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CIVIL PROCEDURE CODE— <i>Section 47—Matters to be established before a case comes under—Interpretation of "representatives."</i> A Chetty firm obtained a simple money decree against A and had certain immovable property attached in execution thereof. The property was sold by auction and purchased by the decree-holder. The latter did not take steps to obtain possession, but after the period of limitation which applies to applications relating to execution had expired, sold the property to B. After B's death his widow brought a suit for possession and mesne profits against the representatives of A, who was then dead, and obtained a decree. A's representatives appealed alleging, <i>inter alia</i> , that the suit was barred by the provisions of section 47, Civil Procedure Code. <i>Held</i> ,—that in considering whether the case is one which comes within the purview of section 47, two matters have to be established: the question must be one between the parties to the suit or their representatives, and must further be one relating to the execution, discharge or satisfaction of the decree. In this case B acquired the ownership of the property from the decree-holder <i>qua</i> auction-purchaser; he did not become the representative of the decree-holder <i>qua</i> decree-holder. The decree was satisfied so far as the property in suit was concerned on the sale of that property which thereupon ceased to be liable to be used to satisfy the decree. The matter was therefore not one relative to the execution, discharge or satisfaction of the decree. For these reasons section 47, Civil Procedure Code, did not apply and the suit lay. <i>Madhusudan Das and another v. Govinda Pria Chowdhurani</i> (1900, I.L.R. 27 Cal., 34; <i>Hari Charan Dutta v. Menmohan Nandi and another</i> , (1913-14) 18 C.W.N., 27; <i>Sandhu Taraganar and another v. Hussain Sahib and others</i> , (1905) I.L.R. 28 Mad., 87; <i>Bhagwati v. Bhanwari Lal and others</i> , (1909) I.L.R. 31 All., 82; <i>Sadashin Bin Mahadu Dhob v. Narayan Vitthal Mawal</i> , (1911) I.L.R. 35 Bom., 452; <i>Goba Nathu Baroia v. Sakharan Teju Patil</i> , (1920) 22 Bom. L.R., 1101; <i>Prosunno Kumar Sanyal v. Kali Das Sanyal</i> , (1892) I.L.R. 19 Cal., 683—referred to. <i>Mi Ah Kook v. Mi Hla Mo Way</i>	17
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JOINT PROPERTY—Partition Suit—Cause of Action—Res Judicata—Civil Procedure Code—Section 11 and Order II, Rule 2.

A mortgaged his land to a Chetty and ultimately sold it outright to him. The Chetty sold the land to B and C, uncle and nephew, who thus became joint owners of the land. After B's death, his widow and children sold their shares of the land, one half, to D. Subsequently A brought a suit against D, claiming to recover the southern portion of the land which he said was the portion actually sold by B's heirs to D, and alleging that B and C before buying the land had agreed to sell it back to A at the price they paid the Chetty. C was joined as a defendant in this suit and confessed judgment. The suit was dismissed. C did not dispute that the southern half of the land was the portion belonging to B.

D next sued C for possession of the southern half of the holding. C did not deny that D had bought B's half of share in the whole of the land but denied that it was by his consent that the southern half was indicated in the former suit as B's share. The Court found that D had purchased half of the holding but not the whole southern half, and gave D a decree for a half share in the southern portion.

D then sued C for partition and possession of the whole holding and asked that the southern half should be allotted as his share. The District Court gave decree for partition and possession of the northern half of the holding. On appeal the Divisional Court held that the suit was barred as *res judicata* under Explanation IV to section 11 of the Civil Procedure Code. Against this order D appealed.

Held,—that the ground on which the Divisional Judge disallowed D's claim fell under Order II, Rule 2, Clause (3), rather than under section 11, Explanation IV; that in his first suit D was suing for separate possession of a share alleged to have already been partitioned to B, while in the second case he was suing his co-sharer C for partition of the whole of the joint property; that the causes of action were separate and distinct in the two suits, and that therefore the suit was not barred.

Denaboundhoo Chowdhry v. Kristomonee Dossee, (1877) I.L.R. 2 Cal., 152; *Abdun Nasir and another v. Rasulan*, (1893) I.L.R. 20 Cal., 385; *Shivram v. Narayan and others*, (1881) I.L.R. 5 Bom., 27—referred to.

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RANGOOB RENT ACT, 1920—Section 10—Bona fides—Definition of "own occupation"

A firm having purchased a house of which B, another firm, were tenants, gave them notice to pay an enhanced rent or to quit. B having refused to do either, A brought a suit for ejection on the ground that the premises were *bona fide* required by them for their own occupation. They alleged that the upper storey was required to house their assistants and that they intended to use the lower storey as a godown.

Held,—that the premises were *bona fide* required and that they were required for A's "own occupation" within the meaning of section 10 of the Act.

Epsom Grand Stand Association (Limited) v. E. J. Clarke, (1918-19) 35 T.L.R., 525; *Stovin v. Farebnass*, *ibid*, p. 659; *Errington v. Metropolitan District Railway Company*, (1881-82) 19 Chan. Div., 559 at p. 571; *Fricker v. Van Grutten*, (1896) 2 Chan., 649—referred to.

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<p>BUDDHIST LAW—DIVORCE—<i>Husband previously married—Wife a spinster at time of marriage—Division of property.</i> A, a widower, married B, a spinster. After several years they were divorced by mutual consent without any fault on either side. B sued for her share in the <i>payin</i> property. <i>Held</i>,—that the relation of <i>nissaya</i> and <i>nissita</i> existed and that there was no justification for applying a different rule in the case of a woman who had not been married before because the husband had been previously married. The rule to be applied was the rule laid down for the case where neither party had been married before and B was entitled to one-third of the <i>payin</i> property. <i>Ma Dwe Now v. Maung Tin</i>, S.J.L.B. 14; <i>Mi Myin v. Nga Twe</i>, (1904-06) 2 U.B.R. Div., p. 19; <i>Ma E Nyun v. Maung Tok Pyu</i>, (1897-01) 2 U.B.R., Div., p. 39—referred to. <i>Ma Ngwe Hnit v. Maung Po Hmu and others</i> 52</p>	
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<p>CIVIL PROCEDURE CODE, SECTION 11—<i>Suit based on declaratory decree—maintainability of—</i> A declaratory decree having been passed in an administration suit, a fresh suit was filed praying that the shares declared by the decree be distributed under the orders of the Court. The Court held that the suit was <i>res judicata</i> by reason of the former administration suit.</p>	

Held,—that as the decree in the administration suit was declaratory and the plaintiff had therefore no remedy by way of execution of the decree, a suit based on the decree was maintainable and was not *res judicata*.

Lakhrani Kuar v. Dhanraj Singh, (1916) 14 A.L.J.R., 102; *Attermoney Dossee v. Hurry Dos Dutt*, (1881) I.L.R. 7 Cal., p. 74; *Kalicharan Nath v. Sukhoda Sundari Debi*, (1915) 20 C.W.N., 58; *Manchharam Kallindas v. Baksh Sahab Mir Mainuddin Khan*, 6 Bom. H.C.R., 231; *Pritchett v. English and Colonial Syndicate*, (1899) 2 Q.B., 428; *Grant v. Easton*, 13 Q.B.D., 302; *Gustave Nouvion v. Freeman*, 15 Appeal Cases, 1; *Pemberton v. Hughes*, (1899) 1 Ch., 781; *Hodsoll v. Baxter*, E.B. & E., 884 (E.R. 120, p. 789); *Williams v. Jones*, 13 M. & W., 628; *Fakirapa v. Pandurangapa*, (1882) I.L.R., 6 Bom. 7—referred to.

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CIVIL PROCEDURE CODE—SECTION 115.—Revisory Powers of High Court—Interlocutory orders.

The Court has power under section 115 of the Code of Civil Procedure to deal with interlocutory orders and may set aside such an order when no appeal lies directly from the order and sufficient grounds exist peremptorily calling for its interference even though the substance of the order may be one that could be brought up on appeal from the final decree in the suit but the Court should not as a rule interfere with orders passed in the exercise of a discretion when there has been some attempt to exercise that discretion judicially, and it should not interfere unless irreparable damage would be caused by its refusal.

Dhapi v. Ram Pershad, (1887) I.L.R., 14 Cal., 768—followed.
Anjad Ali v. Ali Hussain Johar, 15 C.W.N., 353; *Chandi Ray v. Kripal Ray*, 15 C.W.N., 682; *Motilal Kashidhai v. Nana*, (1894) I.L.R. 18 Bom., 35; *Maharaja Sir Rameshwar Singh Bahadur of Darbhanga v. Sadanand Jha and others*, 55 Ind. Cas., 445; *Sawan Singh v. Rahman*, 55 Ind. Cas., 739; *Rameshwar Narayan Singh v. Rikhanath Koeri*, 58 Ind. Cas., 281; *V. V. M. Chetty Firm v. R. M. A. R. Arumachallum Chetty*, 8 L.B.R. 77,—referred to.

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CRIMINAL PROCEDURE CODE, V OF 1898—Section 234—Application of—Charge under minor offence—Conviction of graver offence.

The application of section 234, Criminal Procedure Code, is not limited to cases in which an accused is charged with several offences of the same kind against the same person; the section applies where the complainants are different persons.

A person cannot be convicted of a more serious offence than that with which he is charged.

Chattradhari Mian v. King-Emperor, 19 C.W.N., 557; *Musai Singh v. Emperor*, (1914) 41 I.L.R., Cal. 66; *Crown v. Chit Te*, I.L.B.R., 287; *King-Emperor v. Po Yin and Tha Maung*, 3 L.B.R., p. 232—followed.
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CONTRACT—Agreement to serve—Injunction against third party for breach of—

The Burma Oil Company engaged A to serve them for a period of three years. The agreement also contained a provision that A should not serve any other firm but should return to America on the expiry of his agreement. Before the expiry of the three years A tendered his resignation which the Company refused to accept. A did not rejoin their employ and was believed to be in America. The Indo-Burma Oil Fields, Limited, took A into their service in spite of the protests of the Burma Oil Company. The latter Company then filed *inter alia* an application for an interim injunction to restrain A from continuing to work for the Indo-Burma Oil Fields, Limited, and to restrain the latter from employing him. An interim injunction was granted, and against that order the Indo-Burma Oil Fields, Limited, appealed.

Held,—that the agreement made by A not to serve any other firm applied during the term of service agreed upon and that section 27 of the Indian Contract Act did not apply to it.

Held,—also that an injunction could be granted against the Indo-Burma Oil Fields, Limited, because they were knowingly and for their own ends procuring A to commit an actionable wrong. The appeal was accordingly dismissed.

Whitwood Chemical Company v. Hardman, (1891) 2 Ch. 416; *Lumley v. Wagner*, 91 R.R., 193; *Lumley v. Gye*, 2 E. & B., 216; *Allen v. Flood*, (1898) A.C., 1; *Quinn v. Leatham*, (1901) A.C., 495; *South Wales Miners' Federation v. Glamorgan Coal Company*, (1905) A.C., 239; *National Phonograph Co. v. Edison Bell Phonograph Co.* (1908) 1 Ch., 335; *Blake v. Lanyon*, 101 Eng. Rep., 521—referred to.

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INDIAN INCOME-TAX ACT, 1918—Section 9 (2)—*Definition of "owner."*

The Burma Railways Company, in appealing against their Income-tax assessment, claimed that under section 9 (2) (i) of the Indian Income-tax Act, 1918, the annual value of their premises should be deducted from their profits before assessment. The Chief Revenue-authority referred the following two questions for decision:—

(1) Are the Burma Railways owners of the railway system and all its premises for the purposes of section 9 (2) (i) of the Income-tax Act?

(2) Are the Burma Railways owners of the railway system and all its premises in virtue of being partners with the Secretary of State for India?

Held,—*Per Robinson, C.J., and Maung Kin, J.*—As the expressions "owner" "ownership" and "to own" have not been defined in the Act it was apparently not the intention of the Legislature to give them a narrow and technical meaning of the full ultimate and legal owner or ownership. Where buildings must be used to enable profits to be made or increased an allowance for them is just and reasonable and the justness of the claim to such an allowance of annual value does not depend on absolute ownership and such

- a claim will be equally just where it arises out of a lesser degree of ownership. Having regard to the object and intention of the Legislature the Burma Railways are owners of the railway system and its premises for the purposes of the section.
- Held:—per curiam*—The Burma Railways are the agents, not the partners of the Secretary of State.
- Per Heald, J.*—The income under assessment is that of the Burma Railways Company as managing agents of the Burma Railways undertaking and not that of the undertaking itself. The Secretary of State is owner of the undertaking and all its premises and the position of the Company as managing agents cannot make them owners of the premises so as to entitle them to the deduction claimed when only their own income as managing agents and not that of the undertaking as a whole is being assessed.
- Gilbertson v. Fergusson*, (1880-81) L.R. 7 Q.B.D., 562 at page 572:—referred to.
- The Burma Railways Company v. The Secretary of State for India* .. 33:
- INDIAN PENAL CODE, SECTIONS 182 AND 211—*False charge of offence*—*Appropriate section.*
- Where there have been Court proceedings in consequence of a report to the police, section 211 is the appropriate section to apply, and is so in any event where the case is a serious one; but this does not necessarily make a prosecution under section 182 illegal.
- Queen-Empress v. Raghu Tiwari*, (1893) I.L.R. 15 All., 336; *Emperor v. Hardwar Pal*, (1912) I.L.R. 34 All., 522 at 526; *Emperor v. Sarada Prasad Chatterjee*, (1905) I.L.R. 32 Cal., 180 at 185; *Giridhari Naik v. Empress*, (1900-01) 5 C.W.N., 727; *Emperor v. Apaya Tutoba Munde*, 15 Bom. L.R., 574; *Mi Ngwe v. Mi Chit*, (1910-13) 1 U.B.R., 134; (1872) 7 M.H.C. App. 5—referred to.
- Ma Saw Yin v. King Emperor* .. 43:
- INDIAN PENAL CODE, SECTION 304—*Culpable homicide not amounting to murder.*
- A, who professed by tattooing to render persons immune from the effect of snake bite, caused a poisonous snake to bite B whom he had tattooed and B died. A was convicted under section 304, Indian Penal Code.
- Held*,—that the burden of proving that he was justified in believing and did believe that he could give immunity lay on A, and that as he failed to discharge the burden, he was rightly convicted under section 304, Indian Penal Code.
- The Queen v. Poonai Fattemah*, 12 Sutherland's Weekly Reporter, Criminal, Page 7-3 Bengal Law Reports (A.C.), 25; *The Empress v. Gonesh Dooley*, (1880) I.L.R. 5 Cal., 351; *Queen-Empress v. Nga Po Kyin*, U.B.R., (1897-01), Volume I, page 298 at p. 307; *Nga Po Kyaw and others v. King-Emperor*, U.B.R., (1902-03) Volume I, Penal Code 1; *Queen-Empress v. Jamaludin*, Bom. Unreported Cases, (1892), 603; *Pika Bewa v. Emperor*, I.L.R. 39 Cal., 855; *Emperor v. Ramava Channappa*, 17 Bom. Law Reporter, 217; *Queen-Empress v. Kangla*, (1898) All., W. Notes, 163 and *Shwe Kin v. King-Emperor*, 8 L.B.R., 166—referred to.
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SIMULTANEOUS TRIALS—*Illegality not curable under section 537, Criminal Procedure Code.*

A Sessions Judge, sitting with Assessors, tried two separate cases simultaneously. The two sets of accused were placed in the dock together. Each witness was examined first in the one case and then in the other, each set of accused standing up in turn when the evidence against them was being given. This resulted in several of the depositions being identical or almost identical in their phraseology and form.

Held,—that the two cases were not tried separately but were contrary to law tried together in what amounted to simultaneous trials, and that this was an illegality which could not be cured under section 537, Criminal Procedure Code.

Hossain Buksh v. The Empress, (1881) I.L.R. 6 Cal., 96; *Queen v. Shaik Bazu*, 8 Weekly Reporter, Crim., 47; *Queen-Empress v. Chandra Bhuia*, (1893) I.L.R. 20 Cal., 537; *Sahudev Ahir v. Emperor*, (1903) 8 C.W.N., 344; *Ala Dya v. King-Emperor*, (1906) 41 P.R. Crim. Case No. 5; *Subrahmanya Iyer v. King-Emperor*, (1902) I.L.R. 25 Mad., 61—referred to.

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WILD ANIMALS—*Trained Elephant—Right of property on recapture.*

Where an elephant which had been trained was lost in the jungle for a year but on recapture was found to be tame and could be put to work almost at once,

Held,—that the elephant was not a wild animal and that the original owner had not lost his property in the animal.

Mahudar Mohanta v. Balaram Gagoi, (1908) I.L.R. 35 Cal., p. 413, followed.

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BENAMI TRANSACTIONS—*Burden of Proof.*

A transferred his land to his son B in order that the latter might appear to be a man of property and so get the post of headman. Thereafter B mortgaged the land and then retransferred it to A, who fearing that the mortgagee might proceed against the land, executed a registered deed of sale in favour of another son C. The land remained in the possession of A till his death when C seized the property. A's other heirs brought a suit for the administration of the estate, contending that the sale was a *benami* transaction.

Held,—that the question involved was as to the party on whom lay the onus of proving that the sale was a mere colourable transaction; that the plaintiffs having proved that the sale to C was made to defeat any claim which the mortgagee might bring, it was for C to prove the payment of consideration, and that as he had failed to do so, the original Court was right in holding that the transaction was a *benami* one and in granting an administration decree.

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BUDDHIST LAW—*Adoption—Effect of entering the priesthood on status of*
kiltima adopted son.

