of the Surati community. They are mostly Voras, and they all profess the Sunni doctrines.

It appears that the site of the present mosque was formerly occupied by a bamboo structure built in 1854 by one Moolla Hashim, a native of Randher. It was dedicated to the same purpose, and bore the same name as the present masonry mosque. Divine worship was performed here by all Sunni Mahomedans until it was burnt down three years later, when Moolla Hashim replaced it with a building made of wooden planks. This continued to be the public place of worship until 1872, when the masonry mosque was erected.

The land on which the mosque was first built appears to have been afterwards added to by purchases made by Moolla Hashim or by his fellow-townsmen, who made the same over to him as the custodian of the mosque. In 1862 one Moolla Ibrahim, a brother of Moolla Hashim, and two persons of the names of Golam Moideen Moollah and Cassim Azim, obtained from the Government a grant in respect of certain other plots on the express trust "to build and maintain thereon a mosque or place of worship for and to the use of all persons professing the Sunni sect of the Mahomedan religion."

These lands were also added or attached to the existing mosque, and shops were built there to yield an income for its maintenance.

In 1864, Moolla Hashim went on a pilgrimage to Mecca, leaving the management of the mosque in the hands of Moolla Ibrahim and the two persons already mentioned. He returned to Rangoon in 1866, but never resumed his management of the

mosque. At this time the person in charge was one Mahommed Hashim Mehtar, who also is said to have been a native of Randher.

In 1870, the Government, finding that no mosque had been built on the lands granted in 1862, and that on the contrary shops had been erected thereon, issued a notice on the grantees to show cause why those lands should not be resumed. A meeting was thereupon held, apparently at the instance of the Randherias, of all the Sunni Mahomedans entitled to worship at the mosque, and it was decided to buy outright from the Government the land, and build on it a proper masonry structure suitable to the growing needs of the community. Although there is some dispute with regard to the contributions of the general body of Sunnis apart from the Randherias, it may be taken as fairly uncontroverted that the bulk of the fund was subscribed by the Randheria section of the worshippers. The conveyance was taken in the names of five persons, named respectively Dooplay, Ariff, Pattal, Mohammed Hashim and Ebrahim Ali Moolla, and these men in 1872, whilst the masonry mosque was in course of building, purported to create a new dedication.

The trust deed bears date the 16th March 1872, and after reciting that it was made between the persons named above, of the one part, and one Mohammed Hashim, representing the general Sunni Mussulman community, of the other part, proceeds to declare that "the pieces or parcels of land upon a certain portion of which the Sunni Jamaet Musjid is erected, or is in the course of being built, together with the godowns attached thereto, are solely dedicated for the purpose of divine worship." It then goes on to provide *inter alia* that its management shall remain exclusively in the hands of the Randheria Jamaet (people or assembly).

The five persons in whose names the conveyance stood and who had executed the trust deed appear to have carried on the management for several years; in course of time some dropped out and others came in as trustees. How these men were placed in charge of the management of the mosque is not clear, for apparently no meeting of the Randheria Punchayet was held until 1894, and none between 1894

1914.

MAHOMED ISMAIL ARIFF v. HAJEE AHMED MOOLLA DAWOOD.

MAHOMED ISMAIL ARIFF v. MAHOMED SULEIMAN ISMAILJEE.

and 1906, nor in fact had the Randherias any "organised association" with written rules for the purpose of giving effect to the wishes of their section of the community.

Matters remained in this condition until 1908, when disputes arose regarding the validity of the election of one Hashim Yacub Ally as a trustee in place of another Randheria, who had died the year before. It was in consequence of the quarrels among the Randherias themselves in connection with the election or appointment of this man, that the present suit was launched in the Chief Court of Lower Burma. The original defendants to the action were four persons who were actually managing the mosque as trustees, but the validity of whose appointment as such was impugned by the plaintiffs. In addition three others were joined as defendants ostensibly to represent the Randheria section, but in reality, as the trustee defendants charge, to represent the plaintiffs' faction.

On the institution of the suit notices were issued by the Court under section 30 of the Civil Procedure Code to all persons entitled to worship at the mosque. Thereupon defendants 12 and 13, representing the general body of Sunni worshippers, and defendants 8 to 11 claiming to represent the Surati community, and 14 to 17 the other Randherias appeared and applied to be joined as parties. Each set of defendants has filed a separate defence. Although the trustee defendants deny the plaintiffs' allegation that the mosque in question is a Randheria mosque, and affirm the validity of their and Hashim Yacub Ally's appointments as trustees, they associate themselves with the plaintiffs and their Randheria co-defendants in claiming that the right of management of the mosque belongs exclusively to their party. And they ask that the scheme, if any is to be framed, should be framed on that basis.

The defendants 12 and 13, who represent the general body of worshippers, controvert in substance the right of the Randherias to a monopoly of the management as opposed to the whole nature of the trust; and they claim that as the mosque is dedicated to the performance of public worship by all Mahomedans of the Sunni persuasion, now that a scheme is proposed to be settled under the direction of the Court they should be allowed a voice in its administration.

1914

MAHOMED ISMAIL ARIFF v. HAJEE AHMED MOOLLA DAWOOD.

MAHOMED ISMAIL ARIFF v. MAHOMED SULEIMAN ISMAILJEE.

The suit proceeded to trial before Mr. Justice Robinson, and the whole dispute centred round two points, *viz*:—

1. The effect of the trust deed of 1872, and

2. Whether the Randherias should or should not have the sole and exclusive charge and management of the mosque.

The Randherias rested their case on the trust deed of 1872; they contended that it created a new trust and that the founders, namely, the five persons in whose names the land had been purchased from the Government, were entitled to provide that the management should remain exclusively in the hands of their own section of the community. The learned Trial Judge states their contentions in the following terms:—

"It is urged that the original mosque was created by a Randheria; that the original grant was revoked and the lands sold outright to Randherias, that they thus became the creators of the trust and were at liberty to make any lawful condition they pleased as to the management of the trust."

And his decision is expressed in these words:—

"The position in 1871, then, was that the five vendees became the absolute and untrammelled owners of these two plots and could do with them as they pleased. . . . . They became the owners of the mosque, shops, and lands, and created a trust of them. It was undoubtedly open to them to manage the trust themselves or to lay down the manner in which it was to be managed, and this they did in Exhibit C."

He accordingly came to the conclusion that the Randheria party were exclusively entitled to the management of the mosque.

On appeal by the respondents in the first and second appeals respectively, the learned Judges of the Chief Court, differing from the Trial Judge, held in substance that the lands which were purchased by or in the names of the five persons in 1871 were acquired by them as trustees for the purposes of the existing mosque and subject to the trust therefor; and that nothing that took place in 1871 or 1872 had the effect of cancelling, or could in law cancel, the original trust; and that as the original trust was for the benefit of all persons

1914.

MAHOMED ISMAIL ARIFF v. HAJEE AHMED MOOLLA DAWOOD.

MAHOMED ISMAIL ARIFF v. MAHOMED SULEIMAN ISMAILJEE.

"professing the Sunni sect of the Mahomedan religion," they thought that "all Sunni Mahomedans were entitled to a voice and control of the Juma Musjid of Rangoon."

The plaintiffs and the trustee defendants have appealed to His Majesty in Council, and the same contention that was put forward in the Courts below, based on the document of 1872, has been urged on their behalf. It has further been contended that under the Mahomedan law the Court has no discretion in the matter and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or *mutwallees*. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussulman law like the English law draws a wide distinction between public and private trusts. Generally speaking, in case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the Kâzi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kâzi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution.

Illustrations of this rule are to be found in almost every work on Mussulman law. And the authorities lay down that, "were the *wakif* (the founder) to make a condition that the King or Kâzi should not interfere in the management of the *wakf*, still the Kâzi will have his superintendence over it, for his supervision is above everything."

Their Lordships agree with the Chief Court that the transactions which took place in 1871 and 1872 in no way affected the existing trust, and that the trust deed of 1872 did not create a new dedication; the mosque remained as heretofore a public mosque, dedicated to the performance of worship by all Sunni Mahomedans as originally founded.

In their Lordships' opinion, the real point in issue in the case, owing probably to the nature of the pleadings, has to some extent been missed by the Courts in India. It has been treated as a question involving the determination of conflicting rights rather than a consideration of the best method for fully and effectively carrying out the purpose for which the trust was created. The suit is brought under section 539 of the Code, which vests a very wide discretion in the Court. It declares (omitting the parts not material to this case) that—

"whenever the direction of the Court is deemed necessary for the administration of any express or constructive trust created for public, charitable, or religious purposes, the Advocate-General, acting *ex-officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court, or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

(*a*) appointing new trustees under the trust;

(*e*) settling a scheme for its management;

or granting such further or other relief as the nature of the case may require."

In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future.

1914

MAHOMED ISMAIL ARIFF v. HAJEE AHMED MOOLLA DAWOOD.

MAHOMED ISMAIL ARIFF v. MAHOMED SULEIMAN ISMAILJEE.

In the present case, Moolla Hashim, although he was assisted by several of his compatriots in acquiring the land on which the bamboo mosque was built, was to all intents and purposes its original founder; in 1857, when the bamboo structure was burned down, he replaced it with a plank building; he and his Randheria fellow-townsmen held the *mutwalleeship* until 1871. Since that date also the management has been carried on by people belonging to Randher. In 1862, the lands were purchased with money supplied by them; and in 1871 the bulk of the money appears to have come from the same source. It is not alleged that they have mismanaged the trust or committed any dereliction of duty, or tried to introduce innovations in the services, or otherwise interfered with the rights of the general body of worshippers. In these circumstances it seems to their Lordships, in the exercise of the discretion which the Mussulman law vests in the Kâzi, that the Randheria section of the worshippers, all other conditions being equal, are preferably entitled to the *mutwalleeship* of the mosque. With regard to the case of *Ibrahim Esmael v. Abdool Carrim Peermamode* (1), which has been relied upon on behalf of the respondents, their Lordships deem it sufficient to say that the facts to which they have referred differentiate it widely from the present case.

The present case, however, in their Lordships' opinion, illustrates the mischief of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, whether they call themselves *Punchayet* or *Jamaet*. In order to avoid so far as possible a recurrence of the trouble that has brought about this long-drawn litigation, their Lordships think it desirable, in the interests of the institution which form the primary matter for consideration, that the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which should be in the discretion of the Judge, with due regard to local conditions and needs, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Judge should lay down rules for their guidance in the discharge of any supervisitorial functions that it may

(1) L.R. 35 I.A., 151.

appear necessary to confide to them and for filling up vacancies on their body subject to his control.

Their Lordships are accordingly of opinion that the orders of the Courts of India should be discharged and that the case should be remitted with the following declaration and directions to the Chief Court of Lower Burma to deal finally with the matter: That all other conditions being equal, the Randheria section of the worshippers are preferably entitled to manage and act as trustees of the Sunni Juma Musjid of Rangoon; that the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which committee should be in the discretion of the Court, with due regard to local needs and conditions, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias: and that in settling the scheme the Court should lay down rules for the guidance of the committee in the discharge of any supervisitorial functions that it may appear necessary to confide to them, and for filling up vacancies on their body subject to its control.

As regards the costs in the Courts below, the trustee-defendants will have their costs out of the funds of the institution; the rest of the parties will bear their own costs.

The parties will bear their own costs of these appeals.

And their Lordships will humbly advise His Majesty accordingly.

Civil 1st Appeal No. 14 of 1915.

June 19th, 1916.

Before Sir Charles Fox, Chief Judge, and Mr. Justice Twomey.

1. ANNAMALAI CHETTY, 2. RAMANATHAN CHETTY, 3. CHINNA KURPEN CHETTY, 4. ARUNACHELLUM CHETTY, 5. PALLANIAPPA CHETTY, MINORS BY THEIR NEXT FRIEND AND NATURAL GUARDIAN THE 1ST PLAINTIFF, 6. MUTHU VEERAPPA CHETTY, ALL CARRYING ON BUSINESS IN PARTNERSHIP IN RANGOON UNDER THE MARKS OF M. A. R. R. M. BY ITS ATTORNEY M. A. R. R. M. R. M. SOMASOONDRUM CHETTY *v.* 1. M. L. R. M. LUTCHMAN CHETTY, A MINOR BY HIS MOTHER AND NATURAL GUARDIAN MENATCHI ACHI, 2. A. L. A. S. SOLIAPPA CHETTY, 3. ANNAMALAI CHETTY, 4. VISVANATHAN CHETTY, 5. SOLIAPPA CHETTY, MINORS BY THEIR FATHER AND NATURAL GUARDIAN A. L. A. S. SOLIAPPA CHETTY, 6. A. L. A. S. KASI CHETTY ALIAS ANNAMALAI CHETTY, 7. A. L. A. S. ALLAGAPPA CHETTY, 8. ANNAMALAI CHETTY, A MINOR BY HIS FATHER AND NATURAL GUARDIAN THE 7TH RESPONDENT, 9. A. L. A. S. SWAMINATHAN CHETTY ALIAS ARUNACHELLUM CHETTY, 10. A. L. A. R. M. RAMEN CHETTY, 11. SOMASOONDRUM CHETTY, A MINOR BY HIS FATHER AND NATURAL GUARDIAN THE 10TH RESPONDENT.

Doctor—for appellants.
Chari—for 1st respondent.

Indian Limitation Act, IX of 1908, *1st Schedule, Articles* 57, 115—*Loan on "Thavanai" account.*

The article of the 1st Schedule to the Limitation Act that applies to a loan on a Chetty's "Thavanai" account is Article 57, and the period of limitation begins to run from the date when the money was lent.

In the original plaint the suit was described as a "Suit to recover Rs. 6,306-9-3 due on 'Thavanai account'." It was stated in it that prior to the 13th March 1911 the defendants (the firm of M.L.R.M.A.) had borrowed from the plaintiffs certain moneys on Thavanai account which was an account with two-monthly rests: that on the above date the old account was credited in the defendants' books with all principal and

1916.

ANNAMALAI CHETTY v. M.L.R.M. LUTCHMAN CHETTY.

interest due up to that date, and a fresh account was opened showing the amount then due to the plaintiffs, a statement of the amount being sent to them.

The amount claimed in the suit was for that amount *plus* interest at the Thavanai rate from the abovementioned date. The cause of action was stated to have arisen on the expiry of two months from the same date.

The plaint was allowed to be amended, and in the amended plaint the statements were to the effect that about 15 years previously the plaintiffs appointed the defendant firm their agents for the purpose of lending out moneys for them on a commission for their services, and sent them moneys for investment which they lent to themselves on a Thavanai account. On the 13th March 1911 there was according to copies of entries in the defendants' firm's book Rs. 5,749-8-6 due to the plaintiffs on that account. The cause of action was in this plaint stated to have arisen on the dissolution of the defendants' firm in 1910.

The suit was instituted on the 6th November 1912. The propriety of the order allowing such an amendment or alteration of the plaint is open to question, but this matter is immaterial since the evidence failed to prove any case of agency as alleged in the amended plaint.

It is clear that the defendant firm had at some time received money from the plaintiffs on the ordinary Thavanai terms prevalent amongst Chetty firms.

When the case came before us first it was argued for the plaintiffs that the article of the Limitation Act applicable to the case was Article 60 of the 1st Schedule as being a suit for money deposited under an agreement that it shall be payable on demand, or in the alternative that Article 115 applied. This last article governs a suit for compensation for the breach of any contract express or implied not in writing registered and not specifically provided for elsewhere in the Schedule.

The evidence as to the terms of the Thavanai contract between Chetties being meagre, we called for further evidence as to these terms from Chetties unconnected with the case. A number of representatives of different firms have been examined. The evidence leaves no doubt that the relationship between

1916.

ANNAMALAI CHETTY v. M.L.R.M. LUTCHMAN CHETTY.

the parties to a Thavanai transaction is that of lender and borrower, that the loan is made for a fixed and certain period of two months at a rate of interest which is fixed weekly by members of the Chetty community for transactions which may be entered into during the ensuing week, that the lender cannot demand repayment before the end of the two months for which he has lent the money, that if he does not demand it at such time and the borrower does not elect to repay it then the loan is taken to be extended for another full two months at the rate of interest fixed by the weekly meeting of the community for the then period, and so on until the money is repaid.

It has been argued for the plaintiffs that under such circumstances each renewal must be regarded as constituting a fresh loan, and that limitation only begins to run against the lender from the start of the last renewal, but the terms on which the loan is made are those adopted initially and they apply even when nothing is said or done on either side. We cannot accede to the argument that a new contract is made at the start of each Thavanai period during which the borrower holds the money lent.

Article 60 cannot apply because the money is not payable on demand according to the legal meaning of those terms.

It is difficult to see how Article 115 could in any case apply, but it certainly does not do so if some other article applies.

It appears to us that Article 57 which governs a suit for money lent applies, and that the limitation period began to run from the time when the money was lent.

There is no evidence in this case as to when the money was lent. The earliest extract from the defendant's accounts produced show that the account was in existence in July 1907, but it does not show, and it would not in any case be sufficient to show, that the money was lent then.

We hold that the dismissal of the suit on the ground that the plaintiffs failed to prove that their suit was brought within the period of limitation applicable to it was correct.

The appeal is dismissed with costs payable to the 2nd defendant only, he being the only respondent who appeared by advocate.

Before Mr. Justice Twomey.

PO ON *v.* KING-EMPEROR.

Criminal Revision No. 239B of 1916.

August 31st, 1916.

Maung Ba Kya—for applicant.

Maung Kin, Assistant Government Advocate—for King-Emperor.

Burma Gambling Act, section 4—" ket " not a game of mere human skill.

The Burmese game " ket " is not a game of mere human skill.

It is clear from the evidence in this case that the " ket " gambling was carried on outside the house on the ground and the conviction of the applicant Po On under section 12 of the Gambling Act was therefore incorrect.

Apart from this mistake there is in my opinion no ground for interfering in revision. It cannot be held that " ket " is a game of mere human skill under section 4 of the Act. The evidence as to the actual gambling is sufficient.

The applicant was liable to conviction under section 10 for playing for money with instruments of gaming (*i.e.*, playing cards) in a place to which the public have access. He has already served about 12 days' imprisonment which seems a sufficient punishment.

The conviction of the applicant Po On is altered to one under section 10, Gambling Act, and the sentence to imprisonment for the period which he has already undergone.

FULL BENCH.

Before Sir Charles Fox, Chief Judge, Mr. Justice Ormond and Mr. Justice Twomey.

Civil Reference No. 6 of 1916.

In re A. W. JAMAL *v.* CYRIL BROWN.

September 4th, 1916.

Halkar—for Jamal.

Guy Rutledge, Government Advocate—for King-Emperor.

Court Fees Act, section 17—distinct subjects—ejectment—rent—damages for wrongful occupation.

A claim for possession of a house by ejectment of a tenant and a claim for damages for use and occupation after the tenancy has been terminated by legal notice are not distinct subjects within the meaning of section 17 of the Court Fees Act. A claim for rent due however is a distinct subject.

Reference under the Court Fees Act, (1894) I.L.R. 16 All., 401; *Kishori Lal Roy v. Sharut Chunder Mozumdar*, (1882) I.L.R. 8 Cal., 593;

1916.

In re A. W. JAMAL *v.* CYRIL BROWN.

Civil Regular Suit No. 192 *of* 1916.

August 3rd, 1916.

Venkoba v. Subbanna, (1887) I.L.R. 11 Mad., 151; *Durga Prasad v. Purandar Singh*, (1904) I.L.R. 27 All., 186; *Chedi Lal v. Kirath Chand*, (1880) I.L.R. 2 All., 682; *Ma Nyein v. Ma Kon*, 3 L.B.R., 56—referred to.

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

The plaintiff seeks a decree (*a*) for ejectment, (*b*) for rent due and (*c*) for use and occupation at the same rate from date of expiry of notice to quit. The question is whether these form " distinct subjects " within the meaning of section 17 of the Court Fees Act.

The decisions on these questions are confused. They are considered in a *Reference under the Court Fees Act* (1) in respect of a suit for possession by ejectment and also for damages for use and occupation. It was held in the above-mentioned case and in *Kishori Lal Roy v. Sharut Chunder Mozumdar* (2) and also in *Venkoba v. Subbanna* (3) that there are not distinct subjects and that section 17 of the Act does not apply—see also *Durga Prasad v. Purandar Singh* (4). In *Chedi Lal v. Kirath Chand* (5) the contrary view was taken by a Full Bench. I would hold that there are not distinct subjects, the cause of action being the same, namely ownership or wrongful possession or holding over by the defendant. Where however there is also a claim for rent the cause of action is ownership coupled with a contract of tenancy still subsisting and possession thereunder that is not wrongful.

The matter is one that is frequently arising and as the matter is one of some difficulty I refer the following question for decision by a Bench :—

Does a suit for possession of a house or part thereof by ejectment of the tenant coupled with a claim for rent accrued, due before the tenancy is terminated, and also a claim for damages for use and occupation after the tenancy has been terminated by due legal notice, embrace distinct subjects within the meaning of section 17 of the Court Fees Act ?

(1) (1894) I.L.R. 16 All., 401.
(2) (1882) I.L.R. 8 Cal., 593.
(3) (1887) I.L.R. 11 Mad., 151.
(4) (1904) I.L.R. 27 All., 186.
(5) (1880) I.L.R. 2 All., 682.

1916.

In re A. W. JAMAL *v.* CYRIL BROWN.

The opinion of the Full Bench was as follows :—

Fox, C.J.—In my opinion the claims for possession and for damages for use and occupation after the tenancy has been terminated are not distinct subjects within the meaning of section 17 of the Court Fees Act, because such claims should properly be included in one suit on the analogy of what was decided in *Ma Nyein v. Ma Kon* (1). The claim for rent due however is a distinct subject in my opinion, because a separate suit could be brought for that. It is a subject which arises out of the contract of tenancy, whereas the claim for possession and damages or mesne profits arises out of the tenancy having come to an end, and the defendant wrongfully remaining in occupation.

Ormond, J.—I concur.

Twomey, J.—I concur.

Before Sir Henry Hartnoll, Officiating Chief Judge.

MAUNG MAUNG GYI *v.* SEIN NYUN.

Civil Miscellaneous Application No. 32 of 1914.

May 16th, 1914.

Ba Dun—for applicant.

Legal Practitioners' Act, XVIII of 1879—unauthorised practice.

The proper procedure to be adopted with regard to a person alleged to be practising as pleader in contravention of the provisions of section 10 of the Legal Practitioners' Act is that prescribed in section 32 of the Act.

Tussuduq Hosain v. Girhar Narain, (1887) I.L.R. 14 Cal., 556, referred to.

On the 11th February last Maung Maung Gyi, a Barrister, complained to the Deputy Commissioner, Tavoy, that one Maung Sein Nyun had been appearing before the Courts at Tavoy without holding a pleader's license. The petition set out Maung Sein Nyun's alleged practice. No specific relief was asked for but the Deputy Commissioner in his capacity as District Judge passed the following order :

"That I presume that litigants allow Maung Sein Nyun to conduct only those cases which they consider do not require the advice of a professional pleader or advocate and that I am not prepared to interfere with the discretion of the Judges under the proviso to Rule 1, Order III, First Schedule, Civil Procedure Code."

Maung Maung Gyi now applies for a revision of this order and asks that Maung Sein Nyun be barred from appearing in

(1) (1905) 3 L.B.R., 56.

1914.

MAUNG MAUNG GYI v. SEIN NYUN.

any case, Civil or Criminal, in any Courts except in cases in which he himself is the actual party.

It does not appear that Maung Maung Gyi ever drew the attention of the District Judge to the provisions of sections 10 and 32 of the Legal Practitioners' Act (XVIII of 1879) nor did he ask that action be taken under section 32 of the Act. His petition was one to the Deputy Commissioner and did not state what action was required. He has filed before this Court a list of cases in which Maung Sein Nyun is alleged to have appeared in the Additional District Court and Township Court, Tavoy. I think that the proper course for him to pursue will be to file a proper petition before the District Court, Tavoy, asking that Maung Sein Nyun be punished under section 32 of the Legal Practitioners' Act, and then notwithstanding the order already passed by him the District Judge should proceed to adjudicate on the matter. The point seems to be whether Maung Sein Nyun is not usurping the functions of a pleader and practising as one in contravention of the provisions of section 10 of the Act in which case he is liable under section 32 *or* whether his appearances are covered by the provisions of Order 3, Rule 1, First Schedule of the Civil Procedure Code. It should be noticed that Order 3, Rule 1, says: "except where otherwise expressly provided by any law for the time being in force." The judgment in the case of *Tussuduq Hosain v. Girhar Narain* (1) can be usefully read in connection with any petition that may be filed against Maung Sein Nyun.

Before Mr. Justice Parlett.

N. M. DEY *v.* KING-EMPEROR.

N. C. Sen—for applicant.

Criminal Revision No. 170B of 1915.

August 23rd, 1915.

Poisons Act, I of 1904, *section* 10, *clause* (*b*)—*Chemist's qualifications.*

A person claiming exemption under section 10, clause (*b*), from the operation of the Poisons Act must prove not only that he has the qualifications necessary as a preliminary to his registration as chemist or druggist in the United Kingdom, but also that he has actually been registered.