When a *kiltima* adopted son enters the priesthood he completely severs all ties that existed before and on re-entering civil life he does not *ipso facto* resume his position as adopted son. It is possible that evidence and circumstances may show that he has resumed his position as a *kiltima* adopted

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son—in other words that he has been re-adopted, but a lesser degree of proof would probably be necessary than in the case of the original adoption. <i>Shwe Ton v. Ten Lin</i> , 9 L.B.R., 220; <i>Ma Saw Ngwe v. Ma Thein Yin</i> , 1 L.B.R., 198—referred to.	
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BURMA EXCISE ACT, 1917—SECTIONS 30 (a), 37 AND 44— <i>Possession of an excisable article of a quantity within that allowed by law.</i> Under the Burma Excise Act, 1917, possession of an excisable article of a quantity which does not exceed that allowed by law may be an offence and in certain circumstances a man may be bound to account for such mere possession and if he cannot will be guilty of an offence under section 37. <i>Queen-Empress v. Tun E</i> , 1 L.B.R., 43—referred to. <i>Nga Han Kyi v. King-Emperor</i>	134
BURMA LAWS ACT, 1898— <i>Status of Kalais for the purposes of—Criteria for determining status of new castes or sects evolved from Hinduism.</i> The combined operation of migration, inter-marriage with people of another race and religion, and new occupations, may produce from the descendants of Hindus a community, with its peculiar religion and usages, which is outside Hinduism in the proper meaning of the word. The Kalais form such a community and are not Hindus within the meaning of section 13 of the Burma Laws Act. <i>Abraham v. Abraham</i> , 9 Moore, I.A., 195; <i>Bhagwan Koer v. Bose</i> , 30 I.A., 249; <i>Muthusawmi Muddaliar v. Masilamani</i> , (1910) I.L.R. 33 Mad., 342; <i>Abdurahhim Haji Ismail Mithu v. Halimabai</i> 43 I.A., 35—referred to. <i>Ma Yait v. Maung Chit Maung</i> <i>Maung Chit Maung v. Ma Yait</i>	155

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CIVIL PROCEDURE CODE, ORDER XLV, RULE 7— <i>Appeal to Privy Council—extension of time for the deposit of security.</i> An applicant who asks for an extension of time for furnishing security and depositing cost is bound to show that he has exercised due diligence in endeavouring to obtain the necessary money. <i>Barjore and Bhawani Pershad v. Bhagana</i> , (1884) I.L.R. 10 Cal., 557; <i>Rungasay v. Mahalakshamma</i> , (1891) I.L.R., 14 Mad., 391; <i>Bazga v. Salhion</i> , (1910) Vol. 45, Punjab Record, page 138. <i>Roy Jotindra Nath</i>	
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CIVIL PROCEDURE CODE, SECTION 110—Appeal to Privy Council—Valuations for purposes of appeal.	
In the Court of first instance the plaintiffs obtained a decree for less than Rs. 10,000 for the tort complained of, <i>viz.</i> the erection of a bund and the alleged consequent inundation of their paddy-fields. On appeal this decree was set aside and the plaintiffs were thus forced to acquiesce for the future in the alleged damage to their fields which were worth more than Rs. 10,000.	
<i>Held</i> ,—on application being made for permission to appeal to His Majesty in Council, that the subject-matter of the suit in the Court of first instance exceeded Rs. 10,000 and the decree or final order involved indirectly a question respecting property worth over that sum; and that therefore a certificate should be granted.	
<i>John Joseph DeSilva v. John Joseph DeSilva</i> , (1904) 6 Bom. L.R., 403; <i>Gosain Bhanuath Gir v. Bihari Lal</i> , (1919) 4 Patna Law Journal, 415—referred to.	
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Where a case ordinarily triable by a Court of Session is tried by a Magistrate empowered under section 30 of the Criminal Procedure Code, the magistrate is not competent to award compensation. The special provisions of section 30 which enable a Magistrate to try offences only triable by a Court of Session "as a Magistrate" do not make such offences "triable by a Magistrate" for the purposes of section 250, Criminal Procedure Code.	
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A in order to defraud his creditors, effected a <i>benami</i> transfer of part of his property to his minor son B. Several years later a suit was filed on behalf of B for a declaration that the partition was valid, for possession and for mesne profits. The suit was dismissed. On appeal it was argued, firstly,	

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that it was not open to A to plead in defence his own fraud, and secondly, that the minor's suit was not tainted as he was no party to the fraud and was ignorant of it.	
<i>Held</i> ,— <i>firstly</i> , that where the contesting parties have both been parties to the fraud, the Court will not assist either to obtain possession from the other ; and that therefore although while a plaintiff cannot be allowed to plead his fraud in order to obtain possession of the subject of the fraud from a defendant, a defendant who is in possession can be allowed to plead the true nature of the transaction, and <i>secondly</i> , that while a minor may not be answerable for the fraud of his guardian, he cannot take advantage of it.	
The appeal was accordingly dismissed.	
<i>Babaji v. Krishna</i> , (1894) I.L.R. 18 Bom., 372 ; <i>Mandaya v. Ma E and others</i> , 5 Bur. L.T. 166 ; <i>Petherpermal Chetty v. Muniandi Servai</i> , (1908) I.L.R. 35 Cal., 551 ; <i>Preo Nath Koer v. Kasi Mahomed Shacid</i> , 8 C.W.N., 620 ; <i>Sidlingappa v. Hirasa</i> , (1907) I.L.R. 31 Bom., 405 ; <i>Maniram v. Ganesh</i> , (1909) 4 Ind. Cas., 233 ; <i>Girdharlal v. Yashodabai</i> , (1914) I.L.R. 38 Bom., 10 ; <i>Eugene Pogose v. The Delhi and London Banking Co., Ltd.</i> , (1884) I.L.R. 10 Cal., 951 ;—referred to.	
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Any Court in which a pleader practises is competent to enquire into a charge of misconduct if the charge is brought in that Court. Section 14 of the Legal Practitioners Act does not limit the consideration of the charge to the Court in which the misconduct is alleged to have been committed.	
<i>Radha Churn Chuckerbutty</i> , 10 C.W.N., 1059—dissented from ; <i>In the matter of the Petition of Ganga Dyal and others</i> , (1882) I.L.R. 4 All. 375—referred to ; <i>In the matter of Babu Het Ram</i> , (1901) Punjab Law Reporter Vol. 2, p. 715—followed.	
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MORTGAGE DECREE— <i>sale in execution of—Rights of auction purchaser as against prior purchaser from mortgagor.</i>	
A obtained a simple mortgage on a piece of land which the mortgagor, B , subsequently sold to C and D . Later A brought a suit on his mortgage against B alone, and when the land was sold in execution of the decree, A bought it. When A sought to obtain possession he was resisted by C and D	

- and he then brought a suit for possession by ejection and for a declaration that the sale to C and D was inoperative as against him. The District Judge held that A was entitled to possession provided that C and D's right of redemption was preserved. The Divisional Judge on appeal reversed this decision.
- Held*,—on appeal to the Chief Court, that the possession and rights of C and D as purchasers were not affected by the decree in A's mortgage suit. The mortgage being a simple one, the right of possession remained with B and he transferred it to C and D, whose purchase was however subject to the mortgage. A had no right to possession under the mortgage and when he brought the property to sale he purchased what rights B had and no more. These rights did not include the right of possession. A's proper remedy was a suit to enforce his mortgage against C and D. The appeal was accordingly dismissed.
- San Ewin v. A. N. K. Nagamuttu*, 8 L.B.R., 266; *Mulla Vettil Seethi v. Korambath Paruthooti Achuthan Nair*, 21 Mad. Law Journal, 213; *Balli Singh v. Vinderwari Tewari*, 35 Ind. Cases, 532—followed.
- Chattur Dhari Chowdhury v. Gaya Prasad Singh*, 23 Ind. Cases, 791—referred to.
- S. P. S. Chetty firm v. Maung Pyan Gyi and 4 others* 119
- MORTGAGE DEED—*Attestation of document—Effect of inoperative mortgage deed—Promise to pay—Personal obligation—See TRANSFER OF PROPERTY ACT, SECTION 59* 148
- MURDER—*Blows on the head—intention—Indian Penal Code, section 300.*
A killed B by striking him one blow on the head with a long and heavy bamboo. The nature of the injury indicated that very great force was used.
- Held*,—that although the weapon used was not one that would of necessity cause fatal injury, the force used was so great as to show that the appellant intended to cause injury sufficient in the ordinary course of nature to cause death, and that he was therefore rightly convicted of murder. It cannot be laid down, as a principle, that, in all cases in which a man strikes another over the head with a stick, and thereby causes death, the offence is one falling under section 304, Part 1, Indian Penal Code.
- Shwe La U v. King-Emperor*, 2 L.B.R., 125; *Shwe Ein v. King-Emperor*, 3 L.B.R., 122; *Nga Na Ban v. King-Emperor*, (1904-06) U.B.R., Vol. I, Penal Code, page 33—referred to.
- Nga Khan v. King Emperor* 115

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- PARTNERSHIP—*Liability of one partner for another's borrowings, when the partnership is not a trading one—Suit on a pro note.*
A, the indorsee of some promissory notes executed by B, deceased, brought a suit for the recovery of the amount due against C and D, B's partners in a rice mill. The partnership was admitted and it was not denied that the money was lent for the purposes of the partnership. The defence was that B had no authority to execute negotiable instruments on behalf of the partnership and that the pro-notes were executed in her personal capacity.
- Held*,—that as the partnership was not a trading partnership, there was no implied authority of one partner to bind the others by negotiable instruments.
- Held*,—further, that there is a distinction between suits based on a pro-note and those on the original consideration. An indorsee can claim only on the notes.
- Maung Po Sin v. V. E. S. V. Vellayappa Chetty*, 10 L.B.R., 321; *Karmali Abdulla Allarakia v. Vora Karimji Jiwanji*, (1915) I.L.R. 39 Bom., 261—distinguished.
- M. R. P. R. S. Shanmuganatha Chettiar v. K. Srinivasa Ayyar*, (1917) I.L.R. 40 Mad., 727; *Premabhai Hemabhai v. T. H. Brown*, 10 Bom. H.C.R., 319; *Thaith Attathil Kutti Ammu v. Purushotham Das*, 9 Mad. L.T.R., 120—referred to.
- Maung Po Mya and one v. A. H. Dawood & Co.* 137

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<p>A received Rs. 3,000 from B on giving the latter possession of some land, a house and boats. Subsequently A tendered the money with interest and claimed the return of the property, alleging that the transaction was a loan, but B refused to return the property and brought a cross suit for specific performance of an agreement to sell. It was proved that the document executed was a deed of sale but it was improperly stamped and the description of the immoveable property contained therein was insufficient for its identification. B could therefore not have proceeded under the Registration Act to complete the validity of the document. The transaction was carried through in haste and B alleged that there was an agreement that A should later execute a proper document. A on the other hand alleged that the deed of sale was obtained by fraud. The Lower Court gave a decree for specific performance.</p> <p><i>Held</i>,—that from the evidence it was clear that the transaction was intended to be a sale and not a loan; that since under section 55 (1) (d) of the Transfer of Property Act the seller is bound to execute a proper conveyance, the suit for specific performance was rightly decreed; and further, that it was open to B to plead as a valid defence to A's suit for possession that he was in possession under a contract of sale although he had no valid registered sale deed.</p> <p><i>Ventatasami v. Kristaya</i>, (1893) I.L.R. 16 Mad., 341—dissented from. <i>Surenbra Nath Nag Chowdhury v. Gopal Chunder Ghosh</i>, 12 Cal. Law Journal, 464; <i>Chinnakrishna Reddi v. Dorasami Reddi</i>, (1897) I.L.R. 20 Mad., 19; <i>Nallappa Reddi v. Ramalingachi Reddi</i>, (1897) I.L.R. 20 Mad., 250; <i>Essaji Adamji v. Bhimji Purshotam</i>, 4 Bom. High Court Report, 125; <i>Karamath Khan v. S.P.L. Latchmi Achi</i>, 13 Bur. L.T., 119—followed. <i>Santhayi Ammal and one v. M.K. Mahomed</i> 94</p>	
SALE OF GOODS—C.I.F. CONTRACT—Breach—Measure of Damages.	
<p>Defendants agreed to sell to plaintiffs a quantity of rice at so much per bag, c.i.f., Colombo. The rice was to be shipped from Bassein before a certain date and payment was to be made on delivery of the documents to plaintiffs at Rangoon. Defendants did not ship any rice at Bassein.</p> <p><i>Held</i>,—(1) that a c.i.f. contract is not a sale of documents relating to goods but a sale of goods to be performed by delivery of documents: (2) that the breach of the contract was the failure to ship the rice at Bassein and not the failure to deliver documents which, the principal breach having been committed, could never have come into existence: (3) that damages must be awarded to place plaintiffs in the same position they would have been in had the goods been delivered on due date and the true measure of damages was the loss of the market at Colombo. Plaintiffs were therefore entitled to the difference between the contract rate and the rate at which the rice could have been sold at Colombo had it been delivered on due date.</p> <p><i>Arnhold Karberg & Co. v. Blythe, Green, Jourdan & Co.</i>, (1916) 1 K.B., 495; <i>Riddell Brothers v. E. Clemens Horst Co.</i>, (1911) 1 K.B., 214; <i>Johnson v. Taylor Brothers & Co., Ltd.</i>, (1920) Law Reports, A.C., 144; <i>Donn v. Bucknall Brothers</i>, (1902) 2 K.B., 614; <i>Williams Brothers v. E.A. T. Agius, Ltd.</i>, (1914) Law Reports, A.C., 510; <i>Sally Wertheim v. Chicoutimi Pulp Co.</i>, (1911) Law Reports, A.C., 301—referred to. <i>S.K.R.S.L. Chetty Firm v. Amarchand Madhoojee & Co.</i> 141</p>	
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A mortgage deed, which is inoperative as such, because not duly attested, is admissible in evidence to prove a personal covenant to pay; and where consideration is proved and the agreement to repay is not qualified in its terms, the lender is entitled to a decree for the amount of the loan with the interest due.	
<i>Shamu Patter v. Abdul Kadir Ruvathan</i> , (1912) I.L.R. 35 Mad., 607;	
<i>Ethel Georgina Kerr v. Clara B. Ruxton</i> , (1906) 4 Cal. L.J., 510—followed.	
<i>Bunseedhur v. Suyaas Ali and another</i> , (1889) I.L.R. 16 Cal., 540;	
<i>Narotan Dass v. Sheopargash Singh</i> , (1884) I.L.R. 10 Cal., 740; <i>Kalka Singh v. Paras Ram</i> , (1895) I.L.R. 22 Cal., 434—distinguished.	
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The appellant was one of the defendants in an administration suit the subject matter of which was mainly in Rangoon. The deceased however left certain immoveable property in a Native State and this was found to be in the possession of appellant who was ordered to account for it before she could claim a share in the properties of the deceased in the hands of the Administrator. Against this order she appealed.	
<i>Held, —per Maung Kin, J.</i> —that the order of the Court of first instance was merely to the effect that unless the appellant allowed the value of the estates in the Native State to be taken into account, her share of the properties situated within the Court's jurisdiction should be withheld; and that this order was right and proper.	
<i>Per Higinbotham, J.</i> —that an administration suit is not a suit for land: that the Court can assume jurisdiction in regard to immoveable property outside its jurisdiction when it can act <i>in personam</i> , and the Court in this case had jurisdiction to pass the order appealed against.	
<i>Penn v. Lord Baltimore</i> , (1751) 1 Ves. Sen., 444; <i>Momien Bee Bee v. Ariff Ebrahim Malim</i> , 5 Bur. L.T., 5—referred to.	
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C.R.M. Chetty Firm v. K. M.M. A. K. Muthu Mahomed & Co. .. 178

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 Before the Transfer of Property Act came into force, there existed a right to transfer negotiable instruments as chattels by a written assignment, and in places to which the relevant sections of that Act have not been extended, such a right still exists. Under such circumstances the written assignment is valid and gives the assignee a right of suit.
Benode Kishore Goswami v. Ashutosh Mukhopadhyaya, 16 C.W.N., 666 ;
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A entrusted some jewellery to B to sell for her, but instead of selling B pledged it to C. B was subsequently convicted of criminal breach of trust with respect to the jewellery and the convicting Magistrate ordered the jewellery to be returned to A. C applied to have this order set aside.

Held,—that the Magistrate's order would have been justified only if it could be shown that there was bad faith on the part of C in accepting the jewellery in pledge ; and that as he appeared to have acted in good faith, he was entitled to have the jewellery returned to him.

Stephen Aviet v. King-Emperor, 4 L.B.R., 25—followed.

Kong Lon v. Ma Kay, 4 L.B.R., 13—distinguished.

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B

BUDDHIST LAW :—INHERITANCE—*Orasa—Position and Rights of—Definition of—*

On a reference of certain questions regarding the position and rights of an Orasa child to a Full Bench, it was held :

Per C. J., Maung Kin, J., Heald, J., and Duckworth, J., that—

- (1) in a family consisting of both sons and daughters a child can acquire the full status of Orasa before the death of either parent ;
- (2) in such a family if the eldest born child is a daughter and reaches an age when she is competent to take her mother's place, no son can become Orasa ;
- (3) in such a family the question which child is Orasa can be decided before the death of either parent ;
- (4) there cannot be two Orasas in a family ;
- (5) sons are not as such preferred to daughters as Orasa ;
- (6) if the eldest born child is a daughter and is competent she is Orasa and as Orasa can on her mother's death claim from her father a quarter share of the estate. In certain circumstances her children have a claim to preferential treatment in the division of the estate.

*Per C. J., Maung Kin, J., and Duckworth, J.—*If the Orasa is the eldest born son, and predeceases his parents, his children have a right to preferential treatment. If the eldest born son dies before he becomes competent to take his father's place, a younger son, being fully qualified, may become Orasa, and if that son predeceases his parents, his children have a right to the same preferential treatment. If the eldest born child is a daughter and predeceases her parents after she becomes competent to take her mother's place, her children have a right to the same preferential treatment ; but it is doubtful if a younger daughter who is younger than a son can ever take the place of the eldest born daughter who is not competent or dies before she becomes able to take her mother's place.

*Per Heald, J.—*In a family where the eldest born child is a daughter and is competent, there can be no Orasa son and there can be no son whose children have a right to preferential treatment in the division of the parents' estate.

Per Pratt, J.—

(1) In a family consisting of sons and daughters a child can attain the full status of Orasa prior to the death of its parents, in so far that, if he or she predeceases his parents, his or her children may be entitled to preferential treatment in the division of the parents' estate.

(2) In such a family where the eldest child is a daughter no son can become Orasa until his father dies, subject to the proviso that the eldest daughter attained her majority before her death.

B—contd.

(3) The question as to which is the Orasa can be decided before the death of either parent so far only as the right of representation is concerned.

(4) In such a family there cannot be two Orasa children in the sense of children whose offspring would in the event of their parents' death be entitled to claim an equal share with their younger uncles and aunts. But it is conceivable that where the Orasa eldest child was a daughter and the eldest son attained his majority before his father's death, he would on his father's death be entitled to rank as Orasa for the purpose of claiming one-fourth of the estate from his mother.

(5) Sons are not always preferred to daughters as Orasa.

(6) In such a family where the eldest child is a daughter there cannot be an Orasa son, who predeceasing his parents can transmit to his children a right to preferential treatment in the division of the estate, assuming that the eldest child attained majority and did not forfeit her status as Orasa.

(7) The eldest child, being a daughter, can transmit to her children this right to preferential treatment.

Po Zan v. Maung Nyo, 7 L.B.R., 27; *Ma Mya Thu v. Maung Po Thin*, P.J.L.B., 585; *Ma Nan Gyaw v. Maung Shwe Ket*, 10 Bur. L.R., 234; *Maung San Daw v. Man Min Tha*, Chan Toon's L.C., Vol. II, p. 207; *Po Hman v. Maung Tin*, 8 L.B.R., 113; *Ma Saw Ngwe v. Ma Thein Yin*, 1 L.B.R., 198; and *Ma Thin v. Ma Nyein E.*, 3 B.L.T., 6—overruled.

Mi Min Din v. Mi Hla, (1904-06) II U.B.R., B.L., Inheritance, p. 11—dissented from.