The petitioner was prosecuted for selling 1 lb. of Cyanide of Potassium in contravention of the rules made under section 2 of the Indian Poisons Act, 1904 (I of 1904), and published as Judicial

(1) (1887) I.L.R. 14 Cal., 556.

Department Notification No. 24, dated 8th February 1909. He holds a diploma as qualified medical practitioner granted at Bombay but he is also a chemist and druggist. It is quite clear he did not make the sale in exercise of his profession as a medical practitioner, so that the exemption granted by clause (*a*) of section 10 of the Indian Poisons Act did not apply. At the trial he also admitted that he was not duly qualified to act as a chemist and druggist under the law for the time being in force in the United Kingdom, and accordingly the exemption granted by clause (*b*) of the same section did not apply to him and he pleaded guilty, and was convicted and fined Rs. 51.

His application for revision was admitted because it was stated that the admission of his non-qualification as a chemist and druggist under the law in force in the United Kingdom was made under a misapprehension, and that he was in fact so qualified, and I allowed the matter to be argued so that it might be shown, if it could be, that he was so qualified. Reference was made to 31 and 32 Vict., Cap. CXXI, and 32 and 33 Vict., Cap. CXVII. The general effect of those enactments appears to me to be that it is unlawful for a person in any part of Great Britain to sell poisons unless he is registered as a chemist and druggist under 31 and 32 Vict., Cap. CXXI, or has been registered as a legally qualified medical practitioner, or falls into certain other classes which have no application to the present case. The petitioner is admittedly not registered as a chemist and druggist under 31 and 32 Vict., Cap. CXXI, nor is he registered as a legally qualified medical practitioner within the meaning of section 1 of 32 and 33 Vict., Cap. CXVII, but it is said that he possesses qualifications which would entitle him to be so registered. The provisions of the English Acts however appear to me to be clear and to require the registration of a person in one or other capacity before he can sell poisons under the law in force in the United Kingdom. Not being so registered, petitioner is not qualified to act as a chemist or druggist under the law in force in the United Kingdom, and he cannot claim exemption under clause (*b*) of section 10 of the Indian Poisons Act.

A point was also raised in argument that as the rules apply only to sales by retail they were not infringed in the present case as the sale in question was wholesale. The rules it is true

1915.

N. M. DEY v. KING-EMPEROR.

apply only to retail sales, and apparently wholesale sales remain uncontrolled. The only ground suggested for holding the sale in this case to have been wholesale is that the bottle in which the poison was sold was unopened. That however is a manner in which ordinary retail sales of drugs are commonly made, and the argument has no force. That act and rules do not define retail and wholesale sales, but I feel no doubt whatever that the present sale was retail. It was of only 1 lb. of cyanide, and was combined with a sale of 1 lb. of nitric acid, certainly a small quantity for commercial purposes: it was for cash and was not made to an ostensible dealer who meant to retail it to others, but to some unknown person, evidently either the counterfeit coiner Ah Chaung himself, or an emissary of his. It was certainly retail.

As regards the sentence, I do not consider it unduly severe. The facts of the case show the need of regulating such sales and the fact that the rules have hitherto been commonly broken is no ground for special leniency. The application is dismissed.

Criminal Revision No. 275B of 1915.

October 2nd, 1915.

Before Mr. Justice Ormond.

KING-EMPEROR *v.* MI WA.

Criminal Procedure Code, 1898, *section* 195—*sanction to prosecute—Indian Penal Code, section* 211—*criminal proceedings.*

The "criminal proceedings" contemplated in section 211 of the Indian Penal Code are proceedings in Court, and sanction to a prosecution for an offence under that section can only be given by a Court.

The following reference under section 348 of the Code of Criminal Procedure was made to the Chief Court of Lower Burma by the Sessions Judge of Bassein Division:—

Order of Reference.

For the reasons given in my judgment in Criminal Appeal No. 676 of 1915 of this Court, a copy of which is hereto annexed, I submit this case to the Chief Court with a recommendation that the conviction and sentence passed on Mi Wa be set aside and that she be ordered to be retried by either the District Magistrate or the Special Power Magistrate of Myaungmya under section 211 of the Indian Penal Code.

1915.

KING-EMPEROR v. MI WA.

Judgment in Criminal Appeal No. 676 of 1915.

The appellant has been convicted on her own plea under section 182, Indian Penal Code, and has been sentenced to four months' rigorous imprisonment.

In actual fact the offence that appellant admits is not one under section 182 at all. She went to the police-station and laid an information charging two men with raping her. She now admits that this charge was entirely false. Her offence therefore clearly falls under section 211, Indian Penal Code, and in my opinion it is punishable under the last part of that section with imprisonment which may extend to seven years, and is triable only by the Court of Session. There is perhaps a technical question involved here since some of the Indian High Courts appear to have held that a false charge which does not go beyond the police is not punishable under the last part of section 211. I do not think it is necessary to go into this question, for it seems to me that in any case the appellant should be tried under section 211 and not under section 182. The case should be tried as a warrant case and the facts fully investigated. As matters now stand no evidence has been taken and it is impossible to say whether the sentence passed is appropriate or not. *Primâ facie* the sentence is inadequate for such a serious offence, even allowing for the youth of the appellant.

However, I do not think that this Court has any power to interfere with the *conviction* and to order a retrial. Under section 412, Criminal Procedure Code, there is no appeal against the conviction itself and therefore this Court has no jurisdiction to exercise the power otherwise given by section 423 (1) (*b*) (1), Criminal Procedure Code, either by reversing the finding or by ordering a retrial.

In these circumstances I shall dismiss the appeal and refer the case to the Chief Court in Revision.

The appeal is summarily dismissed.

Order of the Chief Court.

Sanction for the prosecution of an offence under section 211, Indian Penal Code, is required by section 195, Criminal Procedure Code. The police cannot give such sanction; and

1915.

KING-EMPEROR v. MI WA.

there is no Court that can do so, because the false char not lead to proceedings in Court. It would be unreasona construe section 195 (which requires the sanction of the for a prosecution under section 182, Indian Penal Coc allowing a prosecution under section 211, Indian Penal without any previous sanction, if the false charge relate serious offence and does not lead to proceedings in Cou see no reason to interfere.

PRIVY COUNCIL.

Privy Council Appeal No. 42 *of* 1915.

(ON APPEAL FROM THE CHIEF COURT OF LOWER BURM

Before Viscount Haldane, Lord Wrenbury, Sir John Edg Mr. Ameer Ali.

THE BANK OF BENGAL *v.* RAMANATHAN CHI AND OTHERS.

Agent—power of attorney—how to be construed—Chetty pra Indian Contract Act, section 188.

A, a Chetty firm, had given B a power of attorney for the management of its business. The power of attorney conferred wide of borrowing on the agent. B purporting to act as A's agent guar C, one of its constituents, to the Bank of Bengal for Rs. 50,(endorsed a note for that amount over to the Bank. C became in and the Bank filed a suit against A for the amount due to the Ba C. A denied that B had authority to guarantee the loans of others.

Held on appeal by their Lordships of the Privy Council,— view of the nature of the business the agent's authority to bor behalf of A implied an authority to pledge A's credit for the pur securing advances from others to his firm's constituents.

Fitzgerald v. Dressler, (1859) 7 C.B.N.S., 374.

Bryant, Powis, and Bryant Limited v. La Banque Du 1 (1893) A.C., 170, at 177.

This was an appeal from a judgment of the Chief of Lower Burma on its Appellate Side. The following ment of the Chief Court, Original Side (Mr. Justice Robi was delivered on the 16th August 1912.

Civil Regular No. 78 *of* 1911.

August 16*th*, 1912.

Robinson, J.—The plaintiff, the Bank of Bengal, sue defendant on a cash credit account to Hashim Ebrahim had been guaranteed by the defendant firm. Hashim Eb executed a promissory note for Rs. 50,000 in favour (defendant on the 23rd May 1908, interest being paya accordance with the practice of the plaintiff Bank. The dant firm endorsed the said promissory note to the pl

Bank and at the same time executed an agreement guaranteeing the payment of the cash credit account. Hashim Ebrahim became bankrupt and is still an undischarged insolvent. The Bank submitted to the Official Assignee such security as they had with the request that he would realize them, but this the Official Assignee was unable to do. Hashim Ebrahim has absconded.

Defendants by their written statement plead that Chokalingam Chetty, their agent who endorsed the promissory note and signed the agreement of guarantee, was not the duly authorized agent for the purposes for which he acted. Defendants deny that they gave the guarantee and plead that Chokalingam Chetty, who received the power of attorney from his predecessor, Ramasawmy Chetty, had no power to endorse accommodation bills or to give guarantees so as to bind the defendant firm. He pleads that the plaintiff Bank had full knowledge of the terms of the power of attorney and that Chokalingam Chetty had no such authority as he claims. He further pleads that he, the principal, had also prior to the transactions in suit in express terms prohibited the said agent from entering into any guarantee for others, and that plaintiff was aware of this. He lastly pleads that there was no consideration for the alleged guarantee.

When opening the case for the plaintiff Bank Mr. Higinbotham asked to be allowed to amend his pleadings by adding that, even if the agent had not the power to guarantee this account, the defendants had ratified his act.

The issues were as to whether Chokalingam Chetty had power to guarantee Hashim Ebrahim's account; whether defendant did forbid him to enter into such guarantees and if so whether that had the effect of rendering his guarantee of no effect as against defendant; whether if the guarantee was beyond his powers his action had been ratified by his principal, and whether there was no consideration for the guarantee.

Defendant produced no evidence. For plaintiff formal evidence was given by Bank officials as to the amount that was due at the date of suit on the cash credit account and extracts from the Bank's books of account and from the Bank's cash credit account, register of Demand loans, and register of

1915.

THE BANK OF BENGAL v. RAMA-NATHAN CHETTY.

power of attorney certified under the Bankers' Books Act, were filed.

The first question is, what is the effect of the power of attorney that was granted to Ramasawmy Chetty? Ramasawmy under a power of substitution appointed Chokalingam Chetty with exactly the same powers. The power of attorney couched in verbatim terms was considered by my brother Ormond in a case being C.R. No. 118 of 1909. This case was eventually decided by Mr. Justice Bell. No issues appear to have been framed but it was a suit on a promissory note executed in favour of the Bank of Rangoon by two persons and the suit was on that promissory note. The second defendant's plea was that his agent had signed a promissory note merely as surety and that to the plaintiff's knowledge; that he received none of the money lent on that pro-note: in short that he merely guaranteed payment by the principal borrower and an application was made on his behalf for certain commissions to take evidence to prove these facts, and on the 11th October 1909 my brother Ormond passed the following orders:—By consent the commissions ask for to go after it has been decided that defendant is entitled to raise as a defence the fact that his agent signed the pro-note by way of accommodation or as a surety in fact (to the knowledge of the Bank). On the 10th December 1909 he heard Counsel and in the diary the following order appears: Held that defendant 2 is entitled to show that his agent signed as a surety merely, to the knowledge of the plaintiff. On the process file there are notes of the arguments taker by him and at the end there is the following order which has been quoted by Mr. Justice Bell in his final judgment as being what had been held, "Held that under the power of attorney 2's agent had no authority to sign the promissory note for the accommodation of 1 unless 2 was 'interested' in the transaction, which fact would have to be proved by plaintiff." I see no reason whatever to differ from that decision which in my opinion is certainly correct. The essential portions of the power of attorney run as follows:—Now Know Ye and these present witness that I have made ordained nominated constituted and appointed and by these presents do make ordain nominate constitute and appoint Ramaswamy Chetty . . . . to

be my true and lawful attorney under the style or firm of A.R.L. or A. R. L. Ramaswamy Chetty; to transact conduct and manage all and every or any of the affairs concerns matters and things in which I the said L. A. R. L. Lutchmanan Chetty now am or hereafter may be in any wise interested and concerned and for that purpose to use and sign my name to all and every or any documents or document writings or writing whatsoever; to borrow money from any Bank or Banks firm or firms person or persons either with or without pledge of securities for moneys advanced to various persons: to make draw sign accept endorse negotiate and transfer all and every or any bills of exchange promissory notes hundis cheques drafts bills of lading and all and every other negotiable securities whatsoever to which my signature or endorsement may be required or which my said attorney may in his absolute discretion think fit to make draw sign accept endorse negotiate and transfer in my name and on my behalf. From these provisions it appears to me to be clear that a general power is given to conduct and manage the business of the principal, which is described earlier as "business of bankers and money-lenders." Power is given to him to do all things necessary for the purpose of carrying on this business and carrying out any transactions commonly accepted as part of such a bank and money-lending business, in which the principal was at the time or may hereafter become in any wise interested or concerned. It is necessary, therefore, before an act of an agent should bind his principal that that act should be one in which the principal is interested. An act by which the principal is in no way interested or concerned except to the extent of acquiring a liability and that without receiving any of the money, the loan of which creates that liability, cannot be said in my opinion to be one in which the principal is interested and the fact that it may very possibily be the case that the principal would be credited with the commission for lending his name to this transaction does not make it one which falls within the terms of this power of attorney. The first issue, therefore, I must decide in favour of the defendant.

As to the second issue the defendant has not given evidence himself nor has he produced any evidence to show that he ever

1915.

THE BANK OF BENGAL v. RAMA-NATHAN CHETTY.

did expressly forbid his agent to enter into such guarantees, and it has been proved for the plaintiff that the Bank was not aware of any such action on the part of the principal and that it had received no notice from him thereof.

The next question is as to whether the agent having undertaken transactions beyond the scope of his authority the principal is nevertheless bound by reason of his having ratified those acts by accepting them and allowing them to remain uncontested after he had become aware of them. For the defendant it is urged that there is no evidence whatever to show that the principal was aware that his agent had been guaranteeing other persons' loans, and it is further argued that for the purposes of ratification a strong probability is not sufficient but that there must be direct evidence to show that the principal was aware. The case of *Fitzgerald v. Dressler* (1) is relied on for this proposition. It is a case of 1859 and three Judges differing from the Lord Chief Justice held in favour of Mr. Cowasji's contention. Williams, J., said "I am quite prepared to admit that, inasmuch as Harvey, in pursuance of the instructions of Dumas, had succeeded in obtaining the delivery order, it is extremely probable that he told Dumas on his return that, in order to obtain it, he was forced to make the promise he did. That, however, is a thing which is only probable, whereas what is required here is positive proof of the fact, or circumstances from which it may be legitimately inferred that the promise was ratified by Dumas. Where the burthen of proof lies upon the plaintiff, there must be something more than mere probability, or even strong probability: there must be facts from which the inference of authority may legitimately be drawn." The other two Judges held the same, Willes, J., remarking, "There being no original authority in Harvey to make the promise, it was a thing done by him out of the ordinary scope of his duty; and, though there was a moral duty cast upon him to communicate to his employer the fact of his having made the promise, it was nothing more than a moral duty; and the rule, *Omnia Praesumuntur rite esse acta donec probetur in contrarium*, is never applied to such a duty as

(1) (1859) 7 C.B.N.S., 374.

that. There is, therefore, no presumption either that Harvey did or did not perform that duty : and, in the absence of positive evidence that the promise was communicated to defendant or to Dumas, the jury would not have been warranted in assuming that it was, merely because the evidence was equally consistent with either supposition." Lord Chief Justice Cockburn held that it was "impossible not to come to the conclusion that the clerk Harvey, on returning to the defendant's counting-house, communicated to the defendant what had passed between him and Gardiner, the plaintiff's clerk. I think it was palpable and almost necessary that such communications should have taken place, that the jury were warranted in coming to the conclusion that the promise made by the defendant's clerk was confirmed and ratified by him. Though perhaps not very strong, I think there was some evidence upon which the jury might fairly and reasonably come to the conclusion they did, and therefore that the verdict ought not to be disturbed." It appears to me then that this authority lays down that even strong probability of the fact is not sufficient to establish ratification but there must be either positive evidence or such circumstances as would justify a presumption. In the absence of positive proof therefore a decision must depend on the facts of each particular case.

Now there is in this case no positive proof of ratification. There is no positive proof that the principal was aware that Ramasawmy Chetty and after him Chokalingam Chetty had been entering into contracts guaranteeing on demand loans and cash credit accounts. The question, therefore, is whether the facts proved in this case are sufficiently strong to justify a presumption that the principal was aware of what they were doing ; if he was so aware and held his peace I am of opinion that he must be held to have ratified their acts.

Two Chetties have given evidence in this case and they depose that the guaranteeing of such accounts is a recognised branch of Chetty banking business in Rangoon. It is impossible for anybody who has sat in this Court and who is engaged in business not to be aware that Chetties do and very commonly do guarantee other Chetties' accounts. The evidence produced shows that some Chetties also guarantee the accounts of non-

1915.

THE BANK OF BENGAL v. RAMA-NATHAN CHETTY.

Chetties. It further shows that in some instances the firms do not guarantee any others, the agent seeks the permission of his principal before guaranteeing any others; that they do it or refuse to do it at their own discretion. It was also proved that Chetty agents send a copy of their day-book entries to their principal once a month or once in two months. There was a statement that some agents never send them at all, but I think it is perfectly clear that it is practically the universal practice for agents to submit their accounts at short intervals to their principals. It is impossible of course for plaintiff to be able to produce evidence that Chokalingam Chetty submitted his accounts to his principal and there has been no evidence for the defendant so that it was impossible to obtain the information from his witnesses. But it has been proved from the Bank's books that Ramasawmy Chetty and Chokalingam Chetty in 1905 and 1906 guaranteed the on demand loan of other Chetties, and, as regards the cash credit account, the extracts from the books prove that both Ramasawmy and Chokalingam in a very large number of instances have guaranteed the cash credit accounts of others, both Chetties and non-Chetties, from December 1904 until May 1908. Now having regard to the proved practice and to the ordinary presumptions that must arise as to the ordinary course of business and human affairs it is impossible to hold that these agents had never submitted accounts to their principal and if they had submitted accounts to their principal that he should have remained in ignorance of the fact that they were not only carrying on this branch of Chetty banking business but were doing so to a fairly large extent. Defendant held out Chokalingam Chetty as his agent in Rangoon with a full general power to transact business on his behalf. The agent was guaranteeing other persons' loans and no exception had been taken by the principal to his conduct on his behalf for years, and in my opinion it must therefore be held that he held his agent out as having the power to guarantee accounts, and further that the action in so guaranteeing was ratified and confirmed by him. The Written Statement appears to me to support this presumption for it pleads that he had given his agent express orders not to enter into such transactions which

1915.

THE BANK OF BENGAL v. RAMA-NATHAN CHETTY.

implies that he knew that the agent had been or was likely to enter into them.

I am of opinion, therefore, that the defendant is liable on his contract of guarantee, it having been, even if beyond the powers of his agent, ratified and confirmed by him.

There remains the question of consideration. In the first place so far as the promissory note is concerned the consideration must be presumed. We have no sworn evidence on behalf of the defendant that there was no consideration. There is no production of any books by defendant. In his affidavit of documents he did not rely on any account books. Notice was given him to produce his account books but they had not been produced. Those account books would have shown these transactions. They would have shown the receipt of commission which would be consideration. Further the argument itself sets out a consideration. It is at the request of the defendant's agent that the cash credit account is given and that imports a consideration. In my opinion this issue must be decided against defendant. There will, therefore, be a decree for the amount claimed, *i.e.*, Rs. 63,122-12-5 with interest from date of suit until realization at 6 per cent. per annum with costs.

The following judgment of the Chief Court, Appellate Side (Mr. Justice Ormond and Mr. Justice Parlett), was delivered on the 26th March 1914:—

Civil 1st Appeal No. 117 of 1912.

March 25th, 1914.

Ormond, J.—The plaintiff Bank sues the defendant firm for the sum of Rs. 50,000 with interest in the following circumstances: On the 23rd May 1908 one Hashim Ebrahim had a cash credit account with the plaintiff Bank and in order to secure the same, upon the request of the plaintiff Bank, executed a promissory note for Rs. 50,000 and interest in accordance with the practice of the Bank, in favour of the defendant firm. The agent of the defendant firm endorsed the said note over to the Bank and at the same time executed an agreement guaranteeing the payment of the said cash credit account. The defence is a denial of the authority of the agent to enter into the contract of guarantee. It is proved that the defendant's agent entered into 23 transactions with the Bank as surety for others between 1904 and May 1908, 6½ of which were guarantees of persons other than Chetties. On the 21st July 1906 the

1915.

THE BANK OF BENGAL v. RAMA-NATHAN CHETTY.

defendant's agent guaranteed this man Hashim Ebrahim; and on the 3rd of November 1906 the defendant's agent was guaranteed by Hashim and the firm of S.R.M. The learned Judge on the Original Side in his judgment says, "Now having regard to the approved practice and to the ordinary presumptions that must arise as to the ordinary course of business and human affairs, it is impossible to hold that these agents (defendant's agents) had never submitted accounts to their principal; that he should have remained in ignorance of the fact that they were not only carrying on this branch of Chetty banking business but were doing so to a very large extent. Defendant held out Chokalingam Chetty as his agent in Rangoon with a full general power to transact business on his behalf. The agent was guaranteeing other persons' loans and no exception was taken by the principal to his conduct on his behalf for years, and in my opinion it must therefore be held that he held his agent out as having the power to guarantee the accounts, and further that the power in so guaranteeing was ratified and confirmed by him. . . . . Notice was given him (defendant) to produce his account books but they had not been produced. These account books would have shown these transactions. They would have shown the receipt of commission, which would be consideration. Further the agreement itself sets out a consideration. It is at the request of the defendant's agent that the cash credit account is given and that imports a consideration." The Judge therefore gave the plaintiff a decree. The defendant was the sole proprietor of that firm and is dead. The question of ratification was first raised by the plaintiff when the case came on for hearing. The books were not produced before, because the only question was: had the agent authority to enter into this transaction? The learned Judge has assumed that commission was charged for this transaction; that these transactions must have been entered in the books and that the agent sent the books to his principal; and therefore that the principal knew of these transactions of guarantee. In order to make the defendant liable upon a ratification the plaintiff must show that the defendant had full knowledge of the facts. There is no question whether there was consideration to support a contract of suretyship as between

the Bank and the defendant. Mr. Giles who appears for the plaintiff-respondent admits that the question is not really one of ratification, but whether the authority to enter into the transaction of guarantee must necessarily be implied from the powers conferred in the power of attorney. The power of attorney is in the form generally used amongst Chetties. It recites the desire of the principal to appoint the agent his attorney for the general management of his banking and money-lending business. It then constitutes the agent the lawful attorney to transact, conduct, and manage all and every or any of the affairs, concerns, matters and things in which the principal, then was or thereafter might be in any wise interested and concerned and for that purpose to use or sign the principal's name on any documents whatsoever. To borrow money from Banks, firms or persons, either with or without a pledge of securities for money advanced to various persons; to make, draw, sign, accept, endorse, negotiate and transfer bills of exchange, pro-notes, etc., to which the principal's signature or endorsement might be required or which the attorney might in his absolute discretion think fit, in the name of the principal. The agent therefore had a general authority to carry on the business of a Chetty banker and money-lender on behalf of his principal as the sole proprietor of the business and an express power to borrow money and to endorse pro-notes for the purposes of that business. He would not be authorised (without an express power to that effect) to enter into any transaction under which his principal incurred a liability, unless such transaction was a necessary incident in the carrying on of a Chetty banking and money-lending business. If the transaction entered into by the agent is, on the face of it, authorised by the power of attorney, the Bank need not look to the application of the money by the agent; but if it is shown that the Bank had notice of the real nature of the transaction and such transaction is not within the scope of the agent's authority, the principal would not be liable. In this case the agent endorsed a promissory note in favour of the Bank in the name of his principal, and he has an express power to do so; but at the same time he signed for his principal on a letter of guarantee in favour of the Bank on behalf of Hashim Ebrahim

1915.

THE BANK OF BENGAL v. RAMANATHAN CHETTY.

for the whole amount for which the promissory note was given. The Bank therefore knew that none of the money was being taken by the agent as a loan to his principal. The agent was given certain specified or express powers; but they do not include a power to make his principal a surety for another's loan; and they do not include a power to borrow money in his principal's name for another, or to sign promissory notes for his principal jointly with another principal. If he had been given such a power as the last, an authority to guarantee the debt of another might well be inferred: because—since he clearly has no power to thrust a partner upon his principal—if he had the power to sign promissory notes for his principal jointly with another, the manifest effect of such a transaction would be that, as between the two makers of the note, each is a surety for the other as to the amount taken by that other. The sole question then is—is it a necessary incident of the business to guarantee the loans of others? If such transactions are entered into for a commission, the business would not be so much a money-lending business as an insurance business. If such transactions are merely mutual accommodations, it must be shown that such mutual accommodations are necessary. Loans can be raised on security without sureties; and the fact that the Presidency Banks Act requires two independent signatures for a loan on a promissory note is not sufficient to show that such mutual accommodations are necessary for the business.