Tun Myaing v. Ba Tun, 2 L.B.R., 292; *Mi The O v. Mi Shwe*, (1914-16) II U.B.R., p. 46; *Nga Lu Daw v. Mi Mo Yi*, (1914-16) II U.B.R., p. 66 at p. 72; *Mi Kin Lat v. Nga Ba So*, (1904-06) II U.B.R., B.L., Divorce, p. 3; *Ma Ba We v. Mi Sa U.*, 2 L.B.R., 174 at p. 182; *Maung Hne v. Ma Sein*, 9 L.B.R., 191; *Ma Lay v. Tun Shwe*, 10 L.B.R., 10; *Ma Me v. Ma Myit*, P.J.L.B., 48; *Maung Seik Kaung v. Maung Po Nyein*, 1 L.B.R., 23; *Ma Thin v. Ma Wa Yon*, 2 L.B.R., 255 F.B., *Tha Tu v. Maung Bya*, 4 L.B.R., 181; *Ma Ein Thu v. Maung Hla Dun*, 5 B.L.T., 73; *Ma Kyi Kyi v. Ma Thein*, 3 L.B.R., p. 8; *Mi Saung v. Mi Kun*, Chan Toon's L.C., Vol. I, 198 at p. 204, *per* Jardine, J.C.; *Ma Me v. Ma Myit*, Chan Toon's L.C., Vol. I, p. 275; *Ma Mya Thu v. Maung Po Thin*, Chan Toon's L.C., Vol. II, p. 61; *Anleathan v. Mi Tha Ta U*, Chan Toon's L.C., Vol. II, p. 65; *Maung Seik Kaung v. Maung Po Nyein*, Chan Toon's L.C., Vol. II, p. 67; *Sarkar's Hindu Law of Adoption*, 2nd Edn., p. 57; *Ma Saw Ngwe v. Ma Thein Yin*, Chan Toon's L.C., Vol. II, p. 210; *Conflict of Authority*, Vol. II, p. 37; *Ma Gun Bon v. Maung Po Kywe*, (1897-01) II U.B.R., p. 66; *Po Sein v. Po Min*, 3 L.B.R., 45; *Ma Su v. Ma Tin*, 6 L.B.R., 77; *Conflict of Authority on Buddhist Law*, Vol. II, p. 51; *Tha Dun v. Waing Gyi*, Civil 2nd Appeal No. 302 of 1909 of the J.C., U.B.'s Court; *Stokes, Hindu Law Books*, p. 410; *Mayne's Hindu Law*, p. 82 (7th Edn.); *Tagore Law Lectures*, 1880, p. 515, *cf.* Forchhammer's Jardine Prize Essay, p. 49; *Stokes' Op. Cit.*, p. 498; *Ma Hnin Bwin v. U Shwe Gon*, 8 L.B.R., 1; *Ma Thi v. Ma Nu*, S.J.L.B., 70; *Mi Saung v. Mi Kun*, S.J.L.B., 115; *Maung Po Lat v. Mi Po Le*, S.J.L.B., 212; *Ma On v. Ko Shwe O*, S.J.L.B., 378; *Maung Sa So v. Mi Han*, (1892-96) II U.B.R., p. 171; *Ma Min Tha v. Ma Naw*, (1892-96) II U.B.R., p. 581; *Maung Pan v. Ma Hnyi*, (1897-01) II U.B.R., p. 104; *Anleathan v. Mi Tha Ta U*, P.J.L.B., p. 625; *Maung Hmu v. Maung Po Thin*, 1 L.B.R., 50; *Ma Hnin Gaing v. Ma Tha Li*, 4 B.L.T., 74; *Mi Saw Myin v. Mi Shwe Thin*, (1910-13) I U.B.R., 125; *Ma Thit v. Maung Tun Tha*, 8 B.L.T., 138; *Maung Ka Gu v. Ma Hnin Ngwe*, 8 B.L.T., 196; *Nga E v. Nga Aung Thein*, (1914-16) 2 U.B.R., 37; *Mi Hlaing v. Mi Thi*, (1914-16) II U.B.R., 40; *Shwe Po v. Maung Bein*, 8 L.B.R., 115; *Kyi Hlaing v. Ma Htu*, 8 L.B.R., 189; *Ma Sein Ton v. Ma Son*, 8 L.B.R., 501; *Chan Tha v. Mi Ma Pyu*, 9 B.L.T., 95; and *Tun Tha v. Ma Thit*, 9 L.B.R., 56—referred to.

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BUDDHIST LAW : INHERITANCE.—*Orasa son—Right of Orasa son to mesne profits on his share of the estate.*

On the death of his father an *orasa* son becomes entitled to a definite one-fourth of the estate. The estate of the *orasa* son comes into existence at his father's death and he is entitled to *mesne profits* on it.

Maung Pan On v. Maung Tun Tha 292

C

CO-OWNERS—RIGHTS OF—*Sale for arrears of revenue—Fraud on part of purchaser—Civil Court's jurisdiction in case of fraud—See (LOWER) BURMA LAND AND REVENUE ACT, s. 56*

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F

FIRE INSURANCE—*Right to Insurance Money—Claim by Mortgagee against Insurance Company.*

A mortgaged his mill to B as security for a debt and subsequently insured the mill with C. The mill was destroyed by fire, and C paid the insurance money to A, though B had requested C to withhold payment. C also sold the salvage property. B then brought a suit against C, basing the claim on the insurance policy and on the deed of mortgage which, it was claimed, subsisted as against the salvage property.

Held,—that a contract of insurance is a contract by the insurer to indemnify the insured, and there is no privity of contract between the insurer and any third party, and that therefore C was not bound to indemnify B. Further, that the insurer was entitled to sell the salvage property after having indemnified A, who had no rights left as regards the property which could pass to B, the mortgagee. The mortgagee therefore had no rights against the insurer.

Castallain v. Preston, (1882-83) L.R. 11, Q.B.D., 380 at p. 386—followed ; *Rayner v. Preston*, (1880-81) L.R., 18 Ch. Dn., 1—referred to.

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H

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I

INDIAN INCOME-TAX ACT, 1918—*Reference under section 51 (1)—Questions of law and questions of facts.*

The Chief Revenue—authority referred to the Chief Court the question whether on certain facts the Income-Tax authorities were justified in interpreting the Act so that income should include the profit made on the resale of certain property.

Held,—that the reference was made solely on a question of fact and that the Court had no jurisdiction to decide the question referred, since under section 51 (1) of Act VII of 1918 the Court is given power to decide questions which have arisen with reference to the interpretation of any of the provisions of the Act or of any rule thereunder, and is given no power to deal with questions of fact by way of appeal from the decisions of the Revenue Authorities.

Currie v. Inland Revenue Commissioners, (1919-20) 36 T.L.R., 185 ; *Cape Brandy Syndicate v. Inland Revenue Commissioners*, (1920-21) 37 T.L.R., 33—referred to.

Ahimsa Land Co., Ltd. v. The Secretary of State for India 309

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- INDIAN INCOME-TAX ACT, 1918—SECTION 8—*Definition of House Property. Interpretation of Taxing Acts.*
 Business premises, such as shops, offices and godowns, are not included in the term "house property" as used in section 8 of the Indian Income-Tax Act, 1918, previous to its amendment by Act XLIV of 1920.
 In interpreting a taxing Act it is not for the Court to speculate as to the intention of the legislature; the terms of the Act must be construed strictly and the person assessed is entitled to the benefit of any doubt there may be as to his liability to assessment.
Tennant v. Smith, (1892) L.R.A.C., 150; *The Attorney-General v. Milne*, (1914) L.R.A.C., 765; *Lumsden v. Commissioners of Inland Revenue*, (1914) L.R.A.C., 877; *Killing Valley Tea Company, Limited v. The Secretary of State for India*, (1921) I.L.R. 48 Cal., 161; *Commissioners of Inland Revenue v. Gribble*, (1913) 3 K.B., 212; *Whitsley v. Burns*, (1908) 1 K.B., 705; *Partington v. The Attorney-General*, L.R. 4 H.L., 100; *The Attorney-General v. The Earl of Selborne*, (1902) 1 K.B., 388; *The Oriental Bank Corporation v. Henry B. Wright*, (1879-80) 5 Appeal Cases, 842; In *Re Finance Act*, (1892) and *Studdert*, (1900) 2 I.R. 400, C.A., at p. 410, cited in Vol. 27, Halsbury's Laws of England, p. 180—followed.
 In *the matter of A. John and Company*, (1920) I.L.R. 43 All., 139—referred to.
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- INDIAN STAMP ACT, 1899—SECTION 35—*Deficient duty leviable under—One anna stamp to be taken into calculation.*
 A bond chargeable with Rs. 2-8 stamp-duty was executed on paper bearing a one-anna stamp.
Held,—that although the stamp was of the wrong kind, the document should not be considered to be unstamped but merely insufficiently stamped; and the one-anna stamp should be taken into account in calculating the deficient stamp-duty.
Reference under section 50, Stamp Act, (1891) I.L.R. 15 Mad., 259; *Reference under section 46, Stamp Act*, (1884) I.L.R. 8 Mad., 87—dis-sented from.
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J

- JURISDICTION—CIVIL COURTS—IN CASE OF FRAUD—*Sale for arrears of revenue—Fraud on part of purchaser—Rights of co-owners—See (LOWER) BURMA LAND AND REVENUE ACT, s. 56* 313

L

- (LOWER) BURMA LAND AND REVENUE ACT—*Section 56—Sale for arrears of revenue—Fraud on part of purchaser—Rights of co-owners—Civil Court's jurisdiction in case of fraud.*

A, who was co-owner with plaintiffs in certain undivided ancestral land, fraudulently caused the land to be sold for arrears of revenue and bought it herself in the name of her son. Plaintiffs then sued for a declaration of co-ownership and other relief. The trial Court dismissed the suit on the ground that under section 56 (a) of the Lower Burma Land and Revenue Act the Civil Court had no jurisdiction.

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L—*could*.

Held,—on appeal, that where a revenue sale has been obtained by fraud, a Civil Court has jurisdiction to declare that the purchaser is placed in the same position as a private purchaser, and that in such a case the co-owners have not lost their rights in consequence of the sale, but that all that has been actually sold is the interest of the defaulting co-owner.

Deo Nandan Prashad v. Janki Singh, (1916) I.L.R. 44 Cal., 573 ;
Harendra Lal Roy Chowdhury v. Salimullah, (1910) 7 Ind. C., 21 ;
Sidhes Nuzur Ally Khan v. Rajah Ojoodhyaram Khan, (1866) 10 Moore's I.A., 540—referred to.

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MURDER—*Normal sentence—In case of—*

Death is the normal sentence for murder, and if the presiding judge does not pass sentence of death, he is bound to record his reasons for not doing so, that is, he must find that there are really extenuating circumstances and not merely an absence of aggravating circumstances.

Crown v. The Sin, (1902) 1 L.B.R., 216—followed.

King-Emperor v. Shwe Hla U 323

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T

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failure to enforce rights.

A mortgaged land to a chetty as security for a loan and B executed the mortgage deed as surety. Subsequently B paid the chetty Rs. 3,400 in part payment of the debt due on the mortgage and was given possession of part of the land with liberty to enjoy the rents and profits in lieu of interest on the Rs. 3,400. Later B paid off the balance of the debt Rs. 2,600 and thereby acquired the rights of the chetty against A under section 140 of the Indian Contract Act. Thereafter B brought a suit for Rs. 2,600 against A and the suit was compromised, a decree being given for Rs. 3,000 with costs and B surrendering the rights he had acquired under the Contract Act. B however remained in possession of the land as before, and it was agreed that if A did not repay the Rs. 3,400, B could call on him to convey the land outright to him. Soon after A conveyed the land to C who also obtained possession. B brought a suit under section 9 of the Specific Relief Act and obtained possession. C then sued for possession which was decreed. B appealed against this decision.

Held,—that there was no unqualified agreement to sell the land to B and that B had never sought to reduce into being the agreement that he should be entitled to claim that the land be sold to him if A did not or could not repay the Rs. 3,400; that there was no usufructuary mortgage; and that as B had taken no steps to legalise his position by registered deeds, C could

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not be deemed to have had notice of the charges on the land. A. B. had never taken steps to enforce his rights, he had acquired no legal title to the land, and was not entitled to retain possession as against C.	
<i>Po Maung v. Maung Kaing</i> , (1913) 7 L.B.R. 262, <i>Lalchand Motiram v. Lakshman Sahadu</i> , (1904) I.L.R., 28 Bom., 466; <i>Kurri Veerareddi v. Kurri Bapireddi</i> , (1906) I.L.R. 29 Mad., 336; <i>Muthu Gounden v. Chelappa Gounden</i> , (1910) 8 I.C., 1089; <i>Bon Lon v. Po Lu</i> , (1916) 8 L.B.R., 553—referred to.	
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In a case in which a husband and wife died within two months and fourteen days of each other, it was held that the interval was not so short as to justify the application of the special rule that the relations of both should inherit. The decision in such a case does not depend on the question whether there was time for the survivor to obliterate the joint nature of the property.

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It is not open to the Court of execution to enquire into the fact of a payment or adjustment of a decree which has not been certified or recorded as provided in clause (1) of rule 2 of Order XXI, Civil Procedure Code, even when the conduct of the decree-holder is alleged to have been fraudulent. Where an application for execution is opposed on the ground of payment or satisfaction or adjustment, the Court may treat this objection as an application to certify the alleged payment or adjustment, provided the objection be taken within the period of limitation allowed by Law, *viz.*, 90 days from the date of payment or adjustment, but section 18 of the Limitation Act cannot be used to extend the period of limitation.

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CRIMINAL PROCEDURE CODE, SECTION 195—Sanction to prosecute—Jurisdiction to grant or revoke sanction—Costs not to be awarded. A applied to Township Court for sanction to prosecute B under section 205, Indian Penal Code, for false personation of a witness in a civil case, and sanction was granted. On B's application the sanction was revoked by the District Court. A then moved the Divisional Court which cancelled the revocation order and restored the sanction. B then moved the Chief Court on revision under section 115, Civil Procedure Code. <i>Held</i> ,—that the Divisional Court acted without jurisdiction; and that once the District Court had acted under section 195 (6) of the Criminal Procedure Code, the only Court with jurisdiction to revise the District Court's orders was the High Court. <i>Held further</i> ,—that costs should not be allowed when Courts are dealing with cases under section 195, Criminal Procedure Code. <i>Muthuswamy Mudali v. Vieni Chetti</i> , (1907) I.L.R. 30 Mad., 382; <i>Ram Dasi v. Nand Lal Rai</i> , (1907) I.L.R. 30 All., 109; <i>Emperor v. Serh Mal</i> , (1908) I.L.R. 30 All., 243; <i>Nga Tha Win v. Nga San</i> , (1910-13) 1 U.B.R., 166 at p. 169—followed. <i>Karupiah Naidu alias Govindaswamy v. R. M. S. Muthuswami</i>	418

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CRIMINAL PROCEDURE CODE—SECTION 351—Jurisdiction of Magistrate not empowered under section 190 (1) (c).

In the course of a theft case sent up by the Police, the Magistrate made one of the witnesses an accused and tried the case *de novo*. The Magistrate was not empowered to take cognizance of a case under section 190 (1) (c), Criminal Procedure Code, and did not, under section 191, inform the accused that he was entitled to have the case tried by another Court. The following question was referred to a Full Bench:—

“Whether on the facts of the case section 190 (1) (c) or section 351, or any other provision of the Criminal Procedure Code, applied.”

Held,—*Per G. J. and Macgregor, J.*—That the Magistrate had full jurisdiction to act as he did, that section 351 applied to the case, and that the Magistrate, so far as section 190 applied, if it applied at all, was acting under section 190 (1) (b).

Per Maung Kin, J.—That on the facts of the case section 190 (1) (b) applied.

Khudiram Mookerjee v. The Queen-Empress, 1 C.W.N., 105; *Queen-Empress v. Kirashanker*; *Ratanlal's Unreported Cases*, 951; *Raghab Acharjee v. Empress*, 3 C.W.N., CCLXXIX (Law Notes)—referred to.

Jagat Chandra Mozumdar v. Queen-Empress, (1899) I.L.R. 26 Cal. 786; *Charu Chanara Das v. Narendra Krishna Chakravarti*, 4 C.W.N., XLV (Law Notes); 4 C.W.N., 367; *Emperor v. Sakhi*, 3 I.C., 568; *Dedar Buhsh v. Syamapada Das Malakar*, (1914) I.L.R. 41 Cal., 1013—followed.

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When an offence may be one of two or more offences as defined in the Indian Penal Code, the Court should as a rule convict of and punish for the most serious offence that is established, provided that the accused has been charged with and has had an opportunity of meeting the charge of that offence. Although section 215 was enacted to provide for a particular class of offence, there is no provision of law which forbids a conviction under section 420 for an offence of that class, if the necessary facts which constitute an offence under section 420 are proved.

Deputy Legal Remembrancer v. Ijjatullah Kasi, (1906) C.W.N., 1005—referred to.

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RANGOON RENT ACT, 1920.—Power of Rent Controller to set aside *ex-parte* orders and to review his own orders—Powers of First Judge of the Small Cause Court in dealing with orders under section 18.

The Rent Controller fixed the standard rent of a building at Rs. 120. The order was passed *ex-parte*. The next day the Rent Controller at the request of the landlord set aside his order and issued notices to both sides for evidence to be taken. This was done without notice being issued to the tenants of the application to set aside the order. Finally the Rent Controller fixed the rent at Rs. 150. Reference was made to the First Judge of the Small Cause Court who held that the proceedings after the date of the Rent Controller's first order were without jurisdiction and void.

Held,—On revision, that the Rent Controller, acting as a Civil Court, had inherent power to set aside an *ex-parte* order or to review his own order, but in this case as he failed to give notice to the other side, his action in setting aside his first order and his proceedings thereafter were without jurisdiction and void. It was not necessary for the tenants to impugn his action at once; they could do so when they made a reference under section 18. The First Judge of the Small Cause Court could deal with each and every legitimate objection to the last order and not merely with its merits.

Tyeb Beg Mahomed v. Allibhai Mangalji, (1908) I.L.R. 31 Bom., 45; *Sankumani v. Iboran*, (1889) I.L.R. 13 Mad., 211; *Minakshi v. Subramanya*, (1887) I.L.R. 11 Mad., 26—referred to.

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RANGOON RENT ACT, 1920, SECTION 13—Recovery of overpayments by deduction from rent—Period of limitation.

A tenant may deduct overpayments of rent from rent payable by him to his landlord only within six months after the last overpayment made by him.

Jaishankar v. Jivanran Santhal

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RANGOON RENT ACT, 1920, SECTION 18—Revisional jurisdiction of Chief Court.

The First Judge of the Rangoon Small Cause Court, when disposing of a reference under section 18 of the Rangoon Rent Act, is a Court subordinate to the High Court within the meaning of section 115 of the Civil Procedure Code, and the Chief Court has jurisdiction to revise his proceedings.

Indian Engineering and Motor Co., Ltd. v. Gladstone Wyllie & Co., 26 C.W.N., 102; *Bota Krishna Pramanik v. A. K. Ray*, 26 C.W.N., 30; *Kali Dasi v. Kanai Lal De*, 26 C.W.N., 52; *H. D. Chatterjee v. L. B. Tribedi*, 26 C.W.N., 78; *Balaji Sakharam Gurav v. Merwanji Nowroji Antia*, (1897) I.L.R. 21 Bom., 279; *Vasudeva Aiyar v. The Negapantam Devasthanam Committee*, (1915) I.L.R. 38 Mad., 594; *Balkaran Rai v. Gobind Nath Tiwari*, (1890) I.L.R. 12 All., 129 at p. 156—referred to.