The Bank have called two Chetties in support of the proposition that it is a necessary incident in a Chetty's money-lending business to guarantee the debts of others. Ramanathan Chetty, the 2nd witness for the plaintiff, the agent for the R.M.M.S.T. firm, says that his firm has not guaranteed overdrafts of accounts of persons other than Chetties. He has heard that some Chetties do guarantee; in such cases the Chetty gets a commission. In cross-examination he states that "those whose principals allowed them to guarantee the overdrafts of other people, they guarantee." His own principal has told him that he should not guarantee people other than Chetties. The other Chetty Udiappa, 5th witness for the plaintiff, who is the agent of the V.A.R. firm, says "It

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

I would allow the appeal and dismiss the suit with costs in both Courts.

Parlett, J.—I concur.

The judgment of their Lordships of the Privy Council was delivered on the 16th December 1915 by :—

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

Lutchmanan Chetty was a native of Madras, and ordinarily resided there. He belonged to the well-known Chetty

1915.

THE BANK OF BENGAL v. RAMA-NATHAN CHETTY.

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

By a power of attorney dated the 24th of October 1904, he appointed one Ramasawmy Chetty, described in the document as "at present of Rangoon," as his attorney under "the style or firm of Ana Roona Laina or A. R. L. Ramasawmy Chetty." On the 15th of May 1905 Ramasawmy, by the power reserved to him in his appointment, substituted in his place one Chokalingam Chetty "as the attorney and agent" of the defendant. And since his appointment Chokalingam admittedly has managed the entire money-lending business of the defendant's firm in Rangoon.

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

It is to be observed in this connection that under the provisions of the Presidency Banks Act (XI of 1876, section 37, clause *e*), the bank is precluded from opening cash credits on the security of any negotiable instrument of:—

"any individual or partnership firm . . . . . which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership."

It was in view of this provision of the law, and the practice of the Bank in conformity therewith, that the promissory note

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

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

"In consideration of the Bank of Bengal having agreed at our request to grant to Hassum Ebrahim (who is hereinafter referred to as the Borrower) accommodation by way of Cash Credit to such an amount from time to time as the Bank in its discretion shall think proper upon condition that such Cash Credit shall to the extent of Rs. 50,000 and interest be secured by the Promissory Note hereinafter mentioned we the undersigned A. R. L. Chokalingam Chetty (Guarantor) have delivered to the Bank of Bengal a Promissory Note dated 23rd May 1908 for Rs. 50,000 and interest payable on demand made by the said Borrower in favour of us and endorsed by us to the said Bank or order (the said Promissory Note being intended as a guarantee to the extent of Rs. 50,000 and interest of the balance from time to time due to the said Bank from the said Borrower on account of the said Cash Credit) on the understanding that the Bank shall be at liberty to take steps to enforce payment of the said Promissory Note at any time after notice in writing demanding payment thereof posted to us at our usual or last known address and default being made in payment for three days after the posting of such notice."

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

The plaintiff Bank thereupon called upon the defendant to pay the amount due from Ebrahim, and on his failure to do so,

1915.

THE BANK OF BENGAL v. RAMA-NATHAN CHETTY.

brought the present action in the Chief Court of Lower Burma in its original civil jurisdiction. The defence to the action in the main is the denial of authority on the part of Chokalingam to enter into the transaction so as to bind the defendant's firm.

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

They accordingly dismissed the suit.

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

Their Lordships desire to refer shortly to the principal provisions of the power directly bearing on the question raised in the case. After setting out that he was formerly carrying on the business of "bankers and money-lenders in Rangoon" in co-partnership with two other persons, and that owing to the death of one partner and the retirement of the other, he was then "solely carrying on the same business" under the style of A. R. L. Chetty, and that he was desirous of appointing Ramasawmy Chetty as his attorney for the general manage-

ment of his said business, the defendant (Lutchmanan Chetty) proceeds to state the duties with which he charges the agent and the powers he entrusts him with:—

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

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

The power then goes on to declare:—

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

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

Applying to the power in the present case the canon of construction laid down in *Bryant, Powis, & Bryant, Ld. v.*

1915.

THE BANK OF BENGAL v. RAMA-NATHAN CHETTY.

La Banque du Peuple (1) *viz.*—"that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication," their Lordships consider that the authority to enter into transactions of the nature in dispute is to be found in the document itself by necessary implication from the nature of the business, with the general management of which the agent was entrusted. Without such authority it would hardly have been possible to carry on the business of a money-lender and financier.

It is clear from the facts proved in the case that for three years it was accepted, and business was transacted on the basis, that the agent was invested with full authority in that behalf. For between May 1905 and May 1908 Chokalingam entered into twenty-three identical transactions without, so far as appears on the record, any question being raised that they were in excess of his authority. Besides, there is evidence that among these Chetty money-lending firms it is the practice for the agent to pledge the credit of the principal in this manner.

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

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

And their Lordships will humbly advise His Majesty accordingly.

(1) (1893) A.C., 170 at 177.

Before Mr. Justice Maung Kin.

Special Civil 2nd Appeal No. 170 of 1915.

January 10th, 1916.

1. BON LON, 2. KHA U, 3. TOK TE, 4. HMAT KYI *v.* PO LU.

N. N. Sen—for appellants.

Transfer of Property Act, IV of 1882, sections 58 and 100—Charge on immoveable property—incomplete mortgage not a charge.

A transaction intended to be a mortgage cannot be converted into a charge within the meaning of section 100 of the Transfer of Property Act, although owing to non-compliance with the formalities prescribed by the law it cannot operate as a mortgage.

Ma Lon and one v. Maung Po Oh, Special Civil 2nd Appeal No. 140 of 1913; *Pran Nath Sircar v. Jadu Nath Saha*, (1905) I.L.R., 32 Cal., 729 referred to.

Royzuddi Sheik v. Kali Nath Mukerjee, (1906) I.L.R., 33 Cal., 985 at 995; *Sreemutty Rani Kumari Bibi v. Raja Sri Nath Roy*, (1896) 1 C.W.N., 81; *Tofaluddi Peada v. Mahar Ali Shaha*, (1898) I.L.R., 26 Cal., 78; *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee*, (1898) I.L.R., 26 Cal., 246; *Debendra Chandra Roy v. Beharilal Mukerjee*, (1912) 16 C.W.N., 1075; *Narayan Babajee v. Lakshmandas Harakchand*, (1905) 7 Bom. L.R., 934; and *Konchadi Shambhogue v. Shiva Rao*, (1904) I.L.R., 28 Mad., 54 followed.

Rangasami v. Muttukumarappa, (1887) I.L.R., 10 Mad., 509 and *Mithirambat v. Somanatha Naicker*, (1901) I.L.R., 24 Mad., 397 dissented from.

The point for decision is whether the transaction in question operates as a charge or not under section 100 of the Transfer of Property Act.

The nature of the transaction is explained in the first paragraph of the plaint in these words:—

"The 1st defendant being unable to repay the sum of Rs. 125 which she had borrowed from Maung Shwe So on the mortgage of the paddy land was about to lose the same; so she asked the plaintiff to redeem the land with his own money and take possession of it and work it without paying any rent or charging any interest. The plaintiff accordingly paid Maung Shwe So the principal and interest amounting to Rs. 154 about the month of Taboung 1272 Buddhist Era (1911) and redeemed the land in question and took possession of it and has since been working and enjoying it."

It is clear from this description that the transaction is a usufructuary mortgage.

1916.

BON LON
v.
PO LU.

The Township Court dismissed the suit holding that the mortgage was invalid on the ground that it was not made by a registered deed, as it should have been under section 59 of the Transfer of Property Act, and that consequently the plaintiff was not entitled to a mortgage decree.

The District Judge on appeal to him also held that the plaintiff was not entitled to a mortgage decree but he said that he was entitled to a charge on the land and made a declaration to that effect. He cited as his authority a ruling of Ormond, J. in *Ma Lon and one v. Maung Po Oh* (1).

In my opinion that case is different from the present. There the plaintiff at the request of the defendants redeemed a mortgage which they had made. He did not get possession of the property. Nor was it agreed that he should be given possession, as security for the money he had paid on behalf of the defendants. This seems quite clear, for two years later he sued the defendants for specific performance of a contract to sell. As he did not prove the contract he alleged, the Court of 1st instance dismissed his suit. On appeal, however, the Divisional Court gave him a decree for possession as mortgagee —it is difficult to understand for what reason. Ormond, J., on 2nd appeal held that the plaintiff was entitled to a charge on the land to the extent of Rs. 1,200 (that being the amount for which he had redeemed the land) and to a declaration to that effect. It is clear that there was no mortgage within the meaning of section 58 of the Transfer of Property Act to the plaintiff as a result of his payment of Rs. 1,200.

In this case there is clearly an usufructuary mortgage for the sum for which the plaintiff redeemed the mortgage which had been made by the defendant.

Section 100 of the Transfer of Property Act provides that where immoveable property of one person is, by act of parties . . . . . , made security for the payment of money to another, the latter person is said to have a charge on the property, if *the transaction does not amount to a mortgage.* The qualifying words, " the transaction does not amount to a mortgage " are all-important and effect must be given to them. In *Pran Nath*

(1) Special Civil 2nd Appeal No. 140 of 1913.

Sarkar v. Jadu Nath Saha (1) Maclean, C.J., says, "What we have to consider is whether the present transaction amounted to a mortgage. The expression, 'amount to a mortgage,' in section 100 means such a mortgage as is defined by section 58 of the Act." Therefore, having regard to the terms of the latter section, the question to ask is, is the transaction in question a transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced by way of loan? If the answer is in the affirmative, the transaction is a mortgage and if by reason of any of the formalities of law not having been complied with, it cannot be enforced as such, no charge can arise under section 100. In reality that section means that there is no charge in such a case. The Court is not at liberty to go against this statutory provision and apply general equitable principles and say that there is a charge in such a case, because in England under English law where a mortgage fails for want of some formality, the transaction may be valid as an equitable charge. "It is an established doctrine that equity will not contravene the positive enactments or requirements of law and defeat its policy by supplying, under the guise of amending defective instruments, those deficient elements of form without which the agreement is absolutely void, even as between the parties to it (2)." But where the transaction does not amount to a mortgage, the matter is different. The above view has been uniformly maintained in the Calcutta High Court both before and after the case above cited. See *Sreemutty Rani Kumari Bibi v. Raja Sri Nath Roy* (3); *Tofaluddi Peada v. Mahar Ali Saha* (4); *Girindra Nath Mukerjee v. Bejoy Gopal Mukerji* (5); *Royzuddi Sheik v. Kali Nath Mookerji* (2); and *Debendra Chandra Roy v. Behari Lal Mookerji.* (6) The Bombay High Court has adopted the same view, following the Calcutta cases. See *Narayan Babaji v. Lakshmandas Harakchand* (7). In Madras, however, there are two cases which point to the contrary view. See *Rangasami v.*

(1) (1905) I.L.R., 32 Cal., 729.
(2) Per Mookerjee, J., in (1906) I.L.R. 33 Cal., 985 at p. 995.
(3) (1896) 1 C.W.N., 81. (4) (1898) I.L.R. 26 Cal., 78.
(5) (1898) I.L.R. 26 Cal., 246. (6) (1912) 16 C.W.N., 1075.
(7) (1905) 7 Bom. L.R., 934.

1916.

BON LON
v.
PO LU.

Muttukumarappa (1); and *Mithiram Bhat v. Somanatha Naicker* (2). But in a later case the Madras High Court adopted the same view as Calcutta. See *Konchadi Shambhogue v. Shiva Rao* (3). It must, therefore, be held that section 100 of the Transfer of Property Act does not enable a mortgage to be converted into a charge, if it cannot operate as a mortgage by reason of non-compliance with the formalities prescribed by the law.

In the present case the transaction set up is clearly a mortgage but it cannot operate as such because it was not made in accordance with the requirements of section 59 of the Transfer of Property Act. In the case decided by Ormond, J., there was something short of a mortgage, the relation of mortgagor and mortgagee not existing between the parties, and it was right and not contrary to the provisions of section 100 of the Transfer of Property Act to hold that the transaction created a charge.

For the above reasons I hold that the transaction before me does not operate as a charge.

The appeal is allowed with costs throughout.

Civil 2nd Appeal No. 140 *of* 1915.

January 24*th*, 1916.

Before Mr. Justice Maung Kin.

KAW LA *v.* MAUNG KE.

Ginwala—for appellant.

Ba Dun—for respondent.

Easements—riparian owners—"natural stream" discussed.

A claim on the ground of riparian ownership must be in respect of a natural stream, whether permanent or intermittent, and confined to the land lying alongside the stream. It is not however necessary for one riparian owner, seeking to restrain another from diverting water beyond his riparian tenement, to prove that he has suffered any damage.

Secretary of State v. Balvant Ganesh Oze, (1904) I.L.R. 28 Bom., 105 at 118; *Taylor v. St. Helens Corporation*, (1877) 6 Ch. D., 264; *Assistant Collector of Na'sik v. Sha'mji Dasrath Patil*, (1883) I.L.R. 7 Bom., 209; *McCartney v. Londonderry and Lough Swilly Railway Company, Limited*, (1904) L.R.A.C., 301; *Aiyavu Mooppan v. Sawminatha Kavundan*, (1905) I.L.R. 28 Mad., 236 and *Debi Pershad Singh v. Joynath Singh*, (1897) I.L.R. 24 Cal., 865 referred to.

This is a suit for the removal of a bund across what the parties and the witnesses call a *Yo*.

(1) (1887) I.L.R., 10 Mad. 509. (2) (1901) I.L.R. 24 Mad., 397.
(3) (1904) I.L.R. 28 Mad., 54.

1916.

KAW LA v. MAUNG KE.

The plaintiff owns a piece of land past which the *Yo* in question runs and with the water of the *Yo* he irrigates his land. The defendant put up a bund across the *Yo* a little distance above the plaintiff's land thus completely preventing the flow of the water of the *Yo* to it.

The defendant by his written statement replies that the water of the *Yo* does not flow into the plaintiff's land which being low-lying is amply supplied with water independently of the *Yo*; that the land formerly belonged to Maung Kya, from whom the plaintiff had bought it and that about 14 years ago, as the defendant's land was high and the land in suit was amply supplied with water independently of the *Yo*, Maung Kya allowed the defendant to put up the bund in question.

There had been some revenue proceedings before the Revenue Officers and the result had been adverse to the plaintiff.

The Township Judge held the suit *res judicata* by reason of the revenue proceedings and dismissed the suit without going further into the merits.

The Additional Judge of the District Court on appeal held that the suit was not *res judicata*; and that the plaintiff, as a riparian owner, was entitled to have the bund removed, as it had entirely stopped the flow of the water into plaintiff's land and gave a decree as prayed for.

In this appeal it is necessary to determine only the following points :—

(1) Is the *Yo* in question a natural stream?

(2) Is the defendant a riparian owner?

(3) Irrespective of the answers to the above questions, has the defendant acquired any right in respect of the bund by custom, prescription or grant?

(4) Does the fact that the plaintiff's land is amply irrigated independently of the *Yo* constitute any defence for the action of the defendant?

Now, the plaintiff's claim as a riparian owner is a natural right and it must be in respect of a natural stream and not an artificial waterway. There is no evidence that the *Yo* was made by anybody. The evidence regarding the nature of it that the water which runs in the *Yo* comes down in the rains.

1916.

KAW LA
v.
MAUNG KE.

from the hills above, that it flows down the *Yo* past the plaintiff's land, and that the plaintiff and his predecessors in title had made use of the water from the *Yo* for the purpose of irrigating the land which they had successively owned. There is no evidence to show how far the *Yo* extends beyond the plaintiff's land. Evidently, it is dry for a part of the year, probably in March, April and May. It is clear that the *Yo* is a defined channel.

In the case of the *Secretary of State v. Balvant Ganesh Oze* (1) a stream is defined in these words:—"A stream of water is water which runs in a defined course [*Taylor v. St. Helens Corporation*, (1877) 6 Ch. D., 264], nor is a perennial flow a necessary condition to the legal conception of a stream provided the source, though irregular, be one of constant recurrence and not merely fortuitous or temporary." And the *nala* in question in that case is described as follows:—"For about one-half the year the *nala* was a running stream, deriving its flow of water from sources which though not perennial were constant in their recurrence." Again, we find in the Indian Easement Act a definition which might be referred to as embodying the principles of law involved though the Act does not apply. The definition runs:—A natural stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course."

Applying these definitions to the *Yo* in the present case, there can be no doubt that it is a natural stream. Mr. Ginwala for the appellant argues that a natural stream must have its source and empty itself into a river or a lake and that as there is no evidence where the *Yo* in suit goes to, it cannot be held to be a natural stream. In my judgment the argument cannot be conceded. So long as water runs in a defined channel which is not artificial and from a known source and it goes past a man's land, that man has the right to treat it as a stream from its source as far as the lower end of his land. I am unable to agree with the learned Counsel's argument that the water must be proved to empty itself into a lake or a river.

(1) (1904) I.L.R., 28 Bom., 105 at page 118.

There must be many streams which taking their rise in the hills run for a few miles and then lose themselves in a marsh or sandy ground or the like. The river Tarim which is stated in the school geographies as the shortest river in Asia took its rise in a lake in the Tibetan plateau and loses itself in the Gobi desert.

For these reasons I hold that the *Yo* in question is a natural stream.

The next point is whether the parties are riparian owners.

The learned Additional Judge of the District Court says in the course of his judgment that the parties are riparian proprietors and as such are equally entitled to use and consume the water of the stream for drinking, etc., and he also describes them as parties owning lands adjoining a stream. That he is partially wrong will appear presently.

The question has been dealt with in the case of the *Assistant Collector of Na'sik v. Sha'mji Dasrath Patil* (1) where it was laid down that the right to the enjoyment of the water of a river belongs to the occupants of the bank, whatever the nature of their tenancy. And in *McCartney v. Londonderry and Lough Swilly Railway Company, Limited* (2) which has been followed in *Aiyavu v. Sawminatha Kavundan* (3) it was laid down by the House of Lords that the owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement and there consume it for purposes unconnected with the tenement. The inference from this ruling is that a person who owns land which is not on the bank of a river or stream cannot possibly have the rights of a riparian owner, for even a riparian owner properly so called because he occupies land on the bank of a stream, cannot use the water from the stream for the purposes of a piece of land which is not on the bank.

Turning to the facts of this case, we find on reference to the map that the *Yo* runs from the north-east direction past the plaintiff's land on the north-west boundary of it taking a south-westerly course. Just a little above plaintiff's land there is across the *Yo* a bund marked B in red. From a point

(1) (1883) I.L.R., 7 Bom., 209. (2) (1904) L.R.A.C., 301.
(3) (1905) I.L.R., 28 Mad., 236.

1916.

KAW LA
v.
MAUNG KE.

a little above the bund we see a canal (ခြောင်း) running through a piece of vacant land on the north-east of the plaintiff's land and then entering the defendant's land which adjoins the plaintiff's on the south-east of it. The canal is marked C in red. It is admitted that by means of this canal the defendant diverts the water of the stream to his land which he finds is not on the stream at all. It is therefore clear that the defendant is not a riparian owner, and has no natural right to the water in the stream. And it is equally clear that the plaintiff is a riparian owner, as his land is on the left bank of the stream.

Regarding the third point I am unable to hold that the defendant has proved any grant from the plaintiff's predecessor in title as alleged by him. Further, it cannot be held that he has acquired any prescriptive right over the water, as on his own showing he made the bund and the canal only 14 years ago. And it is doubtful if it was so long ago as that. Moreover there is no question of custom.

The fourth question is whether the fact that the plaintiff's land is amply irrigated independently of the stream constitutes a defence to the plaintiff's suit. There is no reliable evidence to prove the fact. Even if there is, it is no defence at all. In the Privy Council Case of *Debi Pershad Singh v. Joynath Singh* (1) it was held that in order to support an action by one riparian owner to restrain another from diverting the water beyond his riparian tenement it is not necessary that the plaintiff should prove that he has suffered any damage. That being the case, the alleged fact, even if proved, does not constitute a defence.

For the reasons above stated the plaintiff must succeed. I may in passing say that assuming that the defendant is a riparian owner I agree with the learned Additional Judge of the District Court in holding that the defendant as such had no right in stopping the flow of water to plaintiff's land by erecting the bund.

I have not dealt with the question of *res judicata*, as it has not been raised by the appellant. In this country there are no Revenue Courts and there can be no case of *res judicata* by reason of the orders of the Revenue Officers. The only question

(1) (1897) I.L.R. 24 Cal., 865.

1916.
KAW LA
v.
MAUNG KE.

that can arise is whether the Courts are debarred by any provision of any local enactment from giving the relief asked for in any particular case. In the present case the question of the jurisdiction of the Court cannot possibly arise.

The appeal is dismissed with costs.

Before Sir Charles Fox, Chief Judge and Mr. Justice Twomey.

Civil 1st Appeal No. 16 of 1915.

June 22nd, 1916.

BYRAMJEE COWASJEE *v.* 1. VERA SOMABHAI MOTIBHAI, 2. SEITH BHOGILALL HARIBHAI.

Lentaigne—for appellant.
Mehta—for respondent.

Specific Relief Act, 1 of 1877, *Section* 52—*Injunction—trade labels—colourable imitation.*

In deciding whether one firm should be restrained from selling goods the "get up" of which is alleged to be a colourable imitation of the "get up" of goods that have for a considerable period been sold by another, the proper test to apply is whether an ordinary purchaser purchasing with ordinary caution is likely to be misled by that "get up."

Paton & Co., Ltd. v. Snelling, Lampard & Co., Ltd., 16 T.L.R., 56; (1901) A.C., 308; *Coleman & Co., Ltd. v. Stephen Smith & Co., Ltd.* (1911) 2 Ch. D., 572; *Ash (Claudius) Sons & Co., Ltd. v. Invicta Manufacturing Co., Ltd.*, (1912) 29 R.P.C., 465 referred to.

Fox, C.J.—The plaintiffs sued to restrain the defendant, his servants and agents from importing into Rangoon or any part of Burma and selling (presumably in Burma) butter in tins bearing labels which they alleged to be a colourable imitation of the "get up" in which the plaintiffs had for a long period been selling butter in the Province.

The plaint alleged that the defendant was about to import butter in tins "got up" in such a manner as not to be distinguishable from the plaintiffs' tins by reason of the tins being of the same shape and size, the wrappers and labels being of the same colours, and by reason of the close imitation of the plaintiffs' lettering, "get up," colours and general appearance. They also alleged that by reason of the colouring adopted by them their butter had acquired the names in the Province of the "Blue Label Crown Butter" and the "Blue Label Butter." Their ground of action was that the use by the defendant of the "get up" he had adopted was calculated to deceive purchasers of his butter into the belief that they were buying butter manufactured and imported by the plaintiffs, and that his

1916.

BYRAMJEE COWASJEE v. VERA SOMABHAI MOTIBHAI.

butter could be passed off as theirs and sold as "Blue Label Butter."

The plaintiffs' butter is sold in cylindrical tins of two sizes, one to contain a pound and one to contain a half pound. On the top of the tin is affixed a paper label on which is printed the words "Empress of India Dairy Company, Bombay" in clear bold type, "Best selected Butter 1 lb. nett" in smaller type, a picture of a cow standing up and a calf lying down in a green field, a light blue sky, and in the centre of that a picture of an imperial crown, and under that the words "trade mark."

Around the circular outside of the tin is affixed a paper band, the prominent feature of which is a broad space in the central portion which is coloured in an attractive shade of light blue, on which are printed words about the good quality of the contents of the tin, and the words "The Empress of India Dairy Company" in two places. At the join of the band is a representation of a buckle. On each side of the broad space is a narrow line in dark blue, on the outer sides of these are narrower lines in yellow, on the outer sides of these are spaces with a fancy design in which the most prominent colour is red, outside these designs are narrower lines in yellow, and outside these are lines in dark blue. On the side opposite the buckle is a circle coloured red on the outside, and a ground of green in the central portion on which is a crown and the words "Trade Mark, Imperial Crown" and the words "The Empress of India Dairy Company, Bombay" in very distinct lettering.

The defendant's tins of which complaint is made are of the same shape and size as the plaintiffs' tins. They have a paper label on the top, the outside edge of which is in green. Then comes a dark blue ground on which are printed in white bold letters the words "The Swan Dairy Company, Bombay." Inside this is "1 lb. nett" on a green ground, and above this the picture of a swan sitting on blue water; the sky above is of a lighter shade of blue than the sky in the plaintiffs' top label.

Around the defendant's tins is a paper band the major portion of which is in practically if not exactly the same shade of blue as that in the central portion of the plaintiffs' band and the space occupied is the same in width. On this space are

words about quality, etc., in the same shape of letters as the wording on the plaintiffs' broad space. Outside this on each side are narrow dark blue lines, outside these are narrower yellow lines, outside these are spaces with fancy designs the prominent colours of which are yellow and white, outside these are again narrow yellow lines, and outside these are dark blue lines. At the end of the band are the words "The Swan Dairy Company, Bombay" and a scroll design. On the opposite side is a circle coloured bright yellow on the outside, with the picture of a swan sitting on water in the centre and the words "Trade Mark" and a plant with flowers outside of the circle.

The allegation as to the plaintiffs' butter and tins having acquired the name of "Blue Label Butter" may be disposed of first. The evidence in support of the allegation scarcely deserves notice. The evidence of the numerous witnesses engaged in the retail trade who were called for the defendant proves conclusively that the plaintiffs' butter and tins cannot be generally known by the public by such name, and that if any butter and tins have acquired such name or any name connected with the colour blue, the tins of the Imperial Dairy Company are those which have acquired it. This disposes of any case of possible injury to the plaintiffs by a tin of the defendant's butter being sold to a person asking for "Blue Label" butter, because he or she had been told that such butter was good, that is to say to a person buying on repute only.

We have to deal only with the case of persons who having once bought the plaintiffs' butter want it again. The question is whether such persons are likely to buy butter in the tins complained of as the butter they want.

The proper test is whether the get up of the defendant's goods is likely to deceive a purchaser who is acquainted with the plaintiffs' get up, but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without distinguishing features being concealed, and the Court must also have regard to the class of purchasers by whom the goods would normally be bought—27 Halsbury's Law of England, 766.

1916.

BYRAMJEE COWASJEE v. VERA SOMABHAI MOTIBHAI.

The plaintiffs are not entitled to have the defendant restrained from selling butter in cylindrical tins of the same diameter as the plaintiffs' tins, or in tins bearing paper labels on the tops and sides as the selling of butter in such tins is common to the trade—*Payton & Co., Ltd. v. Snelling, Lampard & Co., Ltd.* (1) which is evidently an abridged report of the judgments in the Court of appeal of the case dealt with later on in the House of Lords. (2) The top labels of the defendant are as different from the top labels of the plaintiffs as they well could be. The plaintiffs allowed another trader to adopt the particular arrangement of spaces and lines on their band in the case of the Empire Dairy Company. They cannot consequently claim any monopoly in such arrangement. If one can adopt this arrangement, others can. The question resolves itself into whether the plaintiffs are entitled to have the use by others of the particular shade of blue on the broadest space of their bands restrained. No authority has been quoted to us which would justify such an extension of the protection of the Court. Some similarity in parts of the "get-up" is not sufficient to justify an injunction—*Coleman & Co., Ltd. v. Stephen Smith & Co., Ltd.*(3) Is the get up of the defendant's tins looking at the whole of it calculated to deceive purchasers who have seen the plaintiffs' labels and want to purchase butter in tins bearing those labels? In the first place the Court will not strain its jurisdiction to protect fools and idiots: on the other hand it will not require such minuteness of imitation as to deceive persons of unusual sagacity and information—Sebastian on Trade Marks, 5th Edition, 11.

The test is whether an ordinary purchaser purchasing with ordinary caution is likely to be misled, that is to say, whether there is a reasonable probability of deception—see 27 Halsbury's Laws of England—p 766.

As to the class of purchasers of butter it may be assumed that it is not an article which the poorest can indulge in: it is far too expensive for them. Purchasers of butter may be credited with some degree of intelligence and observation above the lowest. The most prominent features in the "get up" of

(1) (1899) 16 T.L.R., 56. (2) (1901) A.C., 308. (3) (1911) 2 Ch.D., 572.

the plaintiffs' tins and the features most likely to remain in the memory of any one who had been favourably impressed with the contents of their tins are the name "Empress of India Dairy Company," the picture of the Crown, and possibly the picture of the cow and calf.

The name and the Crown are manifestly what the plaintiffs themselves invite the public to distinguish their butter by. Purchasers who know English would probably remember the same on the tin best as one remembers such names as Crosse and Blackwell: others who do not know English would probably remember best either the Crown or the picture of the cow and calf. The majority of purchasers are probably females engaged in keeping house. I should be much surprised to hear that even a man who had paid the slightest attention to the labels on the tins of butter he was eating could possibly take butter in the defendant's tins to be the same butter as he had had from the plaintiffs' tins.

Assuming that a person of ordinary intelligence has looked fairly at the plaintiffs' tins, that is to say that he has looked at both the top and the side labels, I cannot think that there is any reasonable probability of his buying one of the defendant's tins as being one of the plaintiffs' tins if he does the same in respect of the defendant's tin.

It has been pressed on us that the defendant must have intended to practise deception and to "steal the trade" of the plaintiffs by adopting a band so similar in prominent features to the plaintiffs' band, and that the Court should not be keen to find that he has failed to attain his object. The fact that he has not given any explanation of how he came to adopt such a band is also relied upon as showing fraudulent intention on his part. In *Ash (Claudius) Sons & Co., Ltd. v. Invicta Manufacturing Co., Ltd.* (1) referred to on page 747 of 27 Halsbury's Laws of England it has been held by the House of Lords that where fraudulent motive is relied on, it should be clearly alleged and pleaded.

There is nothing in the plaint indicating that the plaintiffs intended to rely on the defendant having adopted his band with a fraudulent intention or motive, and there was nothing done

(1) (1912) 29 R.P.C., 465.

1916

BYRAMJEE COWASJEE v. VERA SOMABHAI MOTIBHAI.

during the course of the case to give him notice that the plaintiffs were going to raise any question as to his motive. I do not find that the plaintiffs even asked for an affidavit of documents from him or asked to interrogate him, personally, or that they took any steps to ascertain why he adopted the band complained of. The defendant resides and carries on business in Bombay. The plaintiffs also reside in the Bombay Presidency. They chose the form which was obviously the most inconvenient one for the defendant personally to attend. It scarcely lies in their mouths to complain of the defendant not attending personally and giving evidence in Rangoon when neither of them did so, nor of his not giving an explanation of his adoption of his band when the only question raised in their pleading was practically the question whether they had the exclusive right to use light blue colour as the prominent feature of bands on butter tins.

I would allow the appeal, set aside the decree of the Original Court and dismiss the suit with costs as allowed in that Court. I would order the plaintiffs to pay the defendant's costs of this appeal, and allow 10 gold mohurs as advocate's fees.

Twomey, J.—I concur.

Special Civil 2nd Appeal No. 258 *of* 1915.

August 7th, 1916.

Before Sir Charles Fox, Chief Judge and Mr. Justice Twomey.

MA MAI GALE *v.* TUN WIN.

D. N. Palit—for appellant.

R. N. Burjorjee—for respondent.

Limitation Act, IX of 1908, *section* 5—*limitation of appeal—Judicial discretion—interference by High Court.*

The discretion allowed a Judge in admitting an appeal after the prescribed period of limitation must be judicially exercised and based on materials judicially cognisable. If the discretion has been exercised without appreciation and consideration of all the material facts and without the application of the right principle to those facts, the High Court is bound to interfere.

A *bonâ fide* mistake on the part of a pleader may be sufficient cause for admitting an appeal after time, but no mistake is *bonâ fide* unless made in spite of due care and attention.

Kichilappa v. Ramanujam Pillay, (1901) I.L.R., 25 Mad., 166; *Rakhal Chandra Ghosh v. Ashutosh Ghosh*, (1913) 17 C.W.N., 807; *Sarat Chander Bose v. Saraswati Debi*, (1907) I.L.R., 34 Cal., 216, referred to.

Fox, C.J.—The first ground urged in this 2nd appeal is to the effect that the learned Divisional Judge erred in admitting

the appeal to his Court since it was plainly barred by limitation, and there were no materials before him on which he could rightly be satisfied that the appellant had sufficient cause for not preferring the appeal within the period of limitation.

The suit was one for redemption of mortgaged land valued in the plaint at Rs. 4,500.

A decree for an account of what was due on the mortgage was made on the 27th June 1913. This judgment determined that the plaintiff was entitled to only a portion of what he claimed.

An appeal against such decree was open to the plaintiff and it lay to the Divisional Court. If no appeal from it was made section 97 of the Code of Civil Procedure would preclude its correctness from being disputed in an appeal from the final decree. The period of limitation for it was 60 days and the time taken in obtaining copies of the judgment and decree.

Another judgment and decree based on the result of taking the account ordered was made on the 28th July 1913.

Application was made on that day for copies of both judgments and decrees.

The copies were ready for delivery on the 13th August and were delivered on the 14th of the same month.

No appeal was presented to the Divisional Court against the decree of the 27th June, and counting the time taken in obtaining a copy of that decree and the judgment an appeal would be barred if presented after the 13th September 1913.

An appeal was filed in this Court on the 18th November 1913 which was the first day on which the Court opened after the Vacation. This appeal came on for hearing on the 24th March 1915. The plaintiff's advocate then asked that the Memorandum of Appeal might be returned to him for presentation to the Divisional Court on the ground that the appeal had been filed in this Court by inadvertence.

The appeal was valued at Rs. 5,500 in the Memorandum. It is difficult to understand how this valuation could have been entered by inadvertence. Mr. R. N. Burjorjee says it was done under the instructions of the plaintiff. The Memorandum was returned and was presented to the Divisional Court on the 27th March 1915. The appeal was admitted provisionally subject to

1916.

MA MAI GALE v. TUN WIN.

decision on the question of limitation. This question was argued and the learned Judge admitted, heard and determined the appeal.

All he says about the admission of the appeal is "I have admitted the appeal as, after argument, I am of opinion that the mistake in filing the appeal in the Chief Court instead of in this Court was due to an error about the value of the land on the part of Maung Saw Pe, pleader, who instructed Mr. Burjorjee."

No evidence on oath either oral or by affidavit is on the record, but a letter from Maung Saw Pe to Mr. Burjorjee dated the 13th September 1913 is filed. In this Maung Saw Pe says "I thought of filing the appeal in the Divisional Court but owing to my finding that the land was on the date of filing of the suit worth over Rs. 5,000 I send it round to you to be filed in the Chief Court."

Nowhere is it explained how Maung Saw Pe came or could come to find that the land had been worth over Rs. 5,000. If he had examined the plaint as he should have done he could not have made the mistake. If the plaintiff untruly told him that it was worth over Rs. 5,000 after having valued it at Rs. 4,500 in the plaint, such untrue statement should clearly not have afforded a ground for relaxation of the law of Limitation in the plaintiff's favour.

Not only the initial delay of over a month in applying for a copy of the judgment of the 27th June had to be explained: the gross delay in remedying the mistake of filing the appeal in this Court called for explanation.

The record was received in this Court on the 18th December 1913. Mr. Burjorjee had from that date until the case came on for hearing on the 24th March 1915 in which to examine the record even if it can be assumed that his client did not furnish him with a copy of the plaint. It was open to him at any time within the above period to make the application which he made on the 24th March 1915. A Judge has a discretion in admitting an appeal under Section 5 of the Limitation Act, but the discretion must be judicially exercised and must be based on materials judicially cognizable. High Courts are loth to interfere with the exercise of a discretion given by law to a

lower Court, but if the discretion has been exercised without appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and without the application of the right principle to those facts interference is called for, *Kichilappa Naickar v. Ramanujam Pillay* (1).

It has been held in some cases that a *bonâ fide* mistake of a pleader affords sufficient cause for admitting an appeal after time, see *Rakhal Chandra Ghosh v. Ashutosh Ghosh* (2) and the cases referred to therein—but a *bonâ fide* mistake is one made in spite of due care and attention having been exercised.

In the present case there was nothing before the learned Judge to explain the plaintiff's apparent inaction up to or shortly before the time when an appeal from the decree of the 27th June 1913 would become barred, and there is nothing on the record to justify a finding that the plaintiff's pleader's belief that an appeal lay to this Court was formed with due care and attention. This last alone would have justified refusal to admit the appeal after time, see *Sarat Chander Bose v. Saraswati Devi* (3).

In addition the very gross delay in taking any step to remedy a mistake which must have been obvious to any one who had taken the trouble to read the plaint was quite inexcusable.

The appeal should not have been admitted. This appeal is allowed, the decree of the Divisional Court is set aside and that of the District Court is restored.

The respondent must pay the appellant's costs in this Court and in the Divisional Court.

Twomey, J.—I concur.

(1) (1901) I.L.R., 25 Mad., 166. (2) (1913) 17 C.W.N., 807.
(3) (1907) I.L.R., 34 Cal., 216.

INDEX

TO

LOWER BURMA RULINGS, VOLUME VIII,

1915-16.

A

PAGE

ABUSE OF PROCESS OF COURT—*Civil Procedure Code, sec. 151—Court not bound to demand an inventory—See* PROBATE AND ADMINISTRATION ACT, SEC. 98 (3) 422

ACKNOWLEDGMENT BY A RECEIVER OF A PARTNERSHIP PROPERTY—*See* LIMITATION ACT, IX OF 1908, SEC. 19 159

ACT DONE BY CONSENT—*causing death of a person claiming to be dah-proof—See* INDIAN PENAL CODE, SECS. 87, 90 166

ACTIONABLE CLAIM—*notice of—agent for service of notice—See* TRANSFER OF PROPERTY ACT (1882), SEC. 131 288

ADOPTION—*inheritance—family house—See* CHINESE BUDDHIST LAW .. 404

ADVOCATE'S DUTY TO CLIENT—*settlement of fees—See* LEGAL PRACTITIONERS' ACT (1879), SEC. 13 (B) 294

AGENT—*power of attorney—how to be construed—Chetty practice—Indian Contract Act, section* 188.

A, a Chetty firm, had given B a power of attorney for the general management of its business. The power of attorney conferred wide powers of borrowing on the agent. B purporting to act as A's agent guaranteed C, one of its constituents, to the Bank of Bengal for Rs. 50,000 and endorsed a note for that amount over to the Bank. C became insolvent and the Bank filed a suit against A for the amount due to the Bank from C. A denied that B had authority to guarantee the loans of others.

Held on appeal by their Lordships of the Privy Council,—that in view of the nature of the business the agent's authority to borrow on behalf of A implied an authority to pledge A's credit for the purpose of securing advances from others to his firm's constituents.

Fitzgerald v. *Dressler*, (1859) 7 C.B.N.S., 374.

Bryant, Powis and Bryant, Limited, v. *La Banque Du Peuple*, (1893) A.C., 170 at 177.

Bank of Bengal v. *Ramanathan Chetty & others* 536

AGENT—*sale by agent of his own goods to principal.*

The plaintiff Company were Managing Agents for the defendant Company, but also in the course of their business as general merchants supplied the field manager of the defendant Company with engineering stores, the stores sometimes being taken from their own stock and sometimes purchased from other firms. There was nothing to show that the directors of the defendant Company knew that the plaintiffs were supplying it with goods.

Held,—that the plaintiffs were bound by the rule that no agent in the course of his agency can be allowed to make any profit out of a transaction on behalf of his principal without the principal's knowledge and consent and that they would not recover from defendants more than the cost price of the stores.

Bentley v. *Craven*, (1853) 52 E.R., 29, followed.

Cavendish Bentinck v. *Thomas Fenn*, (1887) 12 A.C., 652, referred to.

Twinzas Oil Company, Limited, v. *Mower, Limited* 102

PAGE

AGENT FOR SERVICE OF NOTICE—*actionable claim—notice of—See* TRANSFER OF PROPERTY ACT (1882), SEC. 131 288

AGENT OF CHETTY FIRM SIGNING PROMISSORY NOTE AS SURETY FOR ANOTHER FIRM—*liability of principal—burden of proof.*

A Bank **A** advanced money to two Chetty firms **B** and **C** on a promissory note signed by the agents of these two firms.

The firm **C** denied liability, contending that they received no part of the money advanced, that their agent signed merely as a surety for the firm **B**, and that he had no authority to do so. They admitted that their agent was authorised to sign notes jointly with other firms, and that had they received any share of the advance they would be bound by his act.

Held—Per Hartnoll, J.,—On a consideration of the power of attorney, **C**'s agent only had authority to do all such acts as were necessary for the transaction of his principal's business. The signing of a promissory note merely as a surety for another firm was outside the scope of the principal's business. But it was for **C** to show that the Bank had knowledge that in this particular case **C**'s agent signed only as a surety. The burden of proof was on **C** and they having failed to discharge it were liable to the Bank.

Per Twomey, J.,—In view of **C**'s admission that their agent had authority to sign notes jointly with other firms the Bank was not concerned with the destination of the money advanced, and would not fail even if **C** could show that their agent to the knowledge of the Bank signed merely as surety for another firm. A power to sign accommodation notes may be inferred from a power to sign promissory notes jointly with others.

Bryant, Powis & Bryant, Limited, v. *La Banque Du Peuple*, (1893) A.C., 170; *Bryant, Powis & Bryant, Limited*, v. *Quebec Bank*, (1893) A.C., 179.

The Bank of Rangoon, Limited, v. *Somasundrum Chetty* 168

AGREEMENT FOR SALE OF MERCHANDISE—*bond, distinction between Ordinary Contract and—See* INDIAN STAMP ACT, SEC. 2 (5), 1ST SCHEDULE, ARTICLE 5 382

AGREEMENT IN RESTRAINT OF TRADE—*want of consideration—void contract—See* CONTRACT ACT, SECS. 23, 24, 25 AND 27 389

ARMS ACT—*See* INDIAN ARMS ACT.

APPEALS—*See* LAND ACQUISITION ACT 163

APPEALS AGAINST ACQUITTAL—*revisional jurisdiction, exercise by High Court of, after Government's refusal to appeal—See* CRIMINAL PROCEDURE CODE, SECS. 417, 439 356

APPEALS FROM ORDERS—*order on a preliminary objection, directing suit to proceed—section 2 (2), Code of Civil Procedure, decree.*

When a preliminary objection is taken that a suit is not maintainable, an order overruling such an objection and directing the suit to proceed, is not a decree within the meaning of section 2 (2), Code of Civil Procedure. It does not determine the rights of the parties with regard to any of the matters in controversy in the suit, and it is not conclusive.

There is therefore no appeal from such an order.

Sidhanath Dhonddev Garud v. *Ganesh Govind Garud*, (1912) I.L.R. 37 Bom., 60, dissented from.

Channalswami Rudraswami v. *Gangadharappa Baslingappa*, (1914) 16 Bom. L.R., 954, followed.

Kamini Debi v. *Promotho Nath Mookerjee*, (1914) 20 Cal. L.J., 476, followed.

Ma Gun alias *Fuljan Bibi* v. *R. Moniandy Survey* 213

APPEALS FROM ORDERS—*Order 21, Rule 66 (4)—See* CIVIL PROCEDURE CODE, 1908, SEC. 105 350

APPROVER, WHOSE PARDON IS ALLEGED TO HAVE BEEN FORFEITED, PROCEDURE IN TRYING—*pardon how forfeited—See* CRIMINAL PROCEDURE CODE, SECS. 337, 339 447

PAGE

ARBITRATION—*application to file award made without intervention of the Court—Code of Civil Procedure, Schedule II, paragraphs 14 and 21.*

There is no provision in the 2nd Schedule to the Code of Civil Procedure for a Court's remitting to arbitrators an award which has been made in arbitration without the intervention of the Court. If the Court is satisfied that grounds such as are referred to in paragraph 14 of the Schedule exist for refusing to file the award, it should dismiss the application. If the parties have agreed to arbitration with the obvious intention of avoiding subsequent litigation and the award does not finally determine the matters in dispute, the Court will dismiss the application.

Mustafa Khan v. *Pulja Bibi*, (1905), I.L.R. 27 All., 526.

P.L.M. Subramonian Chetty v. *K.R.V. Veitian Chetty* 58

ARREST OUTSIDE MAGISTRATE'S JURISDICTION—*preventive sections—See* CRIMINAL PROCEDURE CODE, SEC. 110 378

ASSIGNMENT BY TENANT OF GOODS STORED IN THE PREMISES LEASED—*See* LANDLORD AND TENANT 164

ATTACHMENT OF PROPERTY—*application for removal of attachment—Civil Procedure Code, Order 21, Rule 58—See* MORTGAGE DECREE 215

ATTACHMENT OF PROPERTY BY MORE THAN ONE CREDITOR—*duty of Court which receives the property—sec. 63, Civil Procedure Code.*

A attached certain money due by a Municipal Committee to B in execution of decree obtained by A in the Subdivisional Court. C, plaintiff in a suit in the District Court against B, had previously attached the same money before judgment. C obtained a decree shortly after the attachment by A. The money was paid into the District Court. A applied to the District Court for rateable distribution and was refused.

Held,—that under section 63, Civil Procedure Code, the District Court was bound to give effect to both attachment and this it could only do by rateable distribution.

Sit Saing v. *Maung Fo Kaing*, (1901) 1 L.B.R., 121, and *T. M. Narasimhachariar* v. *V. Krishnamachariar*, (1914) 23 Indian Cases, 909, referred to.

Nyein Hla v. *Aung Gyi* . 204

AUDITOR IRREGULARLY ELECTED—*when to be regarded as* de facto *an officer of a company within meaning of section 214—See* INDIAN COMPANIES ACT .. 80

AWARD BY ARBITRATORS, EFFECT OF—*section 21, Specific Relief Act.*

Section 21, Specific Relief Act, refers only to inchoate and abortive arbitration proceedings. But where there is a complete and final award it is equivalent to a final judgment binding on the parties, and bars a Civil Suit relating to the matters decided by the arbitrators.

Bhajahari Saha Banikya v. *Behary Lal Busak*, (1906) I.L.R. 33 Cal., 881; *Lalldas Jibhai* v. *Bai Lala*, (1908) 11 Bom. L.R., 20; *Krishna Panda* v. *Balaram Panda*, (1896) I.L.R. 19 Mad., 290—followed.

San Nyein v. *Ma Kyaw* 157

B

BENAMIDAR—*right to sue on mortgage deed—right of mortgagor to repudiate his own deed—sec. 92, Evidence Act.*

A benamidar in whose name a mortgage is executed has a right to sue the mortgagor. The mortgagor cannot be allowed to plead that the money lent came from some one other than the person named in the document.

Munshi Basiruddin Ahmed v. *Mahomed Jalish Patwari*, (1908) 12 C.W.N., 369; and *Mohendra Nath Mookerjee* v. *Kali Prashad Johuri*, (1902) I.L.R. 30 Cal., 265—dissented from.

Bhola Pershad v. *Ram Lall*, (1896) I.L.R. 24 Cal., 34; *Sachitananda Mohapatra* v. *Balaram Goram*, (1897) I.L.R. 24 Cal., 644; *Yad Ram* v. *Umrao Singh*, (1899) I.L.R. 21 All., 380; and *Nand Kishore Lal* v. *Ahmad Ata*, (1895) I.L.R. 18 All., 69—followed.

Gopee Krist Gosain v. *Ganga Persaud Gosain*, (1854) 6 Moore I.A., 53, referred to.

Ma Tin v. *Waing Tha* 205

PAGE

BENCH OF HONORARY MAGISTRATES—*Magistrates who have heard all evidence to decide the issue—Criminal Procedure Code, sec.* 350.

The constitution of a Bench of Honorary Magistrates cannot be changed in the middle of a case. The case must be decided only by those Magistrates who have heard all the evidence.

Damri Thakur v. *Bhawani Sahoo*, (1895) I.L.R. 23 Cal., 194; *Hardwar Singh* v. *Khega Ojha*, (1893) I.L.R. 20 Cal., 870—followed.

Itala v. *King-Emperor* 463

BENCH NOT A COURT OF APPEAL—*review by Bench under section* 12, *Lower Burma Courts Act—See* TRIAL BY JURY 274

BILL OF LADING—*construction of—shipowner's liability construed.*

Certain betel leaves shipped on one of defendant company's steamer were damaged in transit owing to lack of ventilation, which was result of their being stowed in the 'tween decks. On the bill-of-lading under which the leaves were shipped was the clause, "at shipper's risk with option of carrying on deck."

Held,—that the option was the shipping company's option and that the company was not liable for damage.

British India Steam Navigation Company, Ltd., v. *Jiawoola* 293

BOND, DISTINCTION BETWEEN ORDINARY CONTRACT AND—*agreement for sale of merchandise—See* INDIAN STAMP ACT, SECTION 2 (5), IST SCHEDULE, ARTICLE 5 382

"BOND SUBJECT TO A CONDITION," WHEN A—*Schedule I, Article* 68, *administration bond—See* LIMITATION ACT, IX OF 1908 99

BREACH OF CONTRACT BY BUYERS, RE-SALE ON—*negotiable securities—damages how measured—See* CONTRACT ACT, SECS. 73, 107 343

BREACH OF PEACE—*Criminal Procedure Code, sec.* 106—*house trespass—Indian Penal Code, sec.* 441—*See* CRIMINAL TRESPASS 463

BUDDHIST LAW—*Chinese Buddhist—marriage, when to be presumed—inheritance.*

It would appear that there are ordinarily six steps to be taken preliminary to a first-class marriage in China, but that the omission of these steps does not make a marriage invalid. Where a Chinese Buddhist man and a Burmese Buddhist woman have lived together as husband and wife for a long period, the burden of rebutting the presumption of marriage that arises is upon the party that denies it.

In the absence of definite evidence as to the Chinese Law of inheritance, Courts must be guided by justice, equity and good conscience, and the principles of division laid down in the Indian Succession Act may suitably be followed.

Fon Lan v. *Ma Gyi*, 2 L.B.R., 95, referred to; *cf. also Ma Shein* v. *Kin Sein*, 8 L.B.R., 225, and *Saw Maung Gyi* v. *Ma Thu Kha*, 8 L.B.R., 208.

Thein Chein v. *Ah Shein* 222

BUDDHIST LAW—*gifts made publicly at a* shinbyu *ceremony—extent of rights acquired thereby by donee.*

Under Buddhist Law a gift of property without possession, made publicly by both the parents (or by the surviving parent if one is dead) at the time of the *shinbyu* ceremony, constitutes a contingent gift.