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- SALE OF LAND—Resale—Contract of—Time essence of the contract.**
 Where land is sold with the right of repurchase to be exercised within a fixed period of time, or on a date fixed, time is of the essence of the contract and the seller has no power to exercise his option after the expiry of the period fixed. The doctrine that time may not be of the essence of the contract, which arises on the construction of contracts of sale of immovable property, is not applicable to contracts of resale of property conveyed.
Jamshad Khodaram Irani v. Burjoriji Dhunjibhai, (1916) 30 Mad. L.J., 186—referred to.
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 When a decree-holder promises to certify satisfaction of a decree but fails to do so, a suit will lie against him for damages for breach of the promise to certify, and such a suit is cognizable by a Small Cause Court.
Shadi v. Ganga Sahai, (1881) I.L.R. 3 All., 538; *Periatambi Udayan v. Vellaya Goundan*, (1897) I.L.R. 21 Mad., 409; *Iswar Chandra Dutt v. Haris Chandra Dutt*, (1898) I.L.R. 25 Cal., 718; *Gendō v. Nihal Kunwar*, (1908) I.L.R. 30 All., 464; *Azizan v. Matuk Lall Sahu*, (1893) I.L.R. 21 Cal., 437; *Viraraghava Reddi v. Subbappa*, (1881) I.L.R. 5 Mad., 397; *Mallamma v. Venkappa*, (1884) I.L.R. 8 Mad., 277; *In the matter of Medai Kaliani Anni*, (1907) I.L.R. 30 Mad., 545; *Promanand Khasnabish v. Khepoo Paramanick*, (1884) I.L.R. 10 Cal., 354; *Patankar v. Devji*, (1882) I.L.R. 6 Bom., 147; *Haji Abdul Rahiman v. Khoja Khaki Aruh*, (1886) I.L.R. 11 Bom., 6; *Deno Bundhu Nundy v. Hari Mati Dasree*, (1903) I.L.R. 31 Cal., 480; *Moru Narsu Gujar v. Hasan valad Fattekhān Jummal*, (1918) I.L.R. 43 Bom., 240; *Jaikaran Bharti v. Raghunath Singh*, (1898) I.L.R. 20 All., 254; *Ishan Chunder Bandopadhyā v. Indro Narin Gossami*, (1883) I.L.R. 9 Cal., 788; *Pat Dasī v. Sharup Chanā Māla*, (1887) I.L.R. 14 Cal., 376; *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I.L.R. 19 Cal., 683—referred to.
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- SECURITY MONEY—Forfeiture of—Contract Act, 1872, section 74—Not applicable to forfeiture of deposits.**
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Mansion Patter v. The Madras Railway Co., (1905) I.L.R. 29 Mad., 118; *Wallis v. Smith*, (1882) L.R. 21 Ch. D., 243 at p. 258; *Cooper v. The London, Brighton and South Coast Railway Co.*, (1879) L.R. 4 Ex. D., 88—followed.
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<i>Held</i> ,—that the principle that inheritance should not ascend applies in favour of half-brothers and half-sisters of a deceased person as against a maternal grandmother in a case where there are no full brothers or sisters of the deceased and no representatives of full brothers or sisters.	
<i>Held further</i> ,—that the fact that the grandchild had previously lived with the grandmother was not sufficient to warrant a departure from that principle.	
<i>Taung Mo v. Aung Nyun</i> , 12 B.L.T., 103; <i>Ma Hnin Bwin v. U Shwe Gon</i> , 8 U.B.R., 1; <i>Le Maung v. Ma Kwe</i> , 10 L.B.R., 107; <i>Kyaw Sein v. Ma Min Yin</i> , 4 U.B.R., 20—referred to.	
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CIVIL PROCEDURE CODE—SECTION 11—EXPLANATION IV—Res judicata.	
.. Appellant claimed title to certain land as having been given to him by his father who at the time of the suit was dead but lost the suit on the ground that the gift was not valid. He then brought a suit for a certain share in the same land as <i>Orasa</i> son of his deceased father and mother. The lower Courts held that the second suit was <i>res judicata</i> .	
.. <i>Held</i> ,—on appeal, that the appellant might in the former suit have put in the claim, that he made in the second, as an alternative. If he had done so there would have been no confusion, and all questions relating to his title would have been completely and finally determined. The second suit was therefore <i>res judicata</i> .	
<i>Rameswar Pershad v. Rajkumari Ruttan</i> , (1892) I.L.R. 20 Cal., 79; <i>Guadappa v. Tirkappa</i> , (1900) I.L.R. 25 Bom., 189—followed.	
<i>Masilamani Pillai v. Thiruvengadam Pillai</i> , (1908) I.L.R. 31 Mad., 385; <i>Sadaya Pillai v. Chinni</i> , (1879) I.L.R. 2 Mad., 352; <i>Thyilar Kandi Ummadha v. Cheria Kunhamed</i> , (1881) I.L.R. 4 Mad., 308; <i>Denobundhoo Chowdhry v. Kristomoner</i> , (1876) I.L.R. 2 Cal., 152; <i>Bheeka Lall v. Bhuggoo Lall</i> , (1877) I.L.R. 3 Cal., 23; <i>Brojo Lall Roy v. Khettur Nath Mitter</i> , (1869) 12 W.R., 55; <i>Dudsar Biber v. Shakir Bukundaz</i> , (1871) 15 W.R., 168—referred to.	
<i>Maung Ba Thaw v. Ma Hnit and others</i>	451
E	
ESCAPE FROM LAWFUL CUSTODY—See INDIAN PENAL CODE, sec. 225B ..	449
I	
INDIAN PENAL CODE—S. 225B—Escape from lawful custody.	
The applicant was arrested on a civil warrant but a number of men assaulted the process-server with the result that the applicant was released. He made no resistance himself, but he disappeared and was not seen till he surrendered next morning.	

- Held*,—that the applicant had taken advantage of the rescue to get out of the way of the process-server and had therefore been rightly convicted of escaping from lawful custody.
Queen-Empress v. Muppan, (1895) I.L.R. 18 Mad. 401; *The Public Prosecutor v. Ramaswami Konan*, (1908) I.L.R. 31 Mad., 271; *The Public Prosecutor v. Sennimalai Goundan* (1918), 25 Mad. L.T., 290; *In re the Public Prosecutor*, (1910) 7 Ind. Cases, 392—referred to.
D. M. Attiya v. King-Emperor 449
 INHERITANCE—*Succession of half brothers and sisters in preference to grand-parents*—See BUDDHIST LAW: INHERITANCE 460

M

- MORTGAGE BY CONDITIONAL SALE—*Nature of transaction*—See SALE OF LAND AND AGREEMENT FOR REPURCHASE 456
 MORTGAGE OF IMMOVEABLE PROPERTY—*Followed by sale*—*Effect of failure to execute conveyance*—*Vendor cannot plead prior mortgage to defraud purchaser*.
 A mortgaged certain land to B who later assigned the mortgage by registered deed to C. Thereafter A made over possession of the land to C and a report was made to the Revenue Surveyor that the land was sold for a certain sum. No conveyance was made. Later C conveyed the land by registered deed to D. A then brought a suit for redemption against B and D, and was granted a decree by the lower Court.
Held,—on appeal, that A could not be allowed to take advantage of his failure to give a conveyance and so redeem the land; that to give A a decree would be in effect to assist him in perpetrating a fraud. The appeal was therefore allowed.
Abbar Fakir v. Intail Sayal, (1915) Ind. Cases, 707; *Karamqth Khan v. Latchmi Achi*, (1920) 13 Bur. L.T., 119; *Venkatesh Damedar v. Mallappa Bhinappa*, (1921) I.L.R., 46 Bom., 722; *Ma Shwe On v. Maung Kywet*, (1915) 9 Bur. L.T., 45—referred to.
Maung Shwe Hmon and others v. Maung Tha Byaw and another 462

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- REPURCHASE, SALE OF LAND AND AGREEMENT FOR—See SALE OF LAND AND AGREEMENT FOR REPURCHASE 456
 RES JUDICATA—See CIVIL PROCEDURE CODE, S. 11, EXPLANATION IV 451

S

- SALE OF LAND AND AGREEMENT FOR REPURCHASE—*Nature of transaction*—*Mortgage by conditional sale*.
 Certain land was conveyed by a registered deed of sale and on the same day the purchaser executed an agreement to let the sellers repurchase the land at the same price within three years. This agreement was not registered.
Held,—that on the facts the intention of the parties was that the transaction should be a usufructuary mortgage and that the agreement should therefore have been registered. As this was not done, a suit for the specific performance of the mortgage would not lie.
Bhagwan Sahai v. Bhagwan Din, (1890) I.L.R. 12 All., 387; *Kinuram Mondol v. Nitye Chand Sirdar*, (1907) 11 C.W.N., 400; *Balkishen Das v. Legge*, (1899) I.L.R., 22 All., 149—referred to.
C. Chaing Kywan v. Ma Oo and others 456
 SUCCESSION OF HALF BROTHERS AND SISTERS IN PREFERENCE TO GRAND PARENTS—See BUDDHIST LAW: INHERITANCE 460

V

- VENDOR CANNOT PLEAD PRIOR MORTGAGE TO DEFRAUD PURCHASER—See MORTGAGE OF IMMOVEABLE PROPERTY 462

LOWER BURMA RULINGS.

Before Sir Daniel Twomey, Chief Judge, and Mr. Justice Robinson.

(1) MAUNG LU THA, (2) MA SHWE THAN
v. MAUNG PO U.*

Rutledge with Ko Ko Gyi—for appellants.
Davies—for respondent.

Special Civil
and Appeal
No. 112 of
1919.
June 8th,
1920.

Joint Property—Partition Suit—Cause of Action—Res Judicata—Civil Procedure Code—Section 11 and Order II, Rule 2.

A mortgaged his land to a Chetty and ultimately sold it outright to him. The Chetty sold the land to B and C, uncle and nephew, who thus became joint owners of the land. After B's death, his widow and children sold their shares of the land, one half, to D. Subsequently A brought a suit against D, claiming to recover the southern portion of the land which he said was the portion actually sold by B's heirs to D, and alleging that B and C before buying the land had agreed to sell it back to A at the price they paid the Chetty. C was joined as a defendant in this suit and confessed judgment. The suit was dismissed. C did not dispute that the southern half of the land was the portion belonging to B.

D next sued C for possession of the southern half of the holding. C did not deny that D had bought B's half share in the whole of the land but denied that it was by his consent that the southern half was indicated in the former suit as B's share. The Court found that D had purchased half of the holding but not the whole southern half, and gave D a decree for a half share in the southern portion.

D then sued C for partition and possession of the whole holding and asked that the southern half should be allotted as his share. The District Court gave decree for partition and possession of the northern half of the holding. On appeal the Divisional Court held that the suit was barred as *res judicata* under Explanation IV to section 11 of the Civil Procedure Code. Against this order D appealed.

Held,—that the ground on which the Divisional Judge disallowed D's claim fell under Order II, Rule 2, Clause (3), rather than under section 11, Explanation IV; that in his first suit D was suing for separate possession of a share alleged to have already been partitioned to B, while in the second case he was suing his co-sharer C for partition of the whole of the joint property; that the causes of action were separate and distinct in the two suits; and that therefore the suit was not barred.

Denoboundhoo Chowdhry v. Kristomonee Dossee, (1877) I.L.R. 2 Cal., 152; *Abdun Nasir and another v. Rasulan*, (1893) I.L.R. 20 Cal.,

* *Second appeal against the decision of H. A. Brown, Esq., Divisional Judge of Myaungmya, setting aside the decree of Maung Maung, District Judge of Myaungmya.*

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385; *Shivram v. Narayan and others*, (1881) I.L.R. 5 Bom., 27-3 referred to.

The paddy land in dispute, a holding of 66.52 acres, was mortgaged by the original owner Lu Tha Gyi to a Chetty and Lu Tha Gyi sold it outright to the Chetty in 1908. The Chetty subsequently sold the holding to Maung Paik and Maung Po U who are uncle and nephew and who thus became joint owners of the land. After Maung Paik's death his wife and children in 1916 sold their shares of the land, one-half, to the present plaintiffs, Maung Lu Tha and his wife. Subsequently Lu Tha Gyi, the original owner, brought a suit against Maung Paik's widow and children and against the purchasers, Lu Tha and his wife, joining Po U also as defendant. Lu Tha Gyi's claim in that suit (No. 84 of 1916 of Wakema Sub-divisional Court) was that the joint purchasers, Maung Paik and Po U, before purchasing the land from the Chetty had agreed to sell the land back to him (Lu Tha Gyi) at the price they paid the Chetty. He claimed therefore to recover the southern half 33.26 acres of the land from the defendants alleging that the southern half was what Maung Paik's heirs had actually sold to Lu Tha and his wife. In his written statement in that suit Maung Po U confessed judgment pleading that it had nothing to do with him and that Maung Paik's wife and children had no right to sell their share of the land to Lu Tha. The suit was dismissed on the ground that the alleged promise to allow repurchase by Lu Tha Gyi was not proved and in any case there was no consideration for such promise. An appeal by Lu Tha Gyi to the Divisional Court was unsuccessful. Both Courts were of opinion that Po U had acted in collusion with Lu Tha Gyi in bringing that suit. It was evident that Lu Tha Gyi had an understanding with Po U and this would explain Lu Tha Gyi's action in seeking to enforce his alleged right of pre-emption in respect of only the southern, Maung Paik's, half of the land and not against Po U's half. The important point to note is that the southern half of the land was treated throughout that case as the half appertaining to Maung Paik and Po U did not dispute that this was so.

The next case concerning the land is suit No. 43 of 1917 of the District Court of Myaungmya by the present plaintiffs, Lu

Tha and his wife, against Po U. They sued for possession of the southern half of the holding. Lu Tha in his plaint set out that he purchased one half of this land (not a specified half) from Maung Paik's heirs by a registered deed, dated 10th July 1916, that the half share which he so bought (though not specified in the document as being the southern half) was really the southern half as shown by the conduct of Po U and all the other parties to the former suit of 1916, and that Po U had dispossessed the plaintiffs. In his written statement in that case Po U denied that it was by his consent that the southern half was indicated in the former suit as Maung Paik's share. But he did not deny that Lu Tha, the plaintiff, had bought Maung Paik's half-share in the whole land. He also pleaded an agreement between himself and his co-owner, Maung Paik, by which they gave one another a right of pre-emption in respect of their half shares. The District Court found against Po U on the issue as to the right of pre-emption. The Court found also that what Lu Tha bought from Maung Paik's widow and children was not the southern half but a half share of the whole holding, this being what they had actually inherited from Maung Paik. In other words the Court held that the widow and children of Maung Paik could not and in fact did not sell to Lu Tha the whole southern half. The learned Judge ended his judgment as follows:—"In order to save further litigation, I asked both parties as to what they wanted to do. Both of them want the southern portion. I must therefore grant a decree according to the plaintiff's rights.

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There will be a decree for a half share in the southern portion of the land. The defendant do bear half of the plaintiffs' costs."

Lu Tha did not appeal against that decree. It gave him a half share in the southern half and gave him no share in the northern half. The result is that Lu Tha who bought an undivided half share in the whole holding has been given an undivided half share in only the southern half of it = quarter of the whole, while Po U is left with three-fourths.

In the present suit (No. 8 of 1918 of Myaungmya District Court) the plaintiff Lu Tha and his wife asked for partition and

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possession of half of the whole holding and asked, collaterally, that in the partition of the whole, the southern half may be allotted as their share, but they left it to the Court to decide as seems just what half portion they should actually get in the partition. The District Court has given a decree for partition and possession of the northern half of the holding, apparently overlooking the fact that the plaintiffs have not yet obtained partition of the southern half but have only a decree for a half share (*i.e.* an undivided half share) in it. On appeal the Divisional Court has held that the present suit is barred as *res judicata* under Explanation IV to section 11 of the Code of Civil Procedure on the ground that the plaintiffs in their previous suit against Po U "ought to have asked for the relief of half of the whole land and did not do so." The learned Judge had previously considered whether Order 2, Rule 2, was a bar to the suit but he decided this question in the negative. Both questions have been argued before us.

The matters substantially in issue in the earlier suit were (*a*) whether the defendant, Po U, had a prior right to pre-emption in respect of Maung Paik's half share, and (*b*) whether the half share bought by the plaintiffs from Maung Paik's heirs was the southern half or not. Both these points were decided in the negative in that case, but the Judge decreed one half of the southern half because the plaintiff was entitled to half share of the whole. Under (*a*) plaintiffs' right to any part of the land was involved, for if Po U had a right of pre-emption the plaintiffs' purchase of Maung Paik's half share could not take effect. It was only when this point was decided in the plaintiffs' favour that the Court had to decide the further question whether the southern half was the half purchased by the plaintiffs. The point (*a*) having been decided in the plaintiffs' favour consequentially the sale of Maung Paik's half share to the plaintiffs was upheld and there is a finding by the Court that Maung Paik's heirs sold a half share of the whole holding to the plaintiffs. This finding is no doubt *res judicata*, but it is *res judicata* in favour of the plaintiffs and there is nothing in section 11 to show that such a finding in their favour can prevent the plaintiffs from suing afterwards for partition. In the later suit of 1918, it is true, an issue was framed. Did Maung Paik's heirs sell his share to the plaintiffs and if so is

the sale valid? But this issue was *otiose* having already been decided in the plaintiffs' favour in the former suit. The only question in issue in the later suit was whether the plaintiffs were entitled to a partition of the whole holding and this was clearly not *res judicata*. The learned Divisional Judge was in our opinion mistaken in holding that the later suit was barred because the plaintiffs failed in the earlier suit to ask for partition of the whole holding, for the plaintiffs' case in that earlier suit was, that there had in fact already been an amicable partition in Maung Paik's life-time by which Maung Paik got the southern half of the land and Po U the northern half. In this alleged state of facts, the correctness of which neither Po U nor any of the other parties to the suit of 1916 disputed, there was clearly no ground for the plaintiffs to ask for partition of the whole holding.

The ground abovementioned on which the learned Divisional Judge has disallowed the plaintiffs' claim to partition appears to us to fall under Order 2, Rule 2, Clause (3), rather than under section 11, Explanation IV. The plaintiffs were no doubt entitled to ask for partition of the whole land in their first suit and they omitted to do so without getting the leave of the Court. But this is immaterial unless the cause of action is held to be the same in both suits. In the first suit they asked for possession of the southern half basing their claim on their purchase of a half share from Maung Paik's heirs and on the alleged partition between Maung Paik and Po U by which the southern portion of the land was taken to have been allotted to Maung Paik. In the present suit their claim for partition of the whole land is based on their purchase alone; they can no longer rely on the alleged partition between Maung Paik and Po U as that has been decided against them in the earlier suit. The term "cause of action" is explained by Garth, C.J., in the case of *Denoboundhoo Chowdhry v. Kristomonee Dossee* (1) as being the grounds on which the claim is founded in each particular case. A reference may also be made to the case of *Abdun Nasir and another v. Rasulan* (2). That was a suit brought for partition of a joint estate. The trial Court held that as regards one piece of land the suit was barred under section 43 of the old

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(1) (1877) I.L.R. 2 Cal., 152.

(2) (1893) I.L.R. 20 Cal., 385.

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Code (corresponding to Order 2, Rule 2, of the present Code) because the plaintiff in a former suit for joint possession against the defendant had omitted to include this particular piece of land in his claim for joint possession. The High Court reversed this decision holding that the cause of action was different in the two cases. In the first case the cause of action was exclusion from joint possession by a co-sharer, in the other case the cause of action was the right of every co-sharer to bring an action against his co-sharer to have the joint estate partitioned and to obtain his separate share. These causes of action were held to be separate and distinct. So here, in the first case Lu Tha was suing for separate possession of a share alleged to have already been partitioned to Maung Paik while in the present case he is suing his co-sharer, Po U, for partition of the whole of the joint property. Reference may also be made to the Bombay case of *Shivram v. Narayan and others* (3). The plaintiff, Shivram, sued for partition of 39 acres of joint family land. In an earlier suit he had unsuccessfully sued to establish his right to 7 acres of that land alleging then that there had been a partition and that these acres of land had been allotted to him, and that claim had been rejected on the ground that no such partition had taken place. It was held by the High Court that the earlier suit brought to establish his sole right to the 7 acres of land did not bar his subsequent suit for partition of the whole of the joint family land including the 7 acres in question.

The decrees of both the Lower Courts are set aside and we direct the District Court to make a just and equal partition of the whole holding, 66.52 acres, between the plaintiffs and the defendant, Po U. If the parties cannot agree between themselves as to how the line of division between the two portions should be drawn, it should be drawn roughly north and south according to the *kazin* bunds giving to each of the parties as nearly as may be one half of the northern portion of the holding and one half of the southern portion of the holding. The plaintiffs' costs in all Courts will be borne by the defendant, Po U.

(3) (1881) I.L.R. 5 Bom., 27.