The property so given remains absolutely at the disposal of the parents or the survivor of them for their life-times, or his or her life-time. If the donee dies leaving either of the donors surviving the gift has no effect. The donee is to get the property only after the death of the parents, and if it has not already been disposed of by them.

A gift made on the day after the *shinbyu* ceremony is not a *shinbyu* gift.

Twomey, J.,—Held that questions as to the validity of *shinbyu* gifts are questions regarding the religious usage and have therefore to be decided according to the Buddhist Law under section 13, Burma Laws Act.

Ormond, J.,—Refrained from deciding the above question.

Nga Pan U v. *Mi Kyu and others*, (1874) S.J., L.B., 39; *Maung Shwe Thwè* v. *Ma Saing*, 2 U.B.R. (1897—1901), 59; *Mra Do Aung* v. *Shwe U*, (1874) S.J., L.B., 22; *Maung At Gyi* v. *Mi U Me and* 1, 2 U.B.R.

PAGE

(1892—1896), 400 ; *Maung Ni* v. *Maung Po Min and* 1, (1875) S.J., L.B., 44—referred to.
Pan Nyun v. *Hla Sein* 190

BUDDHIST LAW—*jurisdiction of Civil Courts in Lower Burma in Ecclesiastical matters.*

There is not in Lower Burma any recognised Buddhist Ecclesiastical Authority such as exists in Upper Burma.

Civil Courts in Lower Burma have jurisdiction to decide and should decide suits of a civil nature in which points of Ecclesiastical Law arise.

U Wisaya v. *U Zaw Ta* 145

BUDDHIST LAW—*marriage, consent essential to valid—damages for breach of promise by party's parent not sustainable.*

A Burmese Buddhist, whether male or female, adult or minor, cannot be legally married without his or her consent or against his or her will. The breach therefore by a father of a promise to give his son in marriage and to give marriage presents suitable to his position in life does not afford a cause of action on which a Court can make a decree for compensation.

Maung Thaik v. *Ma Cho*, 2 U.B.R. (1897—1901), 197, followed.
Maung Thein v. *Ma Thet Hnin* 347

BUDDHIST LAW—*monk ordinarily to be presumed to have no property—Civil Procedure Code*, 1908, *Order* 25, *Rule* 1.

In the absence of strong evidence to the contrary it is to be presumed that a Buddhist monk has no property over which he has rights of disposal.

Maung Taloh v. *Ma Kun*, 2 U.B.R. (1892—96), p. 78, referred to.
Ma Pwe v. *Maung Myat Tha*, 2 U.B.R. (1897—1901), p. 54, followed.
U Wilatha v. *U Thiri* 342

BUDDHIST LAW—*right of a father to dispose of jointly acquired property on the death of the mother, when there is only one son and the father marries again—right of the son in the property.*

A, a Burmese Buddhist, and his wife, B, jointly acquire certain property. There is issue of the marriage, C. B dies. A marries again without partitioning the property with his son C. To what extent can A dispose absolutely of the property ?

Held,—that A can dispose absolutely of ¾ of the property.

The father has in any case an absolute right of disposal of ½. The eldest son can claim his ¼ share at any time within the period of limitation, and over this the father has no right of disposal. Over the remaining ¼ share the father has an absolute right of disposal, as there are no other children whose interests it is necessary to safeguard.

Per Hartnoli, C.J.,—If the son does not claim his share within the period of limitation, he can only claim as heir to his father's estate after his father's death and there would be in that case nothing to prevent his father disposing of the whole land in his lifetime.

Ma Nyo v. *Ma Yauk*, 4 L.B.R., 256 ; *Ma Pe and Kyu Kin* v. *Ma Thein Yin*, 4 L.B.R., 287 ; *Mi Saw Myin* v. *Mi Shwe Thin*, 1 U.B.R. (1910—13), 125 ; *Nga Shwe Yo* v. *Mi San Byu*, S.J., L.B., 108 ; *Maung Po Lat* v. *Mi Po Le*, S.J., L.B., 212 ; *Maung Seik Kaung* v. *Maung Po Nyein*, 1 L.B.R., 23 ; *Maung Sa So* v. *Mi Han*, 2 U.B.R. (1892—96), 171 ; *Maung Hmu* v. *Maung Po Thin*, 1 L.B.R., 50—referred to.

Ma On v. *Saive O*, S.J., L.B., 378, distinguished.
Shwe Po v. *Maung Bein* 115

BUDDHIST LAW—*right of* orasa *son to claim his one-fourth share.*

The *orasa* son is entitled to claim his one-fourth share from his mother even if she does not marry again.

Maung Seik Kaung v. *Maung Po Nyein*, 1 L.B.R., 23 ; *Maung San Dwa* v. *Ma Min Tha*, 2 Chan Toon's L.C., 207—referred to.
Kyi Hlaing v. *Ma Htu* 189

BUDDHIST LAW—*what law applicable to non-Burman Buddhists.*

The law to be applied to a non-Burman Buddhist is the customary law prevailing in his own country.

PAGE

Ma Tin v. *Doop Raj Barua*, 1 Chan Toon's L.C., 370, dissented from.
Fon Lan v. *Ma Gyi*, 2 L.B.R., 95, referred to.
Foe San alias *Fakir Chan* v. *Adi Chandro Barwa* 301

BUDDHIST LAW : INHERITANCE—*grandchild of deceased (son of the eldest daughter) claiming as against a son of deceased.*

There cannot be an *orasa* daughter as well as an *orasa* son in the same family. Where, therefore a Burman Buddhist couple die leaving a son who is capable of becoming the *orasa* son, the son of an elder sister who has predeceased the parents cannot claim a preferential share on the ground of his mother being *orasa*.

Ma Saw Nawe v. *Ma Thein Yin*, (1902) 2 Chan Toon's L.C., 210, referred to.

Po Zan v. *Maung Nyo*, (1912) 7 L.B.R., 27, followed.

Po Hman v. *Maung Tin* 113

BUDDHIST LAW : INHERITANCE—*joint property—widow's power of disposal.*

Subject to any claim by the eldest son to certain specified property and to a quarter share of the joint property, and to any claim by the eldest daughter to certain specifted property, a Burmese Buddhist widow has an absolute right of disposal over the whole of the joint property of herself and her late husband as against the children of their marriage.

Ma On and others v. *Ko Shwe O and others*, (1886), S.J., L.B., 378, overruled.

Ma Saw Myin and one v. *Mi Shwe Thin and one*, 1 U.B.R. (1910—13), 125, followed.

Maung Po Lat v. *Mi Po Le*, S.J., L.B. 212; *Ma Min Tha* v. *Ma Naw*, 2 U.B.R. (1892—96), 581; and *Thakur Vasonji Moraji* v. *Musammat Chanda Bibi*, (1915) 18 C.W.N., 873—referred to.

Ma Sein Ton v. *Ma Son* 501

BUDDHIST LAW : INHERITANCE—*pre-emption—sale of share of undivided estate.*

One of several coheirs of an undivided ancestral estate may sell his share in it, and if the other heirs do not promptly assert their right of pre-emption, the sale is valid. The purchaser of the share cannot however enforce his claim against any specific portion of the estate until the share has been ascertained and separated by division of that estate.

Mi Te v. *Po Maung*, S.J., L.B., 41; *Nga Myaing* v. *Mi Baw*, S.J., L.B., 39; *Ma Ngwe* v. *Lu Bu*, S.J., L.B., 76, overruled.

Maung Ye Nan O v. *Aung Nyat San*, 8 L.B.R., 466; *Maung Shwe Nyun* v. *Ma So*, 2 U.B.R. (1897—1901), 155; *Ma Pa U* v. *Maung Tha Lu*, P.J., L.B., 189, and *Yelumalai Chetty* v. *Srinivasa Chetty*, (1906) I.L.R. 29 Mad., 294—followed.

Somasundaram Chetty, C.T.R.M.A., v. *Shwe Nyun* 497

BUDDHIST LAW : INHERITANCE—*pre-emption, no right of pre-emption as regards partitioned property.*

The following question was referred to a full bench under section 11 of the Lower Burma Courts Act :—

"Have the coheirs who take part in the partition of immoveable ancestral property a right of pre-emption as regards such property after the partition has been effected?"

Held (*Hartnoll, J., dissenting*),—that they have not.

Shwe Eik Ke v. *Tha Hla Aung*, 1 L.B.R., 144; *Ebrahim* v. *Arasi*, P.J., L.B., 26; *Apana Charan Chowdry* v. *Shwe Nu*, 4 L.B.R., 124—followed.

Ma Ngwe v. *Lu Bu*, S.J., L.B., 76; *Mo Thi* v. *Tha Kwe*, 4 L.B.R., 128, dissented from.

Ibrahim Saib v. *Muni Mir Udin Saib*, (1870) 6 Mad. H.C.R., 26, distinguished.

Shwe Nyun v. *Ma So*, 2 U.B.R. (1897—1901) 155; *Nga Tin* v. *Shwe On*, 2 U.B.R. (1907—09), Budhhist Law : Inheritance—Pre-emption, 1; *Gobind Dayal* v. *Inayatullah*, (1885) I.L.R. 7 All., 775 at 815; *Nga Myaing* v. *Mi Baw*, S.J., L.B., 39; *Ma Hnin Bwin* v. *U Shwe Gon*, 8 L.B.R., 1; *Maung La Dok* v. *Ma Po*, 2 U.B.R. (1897—01), Budddhist Law : Inheritance, 162; Preface to *Manu Wunnana*, U Tet To's edition, 1878, p. 4; Jardine Prize

PAG

Eassy, p. 103; *Thein Pe* v. *U Pet*, 3 L.B.R., 175; U Tet To's editions of *Manu Wunnana* and *Manu Thara Shwe Myin* printed in 1878 and 1879—referred to.

Ye Nan O v. *Aung Myat San* 466

BUDDHIST LAW: INHERITANCE—*rights of parents of married couple dying childless—Letters of Administration.*

When a husband and wife die childless within a short time of each other, their estate retains its character as the joint estate of both, and a parent of one or the other who was living with the couple will not be debarred from participating merely because his (or her) son (or daughter) was the first to die.

Ma Gun Bon v. *Maung Po Kywe*, 2 U.B.R. (1897—1901), 66; *Ma Kadu* v. *Ma Yin*, 2 U.B.R. (1904—1906), Buddhist Law: Inheritance, 7; *Ma Hnin Bwin* v. *U Shwe Gôn*, 8 L.B.R., 1—referred to.

Ma Ein v. *Tin Nga* 197

BUDDHIST LAW: INHERITANCE—*succession of brothers or sisters when preferred to that of parents—interpretation of Dhammathats—preponderating authority of Manukye.*

There is a conflict of authority in the Dhammathats as to whether in families which have ceased to live together, parents succeed before brothers and sisters to a deceased child of the parents. On the whole the balance of authority is in favour of the view that preference is to be given to brothers and sisters. In any case as this is the view supported by the *Manukye* Dhammathat, it is the proper view to be accepted in Burma. The *Manukye* has held a commanding position since the time of King Alompra and is still to be regarded as of the highest authority. Where it is not ambiguous, other Dhammathats do not require to be referred to.

Shwe Gon v. *Hnin Bwin*, 5 L.B.R., 231, reversed.

Mi San Hla Me v. *Kya Tun*, P.J., L.B., 116; *Maung Chit Kywe* v. *Maung Pyo*, 2 U.B.R. (1892—96), 184; *Ma Gun Bon* v. *Maung Po Kywe*, 2 U.B.R. (1897—1901), 66; *Ma E Dok* v. *Maung Ngwe Hlaing*, 2 U.B.R. (1897—1901), 109; *Maung Shwe Bo* v. *Maung Pya*, P.J., L.B., 524—referred to.

Ma Hnin Bwin v. *U Shwe Gon* 1

BUDDHIST LAW: MARRIAGE—*effect of imprisonment on marriage tie.*

A Burman sentenced to a long term of imprisonment cannot thereby be said to have deserted his wife. If the wife during his incarceration takes a second husband, her conduct amounts to desertion and adultery, and she forfeits to her first husband all property jointly acquired during the marriage with him. The first marriage is dissolved not from the day she took a second husband, but from the day the first husband claims a divorce as the result of her desertion.

Thein Pe v. *U Pet*, 3 L.B.R., 175; *Ma Thin* v. *Maung Kyaw Ya*, 2 U.B.R. (1892—96), 96—followed.

Aung Byu v. *Thet Hnin* 50

BURDEN OF PROOF—*liability of principal—See* AGENT OF CHETTY FIRM SIGNING PROMISSORY NOTE AS SURETY FOR ANOTHER FIRM 168

BURDEN OF PROOF—*parent and child—alleged undue influence—See* GIFT BEFORE DEATH 235

BURMA GAMBLING ACT, SEC. 4—"*ket*," *not a game of mere human skill.*

The Burmese game "ket" is not a game of mere human skill.

Po On v. *King-Emperor* 529

C

CAUSING DEATH OF A PERSON CLAIMING TO BE DAH-PROOF—*act done by consent—See* INDIAN PENAL CODE, SECS. 87, 90 166

CHARGE ON IMMOVEABLE PROPERTY—*incomplete mortgage not a charge—See* TRANSFER OF PROPERTY ACT, IV OF 1882, SECS. 58 AND 100 553

CHEMIST'S QUALIFICATIONS—*See* POISONS ACT, I OF 1904, SEC. 10, CLAUSE (B) 532

PAGE

CHETTY PRACTICE—*power of attorney—how to be construed—Indian Contract Act, sec.* 188—*See* AGENT 536

CHINESE BUDDHIST—*marriage, when to be presumed—inheritance—See* BUDDHIST LAW 222

CHINESE BUDDHIST LAW—*inheritance—adoption—family house.*

A, as next friend of B, a minor, brought a suit against C, the widow of D, a Chinaman who had been born and bred in Burma, for a declaration *inter alia* that B was D's adopted son. D had been a Chinese Buddhist and all the parties to the suit were or professed to be of the same religion.

Held,—that the law applicable to the case was as far as it could be ascertained the customary law of Chinese Buddhists. Adoption of children by childless married couples is of common occurrence in China, but care must be taken that an alleged adoption is properly proved.

A "family house" within the meaning of Chinese Buddhist Law would appear to be a house which has belonged to paternal ancestors or a house which a man has started for his family and their male descendants. Before a widow can be deprived of maintenance for leaving the house in which her husband had lived, it must be shown clearly not only that it was a family house, but also that she left it without cause.

Fone Lan v. *Ma Gyi*, (1903) 2 L.B.R., 95, followed.

Ma Pwa v. *Yu Lwai* 404

CHINESE BUDDHIST LAW—*marriage—law of domicile as affecting marriage—customary law of woman when to be considered.*

A Chinese Buddhist man persuaded a Burmese Buddhist woman to live with him as his wife by executing a document setting forth that from the date of execution of the document they were to live together as husband and wife for their whole life, whether in sickness or in health, and that in the event of his failing in his duties he would pay her Rs. 5,000 compensation. After they had lived together as husband and wife for some months, he deserted her. She sued him for restitution of conjugal rights or in the alternative for Rs. 5,000 for breach of contract of marriage and in the Original Court was awarded Rs. 2,000 damages.

Held, on appeal—per curiam,—that there had been a breach of contract of marriage and that damages had been rightly awarded.

Held by Parlett, J.,—that in the absence of the preliminary negotiation between the parents of the parties and other ceremonies usual in Chinese marriages, the union could not be regarded as a valid marriage.

Held by the Chief Judge,—that there is *primâ facie* no strong reason why the customary law of the man should be applied and that of the woman disregarded, and that the rule of British Courts should be applied to such cases, *i.e.*, the validity of a marriage should be determined by the "lex loci contractus" and the question of the capacity of the parties to marry by the "lex domicilii."

Pai Beng Teng v. *Ko Maung*, (1904) 2 L.B.R., 261; *Brook* v. *Brook*, (1861) 9 H.L.C., 193; *Brinkley* v. *Attorney-General*, (1890) L.R. 15 P.D., 76; *Sottamayor* v. *De Barros*, (1877) L.R. 3 P.D., 1; *Ma E* v. *Maung San Da*, (1897) 3 Bur. L.R., 8, and 1 Chan Toon's L.C., 140; Alabaster on Chinese Criminal Law—referred to.

Sein Kyi v. *Ma E* 399

CHINESE BUDDHIST LAW—*presumption of validity—See* MARRIAGE .. 225

CHINESE CUSTOMARY LAW—*marriage—what constitutes—burden of proof.*

In the present state of the authorities available on Chinese Customary Law the decision of questions arising under that law will depend largely on the question on whom the onus lies. Hence when a Chinaman sought a declaration that his marriage with a Burmese girl was invalid and it was found that he had obtained the consent of the girl's parents to a marriage and his witnesses generally declared that this was sufficient:

Held,—that the authorities did not negative the idea that such consent might suffice to give the girl the status at any rate of a lesser wife and that he had failed to prove his claim.

PAGE

Fone Lan v. *Ma Gyi*, (1903) 2 L.B.R., 95 ; *Pai Beng Teng* v. *Ko Maung*, (1904) 2 L.B.R., 261 ; *T. Wain Shain* v. *Ma Hnin Hlaing*, (1909) 4 Bur. L.T., 124—referred to.

Saw Maung Gyi v. *Thu Kha* 208

CIVIL PROCEDURE CODE, 1908, SEC. 2 (2), DECREE—*order on a preliminary objection, directing suit to proceed—See* APPEALS FROM ORDERS .. 213

CIVIL PROCEDURE CODE, 1908, SEC. 54—*partition of estate, including immoveable property—procedure of Court on decree ordering—See* EXECUTION .. 338

CIVIL PROCEDURE CODE, 1908, SEC. 63—*duty of Court which receives the property—See* ATTACHMENT OF PROPERTY BY MORE THAN ONE CREDITOR .. 204

CIVIL PROCEDURE CODE, (1908), SEC. 92—*trust scheme—Mussalman law—wakf.*

Alike under Mussulman law and the provisions of section 92 of the Civil Procedure Code (1908), the Court has a very wide discretion in dealing with questions of "wakf" or trust. It is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the trust institution, and the way in which the management has been carried on hitherto, in conjunction with other existing conditions that may have grown up since its foundations, and it may lay down any rules which may facilitate the work of management.

Ibrahim Esmael v. *Abdool Carrim Peermamode*, L.R. 35 I.A., 151, distinguished.

Mahomed Ismail Ariff v. *Hajee Ahmed Mooila Dawood* 517

CIVIL PROCEDURE CODE (1908), SEC. 105—*appeals from orders—Order* 21, *Rule* 66 (4).

No appeal lies against an order under Order 21, Rule 66 (4).

Panch Duar Thakur v. *Mani Raut*, (1912) 16 C.W.N., 970, followed.

N. C. Chatterji v. *R. M. K. Karpan Chetty* 350

CIVIL PROCEDURE CODE (V OF 1908), SEC. 144—*application under, not an application to execute a decree—Limitation Act* (*IX of* 1908), *1st Schedule, Articles* 181, 182.

Where an appellate decree does not expressly order restitution or other relief, any person entitled to relief may apply to the Court for it and the application should be treated as a miscellaneous application, to which Article 181 of the Limitation Act applies, not as an application to execute the decree.

Ram Kanai Ghosh v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur*, (1905) 2 Cal. L.J., 546, referred to.

Asha Bi Bi v. *Nuruddin* alias *Maung Gyi* 262

CIVIL PROCEDURE CODE, 1908, SEC. 151—*abuse of process of Court—Court not bound to demand an inventory—See* PROBATE AND ADMINISTRATION ACT, SEC. 98 (3) 422

CIVIL PROCEDURE CODE (V OF 1908), ORDER 1, RULE 10—*plaintiff, limit to Court's power of adding new.*

A, a Burmese woman, was married three times, but had no natural children. B, her third husband, survived her and retained possession of property acquired during her second marriage. C, who is said to have been her "kittima" adopted son, predeceased her, leaving a son D by E, the daughter of A's second husband. D sued B for the property left by A. The District Court gave him a decree for a half share of the property. On appeal, the Divisional Court, purporting to act under Rule 10 of Order 1 of the 1st Schedule, Civil Procedure Code, added E, D's mother, as co-plaintiff with D and gave her a decree for $\frac{3}{4}$ths of the property as against a quarter left for B.

Held,—On 2nd appeal by B that a Court has no authority to import into a case as co-plaintiff a person whose cause of action is inconsistent with that of the original plaintiff and that the Divisional Court should have dismissed the suit.

Hnin Dok v. *Ma U*, 2 U.B.R. (1897—1901), 126 ; *Maung Kado* v. *Ma Kyin*, 2 U.B.R. (1897—1901), 164 : *Gun Bon* v. *Po Kywe*, 2 U.B.R. (1897—1901), 66 referred to.

Shwe Paw v. *Pan Zi* 302

PAGE

CIVIL PROCEDURE CODE, 1908, ORDER 6—*mortgage unregistered—pleadings, judgment to be in accordance with—See* TRANSFER OF PROPERTY ACT, SEC. 59 334

CIVIL PROCEDURE CODE (V OF 1908), ORDER 6, RULE 17—*amendment of plaints —See* LANDLORD AND TENANT 270

CIVIL PROCEDURE CODE, 1908, ORDER 6, RULE 17—*pleadings, amendment of—when admissible—incomplete sale—Transfer of Property Act, section* 59.

A sued B for the redemption of land alleged to have been mortgaged by her in 1908 for Rs. 1,400. B claimed that the land had been sold to him for Rs. 2,500. In course of the trial it was discovered that neither side could prove its case as there was no registered deed. The District Court allowed A to amend her suit from one for redemption to one for possession, and holding that A had sold the land outright for Rs. 2,500, ordered B to deliver up possession on payment of Rs. 2,500.

Held on appeal,—that the amendment should not have been allowed. Any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid, and there should be no departure from the state of facts and equities and ground of relief originally alleged and pleaded. A's suit as originally laid was to enforce a mortgagor's right under an alleged mortgage ; as amended, it was a suit to enforce a right as owner who had not made any transfer of interest in the property. The later case was inconsistent with the first.

Mukhoda Soondury Dasi v. *Ram Churn Karmokar*, (1882) I.L.R. 8 Cal., 871, and *Eshen Chunder Singh* v. *Shama Churn Bhutto*, (1866) 11 Moore's I.A., 7—followed.

Nauk To v. *Ma Hnin* 418

CIVIL PROCEDURE CODE, ORDER 21, RULE 46 (1), ORDER 29, RULE 2—*See* PROHIBITORY ORDER 62

CIVIL PROCEDURE CODE, ORDER 21, RULE 50—*liability of minor partners— See* JOINT HINDU FAMILY BUSINESS 112

CIVIL PROCEDURE CODE (V OF 1908), ORDER 21, RULE 50 (3)—*See* COURT FEES ACT (1870), SCHEDULE I, ARTICLE 1, AND SCHEDULE II, ARTICLE 11 .. 300

CIVIL PROCEDURE CODE, 1908, ORDER 21, RULE 58—*execution—attachment of property—application for removal of attachment—See* MORTGAGE DECREE 215

CIVIL PROCEDURE CODE, 1908, ORDER 21, RULE 66—*execution— sale proclamation—duty of Court—purchaser's remedy in event of improperly conducted sale.*

A having obtained a mortgage decree against B in respect of a piece of land alleged to measure 29·33 acres applied to the Court concerned for sale of the mortgaged property. Sale proclamation was duly issued, but before the sale B informed the Court that owing, *inter alia*, to a considerable portion of the land having been brought within Penwêgôn Town lands, it was doubtful whether there were really more than 7 acres for sale. The Court held that its only concern was with the sale of such land as had been mortgaged by B and his interest in it. It did not apparently notify intending purchasers of the information given it by B and C bought the land at the sale on the assumption that it measured 29·33 acres. C, when he discovered that he had only obtained possession of 7·61 acres, first brought a suit to set aside the sale, but failed in the Lower Appellate Court, and then filed the present suit for compensation.

Held,—that it is incumbent on a Court to be scrupulous in the extreme in the conduct of its sales, and that though there was no fraud proved on the part of either A or B, the Judge conducting the sale of land now in question so neglected the duties imposed upon him by Rule 66 of Order 21 of the 1st Schedule to the Civil Procedure Code that the purchaser was entitled to a remedy by way either of proportionate refund of purchase money or of cancellation of sale.

Sundara Gopalan v. *Venkatavarada Ayyangar*, (1893) I.L.R. 17 Mad., 228; *Shanto Chandar Mukerji* v. *Nain Sukh*, (1901) I.L.R. 23 All., 355;

PAGE

Muhammad Rahmat Ullah v. *Bachcho*, (1905) I.L.R. 27 All., 537; *Abdullah Khan* v. *Abdur Rahman Beg*, (1896) I.L.R. 18 All., 322; *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry*, (1892) I.L.R. 20 Cal., 8; *Sheo Gobind Singh* v. *Dhanukdhari Singh*, (1913) 21 I.C., 774; *Mahomed Kala Meah* v. *Harperink Smith & Co.*, (1907) 5 L.B.R., 25—followed.