Before Mr. Justice Robinson, Chief Judge, and Mr.
Justice Macgregor.

S. JOSEPH BROTHERS AND COMPANY v.
O. RAISEE AND COMPANY.*

Hamlyn—for appellants.

Das—for respondents.

Civil First
Appeal
No. 101 of
1920.

August 10th,
1920.

*Rangoon Rent Act, 1920—Section 10—Bona fides—Definition of
“own occupation.”*

A firm having purchased a house of which B, another firm, were tenants, gave them notice to pay an enhanced rent or to quit. B having refused to do either, A brought a suit for ejection on the ground that the premises were *bonâ fide* required by them for their own occupation. They alleged that the upper storey was required to house their assistants and that they intended to use the lower story as a godown.

Held,—that the premises were *bonâ fide* required and that they were required for A's “own occupation” within the meaning of section 10 of the Act.

Epsom Grand Stand Association (Limited) v. E. J. Clarke, (1918-19) 35 T.L.R., 525; *Stovin v. Farebrass*, *ibid.*, p. 659; *Errington v. Metropolitan District Railway Company*, (1881-82) 19 Chan. Div., 559 at p. 571; *Fricke v. Van Grutten*, (1896) 2 Chan., 649—referred to.

Robinson, C.J.—Defendants-appellants are a firm of jewelers who were the tenants of the ground floor of No. 40, Phayre Street, where they had their shop. They allege that they subsequently rented the whole house and agreed to pay Rs. 100 per mensem rent and that there was an oral agreement or understanding with their landlord that in consideration of this rent and of their making certain improvements they were to be allowed to occupy the premises as long as they pleased.

In June 1919 the landlord sold the house to plaintiffs-respondents who at once wrote to appellants raising the rent to Rs. 150 and requesting them if they were unwilling to pay this enhanced rent to quit. Appellants refused to do either and on the 20th December 1919 a suit was filed praying for ejection and compensation for use and occupation.

The written statement was filed on the 2nd February 1920 and the case went into the contested list. On its coming up for trial plaintiffs asked leave to amend their plaint by reason of the enactment of Burma Act II of 1920. This was an Act to temporarily restrict the increase of rents in the City of

* Appeal against the judgment of Young, J., on the Original Side.

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Rangoon and was passed on the 3rd April 1920 and came into force on the 6th April 1920.

Leave being given an amended plaint was filed in which plaintiffs stated, in the words of the Act, "that the premises in suit are *bona fide* required by them for their own occupation."

Plaintiffs alleged that they had seven assistants for whom they had under agreements to provide lodging and that they required the upper storey for these assistants to live in and intended to use the lower storey as a godown for storing gunnies in which amongst other things they dealt. They now further argue that even if they should fail on this ground, under which they are entitled as of right to a decree, they should succeed on the general ground allowed by the Act, namely, if they can show any ground which may be deemed satisfactory by the Court.

Defendants deny that the claim is made *bona fide*; they urge that the Act only permits a decree where the premises are required for the landlord's *own*, that is personal, occupation and that the general discretion granted to the Court cannot permit a decree to be granted on the very ground that plaintiff had failed to prove as one of the specified grounds giving an absolute right.

The Act is one of Emergency Legislation due to the effects of the great war and it is enacted primarily to restrict the increase of rents. It contains provisions to prevent evasions of its main object. By section 10, sub-section (1), it is provided that no order or decree for the recovery of possession of any premises shall be made so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by the Act and performs the conditions of the tenancy. Sub-section (2) enacts that the same rule shall ordinarily apply even though the lease may have expired or the premises have been transferred.

To this main rule exceptions are provided in the proviso to sub-section (1). These are divided into three classes (a) certain conduct on the part of the tenant will deprive him of the protection of the Act; (b) the *bona fide* needs of the landlord are to override the express rule; and lastly (c) a general pro-

vision is made for special cases in which interference with rights of ownership would be unjust leaving it to the discretion of the Court to decide whether a sufficient case is made out. These are not specified because it is impossible to provide for all the various circumstances that may arise.

It is with the second of these exemptions that we have to deal in this case. Have the plaintiffs established, for the onus is on them, that the premises are *bona fide* required for their own use?

As to the requirement of *bona fides* Mr. Hamlyn urges that there could be no *bona fides* unless the premises were reasonably required. The argument may have been based on the analogous provision in the English Act, The Increase of Rent and Mortgage Interest Act, 1915, section 1, sub-section (3), though it was not quoted to us. In that Act exception is made where "the premises are reasonably required by the landlord for the occupation of himself or some other person in his employ" and in *Epsom Grand Stand Association (Limited) v. E. J. Clarke* (1) the distinction between reasonably required and *bona fide* required is pointed out. Lord Justice Bankes said: "The plaintiffs had to satisfy the Court that the premises were reasonably required. It was not merely a question of their acting *bona fide*. They must not only act *bona fide*, but they must act reasonably in requiring the possession of the premises. Whether the premises were reasonably required must depend on the circumstances." Again in *Stovin v. Farebrass* (2) the same learned Judge said: "the Court could not be entitled to make an order for possession in a case where a landlord proved that his claim to possession in order to put some person in his employ into a dwelling-house was *bona fide*, but failed to prove it was reasonable."

Again in *Errington v. The Metropolitan District Railway Company* (3) Jessel, M.R., said: "It is the Company who are to be the judges of what they require unless they are not acting *bona fide*, and the evidence, and the only evidence required, is the opinion of the Engineer or Surveyor, or other officer of the Company, unless the other side can shew that they are

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(1) (1918-19) 35 T.L.R., 525.

(2) *Ibid*, p. 659.

(3) (1881-82) 19 Ch. Div., 559 at p. 571.

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not acting *bona fide*. Now, of course, you can show want of *bona fides* in two ways. You may show it by proving that the lands are wanted for some collateral purpose as a fact, or you may show it by proving that the alleged purpose is so absurd under the circumstances that it cannot possibly be *bona fide*."

There is thus a vast difference between "reasonably required" and "*bona fide* required." The latter expression means that plaintiffs' alleged need is genuine and not a mere fiction. He states he has at present to hire premises for his assistants to live in and his rent of those premises has been raised. If he could have possession of his own house he would be free from trouble and possibly litigation as to rent and he would have certainty of peaceful tenure. It is clearly impossible to hold that this is not *prima facie bona fide*. It is not for him to show that his desire to have his own house for these purposes is under the circumstances a reasonable desire but merely that it is a genuine wish.

In reply defendants seek to show that he would gain no advantage by the change but that is an attempt to show it is not reasonable and no proof that it is not *bona fide*. They cannot show that the premises are really required for some totally different object nor can they establish that the allegation is so absurd that it cannot be genuine. It is true this was not at first alleged but when the plaint was filed it was not necessary. Plaintiffs wanted to get rid of the tenant and adopting the usual course raised the rent. When the Act was passed they alleged the necessary ground and I do not think this fact points to or establishes a want of *bona fides*. On this point therefore defendants fail.

The next matter for consideration is whether the words "required by the landlord for his own occupation" in the Act mean for his own personal occupation only. Mr. Hamlyn urges that this is the only possible interpretation unless the whole purpose of the Act is to be defeated. He urges that had the legislature meant to include others besides the landlord it could and would have said so. But it might easily be retorted that the words his own personal occupation might equally well have been employed. He refers us to the case of

Fricke v. Van Grutten (4) where the Court had to consider the meaning of the words "without his own consent in writing" without which a person could not be made a plaintiff in an action. It was held that this meant that the person must sign his consent with his own hand and the consent could not be given on his behalf by his solicitor. This authority is of no assistance in the present case. The use of the word "own" there was in conjunction with "in writing" and it was held that the words were to be interpreted as in a Procedure Act dealing with a similar question in which the language used was "in writing under his, her, or their hands." The subject in the present case is different and "own" is used in conjunction with "occupation." We must decide the question with due regard to the definitions of "premises" and "landlord" and to the object of the Act.

The expression "premises" includes any building, even a stall in a market; "Landlord" many persons besides the actual owner, and even a tenant who sublets. There may be thus more than one "landlord." A man may occupy premises under the Act in many ways other than by residing in them or employing them himself personally. Premises are occupied for other purposes than personal residence. They may be and often are occupied for the purposes of a business for which the immediate and personal occupation of the proprietor is unnecessary. A business may need a house for storage of the goods dealt in, it may use it for a shop or for the residence of managers or employers but in all these cases it is occupied by the owner of the business. He may not even be in the country at all but yet he and not those in actual possession occupy it. If the occupation contravenes any rule or bye-law of a municipal or other authority the person to be held ultimately responsible is not the man in actual possession but the real owner.

If the premises are used for the place of business of a firm, who occupies them? Surely not the manager or agent in immediate control but the proprietor of the firm and equally surely the legislature must have realized this. Had it therefore been intended that the immediate possession of the owner was intended this would have been made clear beyond all

(4) (1896) 2 Chan., 649.

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question. Had the plaintiff firm been in occupation of this house using the ground floor as a godown and the upper floor as residential quarters for the staff necessary to run the business could it have been seriously argued that the firm was not in occupation and if in occupation for whose occupation would it be holding the premises but its own occupation?

The Act was intended primarily to restrict the increase of rents and to restrain any acts intended to defeat this object while outwardly seeming to comply with its provisions. It interfered with private rights of ownership which did not strictly fall within the limits of the exceptions to its main provision. But this interference is not to be enlarged and while the owner must show that his case falls within the exception allowed the Court cannot require more or extend the bounds of the interference. Here the landlord puts forward the grounds on which he requires the premises and his grounds are, we consider, *bona fide*. He may well require the premises for these purposes and they are purposes properly included in the words his own occupation.

But over and beyond this there is in my opinion another reason for the insertion of the word "own." The legislature wished to defeat evasion of the Act by the ejection of tenants who refused to pay an increased rent and to guard against the possibility of the evasion of the Act by a plausible device. A landlord might pretend that, though he did not require the premises for his own residence or use, they were required for his relations or friends or business connections. He might wish to help a man to whom it would be to his advantage to do a good turn and who was really in need of premises. The genuineness of such allegations would be very hard to disprove. Such action had therefore to be forbidden and to effect this object the word "own" was put in. It was not with the object of limiting the occupation to the landlord himself personally or to deny him the right to use the premises for his *bona fide* business or other requirements but to safeguard the evasion of the Act. It was not to limit the user by the landlord but to prevent a transfer which had for its real object the eviction of a recalcitrant tenant.

The appeal therefore fails and is dismissed with costs.

The execution of the decree is to be stayed by consent for one month from to-day to allow appellants time to find other premises.

Macgregor, J.—Plaintiffs-respondents are a Bombay firm of general merchants and commission agents with a branch in Rangoon, where they rent a large godown in Latter Street used for the storage of gunny bags, rice, beans and other merchandise. They employ seven assistants, and for these they provide food and house accommodation free, the latter consisting of a room in Edward Street for which they paid Rs. 65 a month rent until July 1919 when it was raised to Rs. 90. On 2nd June 1919 they acquired by purchase the premises No. 40, Phayre Street, of which the defendants-appellants were in occupation as monthly tenants on a rent of Rs. 100, and on 10th June 1919 they sent to appellants a notice to quit on 1st July afterwards extended to 1st August unless they were agreeable to pay a rent of Rs. 150. Appellants objected and are still in occupation. The suit for ejectment was filed on 20th December 1919, and an amended plaint was filed when the Rangoon Rent Act (Act II of 1920) came into force in April 1920.

The question for decision is whether, in the language of the proviso to section 10 (1) of the Rangoon Rent Act, the premises are *bona fide* required by plaintiffs for their own occupation. I agree with the learned Chief Judge that the landlord's own occupation here includes occupation by persons in his employ. A more difficult question is the construction of the phrase "*bona fide* required." The words in the corresponding section of the English Act of 1915 are "reasonably required." It happens that in *Epsom Grand Stand Association (Limited) v. E. J. Clarke* (1) Lord Justice Bankes wrote: "The plaintiffs had to satisfy the Court that the premises were reasonably required. It was not merely a question of their acting *bona fide*. They must not only act *bona fide*, but they must act reasonably in requiring possession of the premises. Whether the premises were reasonably required must depend on the circumstances. The circumstances must be stated

(1) (1918-19) 35 T.L.R., 525.

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 COMPANY.

from which it would be possible for the Court to decide whether the premises were reasonably required or not."

"They must not only act *bona fide*," i.e. as I understand it, it was not enough that they should really and truly *intend* to use the premises for their own occupation. But we are here not quite on the same position, for we are construing the meaning of "*bona fide* required" as the words of an enactment, and regard must, it seems to me, be had to the force of the word "required" which suggests some element of need or necessity, or at least adequate motive. The question then is whether plaintiffs, on whom the onus lies, have shown that they *bona fide* require the premises. Their managing partner in Rangoon and two of their assistants gave evidence. The managing partner says that they purchased the premises because they wanted to occupy them, and as they are a Bombay firm with a staff to provide for in Rangoon, and as eviction of the staff from the Edward Street house might have been a serious inconvenience in the prevailing scarcity of houses, the statement is entitled to credit. As it was, they had to submit to an increase of the Edward Street rent from Rs. 65 to Rs. 90. No doubt the Rangoon Rent Act has since given certain reliefs in the way of recovery of excess rents, but plaintiffs are not bound to take such action; and also in the way of fixity of tenure; but when plaintiffs have a house of their own, it appears to me that, although it is admitted that there is no fault to find so far with the Edward Street lodgings, when they desire, instead of having their staff lodged here and hiring an additional godown there, to have both staff and godown together in premises of their own which they have gone to the expense of buying for that purpose, they may be said *bona fide* to require the premises. I agree with the learned Chief Judge that too much significance need not be attached to the notice to pay enhanced rent or quit. If plaintiffs expected that defendants would decline to pay the enhanced rent, they were right. This notice was sent by plaintiffs before their own Edward Street rent had been increased and shows at the most that for a substantial consideration they would defer the transfer of their staff. As regards the lower floor, plaintiffs say that they want it to store gunnies. This statement may also be believed for besides that it appears a suitable room for

such a purpose, plaintiffs about the time of filing their suit gave up an additional godown for which they were paying rent. It is credible that they require an additional godown, although, it may be in the expectation of an early decree, they made their Latter Street godown do. The statement that they gave up the extra godown because they did not require it is only that of plaintiffs' Head Clerk.

Considering that plaintiffs bought the house for their own use and in view of the grounds they show for wanting both the upper floor and the lower floor, I am of opinion that they have shown that they *bona fide* require the premises for their own occupation and I concur in dismissing the appeal with costs.

Before Mr. Justice Rigg.

S. R. M. M. C. T. CHETTY FIRM v. CHIMANBUX
 BHOWSINGHA.

Rutledge and Aiyer—for applicants.
Giles—for respondent.

Execution of Decree in two or more districts.

There is nothing in the Code of Civil Procedure prohibiting the concurrent execution of a decree in two or more districts. It is a matter for the discretion of the Court to direct or to refuse concurrent execution.

Saroda Prosaud Mullick v. Lutchmeeput Sing Doogur, (1871-72) M.I.A., 529; *Kristokishore Dutt v. Rooplall Dass*, (1882) I.L.R. 8 Cal., 689—followed.

The S. R. M. M. C. T. Chetty firm obtained a decree in Civil Regular Suit No. 310 of 1915 against the respondent for Rs. 22,500 with interest at 6 per cent. per annum. On the 27th December 1917, Rs. 2,000 were paid towards satisfaction of the decree. In June 1919, the decree was transferred to the High Court, Calcutta, for execution with the usual certificate and no steps were taken to execute that decree. On the 25th August 1920, an application was made to this Court for the execution of the decree by the arrest of the judgment-debtor, and a further application was made for the attachment and sale of certain properties. In Civil Execution Case No. 340 of 1910 Sir Charles Fox in passing orders on an application for execution said, "the decree having been sent to another Court for execution, it is not in my opinion open to this Court to make an order for execution until this decree is returned."

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 BROTHERS
 AND
 COMPANY
 v.
 O. RAISEK
 AND
 COMPANY.

Civil
 Execution
 No. 210 of
 1920.

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 3rd, 1920.

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 S.R.M.M.C.
 T. CHETTY
 FIRM
 v.
 CHIMANBUX
 BHOW-
 SINGHA.

The Deputy Registrar has referred the question of whether the applications for execution in Civil Execution No. 210 of 1920 can be proceeded with in view of the order of Sir Charles Fox. The applicants contend that the order was passed without the point being argued and is contrary to the decision of the Privy Council in *Saroda Prosoud Mullick v. Lutchmeeput Sing Doogur* (1) and is therefore not binding on me. It is doubtful whether the order of a single Judge on the Appellate Side is binding on a Judge sitting on the Original Side of this Court, as appeals from such decisions lie to a Bench of two Judges. It is unnecessary to decide this point, if the ruling of their Lordships applies to execution proceedings under the Civil Procedure Code of 1908, as all Courts in India are bound by relevant rulings of the Judicial Committee. In the case cited, which was decided under the Code of 1859, their Lordships held that there was nothing in the provisions of that Code to prevent a decree being executed simultaneously in two or more districts. The only other case dealing with the point under reference is so far as I know that of *Kristokishore Dutt v. Rooplall Dass* (2), in which the ruling of the Privy Council was held to be decisive on the question under discussion and was stated to be in accordance with several decisions of the Court. This case was decided under the Code of 1877, but the Code of 1882 made no difference in the procedure and in Calcutta the practice of allowing simultaneous executions to proceed, was followed, subject of course to the exercise of the judicial discretion of the Court. The objection to the simultaneous execution of a decree in two Courts is that the judgment-debtor may be harassed and may suffer injury from unnecessary proceedings. Provision to alleviate any hardship likely to result from simultaneous execution is made in Order XXI, Rule 26, which enables a judgment-debtor to apply to a Court to which a decree has been sent for execution to stay its proceedings. It is stated however in a note to section 38, Code of Civil Procedure, by Messrs. Amir Ali and Woodroffe that although the legality of concurrent execution has been recognized in practice it was not generally carried out. It is argued that it was intended to abolish concurrent

(1) (1871-72) Moore I.A., 529.

(2) (1882) I.L.R. 8 Cal., 689.

execution, when the present Code was introduced, and section 46 is cited as proof of that intention. Section 46 gives the Court that has passed the decree power to issue a precept to another Court to attach specified property, such attachment to be in force for two months or any longer period directed by the Court issuing the precept. This section merely provides for an interim attachment of property by precept and such precept could be issued in anticipation of a decree transferred for execution. Order 21, Rule 5, provides that where the Court to which a decree is sent is situate in the same district as the Court that passed the decree, a direct transfer of the decree can be made, but in other instances the transfer must be made through the District Court. Section 6 provides the procedure for the transmission of such decrees. It is obvious that the transfer system involves delay and I do not think section 46 was enacted for any other purpose than to avoid delays and protect decree-holders. I am unable to find anything in the new Code to prohibit concurrent executions. It is a matter for the discretion of the Court to direct or to refuse concurrent execution. In the present case the judgment-creditors state that no steps have been taken to execute the decree in Calcutta, and that they will ask for the proceedings there to be closed. In these circumstances there can be no objection to execution of the decree at Rangoon. I make no order as to costs of this reference.

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SINGHA.

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice Heald.

(1) MI AH KOOK, (2) AH YON, (3) MI KUN HAU AND
(4) AH THU v. MI HLA MO WAY BY HER AGENT MI TUN.*

Das—for appellants.

Ginwala—for respondent.

Civil Procedure Code, section 47—Matters to be established before a case comes under—Interpretation of "representatives."