Doyal Krishna Naskar v. *Amrita Lal Das*, (1901) I.L.R. 29 Cal., 370, referred to.

A. M. Hashim Isphany v. *N. A. P. K. Chetty firm* 427

CIVIL PROCEDURE CODE, 1908, ORDER 21, RULE 66 (1)—*appeals from orders—See* CIVIL PROCEDURE CODE, 1908, SEC. 105 350

CIVIL PROCEDURE CODE, 1908, ORDER 25, RULE 1—*monk ordinarily to be presumed to have no property—See* BUDDHIST LAW 342

CIVIL PROCEDURE CODE, 1908, ORDER 25, RULE 1 (3), AND ORDER 33—*pauper suit by woman—security not required.*

Order 25, Rule 1 (3), of the 1st Schedule to the Civil Procedure Code does not apply in the case of a woman who has been permitted under Order 33 to sue as a pauper.

Mussamat Hafizan v. *Abdul Karim*, (1907) 12 C.W.N., 163, followed.

Ma Gun v. *Tha Hnyin* 387

CIVIL PROCEDURE CODE, 1908, ORDER 30, RULE 4, SEC. 45, CONTRACT ACT—*right to sue on behalf of firm after decease of a partner—See* PARTNERSHIP .. 130

CIVIL PROCEDURE CODE, 1908, ORDER 33—*pauper suit by woman—security not required—See* CIVIL PROCEDURE CODE, 1908, ORDER 25, RULE 1 (3) .. 387

CIVIL PROCEDURE CODE (V OF 1908), ORDER 34, RULE 1—*rights of puisne mortgagee—Transfer of Property Act, sections* 74, 75—*declaratory decree, suit for, when permissible—Specific Relief Act, sec.* 42—*See* MORTGAGE .. 265

CIVIL PROCEDURE CODE, 1908, ORDER 34, RULE 6—*equitable mortgage, effect of—mortgage, recovery of balance due on—Transfer of Property Act* (1882), *sec.* 59.

In towns where equitable mortgages are permitted, a deposit of title deeds is to be regarded as an agreement to execute a legal mortgage and as carrying with it all the remedies incident to such a mortgage. A mortgagor is personally responsible for all the money borrowed on his mortgage.

Before a final personal decree is passed under Rule 6 of Order 34 of the 1st Schedule to the Civil Procedure Code, notice should ordinarily be issued to the judgment-debtor.

Carter v. *Wake*, (1877) L.R. 4 Ch. D., 605, followed.

Badier Rahman Chowdhry v. *M. A. R. R. M. R. M. Chetty firm* .. 450

CIVIL PROCEDURE CODE, 1908, 1ST SCHEDULE, APPENDIX D, FORM 21—*receiver, appointment of—See* PARTNERSHIP, DISSOLUTION OF .. 332

CIVIL PROCEDURE CODE, SCHEDULE II, PARAGRAPHS 14 AND 21—*See* ARBITRATION 58

CLAIM FOR POSSESSION WITHOUT TITLE—*Lower Burma Land and Revenue Act, secs.* 56 (*a*), 55 (*b*), 19 *and* 6—*See* JURISDICTION OF CIVIL COURTS .. 227

COMPENSATION—*perpetual tenancy—improvement—ejectment—See* LANDLORD AND TENANT 433

COMPOSITION—*sections* 23, 28, 29, 30—*See* PRESIDENCY INSOLVENCY ACT (III OF 1909) 258

CONFESSION—*incriminating statement of nature of—made to thugyi—inducement—Evidence Act, sec.* 24.

Appellant had been convicted of murder, the chief ground for conviction being a statement he had made to a neighbouring thugyi, which, whilst not a confession in the ordinary sense of the word, was of such an incriminating character that the Sessions Judge drew from it the conclusion that he had taken part in the murder if he had not alone committed it.

Held,—on appeal that inasmuch as whatever the precise words prior to the making of the statement used by the thugyi were, the impression conveyed to appellant's mind must have been that if he had not taken part

PAGE

in the murder, he would not be punished, the statement came within the terms of section 24 of the Evidence Act and was irrelevant.

Nga Kya Thein v. *King-Emperor* 94

CONTRACT ACT—*See also* INDIAN CONTRACT ACT.

CONTRACT ACT, SECS. 23, 24, 25, 27—*agreement in restraint of trade—want of consideration—void contract.*

A and B entered into an undertaking by which A promised that she would not in any way set up or carry on a stevedoring business and B in consideration thereof promised that he would pay her Rs. 350 a month. B paid the sum agreed upon for three months and then discontinued payment. A sued to recover arrears due.

Held,—that A was not entitled to recover anything. Her promise was in restraint of trade and could not be enforced. There was therefore no consideration to make B's promise binding upon him, and the whole contract was void under section 25 of the Contract Act.

Wallis v. *Day*, (1837) 2 M. & W., 273—46 R.R., 602; *Bishop* v. *Kitchin*, (1868) 38 L.J.Q.B., 20; *Haribhai Maneklal* v. *Sharafali Isabji*, (1897) I.L.R. 22 Bom., 861; *Bank of Bengal* v. *Vyabhoy Gangji*, (1891) I.L.R. 16 Bom., 618; *Belchambers* v. *Sarat Chandra Ghosh*, (1908) I.L.R. 35 Cal., 870; *Davlatsing* v. *Pandu*, (1884) I.L.R. 9 Bom., 176—referred to.

Madhub Chunder Paramunick v. *Rajcoomar Das*, (1874) 14 Ben. L.R., 76; *Nur Ali Dubash* v. *Abdul Ali*, (1892) I.L.R. 19 Cal., 765—followed.

G. Hurry Krishna Pillay v. *M. Anthilatchmy Ammal* 389

CONTRACT ACT, SEC. 45, CIVIL PROCEDURE CODE, 1908, ORDER 30, RULE 4—*right to sue on behalf of firm after decease of a partner—See* PARTNERSHIP 139

CONTRACT ACT, SECTIONS 73, 107—*breach of contract by buyer, resale on—negotiable securities—damages how measured.*

In a contract for sale of shares in Companies the measures of damages for breach of contract is the difference between the contract price and the market price at the date of the breach, but the seller must mitigate the damages by getting the best price he can at the date of the breach.

Section 107 of the Contract Act applies to cases in which a seller has a lien on goods or has stopped them in transit, and should not be extended beyond its scope.

Staniforth v. *Lyall*, 7 Bing., 169; *Yates* v. *Whyte*, 4 Bing. N.C., 272; *Bradburn* v. *Great Western Railway*, L.R. 10 Ex., 1; *Jebson* v. *East and West India Dock*, L.R. 10 C.P., 300; *Rodocanache* v. *Milburn*, 18 Q.B.D., 67; *William* v. *Agius*, 1914, A.C., 510—referred to.

A. K. A. S. Jamal v. *Moolla Dawood Sons & Co.* 343

CONTRACT ACT, SECTION 107—*resale on buyer's default repudiated by buyer—damages claimable at market rate.*

A buyer failed to take delivery of goods and the seller having a power of resale, purported to exercise that power but bought in the goods himself "benami."—The seller sued for resale damages; the defendant impugned the resale as being void. The plaintiff at the hearing obtained leave to amend his plaint by adding, in the alternative, a claim for damages based upon the market rate—and obtained a decree.

Upon appeal, *held*,—Plaintiff was entitled to renounce the resale and pursue his claim for damages based upon the market rate. A plaintiff can sue for damages by way of resale and in the alternative for damages based upon the market rate of the due date.

Semble:—The buyer could have held the seller to the resale; and if prejudiced by an improper resale, could have claimed damages by way of set off and be placed in the same position as if the resale had been properly held and a proper price obtained.

Jamal v. *Moolla Dawood*, 7 L.B.R., 252; *Oldershaw* v. *Holt*, (1840) 12A. & E., 590; *Smith* v. *M'Guire*, (1858) 27 L.J. Ex., 465; *Brace* v. *Calder*, (1895) 2 Q.B.D., 253; *Hagedom* v. *Laing*, 6 Taunt, 162; *Yule & Co.* v. *Mahomed Hossain*, (1896) I.L.R. 24 Cal., 124; *Clive Jute Mills Co., Ltd.*, v. *Ebrahim Arab*, (1896) I.L.R. 24 Cal., 177; *Angullia & Co.* v. *Sassoon & Co.*, (1912) I.L.R. 39 Cal., 568—referred to.

PAGE

Buchanan v. *Avdall*, 15 Ben. L.R., 276, distinguished.
Maung Gyi Maung v. *Moosejee Ahmed & Co.* 367

NTRACT ACT, SECS. 171, 217, 221—*See* LEGAL PRACTITIONER'S EQUITABLE LIEN 70

TRACT FOR RENEWAL NOT CONTRACT FOR PERPETUAL RENEWAL—*See* LIMITATION ACT 64

VICTON OF ABETMENT OF ROBBERY ON A CHARGE OF DACOITY NOT NECESSARILY ILLEGAL—*Criminal Procedure Code, secs.* 237, 238—*Indian Penal Code, secs.* 34, 109, 114—*See* TRIAL BY JURY 274

DURABLE IMITATION—*injunction—trade labels—See* SPECIFIC RELIEF ACT, I OF 1877, SEC. 52 561

RT FEES ACT, SEC. 17—*distinct subjects—ejectment—rent—damages for wrongful occupation.*

A claim for possession of a house by ejectment of a tenant and a claim for damages for use and occupation after the tenancy has been terminated by legal notice are not distinct subjects within the meaning of section 17 of the Court Fees Act. A claim for rent due however is a distinct subject.

Reference under the Court Fees Act, (1894) I.L.R. 16 All., 401 ; *Kishori Lal Roy* v. *Sharut Chunder Mozumdar*, (1882) I.L.R. 8 Cal., 593 ; *Venkoba* v. *Subbanna*, (1887) I.L.R. 11 Mad., 151; *Durga Prasad* v. *Purandar Singh*, (1904) I.L.R. 27 All., 186 ; *Chedi Lal* v. *Kirath Chand*, (1880) I.L.R. 2 All., 682 ; *Ma Nyein* v. *Ma Kon*, 3 L.B.R., 56—referred to.

A. W. Jamal v. *Cyril Brown* 529

RT FEES ACT, SEC. 17—*distinct subjects—suit on cash credit account, and on each portion of it severally guaranteed.*

When a plaintiff sues the principal debtor on a cash credit account, and also in the same suit seeks decrees against the several persons who have guaranteed separate portions of the debt, the plaint is chargeable with the aggregate amount of fees with which plaints embracing separately each of the amounts guaranteed would be chargeable.

Each claim must be taken to be a distinct subject within the meaning of section 17, Court Fees Act.

P.L.R.M.N. Perchiappa Chetty v. *Po Kin*, (1909) 5 L.B.R., 94, referred to.

Bank of Bengal v. *R.M.M.L. Muthia Chetty* 219

RT FEES ACT (1870), SCHEDULE I, ARTICLE 1, AND SCHEDULE II, ARTICLE 11—*Civil Procedure Code* (*V of* 1908), *Schedule I, Order* 21, *Rule* 50 (3).

The court fee payable on an appeal from an order refusing execution as against an alleged partner of a decree obtained against a firm is '*ad valorem*' and governed by Article 1, Schedule I, of the Court Fees Act.

A sought in the District Court to execute against **B** a decree which he had obtained against a Chetty firm, as a firm; and alleged that **B** was a partner in that firm. **B** denied that he was a partner. The District Judge held that the fact of his being a partner was not proved and refused to execute the decree against him.

A appealed against the District Court's order. A question having been raised as to the proper court fee on the memorandum of appeal the decision of the Court was as follows—

Valliappa Chetty v. *Rungasawmy Naiker* 300

IINAL PROCEDURE CODE, SECTION 103—*ward-headmen, respectable witnesses —interpretation of statutes.*

On a reference being made to a Full Bench by Twomey, J., as to whether ward-headmen in towns other than Rangoon are competent witnesses of searches under section 103 of the Criminal Procedure Code, a majority of the Bench—Sir Henry Hartnoll, officiating Chief Judge, and Robinson, J., dissenting,—held that they are competent witnesses.

King-Emperor v. *Kwe Haw*, 4 L.B.R., 213, referred to.

Paw Ya v. *King-Emperor*, 1 U.B.R. (1907—09), Gambling, 1, referred to.

PAGE

King-Emperor v. *Kan Haw*, 4 B.L.T., 91; *Thompson* v. *Goola*, 79 L.J.K. B.D., 905; *Curtis* v. *Stovin*, (1889) 22 Q.B.D., 513; *Palmer* v. *Thatcher*, (1878) 3 Q.B.D., 346; *Coxhead* v. *Mullis*, (1878) 3 C.P.D., 439; *Rex* v. *Hall*, 1 B. & C., 123—referred to.

Ti Ya v. *King-Emperor* 38

CRIMINAL PROCEDURE CODE, SEC. 106—*breach of peace—house trespass—Indian Penal Code, sec.* 441—*see* CRIMINAL TRESPASS 463

CRIMINAL PROCEDURE CODE, SEC. 110—*preventive sections—arrest outside Magistrate's jurisdiction.*

Proceedings under section 110, Criminal Procedure Code, against a person who at the time of the institution of the proceedings was within the jurisdiction of the Magistrate instituting them, are not invalidated by the fact that the actual arrest was effected without the jurisdiction.

Ketuboi v. *Queen-Empress*, (1900) I.L.R. 27 Cal., 993, dissented from.

Emperor v. *Bapoo Yellapa*, (1907) 9 Bom. L.R., 244, and *In re Kora Rangan*, (1912) 23 Mad. L.J., 535—followed.

Sona Ram R. Sangma v. *King-Emperor*, (1905) 3 Cal. L.J., 195, distinguished.

King-Emperor v. *Po Aung* 378

CRIMINAL PROCEDURE CODE, SEC. 110—*prisoner within limits of Magistrate's jurisdiction—sec.* 120.

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

Queen-Empress v. *Chi Do Bon*, P.J., L.B., 204; *Emperor* v. *Bapoo Yallapa*, 1907) 9 Bom. L.R., 244; *In re Kora Rangan*, (1912) 23 Mad. L.J., 535—referred to.

King-Emperor v. *Po Thaw*, 4 L.B.R., 148, overruled.

In re King-Emperor v. *Nga Saing* alias *Ah Saing* 353

CRIMINAL PROCEDURE CODE, SEC. 149—*Police Act* (*V of* 1861), *sec.* 23—*See* POLICE-OFFICER, PREVENTIVE POWERS OF 329

CRIMINAL PROCEDURE CODE (1898), SEC. 195—*sanction to prosecute—Indian Penal Code, section* 211—*criminal proceedings.*

The "criminal proceedings" contemplated in section 211 of the Indian Penal Code are proceedings in Court, and sanction to a prosecution for an offence under that section can only be given by a Court.

King-Emperor v. *Mi Wa* 534

CRIMINAL PROCEDURE CODE, SECS. 221 (7), 537—*previous convictions, to be set forth in charge—irregularity, when curable.*

The provisions of section 221 (7) of the Criminal Procedure Code should be complied with strictly. Omission to comply with them may however be cured by section 537 if the irregularity has not actually prejudiced the accused.

Nga Hla v. *King-Emperor* 461

CRIMINAL PROCEDURE CODE, SECS. 237, 238—*conviction of abetment of robbery on a charge of dacoity not necessarily illegal—Indian Penal Code, sections* 34, 109, 114—*See* TRIAL BY JURY 274

CRIMINAL PROCEDURE CODE, SEC. 297—*See* DEFAMATION 16

CRIMINAL PROCEDURE CODE, SEC. 299 ILLUSTRATION (A)—*alleged misdirection—distinction between murder and culpable homicide—duty of Judge—illustrations not substantive law—section* 105, *Indian Evidence Act—See* TRIAL BY JURY 306

CRIMINAL PROCEDURE CODE, SECS. 337, 339—*pardon, how forfeited—approver, whose pardon is alleged to have been forfeited, procedure in trying.*

At the conclusion of a dacoity trial in which evidence had been given by an approver who had been granted a pardon under section 337 of the Criminal Procedure Code, the Sessions Judge holding that the approver had forfeited

PAGE

his pardon, directed his commitment to sessions on a charge of dacoity. The approver was committed accordingly, but as the Sessions Judge was doubtful as to the validity of his previous order he referred the matter to the Chief Court.

Held,—that the Sessions Judge's order declaring the pardon forfeited was illegal and that the commitment must be quashed. The proper authority to decide whether or not an approver should be prosecuted for the offence with regard to which he has been granted a pardon is the District Magistrate. If a prosecution is instituted, it is open to the approver to plead his pardon as a bar to prosecution, first in the Committing Magistrate's Court, then in the Sessions Court. The Magistrate before inquiring into the offence charged must, as laid down in *To Gale* v. *King-Emperor* (VII L.B.R., 3), give the approver an opportunity of proving that he has not forfeited the pardon granted, and must satisfy himself that there is *primâ facie* ground for holding that it has been forfeited. Similarly, if committed to Sessions, the accused may plead his pardon in bar of prosecution there, and the Sessions Judge must entertain and decide the plea before putting him on trial for the substantive offence.

To Gale v. *King-Emperor*, (1912) 7 L.B.R., 1, referred to.

Emperor v. *Kothia*, (1906) I.L.R. 30 Bom., 611; *Emperor* v. *Abani Bhushan Chuckerbutti*, (1910) I.L.R. 37 Cal., 845; *Emperor* v. *Gangua*, (1915) I.L.R. 37 All., 331—followed.

King-Emperor v. *Po Ket* 447

CRIMINAL PROCEDURE CODE, SECS. 337, 339—*See* PARDON, HOW FORFEITED .. 357

CRIMINAL PROCEDURE CODE, SEC. 350—*Magistrates who have heard all evidence to decide the issue—See* BENCH OF HONORARY MAGISTRATES .. 463

CRIMINAL PROCEDURE CODE, SECS. 417, 439—*appeal against acquittal—revisional jurisdiction, exercise by High Court of, after Government's refusal to appeal.*

In cases of acquittal the revisional jurisdiction of a High Court should be exercised sparingly and only where it is urgently demanded in the interests of public justice. There is no precedent for a High Court entertaining a private application to revise an acquittal after the Local Government has declined to direct an appeal against it.

Faujdar Thakur v. *Kasi Chowdhury*, (1914) I.L.R. 42 Cal., 612, followed.

J. & F. Graham & Co. v. *H. C. Elsey* 356

CRIMINAL PROCEDURE CODE, 1898, SEC. 423—*whipping in lieu of other punishment—See* WHIPPING ACT, IV OF 1909, SEC. 3 466

CRIMINAL PROCEDURE CODE, SEC. 435—*revision, power of Sessions Judge to review orders passed in.*

A Sessions Judge of his own motion called for proceedings in which a Magistrate had discharged four persons accused of theft, but finding on the record no cause for interference returned the proceedings to the Magistrate without taking further action. On the day he returned them A, the complainant, applied to him to have the case reopened and the Sessions Judge, holding himself to be barred from taking further action, returned the application to be presented to the Chief Court.

Held,—that the Sessions Judge was not barred from dealing with the application himself.

Tun Myaing v. *Kauk San* 377

CRIMINAL PROCEDURE CODE, SEC. 435 (4)—*revision, concurrent jurisdiction of Sessions Judge and District Magistrate in.*

A District Magistrate on June 4, 1915, called for the proceedings of a case in which persons accused under section 477, Indian Penal Code, had been discharged. On the 20th June the complainant in the case presented an application to have the order of discharge set aside to the Sessions Judge. The Sessions Judge sent for the proceedings to the District Magistrate, who on the 26th before submitting them to the Sessions Judge and without notifying the Sessions Judge of his action signed his name on a printed form bearing the words "On a perusal of the record no cause appearing for interference, it

PAGE

is ordered that the record be returned." Subsequently the Sessions Judge passed orders directing that the accused be committed for trial.

Held,—that the District Magistrate's action in calling for the record was not equivalent to entertaining an application and that there was nothing in section 435 (4) of the Criminal Procedure Code to render the Sessions Judge's order invalid.

Kali Muthu v. *King-Emperor*, (1902) I.L.R. 26 Mad., 477, distinguished.

King-Emperor v. *Po Gyi* 361

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECTION 471 (1)—*an order under consequential within the meaning of section* 423 (1) (*d*)—*issue of warrant by High Court in revision without previous notice—sections* 439 (2) *and* 427.

A Magistrate acquitting an accused person on the ground of insanity is bound to proceed under section 471 (1), and if he fails in his duty, the High Court has power to remedy his error in revision. A warrant of arrest issued by the High Court in such case is not an order to the prejudice of the accused within the meaning of section 439 (2).

Mehi Singh v. *Mangal Khandu*, (1911) I.L.R. 39 Cal., 157, followed.

King-Emperor v. *E Maung* 290

CRIMINAL PROCEDURE CODE, SEC. 488—*See* MAINTENANCE 105

CRIMINAL PROCEDURE CODE, SEC. 537—*sanction when necessary—irregularity, when not curable—See* INDIAN ARMS ACT, SECS. 19 (F), 20 AND 29 .. 452

CRIMINAL PROCEEDINGS—*Indian Penal Code, sec.* 211—*sanction to prosecute—See* CRIMINAL PROCEDURE CODE, 1898, SEC. 195 534

CRIMINAL TRESPASS—*house trespass—Indian Penal Code, sec.* 441—*Criminal Procedure Code, sec.* 106—*breach of peace.*

Criminal trespass on the "panat-chut" or outer verandah where shoes are taken off of a Burmese house is house-trespass.

Criminal trespass may be an offence involving a breach of the peace within the meaning of section 106 of the Criminal Procedure Code.

Tarini Charn Mundle v. *Gourikant Biswas*, 7 C.W.N., p. 25, followed.

Sit Hon v. *King-Emperor* 463

CRIMINAL TRESPASS—*possession must be actual not juridical—See* INDIAN PENAL CODE, SEC. 441 425

CULPABLE HOMICIDE, DISTINCTION BETWEEN MURDER AND—*See* TRIAL BY JURY 306

CUSTOMARY LAW OF WOMAN WHEN TO BE CONSIDERED—*marriage—law of domicile as affecting marriage—See* CHINESE BUDDHIST LAW 399

D

DAMAGES—*what must be proved in suit for—See* MALICIOUS PROSECUTION .. 78

DAMAGES CLAIMABLE—*wrongful dismissal—See* MASTER AND SERVANT .. 420

DAMAGES CLAIMABLE AT MARKET RATE—*resale on buyer's default repudiated by buyer—See* CONTRACT ACT, SEC. 107 367

DAMAGES FOR BREACH OF PROMISE BY PARTY'S PARENT NOT SUSTAINABLE—*marriage, consent essential to valid—See* BURMESE BUDDHIST LAW 347

DAMAGES FOR WRONGFUL OCCUPATION—*distinct subjects—ejectment rent—See* COURT FEES ACT, SEC. 17 529

DAMAGES HOW MEASURED—*breach of contract by buyer, resale on—negotiable securities—See* CONTRACT ACT, SECS. 73, 107 343

DAMAGES, SUIT FOR, FOR INJURIES CAUSED BY ANIMAL—*negligence to be proved —See* TORT 388

DECLARATORY DECREE, SUIT FOR, WHEN PERMISSIBLE—*rights of puisne mortgagee—Transfer of Property Act, sections* 74, 75—*Civil Procedure Code, Order* 34, *Rule* 1—*Specific Relief Act, section* 42—*See* MORTGAGE .. 266

DECREE, SEC. 2 (2), CIVIL PROCEDURE CODE—*order on a preliminary objection, directing suit to proceed—See* APPEALS FROM ORDERS 213

PAGE

DEFAMATION—*eighth exception—good faith—see* INDIAN PENAL CODE, SEC. 499 440

DEFAMATION—*Indian Penal Code, Section* 499, *Exception* 9—*position of the press—what constitutes misdirection—Privy Council not a Court of Criminal Appeal.*

The privilege of a journalist is no other and no higher than that of a member of the general public. In a case in which the statements on which a charge of defamation is founded must harm the reputation of the prosecutor, an accused who relies upon the 9th Exception to section 499 of the Indian Penal Code as a defence to the charge must satisfy the Court that he acted in good faith after exercising due care and attention.

A charge to a jury must be read as a whole. In a protracted narrative of fact, it must needs be that the view of the Judge may not coincide with the views of others who look upon the proceedings in black type, but it would not be in accordance either with usual or with good practice to treat such cases as cases of misdirection if, upon the general view taken, the case has been fairly left within the jury's province.

The Judicial Committee is not a Court of Criminal Appeal. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of the regular law, or, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, first, that the result arrived at was opposite to the result which their Lordships would have reached, and secondly that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided.

The Queen v. *Mukerji*, 1 Moore N.S., 272; *The Falkland Islands Company* v. *The Queen*, 1 Moore N.S., 312; *Queen* v. *Newman*, 1 E. & B., 558; *In re Dillet*, 12 A.C., 459; *Makin* v. *Attorney-General for N.S. Wales*, (1894) A.C., 57; *Pillai* v. *K.E.*, L.R. 40 I.A., 193; *Lanier* v. *The King*, L.R. 1914, A.C. 221; and *Clifford* v. *K.E.*, L.R. 40 I.A., 241 referred to.