A Chetty firm obtained a simple money decree against A and had certain immoveable property attached in execution thereof. The property was sold by auction and purchased by the decree-holder. The latter did not take steps to obtain possession, but after the period of limitation which applies to applications relating to execution had expired, sold the property to B. After B's death his widow brought a suit for possession and

* Appeal against the judgment of Maung Kyaw U, District Judge of Akyab.

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mesne profits against the representatives of A, who was then dead, and obtained a decree. A's representatives appealed alleging, *inter alia*, that the suit was barred by the provisions of section 47, Civil Procedure Code. *Held*,—that in considering whether the case is one which comes within the purview of section 47, two matters have to be established: the question must be one between the parties to the suit or their representatives, and must further be one relating to the execution, discharge or satisfaction of the decree. In this case B acquired the ownership of the property from the decree-holder *qua* auction purchaser; he did not become the representative of the decree-holder *qua* decree-holder. The decree was satisfied so far as the property in suit was concerned on the sale of that property which thereupon ceased to be liable to be used to satisfy the decree. The matter was therefore not one relating to the execution, discharge or satisfaction of the decree. For these reasons section 47, Civil Procedure Code, did not apply and the suit lay.

Madhusudan Das and another v. Govinda Pria Chowdhurani, (1900) I.L.R. 27 Cal., 34; *Hari Charan Dutta v. Monmohan Nandi and another*, (1913-14) 18 C.W.N., 27; *Sandhu Taraganar and another v. Hussain Sahib and others*, (1905) I.L.R. 28 Mad., 87; *Bhagwati v. Banwari Lal and others*, (1909) I.L.R. 31 All., 82; *Sadashin Bin Mahadu Dhob v. Na'ayan Vithal Mawal*, (1911) I.L.R. 35 Bom., 452; *Goba Nathu Baroia v. Sakharani Teju Patil*, (1920) 22 Bom. L.R., 1101; *Prasunno Kumar Sanjal v. Kali Das Sanjal*, (1892) I.L.R. 19 Cal., 683—referred to.

Robinson, C.J.—The Chetty firm of R.M.M. obtained a money decree on a pro-note against one Ah Fee. In execution of the decree they attached some land and a pucca building thereon belonging to Ah Fee. This property was sold by auction and was bought by the decree-holder on the 30th April 1909 for Rs. 4,000. The decree-holder did not, however, obtain possession of the premises. Several years later R.M.M. is said to have sold the premises to the respondent's husband, and after his death she brought a suit for possession of the premises and mesne profits against the present appellants who are the daughter, son-in-law, daughter, and son of Ah Fee. After Ah Fee's death his wife occupied the house, and after her death their children, the appellants, went into possession. The Lower Court has granted respondent a decree declaring respondent was the owner and entitled to possession and also granting decree for Rs. 120 for mesne profits. Against that decree the present appeal is filed. Two grounds of appeal are taken; firstly, that no suit lies under section 47, Civil Procedure Code, and that any application under section 47 would now be barred; secondly, that though they put plaintiff to proof of the sale by R.M.M. to her the sale was not legally proved, nor was

the power of the agent of R.M.M. to sell the property established.

As regards the question whether such a suit is barred by the provisions of section 47, Civil Procedure Code, there is a very great divergence of opinion in the decisions passed by the various High Courts. The authorities are very fully considered in several of the cases and it is not necessary for us to collate and discuss them in detail. In *Madhusudan Das and another v. Govinda Pria Chowdhurani* (1) it was held that proceedings for the delivery of possession to the auction-purchaser after sale in execution of the decree are proceedings in execution of the decree, and the question was one that came under section 244 of the Civil Procedure Code and must be decided under that section and not by a separate suit. The latest authority of the Calcutta High Court, to which we have been referred, is *Hari Charan Dutta v. Monmohan Nandi* (2), where it was held that the matter was one that came under section 47 and that an appeal therefore lay from the decision. A divergence in views of the High Courts is set out, and it was held that the balance of authority was in favour of the view that this question comes within the scope of section 47 of the Code. The learned Judge further remarked that "on the question of principle I agree with the reasoning of Stanley, C.J., in the case of *Bhagwati v. Banwari Lal*." To that case we shall shortly refer. In the Madras High Court there has been a long series of decisions holding that the question falls within the purview of section 244 of the last Code of Civil Procedure. This view was taken in the case of *Sandhu Taraganar v. Hussain Sahib* (3) where Sir Arnold White, C.J., remarked on the point whether this was a question relating to the execution, discharge or satisfaction of the decree that "if the matter were *res integra* I should be disposed to hold that the question is not one relating to the execution, discharge or satisfaction of the decree. It has been held, however, in a series of cases decided by this Court that proceedings between a decree-holder who has purchased at a Court auction and the judgment-debtor are proceedings relating to the execution, discharge or satisfaction of the decree." He

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(1) (1900) I.L.R. 27 Cal., 34. (2) (1913-14) 18 C.W.N., 27.

(3) (1905) I.L.R. 28 Mad. 87.

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then refers to a number of authorities and continues, "Although the decisions on the point are not altogether uniform, the balance of authority certainly supports the view taken by the Lower Appellate Court in this case." On the question as to whether the purchaser from a decree-holder who has purchased at a Court auction is a representative of the decree-holder for the purposes of section 244 he held that the authorities appeared to be all one way, namely, that he was such a representative, and he saw no reason to take a different view. Subrahmania Ayyar, J., held that it was now too late to contend that the question was not one relating to the execution of the decree. The matter was next considered by a Full Bench of the Allahabad High Court in *Bhagwati v Banwari Lal* (4), and it was held by three out of the five Judges composing the Bench that a decree-holder, whether holding a decree for sale on a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment-debtor is in the same position as would be any other purchaser at an auction sale held in execution of a decree and that after confirmation of a sale the purchaser who had failed to obtain possession of the property purchased might claim possession either by an application or also by suit and that section 244 of the Code was no bar to such a suit. Stanley, C.J., and Knox, J., were of the contrary opinion. The whole matter was again considered by the Bombay High Court in *Sadashin Bin Mahadu Dhob v. Narayan Vithal Mawal* (5). The Court agreed with the views taken by the Calcutta and Madras High Courts and differed from that taken by the Allahabad High Court. In the course of their judgment they say, "We think that the execution of the decree is not complete and final, until in the one case the decree-holder actually receives the sale proceeds through the Court, and in the other case until he secures possession of the property through the Court." They further pointed out that they would have allowed the suit to be treated as a proceeding in execution, but for the fact that the execution of the decree was barred by limitation at the date of the suit. However, in a very recent ruling of the Bombay High Court in the case of

(4) (1909). I.L.R. 31 All., 82. (5) (1911) I.L.R. 35 Bom., 452.

Goba Nathu Baroia v. Sakharam Teju Patil (6) the ruling to which we have just referred was distinguished and doubted and the Full Bench decision of the Allahabad High Court was approved. Macleod, C.J., said, "For myself I feel inclined to doubt the decision in *Sadashin Bin Mahadu Dhob v. Narayan Vithal Mawal*. I would prefer to follow the decision of the Full Bench of the Allahabad High Court in *Bhagwati v. Banwari Lal*." In the case before him however there was a second defendant who set up an independent title to the property and who was not a party to the suit. It was therefore held that the suit would lie. Heaton, J., said, "Whether the decision in *Sadashin v. Narayan* is correct or not (and I think it may need reconsideration), yet the case as presented by the plaintiff here is certainly not one which can be summarily dismissed on the ground that the suit will not lie." It will thus be seen that though the Calcutta High Court has not always taken the same view the balance of authority is clearly in favour of holding that a separate suit would be barred by the provisions of section 47. The Bombay High Court also took that view but has since expressed grave doubts as to the correctness of it. Similar doubts have been expressed by the Madras High Court, but owing to a long course of decisions, they have acted on the principle of *stare decisis*, while the Allahabad High Court while holding that a suit is not barred only did so by a majority of Judges.

This being the state of the authorities, we propose to consider the question without referring to them in detail. In the present appeal the facts are that the decree-holder had obtained a simple money decree, that in execution thereof he brought certain immovable property to sale, obtained leave to bid and became the action-purchaser himself. He paid the purchase price into Court and the sale was confirmed and the sale certificate issued to him. He did not however proceed to obtain possession, and after the three years' limitation which applies to applications under section 47 had expired he sold the property to the present respondent's husband. In considering the question whether the case is one which comes within the purview of section 47, it must be remembered that before it can

(6) (1920) 22 Bom. L.R., 1101.

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do so two matters have to be established. The question must be one between the parties to the suit or their representatives and must further be one relating to the execution, discharge or satisfaction of the decree. The first question then is whether the respondent is to be held to be the representative of the decree-holder within the meaning of section 47 and whether the appellants must be held to be the representatives of the judgment-debtor. As to them they are sued as the children of Ah Fee, the original judgment-debtor; and we think it is clear that they are sued as his legal representatives in possession of the property. As regards the respondent, she, being regarded as a purchaser from the decree-holder, may or may not be held to be the representative of the decree-holder according to the interpretation that is put on that word as used in the section.

It cannot be doubted that the object of the enactment of this provision was to enable a litigant who had obtained a decree to realize the fruits of his decree by obtaining execution in a speedy, simple and inexpensive manner and that it was intended to avoid the delay and expense which must arise if it is necessary for a separate suit to be filed. At the same time it must be remembered that an ordinary purchaser is allowed by Article 138 of the Limitation Act 12 years within which to recover possession of the property purchased, and we can find no reason to suppose that by the enactment of section 47 the legislature contemplated the taking away of that right except in the case of persons for whom and for whose benefit a special and summary procedure was provided. It must therefore be clearly shown that the plaintiff falls within the provisions of that section. The decision of their Lordships of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (7) has been pressed upon us as showing that a narrow construction is not to be placed on the language of the section when a question has arisen as to the execution, discharge or satisfaction of the decree between the parties to the suit in which the decree was passed. Their Lordships were dealing with the case where property had been sold in execution and the judgment-debtor applied to set aside the sale on the ground

(7) (1892) I.L.R. 19 Cal., 683.

of fraud. They made the auction-purchaser a party, and what their Lordships, in our opinion, meant to lay down was that the presence of the auction-purchaser on the record should not be used to take the question out of the section. That was a question which clearly related to the execution, discharge or satisfaction of the decree, and the argument was that the auction-purchaser was as much interested as anybody else and the question therefore should not be held to be one arising between the parties to the suit. While no doubt it has always been recognised that a narrow construction should not be placed on the section, this cannot be used as an argument in support of extending the object and intent of the section beyond the limits that the language used justifies. The section appears to us as intended to apply only to those cases in which the contesting parties were parties to the original suit or their representatives with reference to the original decree and that it should not be extended to cover all those persons who, by subsequent events, may have acquired an interest in the property brought to sale quite independently of the decree that had been given. The legal representatives of the decree-holder who had died or the assignee of a decree would no doubt be his representatives within the meaning of the section, but to hold that a person who purchases the property brought to sale is the representative of the decree-holder appears to us to be going beyond the limits that the legislature contemplated. A purchaser from a decree-holder auction-purchaser no doubt acquires the interest and the rights of the auction-purchaser, but we can see no justification for holding that he is therefore to be deprived of the rights of an ordinary auction-purchaser to bring a suit at any time within 12 years to recover possession. A representative within the meaning of the section, we think, must be a person who is a representative with direct reference to the decree. In a case in which the property realises at auction an amount larger than the amount of the decree, the decree must, we think, be held to be satisfied. The decree-holder auction-purchaser must pay the amount of his bid into Court, and it is open to him to withdraw the amount sufficient to satisfy his decree. The question whether he has obtained possession of the property he bought appears to us to be outside the question whether the decree has been

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satisfied. He becomes the owner of the property and what the purchaser from him acquires is that ownership. So far as the decree is concerned, the property is no longer liable to be used to satisfy the decree. In the present case the decree is a simple money decree, and if that decree has been fully paid, the decree is satisfied, and if the amount realised is not sufficient to satisfy the decree, further proceedings in execution to obtain satisfaction of the balance cannot be taken against that property. So far therefore as the decree is concerned, the property is outside it altogether and therefore steps to recover possession could not be said to be steps in aid of execution or relating to the execution. We are not considering the question with reference to an attempt by the decree-holder auction-purchaser himself to recover possession of the property that he has purchased. We are only dealing with the position of a purchaser from him of the ownership of the property. We would therefore hold that the purchaser from the decree-holder auction-purchaser is not a representative of the decree-holder *qua* decree-holder. It has been argued that a decree-holder auction-purchaser occupies two different capacities with reference to the decree and that when he has purchased the property he is to be treated merely as an auction-purchaser so far as the recovery of possession of the property is concerned. As regards a purchaser from him, we think the purchaser steps into his shoes as auction-purchaser but not as decree-holder.

The next question is as to whether the matter is one relating to the execution, discharge or satisfaction of the decree. We have shown that the more recent opinion generally tends in the direction of holding that it is not such a matter and we are clearly of that opinion. It is in our view a question outside or beyond the question of execution and for the reasons we have given above we must hold that section 47 does not apply to such a case as this and that therefore the suit does lie.

It is undoubtedly the case that the defendants could put plaintiff in this suit to proof of the purchase of the property from R.M.M. Plaintiff was not in a position to produce the original deed of sale, but it appears that that document was filed in a case in which an appeal was pending in this Court

and she could have had no difficulty therefore whatever in producing the original document. A certified copy of it was not admissible, and the Lower Court erred in admitting one. Two attesting witnesses were called, but in the absence of the original document they were unable to give the necessary evidence to prove the sale. In the next place, plaintiff was put to proof of the authority of the agent of the R. M. M. firm to sell the property. The agent had returned to Madras and no attempt was made apparently to obtain a commission to examine either him or his principal, or to obtain the original power-of-attorney. The agent of the local branch of the Bank of Bengal was called and he produced a copy of the copy registered by the Bank in their books of the original power-of-attorney. It is urged that the original could not be obtained within a reasonable time and that therefore a copy would have been admissible under section 65 (c) of the Evidence Act. The Court, however, decided that the copy of the copy might be proved. This would not prove the execution of the power, even if it could be held to establish that the power did contain authority to sell, and as no attempt was made to obtain the original or evidence to prove that it was lost, or could not be produced, we are of opinion that a copy of a copy was not admissible. We think, however, that as the Court ruled in plaintiff's favour on this point plaintiff should be given an opportunity of producing the originals, or tendering such evidence as would excuse their production, and we remand the case that an opportunity be given her of producing this evidence, or evidence to show secondary evidence was admissible.

Seeing that both parties have been partly successful in respect of the matter raised in this appeal, we make no order as to costs and direct that the costs of the suit should abide by the result after this evidence, if any, has been tendered. This evidence when taken will be sent to this Court.

Heald, J.—I concur.

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Before Mr. Justice Robinson, Chief Judge, and Mr. Justice Heald.

Civil
Miscellaneous
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1920.

Jan. 10th,
1921.

THE INDO-BURMA OIL FIELDS, LTD. v. THE
BURMA OIL COMPANY, LTD.*

Giles—for appellant.

Lentaigne (Senior)—for respondent.

Contract—Agreement to serve—Injunction against third party for breach of—

The Burma Oil Company engaged A to serve them for a period of three years. The agreement also contained a provision that A should not serve any other firm but should return to America on the expiry of his agreement. Before the expiry of the three years A tendered his resignation which the Company refused to accept. A did not rejoin their employ and was believed to be in America. The Indo-Burma Oil Fields, Limited, took A into their service in spite of the protests of the Burma Oil Company. The latter Company then filed *inter alia* an application for an interim injunction to restrain A from continuing to work for the Indo-Burma Oil Fields, Limited, and to restrain the latter from employing him. An interim injunction was granted, and against that order the Indo-Burma Oil Fields, Limited, appealed.

Held,—that the agreement made by A not to serve any other firm applied during the term of service agreed upon and that section 27 of the Indian Contract Act did not apply to it.

Held,—also that an injunction could be granted against the Indo-Burma Oil Fields, Limited, because they were knowingly and for their own ends procuring A to commit an actionable wrong. The appeal was accordingly dismissed.

Whitwood Chemical Company v. Hardman, (1891) 2 Ch., 416; *Lumley v. Wagner*, 91 R.R., 193; *Lumley v. Gye*, 2 E. & B., 216; *Allen v. Flood*, (1898) A.C., 1; *Quinn v. Leatham*, (1901) A.C., 495; *South Wales Miners' Federation v. Glamorgan Coal Company*, (1905) A.C., 239; *National Phonograph Co. v. Edison Bell Phonograph Co.*, (1908) 1 Ch., 335; *Blake v. Lanyon*, 101 Eng. Rep., 521—referred to.

Robinson, C.J.—The respondent company engaged the defendant Sampson to serve them for a period of three years up to the 28th February 1921 on the same terms and conditions as were embodied in the original agreement entered into between the parties when Sampson first joined their service.

On or about the 19th January 1920 Sampson left Burma on thirty days' leave. He wrote a letter dated 30th January 1920 from Calcutta tendering his resignation. The respondent company replied refusing to accept his resignation but Sampson has not rejoined and is believed to be in America.

On the 7th February 1920 the present appellant company issued a prospectus in which it was stated that Sampson had

* Appeal against the order of Rigg, J., on the Original Side.

left the respondent company's service on 31st December 1919 and had been engaged to undertake the development of their Yenangyaung properties. The respondent company thereupon wrote to the appellant company pointing out that Sampson was still in their employ and requesting them to dispense with his services. The appellant company replied refusing to do so. On the 6th July 1920 the appellant company issued a letter to the share-holders stating that Sampson, their Field Manager, had been able to arrange for speedy delivery of enough of the plant to ensure that drilling of several wells should commence in the early autumn of that year.

The respondent company then filed a suit on the 25th August 1920 against Sampson and the appellant company praying for leave to institute the suit in this Court and for injunction against Sampson and the appellant company restraining the former from continuing to work for the latter and the latter from employing the former during the period of Sampson's agreement. On the same day they filed an application for an interim injunction.

Leave to file the suit on the original side of this Court was granted by the Deputy Registrar without notice to either defendant, and the Appellant Company on the 7th September filed an application that the order granting leave may be set aside and due notice of that prayer may be served on both defendants.

The hearing of the application for an interim injunction was by consent fixed for the 8th September and was then heard. The question of the grant of leave was raised and the learned Judge held that leave might be granted without notice.

He granted interim injunctions as prayed until the suit has been disposed of and the appellant company now appeals against that order.

The question of the grant of leave is again raised and it is urged that the jurisdiction of the Court to hear the suit being dependent on the grant of leave notice should have been first issued and in any case an interim injunction should not have been granted where the jurisdiction hung on a thread. Section 20 (b) of the Code of Civil Procedure does not require

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notice as section 22 does and it is in my opinion clear that leave may be granted without notice. In the present case to require notice would be to refuse plaintiff any opportunity of obtaining a hearing before the period for which an injunction was sought expired. Leave being granted, and as I think rightly granted the jurisdiction of the Court on that ground was unassailable and I can find no force in the argument.

It is urged that the agreement not to serve any other person or persons applies only after the expiry of the current contract of service. By the agreement Sampson undertook to proceed to Burma or India to work in the oil fields there or elsewhere always acting under the Managing Agents, Managers or Overseers of the Company and them only. The second clause runs as follows :—"This engagement shall be for three (3) years, and it is clearly understood that the party of the first part shall not directly or indirectly or in any way whatsoever give service, information or advice, or in any way become connected with any other firm or company in Burma or India or elsewhere, but shall at the expiration of this agreement, unless it is mutually arranged to continue it, return to America, and shall not enter the service of any other firm or Company in Burma or India."

I can find no ground for holding that the covenant not to serve any other firm does not and was not intended to apply to the term of the service. The clause sets out that Sampson is to serve the Company for three years and not to serve any one else but shall, on expiration of the agreement, return to America. This so far from showing that the negative covenant is to come into force only on the expiration of the agreement emphasizes that it is to apply during the period of the agreement. It is impossible to believe that the parties contemplated the possibility of Sampson serving others during the continuance of the agreement and not doing so after its termination.

It is next urged that if it applies during the three years it is void by reason of the provisions of section 27 of the Indian Contract Act. That section does not apply to contracts of service of this kind. No authority holding that it does has been quoted and to hold it applies would defeat the object of

all such agreements and permit the employee at any time and for any reason to break his agreement without penalty. It is clearly not a covenant in restraint of trade and it has repeatedly been held to be a valid agreement. The authorities are cited in the judgment appealed from and an agreement by which he is engaged to exercise his trade cannot be said to be one restraining him from so doing.

The next question is whether an injunction can be granted against a third party, and, if so, whether in the exercise of a judicial discretion it should be granted in this case. We are not concerned in this appeal with the injunction granted against Sampson except in so far as it affects the question of the grant against the appellant company. We have been referred to a large number of English Authorities on the subject, but I do not think it is necessary to deal with them in detail, firstly, because the English Law as to restraint of trade is not the same as the Indian Law, and, secondly, because our law as to specific performance and injunction has been codified and it is that law alone that our Courts have to apply. As to the discretion to be exercised in the grant or refusal of an injunction that must depend on the particular circumstances of each individual case.

It is no doubt true that the Courts cannot grant specific performance of contracts of service because they depend on the personal qualifications or volition of the parties—section 21 (b) of the Specific Relief Act. It is also true that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced—section 56 (f), Specific Relief Act. But to this rule the Legislature has enacted an express exception in section 57 where it is laid down that notwithstanding section 56 (f) the Court is not precluded from granting an injunction to perform a negative covenant, express or implied, even though it is unable to enforce specific performance of the affirmative covenant provided the applicant has not failed to perform his part of the contract. Illustration (d) to this section exactly applies to the present case; indeed it goes further. This illustration goes further than recent English decisions where the Courts are averse to enforce an implied negative covenant, and to extend the evasion of the rule against the specific

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performance of contracts of service which must to some extent be done by the grant of injunctions to perform a negative covenant. See *Whitwood Chemical Co. v. Hardman* (1).

In the present case however we have an express affirmative covenant to serve for three years and an express negative covenant not to serve any other firm or company during that period. This is clearly within the rule laid down in *Lumley v. Wagner* (2) and also clearly within section 57 and illustration (d) thereto.

There is thus no ground for holding that an injunction could not be granted against Sampson provided it was a case in which the Court's discretion should be exercised in favour of the applicant. Had Sampson been in Burma it is clearly a case for the exercise of that discretion in favour of the respondent company. It is urged that as Sampson is in America the Court would be issuing an injunction at which he could snap his fingers and which could not be enforced. But it is clear that if he came to Burma in breach of his contract not to serve any one else it could be served and enforced and I can see no grounds for holding the grant of an injunction against him was not right or justifiable. But even were it otherwise it would not affect the Court's power to grant an injunction against the appellant company. They had expressed their hope to be able to start work in Burma and their intention to do so in the autumn of this year and Sampson was their Field Manager. This was a clear indication on their part of an intention to bring Sampson out here during the period of his engagement to serve only the respondent company and it led the latter to take immediate action.

It is urged that an injunction should not be granted against them as there is no allegation that they acted fraudulently or with deceit. No such allegation is made but while it is admitted that there must be a cause of action against the appellant company to justify the issue of an injunction against them it is said that there is such a cause of action and that that is sufficient to support an injunction. The cause of action alleged is that the appellant company caused and procured a breach of contract on the part of Sampson by harbouring

(1) (1891) 2 Ch., 416.

(2) 91 R.R., 193.

him in that they retained him in their employ after they became aware that he was bound to the respondent company even if they did not know it before and thereby caused loss and damage.

The law on this subject is to be found in *Lumley v. Gye* (3) and subsequent cases and it has been exhaustively considered by the House of Lords in *Allen v. Flood* (4), *Quinn v. Leatham* (5) and *South Wales Miners' Federation v. Glamorgan Coal Co.* (6). Both parties also rely on *National Phonograph Co. v. Edison Bell Phonograph Co.* (7). In this last cited case an injunction was granted against the third party Company though no case was brought against the factors with whom the plaintiff company had a contract and against whom possibly there was no cause of action.

In *Allen v. Flood* (4) Lord Watson says: "There are in my opinion two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first case he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley v. Gye* (3), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."

The present case falls in my opinion within the first of the two cases enunciated. Even if the appellant company acted innocently in the first instance in believing that Sampson had terminated his contract with the respondent company, they were informed later that this was not the case and that his resignation had not been accepted. They could have easily verified the facts but they chose to refuse to dismiss him and to retain him in their employ. From that time onwards they were knowingly and for their own ends procuring him to continue to break his contract of service and also his contract

(3) 2 E. & B., 216. (4) (1898) A.C., 1. (5) (1901) A.C., 495.

(6) (1905) A.C., 239.

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not to serve anyone else, that is, to commit an actionable wrong. It is not necessary in my opinion that they should have originally induced him to commit this wrong knowing it was a wrong nor that they should have been guilty of any fraud or deceit in doing so. Sampson's contract was a continuing contract and every day that he broke it he committed a fresh breach. This they abetted him in doing and to the detriment of the respondent company. The matter is rendered clearer by a reference to Lord Macnaghten's speech in *Quinn v. Leatham* (5). Referring to the decision in *Lunley v. Gye* (3) he said: "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."

Mr. Justice Joyce in his judgment from which the appeal was laid points out that the expression "contractual relation" would not apply to the breach of any and every contract but he does not deny that it would apply to the breach of an express and binding contract and in the present case there was a valid and binding contract between Sampson and the respondent company and there was between them a contractual relation within the meaning of the rule laid down by Lord Macnaghten with which the appellant company has deliberately interfered. That they thereby caused not merely nominal damage is I think clear. Sampson was the Field Manager, a post requiring special knowledge and experience, and to deprive the respondent of his services was not merely to cause inconvenience and nominal damage but serious loss and substantial damage.

Lastly as to harbouring a servant that is clearly a cause of action for which there is the authority of *Blake v. Lanyon* (8) and many other cases.

It is urged that these authorities are ancient and of no authority at the present day but I can see no ground for holding that this would not afford a cause of action under the law

(8) 101 Eng. Rep., 521.

as it stands to-day. In Lord Halsbury's Laws of England, Volume 20, paragraph 623, it is said: "The action lies whenever one person is under contract to give his personal services, whether exclusive or otherwise, for the benefit of another, and is induced to break his contract by the procurement or encouragement of a third person." In paragraph 625 the case of harbouring is dealt with specifically.

For the above reasons I am of opinion that the injunction was rightly granted and the appeal fails and is dismissed. But plaintiff company only sought an injunction "during the period of the agreement" and the injunction will be amended and be granted until the suit is disposed of or up to the 1st March 1921 whichever shall first occur. Costs of this appeal Advocate's fee 5 gold mohurs will be allowed to the respondent company.

Heald, J.—I concur.

Before Mr. Justice Robinson, Chief Judge, Mr. Justice Maung Kin, and Mr. Justice Heald.

THE BURMA RAILWAYS COMPANY v. THE SECRETARY OF STATE FOR INDIA.*

Giles—for appellant.

McDonnell with *Mya Bu*—for respondent.

Indian Income-tax Act, 1918—section 9 (2)—Definition of "owner."

The Burma Railways Company, in appealing against their income-tax assessment, claimed that under section 9 (2) (i) of the Indian Income-tax Act, 1918, the annual value of their premises should be deducted from their profits before assessment. The Chief Revenue authority referred the following two questions for decision:—

(1) Are the Burma Railways owners of the railway system and all its premises for the purposes of section 9 (2) (i) of the Income-tax Act?

(2) Are the Burma Railways owners of the Railway system and all its premises in virtue of being partners with the Secretary of State for India?

Held,—*Per Robinson, C.J., and Maung Kin, J.*—As the expressions "owner," "ownership" and "to own" have not been defined in the Act it was apparently not the intention of the Legislature to give them a narrow and technical meaning of the full ultimate and legal owner

* Referred by the Financial Commissioner, Burma, under section 51 of Indian Income-tax Act, 1918.

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or ownership. Where buildings must be used to enable profits to be made or increased an allowance for them is just and reasonable and the justness of the claim to such an allowance of annual value does not depend on absolute ownership and such a claim will be equally just where it arises out of a lesser degree of ownership. Having regard to the object and intention of the Legislature the Burma Railways are owners of the Railway system and its premises for the purposes of the section.

Held,—per curiam—The Burma Railways are the agents, not the partners of the Secretary of State.

Per Heald, J.—The income under assessment is that of the Burma Railways Company as managing agents of the Burma Railways undertaking and not that of the undertaking itself. The Secretary of State is owner of the undertaking and all its premises and the position of the Company as managing agents cannot make them owners of the premises so as to entitle them to the deduction claimed when only their own income as managing agents and not that of the undertaking as a whole is being assessed.

Gilbertson v. Fergusson, (1880-81) L.R. 7 Q.B.D., 562 at p. 572—referred to.

Robinson, C.J.—This is a reference by the Chief Revenue authority under section 51 of the Indian Income-tax Act, 1918. Two questions are referred for decision:—

(1) Are the Burma Railways owners of the Railway system and all its premises for the purposes of section 9 (2) (i) of the Income-tax Act? and

(2) Are the Burma Railways owners of the Railway system and all its premises in virtue of being partners with the Secretary of State for India?

Section 5 of the Act divides income that is taxable into six different classes and the succeeding sections deal with each of such classes and allow certain deductions to be made from the income before the sum on which the tax is to be levied is fixed. The reference assumes that the income of the Burma Railways is derived from business. Section 9 deals with such income and grants allowances (1) any rent paid for the premises in which the business is carried on or (2) "where the premises are owned by the assessee the *bonâ fide* annual value thereof." The annual value it is declared in section 8 is to be deemed to be the sum for which the property might reasonably be expected to let from year to year.

The question we have to decide is what is the meaning to be given to the expression "owned," that is to say, must the assessee show that the full ultimate legal title rests

in him or was it intended that the allowance should be granted to an assessee holding only some lesser degree of ownership?

The rule for the interpretation of such statutes is laid down by Cotton, L.J., in *Gilbertson v. Fergusson* (1).

"I quite agree we ought not to put a strained construction upon that section in order to make liable to taxation that which would not otherwise be liable, but I think it is now settled that in construing these Revenue Acts, as well as other Acts, we ought to give a fair and reasonable construction, and not to lean in favour of one side or the other, on the ground that it is a tax imposed upon the subject, and therefore ought not to be enforced unless it comes clearly within the words."

There is another rule of interpretation which must also be borne in mind. Where the object and intention of the Legislature is clear and undoubted that meaning should be given when possible to the words used which will best carry out the clear object and intention.

It must be presumed that the Legislature was aware that the expressions "Owner," "ownership" and the verb "to own" in its various tenses have been frequently used in Acts of a similar nature and further that they can be and are used in various meanings in different Acts in some of which they have been specially defined for the purposes of particular sections. Nevertheless the expression has not been defined for the purposes of this Act. It may have the narrow and technical meaning of the full ultimate and legal owner but if this was intended it could easily have been expressed and the failure to do so points to its not having been so intended.

Next let us consider the object in view in granting these allowances. Where buildings are essential to the carrying on of a business and to the earning of profits therefrom, the rent of those buildings, which would ordinarily be paid from the profits made, are an essentially just and reasonable charge reducing the total of the profits. Without this expenditure on rent the profits to be taxed could not be made. Therefore it was realized that to allow a deduction of such rents was only

(1) (1880-81) L.R. 7 Q.B.D., 562 at page 572.

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just and the allowance is accordingly granted. Then where there are no rents paid but buildings are used which might otherwise be let out and so earn income, an allowance based on the amount that the buildings might reasonably be expected to let for is granted in lieu of the rents. The principle is that where buildings must be used to enable profits to be made or increased it is recognized that an allowance for them is just and reasonable. The justness of the claim to such an allowance of annual value in no way depends on absolute ownership and would be equally just when arising out of a lesser degree of ownership.

Suppose a father leaving the country hands over house property to his son but retains the legal ownership. He allows the son to take the profits so long as he bears the charges and gives him full powers of management. The son instead of leasing out the houses and taking the rents starts a business which he carries on in the houses. Could it be said that it was not intended that he should be entitled to deduct the annual value before the profits on which he was to be taxed were arrived at? I think not. All the grounds on which the allowance was sanctioned are present. He is in immediate possession and has full powers of management and control; he is entitled to take all the profits and has to bear all the charges. The only ground would be that the legal title still remained in the father and that a narrow and restricted interpretation of the section would give it to the father only.

It would be difficult to set out in detail the exact positions of the Burma Railways and the Secretary of State for India under the principal contract but there is no doubt what the position of the Railway for all practical purposes is. It has possession, control and management of the Railway system. It supplied and supplies the capital but it must when fresh capital or money is required obtain it primarily from the Secretary of State. On the determination of the contract the capital is refunded but the land, track, buildings, stations, yards, godowns, etc., are all to be made over to the Secretary of State. The provisions of clause 42 of the Contract have been much pressed upon us. By it all the property is declared to be "the property of the Secretary of State, but subject to the use and enjoyment thereof by the Company during the

continuance of this Contract." By clauses 47 and 48 all monies paid in are declared to be the absolute property of the Secretary of State. But it is not necessary in the view I take to continue the examination any further for even assuming that the ultimate legal title in the properties lies in the Secretary of State that does not decide the matter. The Railway is entitled to hold the lands, buildings, etc.; it has full management and control subject to certain supervision. It rents out house property and lands, erects buildings and generally manages the business as Agent for the Secretary of State. The use of the premises is essential to the earning of the profits. Applying the two rules of construction I have cited above it seems to me to be impossible to give a restricted meaning to the word "owned." It must be interpreted in a wide and popular sense and having regard to the object and intention of the Legislature, it is, I consider, clear that the Railway comes within the rule granting this allowance.

As to the question of a partnership that involves the finding that the Secretary of State has entered on a commercial undertaking and is not acting in exercise of his powers of government. The lands belong to Government and in the interests of the community the means of transport and communication were secured. To this end the Secretary of State entered into a contract to secure the working and extension of the Railway system. The contract speaks of the Railway as his Agent and this is the true view of the relationship of the parties. No doubt several of the features of a partnership are present. The Secretary of State supplies some of the property and also some of the capital on which he is to be paid interest and a share of the profits. But he has no concern in or liability for the losses if any and this fact strongly militates against a partnership. The relationship is in my opinion not that of partners but of principal and Agent. The Agent may have full and wide powers of management and control but he has none of the equal rights that a partner has and can be compelled to any line of conduct the Secretary of State may decide to be proper.

I would therefore answer the first question referred in the affirmative and the second in the negative.

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As to the costs of this reference the Secretary of State must pay the costs in this Court, Advocate's fee 10 gold mohurs.

Maung Kin, J.—I concur.

Heald, J.—The following questions have been referred to the Court by the Chief Revenue Officer under the provisions of section 51 of the Indian Income-tax Act, 1918:—

“(1) Are the Burma Railways owners of the Railway system and all its premises for the purposes of section 9 (2) (i) of the Income-tax Act”; and

“(2) Are the Burma Railways owners of the Railway system and all its premises in virtue of being partners with the Secretary of State for India?”

Section 9 of the Income-tax Act deals with the assessment of “income derived from business,” that is from any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture, and clause (2) (i) of that section says that in assessing the tax on such income a deduction from the income of the business is to be allowed, in cases where the person assessed pays rent, to the extent of the rent paid for the premises in which the business is carried on, and, in cases where the premises are owned by the assessee, to the extent of the *bonâ fide* annual value of the premises, that annual value for the purposes of the section being the sum for which the property might reasonably be expected to let from year to year.

The Burma Railways Company were assessed to tax on their income, and although it was not expressly so stated in the notice of demand, it may for the purposes of this reference be assumed that they were assessed on the basis that their income was “income derived from business.”

They objected to the assessments on the ground that the income of the business of the Railways, which is not assessed to income-tax, would, if assessed, have been entitled to a deduction of the *bonâ fide* annual value of the premises in which that business was carried on, and that therefore their private income, which is a share of the income of the Railways, ought to be regarded as being entitled to a corresponding deduction. Their claim as originally stated was not

a claim that the company were owners of the Railway premises and was not in fact a claim under section 9 (2) (i) of the Act. It was analogous rather to a claim under section 37, but so far as I can see it would not fall under any specific provision of the Act. It was however subsequently regarded by all parties as a claim under section 9 (2) (i), probably because there was no other section under which it could possibly be made, and the reference to this Court assumes that it is such a claim. It has been argued in this Court as a claim that the Company are owners of the premises of the Railways within the meaning of that section and for the purposes of this reference it must be taken to be such a claim.

The position of the Burma Railways Company in respect of the Railways is peculiar.

Up to the 31st of August 1896 the Railways were State Railways and were owned and managed entirely by the Secretary of State for India, but with effect from the 1st of September 1896 they were taken over and worked by the Burma Railways Company under a contract with the Secretary of State. The main terms of that contract, so far as they now concern us, are that the Railways as they then existed and all subsequent extensions and everything connected with the working of the Railways or extensions were to continue to be owned by the Secretary of State, that the entire capital of the Company was to be paid to him to be used for the purposes of the Railways and was to belong to him, that he was to supply all the capital required for extensions or capital works, either out of the capital of the Company or out of his own funds, that the Company were to have possession of all Railway lands and take over and manage the Railways and to construct, equip and manage such extensions as the Secretary of State might approve or direct, that the Secretary of State was to guarantee to the Company $2\frac{1}{2}$ per cent. on their share capital, that out of the "net revenue receipts," that is practically the net profits of the working of the Railways, the $2\frac{1}{2}$ per cent. paid by the Secretary of State to the Company as guaranteed interest should first be taken by him, that interest on the capital invested by him in the Railways should next be taken by him, that any surplus should be divided between him

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and the Company in certain proportions, and that on the termination of the contract the Railways should be handed back by the Company to the Secretary of State and the Company should receive back their capital in full. It was expressly provided in the contract that all the capital of the Company should become the absolute property of the Secretary of State, and that all profits from the Railways should also be his absolute property, subject in each case to the provisions of the contract. It was further provided that the Company should keep the Railways and all their equipment in good working condition and maintain a sufficient staff to the satisfaction of the Secretary of State, that he should have power to determine the situation and particulars of all works connected with the Railways, to prescribe routes and to require the Company to construct or acquire extensions, which extensions like the original Railways should be owned by him, and that the Company should obey and be absolutely subject to his orders in respect of practically every matter connected with the working of the Railways.

In support of the claim that the Company are owners of the Railway premises it is argued that the Company and the Secretary of State were partners and therefore joint owners of the premises, but in view of the terms of the contract set forth above, it seems to me impossible to hold that the relations between them were those of partners. "Partnership" is defined as "the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business and to share the profits between them," but that definition is subject to *provisos* that "a loan to a person engaged or about to engage in any trade or undertaking upon a contract with such person that the lender shall receive interest at a rate varying with the profits or that he shall receive a share of the profits does not of itself constitute the lender a partner," and that "no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall of itself render such servant or agent responsible as a partner therein or give him the rights of a partner." Under the contract between the present parties

the Company were to obey the orders of the Secretary of State and to act as his agent. They were to be remunerated by a share of the profits resulting from the working of the Railways, but they took no share in any loss which might result since interest on their capital and the capital itself were guaranteed by the Secretary of State. The Railways in their entirety were owned by the Secretary of State and the position of the Company was in my opinion that of a managing agent and not that of a partner. I would therefore give a negative answer to the second of the two questions referred to us and would say that the Company are not owners of the Railways or of the Railway premises in virtue of being partners with the Secretary of State for India.