Channing Arnold v. *The King-Emperor* 16

DESERTION—*delay in making application—See* INDIAN DIVORCE ACT (IV OF 1869), SECS. 10 AND 12 256

DESERTION MUST BE DESERTION AGAINST PETITIONER'S WISH—*See* INDIAN DIVORCE ACT, SEC. 10 106

DISTINCT SUBJECTS—*ejectment—rent-damages for wrongful occupation—See* COURT FEES ACT, SEC. 17 529

DIVORCE ACT—*See* INDIAN DIVORCE ACT.

DIVORCE ACT (IV OF 1869), SECS. 10 AND 22—*judicial separation—cruelty of what kind requisite for divorce.*

The cruelty requisite to entitle a wife to a divorce "a mensa et toro" must be such as endangers life, limb or health, bodily or mental or induces reasonable apprehension of such danger. Adultery alone is sufficient cause for judicial separation.

Ma Cho v. *Maung Sein* 385

DUTY OF COURT WHICH RECLIVES THE PROPERTY—*section* 63, *Civil Procedure Code—See* ATTACHMENT OF PROPERTY BY MORE THAN ONE CREDITOR 204

E

EASEMENTS—*riparian owners—"natural stream" discussed.*

A claim on the ground of riparian ownership must be in respect of a natural stream, whether permanent or intermittent, and confined to the land lying alongside the stream. It is not however necessary for one riparian owner, seeking to restrain another from diverting water beyond his riparian tenement, to prove that he has suffered any damage.

Secretary of State v. *Balvant Ganesh Oze*, (1904) I.L.R. 28 Bom., 105, at 118; *Taylor* v. *St. Helens Corporation*, (1877) 6 Ch. D., 264; *Assistant Collector of Na'sik* v. *Sha'myi Dasarath Patil*, (1883) I.L.R. 7 Bom., 209; *McCartney* v. *Londondery and Lough Swilly Railway Company, Limited*,

PAGE

(1904) L.R.A.C. 301 ; *Aiyavu Mooppan* v. *Sawminatha Kavundan*, (1905) I.L.R. 28 Mad., 236 ; and *Debi Pershad Singh* v. *Joynath Singh*, (1897) I.L.R. 24 Cal., 865 referred to.

Kaw La v. *Maung Ke* 556

ECCLESIASTICAL MATTERS, JURISDICTION OF CIVIL COURTS IN LOWER BURMA IN—*See* BUDDHIST LAW 145

EJECTMENT—*perpetual tenancy—improvements—See* LANDLORD AND TENANT 433

EJECTMENT—*rent—damages for wrongful occupation—distinct subjects—See* COURT FEES ACT, SEC. 17 529

"ENGLISH MORTGAGE"—*lease by mortgagor in possession—See* TRANSFER OF PROPERTY ACT, 1882, SEC. 58 (A), 66 413

EQUITABLE MORTGAGE—*transfer of title deeds—See* TRANSFER OF PROPERTY ACT, (1882), SEC. 59 458

EQUITABLE MORTGAGE, EFFECT OF—*mortgage, recovery of balance due on—Transfer of Property Act* (1882), *sec.* 59—*See* CIVIL PROCEDURE CODE, 1908, ORDER 34, RULE 6 450

EVIDENCE ACT, SEC. 24—*Inducement—See* CONFESSION 94

EVIDENCE ACT, SEC. 92—*right to sue on mortgage deed—right of mortgagor to repudiate his own deed—See* BENAMIDAR 205

EVIDENCE ACT, SEC. 102—*burden of proof—Indian Limitation Act, 1st Schedule, Articles* 142 *and* 144—*See* LAND-POSSESSION 264

EVIDENCE ACT, SEC. 105.—*Illustrations not substantive law—See* TRIAL BY JURY 306

EVIDENCE ACT, SEC. 106—*person drawing* tari *from his own trees—See* EXCISE ACT, SECS. 3, 51 217

EXCISE ACT, SECS. 3, 51—*person drawing* tari *from his own trees—Evidence Act, see.* 106.

Every toddy climber must be presumed to know roughly the yield of a given tree in a given time, if a given number of pots are affixed to it.

If the pots are found on examination to contain more than four quarts, the *tari* climber must show that owing to exceptional unforeseen circumstances the quantity received was unusually great, and that under normal conditions the quantity received would not exceed four quarts. The burden of proof is on him.

King-Emperor v. *Nga Aw* 217

EXCISE ACT, SEC. 51—*joint possession—General Clauses Act, sec.* 13.

Section 51 of the Excise Act prevents the joint possession by several persons of more fermented liquor than can be sold retail to one.

Queen-Empress v. *Rajia*, P.J.L.B. 405 followed.

In re *King-Emperor* v. *Nga Pyu* 464

EXECUTION—*attachment of property —application for removal of attachment—Civil Procedure Code, Order* 21, *Rule* 58—*See* MORTGAGE DECREE .. 215

EXECUTION—*partition of estate, including immoveable property—procedure of Court on decree ordering—Civil Procedure Code, sec.* 54.

Section 54 of the Civil Procedure Code only applies when the decree is for the partition of land by metes and bounds, that is to say, where land held jointly but assessed to Government revenue as a whole is to be divided between the sharers into two or more plots or portions, in order that each sharer may henceforth possess and be assessed on his separate plot.

The proper form to be used for a decree in an administration-suit or the like is that prescribed as No. 17 in Appendix D of the 1st Schedule, Civil Procedure Code.

Po Win v. *Ma Tin* 338

EXECUTION—*sale of land—right to eject judgment-debtor.*

A judgment-debtor even after his land is sold in execution is entitled to remain in possession of it till removed by due process of law in execution of

PAGE

the decree or until successfully sued by some one who can show that he has a good title.
Maung Te v. *Maung On* 165

EXECUTION—*sale proclamation—duty of Court—purchaser's remedy in event of improperly conducted sale—See* CIVIL PROCEDURE CODE, 1908, ORDER 21 RULE 66 427

F

FAMILY HOUSE—*inheritance—adoption—See* CHINESE BUDDHIST LAW .. 404

FEES, SETTLEMENT OF—*advocate's duty to client—See* LEGAL PRACTITIONERS' ACT (1879), SEC. 13 *(b)* 294

FRAUD—*must be pleaded—gifts made orally—Transfer of Property Act.*
A plea of fraud will not be heard unless it is expressly and specifically advanced in the pleadings.
Gifts made before the introduction of the Transfer of Property Act on 1st January 1905 are not invalidated merely by the absence of a registered instrument.
Maung At Gyi v. *Ma U Me and one*, 2 U.B.R. (1892—1896), 400, referred to.
Lal Mahomed v. *Mra Tha Aung* 185

FRAUDULENT—*Transfer of "grant" land by involved debtor—position of volunteer paying off an attaching creditor—Transfer of Property Act, sec.* 53—*See* TRANSFER OF PROPERTY 233

G

GAMBLING ACT—*See* BURMA GAMBLING ACT.

GENERAL CLAUSES ACT, SEC. 13—*joint possession—See* EXCISE ACT, SEC. 51 464

GIFT BEFORE DEATH—*parent and child—alleged undue influence—burden of proof.*
No presumption of undue influence is to be drawn in the case of the gift to near relatives even if made during the donor's illness and shortly before his death. It is for the person alleging the undue influence to prove it.
Huguenin v. *Basely*, 1 W. & T.L.C. in Eq., 8th Ed., p. 259; *Morely* v. *Loughnan*, (1893) 1 Ch.D., 736; *Allcard* v. *Skinner*, (1887) 36 Ch. D., 145; *Beanland* v. *Bradley*, (1854), 2 Sm. & G., 359; 65 E.R., 427; *Ismail Mussajee Mookerdam* v. *Hafiz Boo*, (1906) I.L.R. 33 Cal., 773; referred to.
Maung Pu v. *Lucy Moss* 235

GIFTS MADE ORALLY—*Transfer of Property Act—See* FRAUD 185

GIFTS MADE PUBLICLY AT A *shinbyu* CEREMONY—*extent of rights acquired thereby by donees—See* BUDDHIST LAW 190

GOOD FAITH—*defamation—eighth exception—See* INDIAN PENAL CODE, SEC. 499 440

GOOD FAITH, MEANING OF—*See* LIMITATION ACT, IX OF 1908, SEC. 14 .. 146

GRANDCHILD OF DECEASED (SON OF THE ELDEST DAUGHTER) CLAIMING AS AGAINST A SON OF DECEASED—*See* BUDDHIST LAW: INHERITANCE .. 113

GUARDIANS AND WARDS ACT, SEC. 19(*b*)—*father, the father of legitimate child—interpretation of statutes.*
The term "father" in section 19 (*b*) of the Guardians and Wards Act applies only to the father of a child born in wedlock.
M. O. Rahman and another v. *G. George and ancther*, 2 U.B.R. (1892—96), 413 dissented from.
Ma Nyo v. *Maung Kyan* 415

GUARDIANS AND WARDS ACT, VIII OF 1890, SEC. 25—*suit for the custody of a child.*
A suit for the custody of a child cannot be brought otherwise than under the Guardians and Wards Act.

PAGE

Sharifa v. *Munekhan*, (1901) I.L.R. 25 Bom., 574; *Sham Lal* v. *Bindo*, (1904) I.L.R. 26 All., 594; *Krishna* v. *Reade*, (1885) I.L.R. 9 Mad., 31; *Ghasita* v. *Wazira*, (1897) 32 P.R., 341—referred to.
Ma Shwe Ge v. *Maung Shwe Paw*, 2 L.B.R., 140, not followed.
Besant v. *G. Narayaniah*, (1914) L.R. 41 I.A., 314 followed.
Arnachallam Pillay v. *Iyama* 211

H

HACKNEY CARRIAGES ACT, XIV OF 1879, SEC. (6) (*h*)—*person keeping—limit of owner's responsibility.*
The driver of a hackney-carriage cannot be said to "keep" it within the meaning of section (6) (*h*) of the Hackney Carriages Act, 1879. The owner of a carriage cannot be held responsible under the Act for the driver's refusal to ply.
King-Emperor v. *Kamali Khan* 91

HIGH COURT, INTERFERENCE BY—*limitation of appeal—judicial discretion—See* LIMITATION ACT, IX OF 1908, SEC. 5 566

HOUSE TRESPASS—*Indian Penal Code, sec.* 441—*Criminal Procedure Code, sec.* 106—*breach of peace—See* CRIMINAL TRESPASS 463

I

IMITATION, COLOURABLE—*injunction—trade labels—See* SPECIFIC RELIEF ACT, I OF 1877, SEC. 52 561

IMPRISONMENT, ITS EFFECT ON MARRIAGE TIE—*See* BUDDHIST LAW: MARRIAGE 50

INCOMPLETE MORTGAGE NOT A CHARGE—*charge on immoveable property—See* TRANSFER OF PROPERTY ACT, IV OF 1882, SECS. 58 AND 100 .. 553

INCOMPLETE SALE—*Transfer of Property Act, sec.* 59—*pleadings, amendment of—when admissible—See* CIVIL PROCEDURE CODE, 1908, ORDER 6, RULE 17 418

INDIAN ARMS ACT, SECS. 19 (*f*), 20 AND 29—*sanction when necessary—irregularity, when not curable—Criminal Procedure Code, section* 537.
Proceedings may be instituted against any person under section 20 of the Arms Act for the secret possession of arms in contravention of the provisions of section 14 or section 15 without the previous sanction of the District Magistrate under section 29. If the Magistrate finds that the intention to conceal the possession is not made out he should discharge the accused under section 20. Proceedings under section 19 (*f*) may then be instituted if and when the necessary sanction is given under section 29. The absence of sanction when required under section 29 is a defect that cannot be cured by section 537, Criminal Procedure Code.
Ahmed Hussein v. *Queen-Empress*, (1900) I.L.R. 27 Cal., 692; *Shunshanisa* v. *King-Emperor*, (1904) 2 L.B.R., 244; *Bawdu Wadein* v. *Queen-Empress*, (1899) 5 Bur. L.R., 171 referred to.
In re *Po Chein* v. *King-Emperor* 452

INDIAN COMPANIES ACT—*auditor irregularly elected—when to be regarded as* de facto *an officer of a company within the meaning of section* 214.
The Official Liquidator of the Bank of Burma, Limited, applied to Court under section 214 of the Indian Companies Act, 1882, for an order calling on A and B as the auditors, and on other officials of the Bank to refund certain moneys which he alleged to have been misapplied. A and B objected that as there had been irregularities in their election as auditors they had not been officers of the Bank within the meaning of section 214 and that the Official Liquidator's proper course was to file a regular suit.
Held,—following English decisions, that though owing to some irregularity in his appointment an auditor may not be *de jure* an officer of a company, he may be an officer *de facto*, and that the decision whether or not he is an officer *de facto*, must depend on the circumstance of each case.

PAGE

Gibson v. *Barton*, (1875) L.R. 10 Q.B., 329; *Coventry & Dixon*, (1880) 14 Ch.D., 660; In re *London and General Bank*, (1895) 2 Ch.D., 166; In re *Western Counties Steam Bakeries & Milling Company*, (1897) 1 Ch.D., 617, referred to.

Stuart Smith v. *The Official Liquidator of the Bank of Burma Limited* .. 80

INDIAN CONTRACT ACT—*See also* CONTRACT ACT.

INDIAN CONTRACT ACT, SEC. 188—*power of attorney—how to be construed—Chetty practice—See* AGENT 536

INDIAN DIVORCE ACT, SEC. 10—*desertion must be desertion against petitioner's wish.*

For a woman to obtain a dissolution of a marriage on the ground of adultery coupled with desertion under section 10 of the Indian Divorce Act (1869) there must be clear proof that the desertion was against her wish. Subsequent conduct cannot transform what was a voluntary separation into desertion by a husband.

Robinson v. *Robinson & Lane*, 1 S. & T., 363; *Williams* v. *Williams and Padfield*, L.R. 1 P. & D., 29; *Fitzgerald* v. *Fitzgerald*, L.R. 1 P. & D., 694; *Wood* v. *Wood*, I.L.R., 3 Cal., 485, referred to.

Bridget Theresa Mary Glancy v. *James Glancy* 106

INDIAN DIVORCE ACT (IV OF 1869), SECS. 10 AND 22—*Desertion—delay in making application.*

"Desertion" under the Divorce Act implies an abandonment against the wish of the person alleging it, but to prove desertion it is not necessary to prove that the wish was specifically expressed.

An application for divorce will not be granted if there was undue delay in making it, but what is undue delay depends on the circumstances of each case.

Yin Za v. *C. Nash*, 6 L.B.R., 53; *Newman* v. *Newman*, (1870) L.R. 2 P. & D., 57; *Pellew* v. *Pellew*, (1859) 1 S. & T., 553; *Tollemache* v. *Tollemache*, (1859) 1 S. & T., 557 referred to.

Ma Array v. *E Po* 256

INDIAN LIMITATION ACT—*See* LIMITATION ACT.

INDIAN LIMITATION ACT, IX OF 1908, 1ST SCHEDULE, ARTICLES 57, 115—*loan on* "Thavani" *account.*

The Article of the 1st Schedule to the Limitation Act that applies to a loan on a Chetty's "Thavani" account is Article 57 and the period of limitation begins to run from the date when the money was lent.

Annamalai Chetty v. *M.L.K.M. Latchman Chetty* 526

INDIAN PENAL CODE, SECS. 34, 109, 114—*conviction of abetment of robbery on a charge of dacoity not necessarily illegal—Criminal Procedure Code, sections 237, 238—See* TRIAL BY JURY 274

INDIAN PENAL CODE, SECS. 87, 90—*act done by consent—causing death of a person claiming to be dah-proof.*

A claimed to be dah-proof and invited B to put his claim to the test. B thereupon cut A on the arm inflicting a wound, as a result of which A bled to death.

Held,—that A's consent was given under a misconception of fact but that in the circumstances B could not be supposed to be aware of his mistake.

B had no intention of causing death or grievous hurt and it is doubtful whether he knew himself to be likely to do so. He was therefore entitled to the benefit of section 87, Indian Penal Code, and should have been acquitted.

Shwe Kin v. *King-Emperor* 166

INDIAN PENAL CODE, SEC. 211—*criminal proceedings—sanction to prosecute—See* CRIMINAL PROCEDURE CODE, 1898, SEC. 195 534

INDIAN PENAL CODE, SECS. 299, 300, 304, 326—*directions to jury—intention—See* MURDER 125

INDIAN PENAL CODE, SEC. 376,—*whipping—See* PUNISHMENT 143

INDIAN PENAL CODE, SEC. 441—*criminal trespass—possession must be actual not juridical.*

PAGE

The possession contemplated in section 441 of the Indian Penal Code is actual physical possession, not mere juridical possession. Where there is a person in actual physical possession of property, he is the only person whose feelings have to be considered under that section.
Tok Gyi v. *King-Emperor* 425

INDIAN PENAL CODE, SEC. 441—*house trespass—Criminal Procedure Code, sec.* 106—*breach of peace—See* CRIMINAL TRESPASS 463

INDIAN PENAL CODE, SEC. 499—*defamation—eighth exception—good faith.*
Certain paddy traders sent to the Traffic Manager of the Burma Railways a telegram, containing an allegation that A, a stationmaster, was giving preferential treatment to charcoal dealers and setting forth particulars in support of their allegation. The Railway authorities after an inquiry into the allegation held that it was not substantiated, and A prosecuted the paddy traders for defamation. They showed that when they sent their telegram they had good reasons for supposing their allegation to be true.
Held on appeal,—that they were entitled to the protection of the eighth exception to section 499 of the Indian Penal Code.
Toogood v. *Spyring* (1834) 1 Cr.M. & R., 181, at 193; 40 R.R., 523, at 534; *Harrison* v. *Bush*, (1855) 25 L.J.Q.B., 25 at 29; 5 E. & B., 344, at 349; *Waring* v. *M'Caldin*, Ir. Rep. 7 C.L., 282, at 288—referred to.
Poona v. *King-Emperor* 440

INDIAN PENAL CODE, SEC. 499, EXCEPTION 9—*See* DEFAMATION .. 16

INDIAN STAMP ACT—*See* STAMP ACT.

INDIAN STAMP ACT, SEC. 2 (5), 1ST SCHEDULE, ARTICLE 5—*bond, distinction between ordinary contract and—agreement for sale of merchandise.*
A and B executed an instrument, attested by witnesses, under which B was to deliver to A a certain amount of paddy at a fixed rate. The Judge of the Rangoon Small Cause Court impounded it and treated it as an agreement liable under Article 5 (*c*) of Schedule I of the Stamp Act to 8 annas duty. The Collector holding that it should have been treated as a bond within the meaning of clause (5) (*c*) of section 2 of the Act referred the matter to the Chief Court.
Held,—that the instrument was not a bond within the definition of section 2 (5) (*c*) of the Stamp Act, but an agreement relating to the sale of goods exclusively and as such exempt from stamp duty under clause (*a*) of the exemptions under Article 5 of the 1st Schedule. The word "oblige" in section 2 (5) is to be interpreted in a technical sense. The distinction between an obligation under a bond and an obligation under an ordinary contract is that breach of an obligation under a bond does not, and breach of obligation under an ordinary contract does, "sound in damages."
Gisborne & Co. v. *Subal Bowri*, (1881) I.L.R. 8 Cal., 284, followed
The Collector of Rangoon v. *Aung Ba* 382

INDUCEMENT—*Evidence Act, sec.* 24—*See* CONFESSION 94

INHERITANCE—*adoption—family house—See* CHINESE BUDDHIST LAW .. 404

INHERITANCE—*Chinese Buddhist—marriage, when to be presumed—See* BUDDHIST LAW 222

INJUNCTION—*trade labels—Colourable imitation—See* SPECIFIC RELIEF ACT, I OF 1877, SEC. 52 561

INTENTION—*directions to jury regarding—secs.* 299, 300, 304, 326, *Indian Penal Code—See* MURDER 125

INTERLOCUTORY ORDER—*See* REVISORY POWERS OF HIGH COURT .. 77

INTERPRETATION OF DHAMMATHATS—*preponderating authority of Manukye—Succession of brothers or sisters when preferred to that of parents—See* BUDDHIST LAW: INHERITANCE 1

INTERPRETATION OF STATUTES—*father, the father of legitimate child—See* GUARDIANS AND WARDS ACT, SEC. 19(B) 415

PAGE

INTERPRETATION OF STATUTES—*ward-headman, respectable witnesses—See* CRIMINAL PROCEDURE CODE, SEC. 103 38

J

JOINT HINDU FAMILY BUSINESS—*liability of minor partners—Civil Procedure Code, Order* 21, *Rule* 50.

Joint Hindu family property is not necessarily part of the assets of the joint family firm. Minor partners of a Hindu joint family business are only liable for the debt of the business to the extent of their share in the property of the firm.

Joykisto Cowar v. *Nittyanund Nundy*, (1878) I.L.R. 3 Cal., 738; *Samalbhai Nathubhai* v. *Someshvar, Mangal and Harkisan*, (1880) I.L.R. 5 Bom. 38; *Sakrabhai Nathubhai* v. *Maganlal Mulchand*, (1901) I.L.R. 26 Bom., 206—followed.

O.A.M.K. Chetty firm v. *K.P. Chetty firm* 112

JOINT POSSESSION—*General Clauses Act, sec.* 13—*See* EXCISE ACT, SEC. 51 .. 464

JOINT PROPERTY—*widow's power of disposal—See* BUDDHIST LAW: INHERITANCE 501

JUDGMENT-DEBTOR, RIGHT TO EJECT—*sale of land— See* EXECUTION .. 165

JUDICIAL DISCRETION—*limitation of appeal—interference by High Court—See* LIMITATION ACT, IX OF 1908, SEC. 5 566

JUDICIAL SEPARATION—*cruelty of what kind requisite for divorce—See* DIVORCE ACT (IV OF 1869), SECS. 10 AND 22 385

JURISDICTION OF CIVIL COURTS—*Land and Revenue Act—secs.* 4 *and* 5—*Pagoda site.*

It is for the Revenue Officer, not the Civil Court, to decide what are the boundaries of land belonging to the site of a Pagoda at the time the Land and Revenue Act (II of 1876) came into force.

Annamalay Cetty v. *Shwe May* 260

JURISDICTION OF CIVIL COURTS—*Lower Burma Land and Revenue Act, secs.* 56 (*a*), 55 (*b*), 19, *sec.* 6—*claim for possession without title.*

A sued B to recover possession of land in respect of which there was no grantee, lessee or person having the status of landholder, basing his claim on the fact that he had been in possession and paid revenue to Government and had been dispossessed by B.

Held,—on a reference made by Ormond, J., that section 56 of the Land and Revenue Act does not oust the jurisdiction of a Civil Court. "Claims" in section 55 (*b*) of the Land and Revenue Act means claims against Government. Mere previous possession is sufficient to support a claim for possession against one who has dispossessed the plaintiff when the defendant has no title himself.

Maung San Paing v. *Shwe Hlaing*, 1 L.B.R., 277; *Arunachallam Chetty* v. *Veerappa Chetty*, 4 Bur. L.T. 117; and *Maung Po Chit* v. *A.A.R.M. Pariacurpen Chetty*, 4 Bur. L.T., 215; overruled.

Maung Yat v. *Maung Tarok*, 1 L.B.R., 16; *Saya Hlaing* v. *Maung Lu Gyi*, P.J.L.B., 436; *Krishnarav Yashvant* v. *Vasudev Apaji Ghotiker*, (1884) I.L.R. 8 Bom., 371; *Ismail Ariff* v. *Mahomed Ghous*, (1893) I.L.R., 20 Cal., 834; *Gobin Prasad* v. *Mohan Lal*, (1901) I.L.R. 24 All., 157 followed,

In re *Maung Naw* v. *Ma Shwe Hmut* 227

JURISDICTION OF CIVIL COURT—*Lower Burma Town and Village Lands Act, sec.* 41—*Suits between private parties.*

The ruling of their Lordships of the Privy Council in the case *Secretary of State* v. *Moment* VII L.B.R., 10, related to suits to which Government is a party. Where private persons litigate concerning claims to land which is not held under grant or lease from Government or under a license from the Revenue Officer, but is land at the disposal of Government, the jurisdiction of the Civil Court is not barred by section 41 (*a*) of the Lower Burma Town and Village Lands Act.

PAGE

Ormond, J.—A case must be decided according to the circumstances in existence at the time of the institution of the suit. The eviction of a squatter by another squatter, or of a sub-lessee by a lessee (from Government), is not a matter that "is to be determined by the Revenue Authority" and such a case does not involve the decision of any rights as against Government. An encroachment by a sub-lessee enures for the benefit of his lessor.

Moment v. *Secretary of State*, 3 L.B.R. 165; *Maung Law* v. *Suppaya Padayachi*, 3 L.B.R., 256, referred to.

Secretary of State v. *Moment*, 7 L.B.R., 10, distinguished.

Sit Yin v. *Ma Shin* 31

JURISDICTION OF CIVIL COURTS IN LOWER BURMA IN ECCLESIASTICAL MATTERS—*See* BUDDHIST LAW 145

K

KEEPING CATTLE"—*See* MUNICIPAL ACT, SEC. 142 (R) *by-law under* .. 328

"KET," NOT A GAME OF MERE HUMAN SKILL—*See* BURMA GAMBLING ACT, SEC. 4 529

L

LAND ACQUISITION ACT—*appeals.*

There is no appeal from an award under Part III of the Land Acquisition Act made by a Judge of the Chief Court exercising original jurisdiction. It is not a decree or order, nor does section 54, Land Acquisition Act, give a right of appeal in such a case.

The Rangoon Botataung Company, Limited v. *The Collector of Rangoon*, 6 L.B.R., 150, followed.

The Collector of Rangoon v. *Chandramma* 163

LAND AND REVENUE ACT, SECS. 4 AND 5—*Pagoda site*—*See* JURISDICTION OF CIVIL COURTS 260

LANDLORD AND TENANT—*assignment by tenant of goods stored in the premises leased.*

An assignment by a tenant of the stock-in-trade of a business which he carries on in leased premises does not, in the absence of a special contract, render the assignee liable for the rent of the premises.

Madhubmoney Dassee v. *Nundo Lall Gupta*, (1899) I.L.R., 26 Cal., 338, followed.

Bamsilall Abeychand v. *Mohamed Ebrahim Mulla* 164

LANDLORD AND TENANT—*lease unregistered, effect of—notice to quit*—*See* TRANSFER OF PROPERTY ACT, SECS. 106, 107 351

LANDLORD AND TENANT—*perpetual tenancy—improvements—ejectment—compensation—Transfer of Property Act* (1882) *sec.* 108—*lessor and lessee—"local usage."*

The erection by a tenant of permanent structures on land leased to him, though effected to the knowledge of and without interference by the lessor, will not of itself suffice to raise an equitable right against the lessor preventing him from ejecting the tenant at the end of the tenancy. To raise such an estoppel the lessee must show that the conduct of the lessor was sufficient to justify the legal inference that he had by plain implication contracted that the right of tenancy should be changed into a perpetual right of occupation.

In the absence of contract explicit or implied or of local usage to the contrary, the whole law as to the rights and liabilities of lessor and lessee is embodied in section 108 of the Transfer of Property Act. The lessor is not bound to pay his tenant compensation either for the buildings built by the tenant or for their removal. All to which the tenant is entitled is reasonable time for their removal.

Dattatraya Rayaji Pa'i v. *Shridar Narayan Pa'i*, (1892) I.L.R. 17 Bom., 736; *Yeshwadabai* v. *Ramachandra Tukaram*, (1893) I.L.R. 18 Bom., 66 dissented from.

PAGE

Beni Ram v. *Kundan Lal*, (1899) I.L.R. 21 All., 496; *Ismail Khan Mahomed* v. *Jaigum Bibi*, (1900) I.L.R. 27 Cal., 570; *Ismai Kani Rowthen* v. *Nazarali Sahib*, (1903) I.L.R. 27 Mad., 211, followed.

Ramaden v. *Lee Dyson*, (1865) L.R. 1 E. & I.A., 129; *Angammal* v. *Malick Mahomed Sayed Asalamis Sahib*, (1911) 11 Indian Cases, 745; *Angammal* v. *Malic Mahomed Sayed Aslami Sahib*, (1913) 21 Indian Cases, 583; In the matter of *Thakoor Chunder Paramanick*, (1886) Ben. L.R. Full Bench, 595, referred to.

Moolla Mahomed Bin Molla Mahomed v. *P.K. Ibrahim* 433

LANDLORD AND TENANT—*rent—use and occupation—lessor and lessee—section* 109, *Transfer of Property Act*, 1882—*amendment of plaint—Civil Procedure Code, Order* 6, *Rlue* 17.

A claim for damages for use and occupation of a house only arises where it is shown that the occupation was by permission or sufferance of the plaintiff. As against a trespasser, the proper suit is one for mesne profits, and where it is open to sue for rent, the suit should be for rent.

The rights of an original lessor may be acquired otherwise than by transfer under section 109 of the Transfer of Property Act.

Where a suit for rent is brought, but does not lie, there is no bar to its being amended to a suit for use and occupation.

Ramrick Dass v. *Mahomed Yacubji Dudah*, 2 L.B.R., 122, referred to.

Po Shein v. *Mahomed Thambi*. 270

LAND POSSESSION—*burden of proof—Evidence Act, section* 102—*Indian Limitation Act*, 1*st Schedule, Articles* 142 *and* 144.

In a suit for possession of immoveable property of which neither the plaintiff nor his predecessor in interest has ever been in possession the defendant cannot be required to prove adverse possession, until the plaintiff has proved his title. A mere entry in a Revenue map is not sufficient proof of title.

The article of the 1st Schedule to the Limitation Act that applies is Article 144.

Aung Hla v. *Ton Gyi* 264

LEASE BY MORTGAGOR IN POSSESSION—"*English mortgage*"—*See* TRANSFER OF PROPERTY ACT, 1882, SECS. 58 (*a*), 66 413

LEASE UNREGISTERED, EFFECT OF—*Notice to quit—landlord and tenant—See* TRANSFER OF PROPERTY ACT, SEC. 106, 107 351

LEGAL PRACTITIONERS' ACT, XVIII OF 1879—*unauthorised Practice*.

The proper procedure to be adopted with regard to a person alleged to be practising as pleader in contravention of the provisions of section 10 of the Legal Practitioners' Act is that prescribed in section 32 of the Act.

Maung Maung Gyi v. *Sein Nyun* 531

LEGAL PRACTITIONERS' ACT (1879), SECTION 13 (*b*)—*Advocate's duty to client—settlement of fees.*

It is incumbent on an advocate to see that the terms of his engagement are clear and are understood by his client. In the absence of any special contract the fee must be taken to be for the whole case, and an advocate who accepts a fee without expressly arranging that it is only for a limited number of hearings and after a few appearances refuses to appear further without additional fee is guilty of professional misconduct.

In the matter of a 1*st Grade Pleader, Rangoon* 294

LEGAL PRACTITIONER'S EQUITABLE LIEN—*Contract Act, Sections* 171, 217, 221.

A certain sum of money was paid into Court in satisfaction of a mortgage decree against the clients of A, a barrister. This sum was subsequently attached in execution of another decree against the same clients. A claimed that the money actually paid into Court was paid in under protest and was in excess of the money due under the decree, and that he had a lien on Rs. 217 of this excess on account of fees.

PAGE

Held,—that **A** had no lien either on the analogy of an English solicitor's equitable lien or under sections 171, 217 and 221 of the Indian Contract Act, *A. J. Robertson* v. *Ko Cheik* 70

LESSOR AND LESSEE—"*local usage*"—*Transfer of Property Act*, 1882, *sec.* 108—*See* LANDLORD AND TENANT 433

LESSOR AND LESSEE—*rent—use and occupation—section* 109, *Transfer of Property Act*, 1882—*See* LANDLORD AND TENANT 270

LETTERS OF ADMINISTRATION—*right of parents of married couple dying childless*—*See* BUDDHIST LAW : INHERITANCE 197

LIABILITY OF MINOR PARTNERS—*Civil Procedure Code*, *Order* 21, *Rule* 50—*See* JOINT HINDU FAMILY BUSINESS 112

LIABILITY OF PRINCIPAL—*burden of proof*—*See* AGENT OF CHETTY FIRM SIGNING PROMISSORY NOTE AS SURETY FOR ANOTHER FIRM .. 168

LIMIT OF OWNER'S RESPONSIBILITY—*person keeping*—*See* HACKNEY CARRIAGE ACT, XIV OF 1879, SEC. (6) (*h*) 91

LIMITATION ACT—*1st Schedule*, *Articles* 113, 133, 144, *when Applicable—contract for renewal not contract for perpetual renewal.*

In 1866 **A** obtained a permit from the forest authorities entitling him to extract teak from a certain forest for a period of thirty years expiring in October 1896, with a promise that at the end of the time for which it was granted the permit would be renewed. In 1896 **A**'s son applied for a renewal of the permit and was refused. In September 1907 **A**'s representatives filed a suit against the Secretary of State praying that they might be declared entitled to claim the right of renewing **A**'s permit every thirty years and that defendant might be compelled to issue a permit in pursuance of that right.

Held on appeal—that the suit was governed by the provisions of Article 113 of the 1st Schedule to the Limitation Act (1908), inasmuch as—

(1) A person claiming that a covenant for renewal is a covenant for perpetual renewal cannot, without strict proof of his claim, avail himself of the provisions of Article 131, and (2) Article 144 can only apply where the claim is based on title, and not on contract.

Lalla Ram Sahoy Lall v. *Bibee Chowbain and others*, Sutherlands W.R., Vol. 22, page 287, followed.

The Secretary of State for India in Council v. *Ma Dwe* 64

LIMITATION ACT, IX OF 1908—*Schedule* 1, *Article* 68, *administration bond—when a bond subject to a condition.*

An administration bond which provides that in certain events the obligation to pay the amount mentioned in it shall be void comes within the meaning of "bond subject to a condition" in Article 68 of the 1st Schedule to the Limitation Act, and the period of limitation starts from the day when the condition is broken.

Ahmed Moola Dawood v. *Fatima Bee Bee* 99

LIMITATION ACT, IX of 1908, SEC. 5—*limitation of appeal—judicial discretion—interference by High Court.*

The discretion allowed a Judge in admitting an appeal after the prescribed period of limitation must be judicially exercised and based on materials judicially cognisable. If the discretion has been exercised without appreciation and consideration of all the material facts and without the application of the right principle to those facts, the High Court is bound to interfere.

A *bonâ fide* mistake on the part of a pleader may be sufficient cause for admitting an appeal after time, but no mistake is *bonâ fide* unless made in spite of due care and attention.

Kichilappa Naiker v. *Ramanujam Pillai*, (1901) I.L.R. 25 Mad., 166; *Rakhal Chandra Ghosh* v. *Ashutosh Ghosh*, (1913) 17 C.W.N., 807; *Sarat Chander Bose* v. *Saraswati Debi*, (1907) I.L.R. 34 Cal., 216, referred to.

Ma Mai Gale v. *Tun Win* 566

LIMITATION ACT, IX OF 1908, SEC. 14—*good faith, meaning of*—.

Rule 63 of Order 21 clearly lays down the procedure to be adopted by a person who fails in an application for removal of attachment. When therefore

PAGE

such a person instead of following such procedure spends time in filing appeals and applications for revision which do not lie, he is not entitled, when he does file a regular suit, to deduct under section 14, Limitation Act, the time so spent. In such a case it is no excuse for plaintiff to say that he acted in good faith at the advice of his advocate. He is bound by the negligent conduct of his advocates.

Kura Mal v. *Ram Nath*, (1906) I.L.R. 28 All., 414, referred to.

Tun U v. *Y.P.S.P.L. Pallaniappa Chetty* 146

LIMITATION ACT, IX OF 1908, SEC. 19—*acknowledgment by a receiver of a partnership property.*

A receiver appointed in a suit for dissolution of partnership is not the agent of all the partners. Whether he can give an acknowledgment which will create a fresh period of limitation against the partnership under section 19, Limitation Act, will depend entirely upon the terms in which he is appointed.

Chinnery v. *Evans*, (1864) 11 H.L.C., 115; *Lewin* v. *Wilson*, (1886) L.R. 11 A.C., 639; *Ebrahim Haji Yakub* v. *Chunilal Lalchand Kabre*, (1911) I.L.R., 35 Bom., 302—referred to.

Arunachellam Chetty v. *Meenatchi Archi* 159

LIMITATION ACT, IX of 1908, 1ST SCHEDULE, ARTICLE 85—"*mutual, open and current account*" *defined.*

A mutual account means not an account in which one of two parties has received money and paid it on account of the other, but an account in which each of two parties has received and paid on the other's account.

If an account does not come within such a definition Article 85 of the 1st Division of the 1st Schedule of the Limitation Act has no application to a suit thereon.

Parkinson v. *Hanbury*, (1867) L.R. 2 H.L., 1, at pp. 11 and 19; *Narrandas Hemraj* v. *Vissandas Hemraj*, (1881) I.L.R. 6 Bom., 134: *Hirada Ba'sappa* v. *Godigi Muddappa*, (1871) 6 Mad. H.C.R., 142; *Webber* v. *Tivill*, (1663) 2 Wms. Saund., 124=85 E.R., 843—referred to.

Phillips v. *Phillips*, (1852) 9 Hare, 471=68 E.R., 596; *Padwick* v. *Hurst*, (1854) 18 Beav., 575=52 E.R., 225; *Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa*, (1880) I.L.R. 5 Cal., 759; *Ram Pershad* v. *Harbans Singh*, (1907) 6 Cal., L.J., 158—followed.

Ebrahim Ahmed Mehter v. *S. Abdul Huq* 149

LIMITATION ACT, 1ST SCHEDULE, ARTICLES 142 AND 144—*burden of proof*—*See* LAND-POSSESSION 264

LIMITATION ACT, 1ST SCHEDULE, ARTICLE 181—*Court not bound to demand an inventory—abuse of process of Court—Civil Procedure Code, sec.* 151—*See* PROBATE AND ADMINISTRATION ACT, SEC. 98 (3) 422

LIMITATION ACT (IX OF 1908), 1ST SCHEDULE, ARTICLES 181, 182—application under, not an application to execute a decree—*See* CIVIL PROCEDURE CODE, V OF 1908, SEC. 144 262

LIMITATION OF APPEAL—judicial discretion—interference by High Court—*See* LIMITATION ACT, IX OF 1908, SEC. 5 566

LOAN ON 'THAVANAI' ACCOUNT—*See* INDIAN LIMITATION ACT, IX OF 1908, 1ST SCHEDULE, ARTICLES 57, 115 526

LOWER BURMA COURTS ACT, SECTION 12, REVIEW BY BENCH—Bench not a Court of Appeal—*See* TRIAL BY JURY 274

LOWER BURMA LAND AND REVENUE ACT, SECS. 56 (*a*), 55 (*b*), 19 AND 6—Claim for possession without title—*See* JURISDICTION OF CIVIL COURT 227

LOWER BURMA TOWN AND VILLAGE LANDS ACT, SEC. 41—Suit between private parties—*See* JURISDICTION OF CIVIL COURT 71

M

MAGISTRATE'S JURISDICTION, PRISONER WITHIN LIMITS OF—SEC. 120—*See* CRIMINAL PROCEDURE CODE, SEC. 110 353

PAGE.

MAHOMEDAN LAW : MARRIAGE—*restitution of conjugal rights—effect of apostasy.*

There can be no valid marriage between a Mahomedan and a Burmese Buddhist. If a woman, who has become a Mahomedan and been married according to Mahomedan ceremonies, subsequently apostatises, the marriage is cancelled by the apostasy.

Hossain Unwar v. *Fatima Bee*, (1885) S.J.L.B., 368, followed.

Kumal Sheriff v. *Mi Shwe Ywet*, (1875) S.J.L.B., 49, dissented from.

Ali Asghar v. *Mi Kra Hla U* 461

MAHOMEDAN LAW : MARRIAGE—*what constitutes a Siyeeba—marriage of a Shafi woman without her guardian's consent.*

Under Shafi law intercourse between a Mahomedan man and a Mahomedan woman, subsequent to their elopement, but prior to their marriage, is sufficient to constitute her a Siyeeba.

Authority is against the view that a woman of the Shafi sect, even though a Siyeeba, can contract a valid marriage without her guardian's consent.

Sir Roland Wilson's Anglo-Mohammadan Law, 4th Edition, Paras. 392 and 394, referred to.

Rahima Bi alias Ma Ta v. *Mahomed Saleh* 54

MAINTENANCE—*Criminal Procedure Code, sec. 488—neglects or refusal.*

The fact that children are for a time in their mother's custody is not of itself proof that their father has neglected or refused to maintain them within the meaning of section 488 of the Criminal Procedure Code.

Venkatasubbaiyan alias *Samaiyan*, 2 Weir's Criminal Rulings, 682, referred to.

Shwe Hmyin v. *Po Chet* 105

MALICIOUS PROSECUTION—*damages—what must be proved in suit for*

To be successful in a suit for damages for malicious prosecution, the plaintiff must prove (1) that he was innocent, (2) that he was pronounced innocent by a competent tribunal, (3) that there was a want of reasonable and probable cause for the prosecution, (4) that the prosecution was initiated in a malicious spirit.

Abrath v. *North-Eastern Railway Co.*, (1886) L.R. 11 A.C., 247, followed.

Soobramony Pillai Chetty v. *Maung Po Lu*, 2 L.B.R., 111, modified.

Padashin v. *Maung Lun* 78

MARRIAGE—*Chinese Buddhist Law—presumption of validity.*

In the absence of good evidence to the contrary, a marriage between a Buddhist Chinaman and a Burmese Buddhist woman according to Burmese Buddhist custom is to be regarded as valid under Chinese Buddhist Law.

Ma Thein Shin v. *Ah Shein*, 8 L.B.R. 222, referred to.

Ma Shein v. *Kin Sein* 225

MARRIAGE—*law of domicile as affecting marriage—customary law of woman when to be considered—See* CHINESE BUDDHIST LAW 399

MARRIAGE—*what constitutes—burden of proof—See* CHINESE CUSTOMARY LAW 208

MARRIAGE, CONSENT ESSENTIAL TO VALID—*damages for breach of promise by party's parents not sustainable—See* BURMESE BUDDHIST LAW .. 347

MARRIAGE, WHEN TO BE PRESUMED—Chinese Buddhist—inheritance—*See* BUDDHIST LAW 222

MASTER AND SERVANT—*wrongful dismissal—damages claimable.*

In the event of wrongful dismissal a servant can sue for damages and the amount of damages to be awarded will depend on the nature of the hiring contract and the wages agreed upon. Damages to the extent of a month's wages might be given in case of a menial or domestic servant and certainly would not be excessive in case of a clerk.

Smith's Law of Master and Servant, 6th Edition, cases cited at p. 148.

Smith's Law of Master and Servant, Cases cited at p. 60.

M. E. Moola v. *K. C. Bose* 420

PAGE

MISDIRECTION, WHAT CONSTITUTES—*See* DEFAMATION 16

MONK ORDINARILY TO BE PRESUMED TO HAVE NO PROPERTY—*Civil Procedure Code*, 1908, *Order* 25, *Rule* 1—*See* BUDDHIST LAW 342

MORTGAGE—*rights of puisne mortgagee—Transfer of Property Act, secs.* 74, 75—*Civil Procedure Code, Order* 34, *Rule* 1—*declaratory decree, suit for, when permissible—Specific Relief Act, sec.* 42.

A mortgaged a piece of land first to **B**, and then to **C**. The mortgage to **C** was alleged to be an usufructuary mortgage with possession. **B** sued **A** on his first mortgage, but despite the provisions of Order 34, Rule 1, of the 1st Schedule to the Civil Procedure Code, did not include **C** as a party to the suit. He obtained a mortgage decree and on the decree sale followed. **C** then sued **A**, **B** and the purchaser at the sale for a decree declaring *inter alia* that the decree and sale in **B**'s suit were inoperative as against him and that the purchaser was not entitled to disturb his possession.

Held,—firstly, that any rights **C** might have had at the date of his mortgage were entirely unaffected either by **B**'s suit to which he was not a party or by the sale thereunder, and,

Secondly, that as all that **C** wanted at the time of suit was to remain in possession of the land, he was not obliged to seek further relief than a mere declaration.

Mulla Veetil Seeti Kutti v. *Korambath Paruthooli Achuthan Nair*, (1911) 9 Indian Cases, 513, followed.

Goverdhana Dass v. *Vecrasami Chetty*, (1902) I.L.R. 26 Mad., 537, referred to.

San Bwin v. *A.N.K. Nagamutu* 266

MORTGAGE DECREE—*execution—attachment of property—application for removal of attachment—Civil Procedure Code, Order* 21, *Rule* 58.

Procedure by attachment is not appropriate to a mortgage decree. But if an attachment is made, any claims or objections thereto must be entertained. But Order 21, Rule 58 (*et seq*), applies to such proceedings.

S.R.M.A.N. Muthappa Chetty v. *S.A.R.M. Pallathappa Chetty*, (1903) 2. L.B.R., 138, and *Gobalu* v. *Po Hla*, (1906) 4 L.B.R., 82—overruled in part.

In re Maung Mra Tun v. *U Kaing* 215

MORTGAGE, RECOVERY OF BALANCE DUE ON—*Transfer of Property Act*, (1882) *sec.* 59—*Equitable mortgage, effect of*—*See* CIVIL PROCEDURE CODE, 1908, ORDER 34, RULE 6 450

MORTGAGE, UNREGISTERED—*pleadings, judgment to be in accordance with —Civil Procedure Code*, 1908, *Order* 6—*See* TRANSFER OF PROPERTY ACT, SEC. 59 334

MUNICIPAL ACT, SEC. 142 (*r*)—*bye-law under*—"*keeping*" *Cattle.*

A bye-law duly promulgated by the Rangoon Municipality forbids the "keeping" of goats within certain limits. Applicant took a goat to a Hindu temple to be sacrificed and kept it tied up in the temple awaiting sacrifice for two hours. He was prosecuted for a breach of the bye-law and convicted.

Held,—on revision that the word "keeping" in the bye-law must mean keeping for a lengthened time and that the conviction must be set aside.

Boyhenj Chandra v. *Rangoon Municipality* 328

MURDER—*intention—directions to jury regarding sections* 295, 300, 304, 326, *Indian Penal Code.*

In a trial on a capital charge the jury should be directed, in the event of finding that the accused culpably caused the injuries which resulted in death, to find with what intention he did so. If they find that his intention was to cause only such bodily injury as was likely to cause death, they should find the accused guilty of culpable homicide not amounting to murder.

The general conduct of the accused at the time of committing the act, the nature of the weapon used, the number and nature of the wounds inflicted

PAGE

are all considerations which should guide the jury in arriving at the intention of the accused.

Shwe Ein v. *King-Emperor*, (1905) 3 L.B.R., 122, referred to.

Kya Nyun v. *King-Emperor* 125

MURDER AND CULPABLE HOMICIDE, DISTINCTION BETWEEN—*alleged misdirection—duty of Judge—illustration (a) of sec.* 299, *Criminal Procedure Code—illustrations not substantive law—sec.* 105, *Indian Evidence Act—See* TRIAL BY JURY 306

MUSSULMAN LAW—*wakf—trust scheme—See* CIVIL PROCEDURE CODE, 1908, SEC. 92 51

"MUTUAL, OPEN AND CURRENT ACCOUNT" DEFINED—*See* LIMITATION ACT, IX OF 1908, 1ST SCHEDULE, ARTICLE 85 149

N

"NATURAL STREAM" DISCUSSED—*riparian owners—See* EASEMENTS .. 556

NEGLIGENCE TO BE PROVED—*Suit for damages for injuries caused by animal—See* TORT 388

NEGOTIABLE INSTRUMENTS ACT, 1881, SECS. 56, 59—*right of indorsee for value without notice of part payments to recover full amount.*

A executed a promissory note in favour of **B**, who indorsed it to **C** for value. **C** sued **A** for the full amount due on the note, whereupon **A** pleaded that he had made payments to **B** prior to the indorsement in favour of **C**.

Held,—that as **C** at the time of accepting the note had no notice of such part payments either by indorsement on the note or otherwise, and had no cause to believe that there was any defect in his title, he was entitled to recover from **A** the full amount due on the note.

Barough v. *White*, (1825) 4 B. & C., 325, also at 107 E.R., 1080, referred to.

Glasscock v. *Balls*, (1889) 24 Q.B.D., 13, and *Nash* v. *De Freville*, (1900) 2 Q.B.D., 72, followed.

Vithaldas Khandas v. *S. M. Indravaloo* 202

NEGOTIABLE SECURITIES—*breach of contract by buyer, resale on—damages how measured—See* CONTRACT ACT, SECS. 73, 107 343

NON-BURMAN BUDDHIST, WHAT LAW APPLICABLE TO—*See* BUDDHIST LAW 301

O

ORASA SON, RIGHT OF, TO CLAIM HIS ONE-FOURTH SHARE—*See* BUDDHIST LAW 18

ORDER ON A PRELIMINARY OBJECTION, DIRECTING SUIT TO PROCEED—*sec.* 2 (2), *Civil Procedure Code, decree—See* APPEALS FROM ORDERS .. 213

P

PAGODA SITE—*Land and Revenue Act, secs.* 4 *and* 5—*See* JURISDICTION OF CIVIL COURTS 260

PARDON—*how forfeited—Criminal Procedure Code, secs.* 337, 339.

A was tendered a pardon as an approver in a dacoity case and was subsequently released on his own recognizances before the trial began. Four men were sent up for trial on the charge of dacoity and A was examined at great length by the trying Magistrate, and there not being time on the same day for his cross-examination he was directed to appear next day. Next day he was found to have absconded and some weeks later the four accused were discharged. Subsequently A was arrested, sent up for trial for the dacoity in respect of which he had received a pardon and sentenced to seven years' transportation.

Held, on appeal,—that the conviction was invalid. A pardon once granted can only be forfeited if it can be shown that the man pardoned has wilfully concealed anything essential or given false evidence, and the prosecution must show that he has done so. It is a contravention of the provisions of section