But it is contended that although the Company may not be owners of the premises as being partners with the Secretary of State and although under their contract with him they may not be entitled to claim legal ownership, and may not be owners in any strict sense, nevertheless on a fair construction of section 9 of the Act they are entitled to be regarded as owners of the premises for the purposes of that section. It is therefore necessary to consider their claim to be "owners" in some looser or wider sense. It is, I think, clear that their position as managing agents, although it gives them possession of the premises, cannot give them ownership in any sense of the word. As managing agents they may of course be treated for many purposes as if they were owners, but they can be so treated only as representing their principal, and although they might on behalf of their principal be allowed to claim the deduction allowed by the section if the profits from the business of the Railways were being assessed, they cannot in my opinion be allowed to claim that deduction on their own account when only the income from their own business and not that of the undertaking as a whole is under assessment. It may be true that if the income from the business of the Railways were being assessed, a deduction of the annual value of the premises would have to be made, but it is not that income but the income of the Company which is being assessed, and there is in my opinion a clear distinction between the business of the Company, which is the management of the Railwa

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and the business of the Railways which is mainly the business of carriers. The Company may be owners of an office or other premises in which they carry on their own business as managers and if so they would doubtless be entitled to a deduction of the annual value of those premises from their income before income-tax could be assessed on it, but I cannot see that their position as managing agents of the business of the Railways gives them any claim to be regarded as owners of the premises in which that business is carried on.

It seems clear that the basis of their claim to be owners of the premises on their own account must be sought elsewhere than in their position as managing agents and the only possible basis for that claim which I can imagine is the fact that they supplied capital with which some of the premises may have been acquired. But they receive interest on that capital at a guaranteed rate which is not dependent on the profits or losses of the undertaking, and on the termination of the contract they take back their capital in full. They run no risk of losing either interest or capital even if the undertaking results in a loss or the premises are entirely destroyed. Under these circumstances I fail to see how they can possibly be regarded as having any kind of ownership in the premises. They are for all practical purposes in the position of an agent in possession of his principal's business premises who has lent money to his principal for the purposes of the business, and neither the fact that he is in possession as agent of the owner nor the fact that he has lent money to the owner gives him any real claim to be owner of the premises.

I am of opinion therefore that the Company are not owners of the premises within the meaning of section 9 (2) (i) of the Act, either by virtue of their possession, since that possession is that of a managing agent, or by virtue of their having contributed to the capital of the undertaking since they get interest on their capital and have no charge or mortgage on or other real interest in the premises.

I would answer the two questions referred as follows:—

(1) The Burma Railways Company are not owners of the railway system and all its premises for the purposes of section 9 (2) (i) of the Income-tax Act.

(2) The Burma Railways Company are not partners with the Secretary of State for India and are therefore not owners of the railway system and all its premises in virtue of being partners with the Secretary of State for India.

I would direct the Company to pay the costs of the reference in this Court.

Before Mr. Justice Higinbotham.

MA SAW YIN v. KING EMPEROR.*

Indian Penal Code, sections 182 and 211—False charge of offence—Appropriate section.

Where there have been Court proceedings in consequence of a report to the police, section 211 is the appropriate section to apply, and is so in any event where the case is a serious one; but this does not necessarily make a prosecution under section 182 illegal.

Queen Empress v. Raghu Tiwari, (1893) I.L.R. 15 All., 336; *Emperor v. Hardwar Pal*, (1912) I.L.R. 34 All., 522 at 526; *Emperor v. Sarada Prasad Chatterjee*, (1905) I.L.R. 32 Cal., 180 at 185; *Giridhari Naik v. Empress*, (1900-01) 5 C.W.N., 727; *Emperor v. Apaya Tatoba Mundi*, 15 Bom. L.R., 574; *Mi Ngwe v. Mi Chit*, (1910-13) 1 U.B.R. 134; (1872) 7 M.H.C., App. 5—referred to.

In this case the complainant lodged a false report with the police that certain persons had stolen, *inter alia*, some money and gold belonging to her. As she was not satisfied with the investigation by the police she also complained to the Magistrate. The Magistrate held that so far as the money and gold were concerned, and these seem to have been the most important portion of the alleged stolen property, the report and complaint were false. Proceedings were therefore taken by the police under section 182, Indian Penal Code, against the complainant.

It is suggested that the proceedings under section 182 are illegal and that proceedings under section 211, Indian Penal Code, should have been taken. The learned Sessions Judge has referred to certain rulings in support of this contention, but they do not seem to carry the matter as far as that.

The Allahabad High Court has held in the case of the *Queen Empress v. Raghu Tiwari* (1), that as soon as a false

* Reference made under section 438, Criminal Procedure Code, by J. P. Doyle, Esq., Sessions Judge, Prome, for review of the order passed by Maung Hla Pe, 1st Class Township Magistrate of Thegon,

(1) (1893) I.L.R. 15 All., 336

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report is lodged the offence under section 182 is complete and that criminal proceedings are not necessary to complete the offence. That the Magistrate has a discretion as to which section he will proceed under, but that proceedings under section 211 or 182 should not be commenced until the pending criminal proceedings instituted in consequence of the report have been disposed of.

In the case of the *Emperor v. Hardwar Pal* (2) in which Court proceedings had resulted from the report of the police, the same Court held that the offence of making a false charge falls under both sections. The Calcutta High Court in the case of the *Emperor v. Sarada Prasad Chatterjee* (3) after reviewing the authorities held that "The law still remains as it was laid down in I.L.R. 5 Cal., 184, and we entirely accept that view. That read with 7 C.L.R., 382, lays down that a prosecution for a false charge may be under section 182 or section 211 but if the false charge was a serious one the graver section 211 should be applied and the trial should be full and fair." The same Court in *Giridhari Naik v. Empress* (4) held that where a false charge is made to the police of a cognizable offence, the offence committed by the person making the charge falls within the meaning of section 211 and not section 182. The Bombay High Court has taken a different view of these sections and in the case of the *Emperor v. Apaya Tatoba Mundi* (5) has held that where the information to the police amounts to the institution of criminal proceedings, section 211 and not section 182 is applicable.

The Lower Burma rulings cited by the learned Sessions Judge deal with the question of the necessity for a sanction in cases where section 211 has been applied and none of them have held that a prosecution under section 182 is illegal because the offence also falls under section 211. The weight of authority seems to indicate that where there have been Court proceedings in consequence of a report to the police then section 211 is the appropriate section to apply, and is so in any event, where the case is a serious one. The only reported Burma case directly bearing on this point supports

(2) (1912) I.L.R. 34 All., 522 at 526

(4) (1900-01) 5 C.W.N., 727.

(3) (1905) I.L.R. 32 Cal., 180 at 185.

(5) 15 Bom. L.R., 574.

this view, *Mi Ngwe v. Mi Chit* (6). But this does not of necessity make a prosecution under section 182 illegal and the Madras High Court (7) has ruled that there is no error in the conviction under section 182 when the false charge before the police is punishable under section 211, and that it is a question of expediency whether the High Court will quash the conviction for the minor offence and direct a trial for the graver one.

I do not think that the present case which appears to have arisen out of a family squabble can be said to be serious. I also do not understand the Sessions Judge to say that the Magistrate had no jurisdiction to try the case summarily. On the view of the law as above stated, there also does not appear to be any illegality in the trial under section 182, and as substantial justice seems to have been done in this case, I see no reason to interfere with the conviction and sentence.

Before Mr. Justice Duckworth.

NGA PO KYIN v. KING-EMPEROR. *

Surti—for Appellant.

Government Advocate—for King-Emperor.

Code of Criminal Procedure, V of 1893—section 234—application of—Charge under minor offence—Conviction of graver offence.

The application of section 234, Criminal Procedure Code, is not limited to cases in which an accused is charged with several offences of the same kind against the same person; the section applies where the complainants are different persons.

A person cannot be convicted of a more serious offence than that with which he is charged.

Chattradhari Mian v. King-Emperor, 19 C.W.N., 557; *Musai Singh v. Emperor*, (1914), 41 I.L.R. Cal., 66; *Crown v. Chit Te*, 1 L.B.R., 287; *King-Emperor v. Po Yin and Tha Maung*, 3 L.B.R., p. 232—followed.

The Appellant Nga Po Kyin is the *ex-Headman* of Kadok in the Tharrawaddy District.

He has been convicted under three separate charges under section 468, India Penal Code, in regard to three Land Revenue Receipts, Exhibits A, C & E, which he is said to have forged, and he was sentenced to five years' Rigorous Imprisonment for each offence, the sentences to run concurrently.

(6) (1910-13) 1 U.B.R., 134. (7) (1872) 7 M.H.C., App. 5.

* Criminal appeal against the order passed by Maung E Cho, Special Power Magistrate of Tharrawaddy.

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*Criminal
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 EMPEROR.

The facts have been very fully set out in the lengthy judgment of the learned Special Power Magistrate, Tharrawaddy, and I see no reason to recapitulate them in detail here, but it is necessary to make it clear that the prosecution case is that the assessment rolls and the receipts were made over to the appellant when the entries were correct, and that the alterations of the amounts payable in both receipts and assessment rolls must have been made by the Headman himself, with dishonest intention, before he collected the amounts due from the persons concerned.

The learned Magistrate found that this was what had occurred.

Mr. Surti for the appellant appeals both on points of law and on matters of fact.

I will take the lawpoints at once. First he contends that it was illegal on the part of the Magistrate to try even three of the offences of which the appellant was accused (for there were more than three instances brought to light) in one trial, inasmuch as there was a different complainant in each case. In regard to this, it will be noted that though Maung Shwe Ngo, whose Revenue Receipt is Exhibit A, appears to have been protagonist in bringing the Headman to trial, the actual prosecutor was the Deputy Commissioner of Tharrawaddy, who in his capacity as District Magistrate took cognizance of the case under section 190 (1) (c), Criminal Procedure Code. Mr. Surti relied upon certain rulings, but it is not necessary to quote them, inasmuch as they are all dealt with in the case of *Chattradhari Mian v. King-Emperor* (1) in which it was decided that section 234, Criminal Procedure Code, is not limited to cases where the offence has been committed against the same person but that it applies where the complainants are different persons. The same principle is to be found in the recent case of *Musai Singh v. Emperor*, (2) though the actual case dealt with a different state of affairs. I accept the reasoning in the C.W.N. case already quoted as correct. It is moreover in accordance with the universal practice of the Courts in this country.

(1) 19, C.W.N., 557.

(2) (1914) I.L.R. 41 Cal., 66.

The second point taken up by Mr. Surti is that it was illegal on the part of the learned Magistrate to have convicted the appellant under section 468, Indian Penal Code, when he had only charged him with three separate offences under section 465, which he contends is a minor offence. Here I am of the opinion that he is right. If a person is charged with a major offence, or an aggravated offence of any kind, it is true that he can be convicted of a minor offence, but the converse does not hold good. An offence under section 465, Indian Penal Code, is punishable with a maximum penalty of 2 years' imprisonment, whereas an offence under section 468 is punishable with 7 years' imprisonment, and it is an aggravated form of forgery, which, in the present instance, the appellant was not called upon to meet. It is an accepted principle of law in India and Burma that a person cannot be convicted of a more serious offence than that with which he is charged whether on appeal or in the original Court. The point is that the person concerned has not had an opportunity of meeting the charge in question, so far as the facts, which render it more serious, or an aggravated offence, are concerned [see *Crown v. Chit Te* (3)]. Neither side has quoted any authority on the subject, but I am satisfied that the law is as stated. The correct course would have been to have amended the charge under section 227, Criminal Procedure Code, and to have acted under the subsequent sections. Further it is open to doubt whether in this instance section 236, Criminal Procedure Code, had any application. There could not have been any doubt in the Magistrate's mind as to the application of the law to the facts alleged. The case of *King-Emperor v. Po Yin and Tha Maung* (4) deals of course with the powers of Appellate and Revisional Courts, but in my view the principle involved here is the same.

(The remainder of the judgment being on facts is not published.)

(3) 1 L.B.R., 287.

(4) (1905-06) 3 L.B.R., p. 232.

Civil
1st Appeal
No. 17 of
1920.
December
8, 1921.

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice
Macgregor.

MAUNG SHWE THA v. MA WAING.*

MacDonnell—for appellant.

Keith—for Respondent.

Buddhist Law—Divorce—Division of property—

The rule by which *payin* property goes to the party who brought it to the marriage still applies even though the property may have been changed in form provided it has not been merged entirely in the jointly acquired property and so changed its character. Change of form does not affect the rule so long as the *payin* can be identified.

The husband can get only one-third of property inherited by the wife during coverture.

Maung Shwe Ngon v. Ma Min Dwe, S.J.L.B., 110 at 113; *Maung Ghit Kywe v. Maung Pyo*, II U.B.R. (1892-06), 184; *Ma Ba We v. Mi Sa U*, 2, L.B.R., 174; *Maung Po Sein v. Ma Pwa*, P.J.L.B., 403; *Kin Kin Gyi v. Maung Kan Gyi*, II U.B.R. (1902-03), Buddhist Law, Divorce, 1; *Mi Myin v. Nga Twe*, II U.B.R. (1904-06), Buddhist Law, Divorce, 19—referred to.

Robinson, C.J. and Macgregor J. :—Ma Waing sued her husband Ko Shwe Tha for divorce and partition of property. Ko Shwe Tha was appointed Receiver during the pendency of the litigation and a Commissioner was appointed to take evidence and accounts of the property brought by either party to the marriage, as to the property jointly acquired and as to the debts due. He submitted his report and the District Court heard and decided the objections of the parties thereto and passed a final decree.

This is an appeal from that judgment and decree.

The grounds of appeal refer to many matters of objection but Counsel for the Appellant stated that he was only able to press three points, namely, the liability for eight items of debts, the item of *payin* land being No. 1 (e) in the Lower Court's summary of his finding and the two pieces of land specified in the Court's summary as II (a) and (b).

Later, finding that the debts mentioned above were all created by Ko Shwe Tha after he obtained possession of the properties as Receiver the contention as to them was abandoned and need not be considered by us.

* Civil 1st Appeal against the decree passed by D. D. Nanavati, Esq., District Judge of Hanthawaddy.

As to the *payin* land the position is as follows. During her marriage Ma Waing inherited some land jointly with her brother Pa Nauk. Her half of this land was thus *lettetpwa* property but the other half she acquired by purchase from Pa Nauk. The money for this purchase was *payin*, that is, she had it by her at the time of marriage. It has been held that as the land was purchased with money that was her *payin* property the land, though bought during coverture, remains *payin* property. Appellant claims a half share in this land on the ground that it became jointly acquired property and was entered in the names of both. The question is whether the money being converted into land after the parties were married the property lost its character of *payin* and became *lettetpwa* for the purposes of partition of property on a divorce by mutual consent.

There are no authorities actually dealing with the point in connection with partition on a divorce by mutual consent. In connection with inheritance there are two rulings to which I will refer though the principle governing these cases is different from that before us as is pointed out in *Maung Shwe Ngon v. Ma Min Dwe* (1). In *Maung Chit Kywe v. Maung Pyo* (2) lands were sold and others bought and as the wife alone had property when the marriage took place it was held that the presumption was that the property was still her *payin* and not become *lettetpwa* though acquired during marriage. In *Ma Ba We v. Mi Sa U* (3) a contrary view was taken by a Full Bench of this Court.

In the preset case the facts are that both parties had been previously married and the wife alone brought property to the marriage. The husband asserts that he had property but he gave that away before this marriage to his children by a former marriage. The broad rule for division is clear and undoubted, namely, that each party to the marriage will take the property (*payin*) which he or she brought to the marriage. If that property is preserved in the form it originally held the party bringing it in will take it away and this being the intention of the law there does not seem to be any adequate reason why

(1) S.J.L.B., 110 at 113

(2) II U.B.B. (1892-96), 184.

(3) 2 L.B.R., 174.

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if the property is changed in form but is still recognizable it should be governed by a different rule. In the extract from the *Kungyalinga* in the *ex-Kinwun Mingyi's Digest*, section 257, it is ruled:—"If the husband and wife, both of whom have been previously married, mutually consent to divorce let each take the property (*payin*) which he or she brought to the marriage, and that obtained from his or her parents, (that is to bring to the marriage) although the nature of such property may have changed by using it for purposes of trade The property acquired jointly shall be divided equally between them."

Again in section 264 of the Digest dealing with the distinction between *payin* and jointly acquired property we find the following passage from the same Dhammathat:—

"The rule of partition on divorce when the nature of the property (*payin*) brought by either to the marriage has changed or has merged into jointly acquired property, is laid down above (section 257), such property shall always be obtained by its respective owners."

The profits arising from this land may be *lettetpwa* and the husband may be entitled to a share in them but there is clear indication in the Dhammathats, it appears to me, that *payin* property is to go to the party who brought it to the marriage and that this rule is still to apply even though the property may have been changed in form provided it has not been merged entirely in the jointly acquired property and so changed its character. Change of form does not effect the rule so long as the *payin* can be identified. It can in no sense be regarded as jointly acquired and especially so in such a case as this where the husband had no property at all. I can see no force in the argument that it should be regarded as jointly acquired because it stands in the names of both husband and wife. When bought it was entered in the wife's name alone. Later it is true that the names of both were shown but the change was only made at the request of the husband.

As regards this land therefore I am of opinion that it was rightly held to be *payin* of the wife in which the husband was entitled to no share.

As regards the other half it was inherited by the wife during coverture and the husband has been allowed a one-third share in it. He claims a half.

The rule is given in the Manugye as follows:—"Property acquired and debts contracted by the husband and wife are of two kinds, namely, property and debts inherited after marriage by either from his or her parents and property acquired and debts contracted while they are working jointly for their mutual benefit. In the case of the first, if it is the husband who so inherits, let him take two shares of the property and liquidate two shares of the debts and let the wife have one share of the property and liquidate one share of the debts. If it is the wife, let her receive and pay two shares." In *Maung Po Sein v. Ma Pwa* (4) it is pointed out that the rule as to equal division upon divorce applies only to property conjointly acquired after marriage. That the husband in such a case as this can only get a one-third share is laid down in *Kin Kin Gyi v. Maung Kan Gyi* (5) and again in *Mi Myin v. Nga Twe* (6). There is thus ample authority to show that the decision of the Court below was correct.

The rule of dependence has also been referred to. It is clear that it cannot be invoked by the husband. He had property but did not bring it to the marriage. He deliberately gave it away. But in any case it would not increase his share. The appeal therefore fails; it must be dismissed with costs in this Court.

(4) P.J.L.B., 403.

(5) II U.B.R. (1902-03) Bud. Law, Divorce, 1.

(6) II U.B.R. (1904-06) Bud. Law, Divorce, 19.

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MAUNG
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v.
MA WAING.

Civil
1st Appeal
No. 86 of
1919.

Before Mr. Justice Robinson, Chief Judge, and
Mr. Justice Heald.

January 17th,
1921.

MA NGWE HNIT v. (1) MAUNG PO HMU, (2) MAUNG AUNG BA, (3) MAUNG PO HLA, (4) MAUNG PO THA, (5) MA MAI TIN, (6) MA NYEIN, (7) MAUNG BA TIN, (8) MAUNG KYAW ZAN, (9) MAUNG PO THAING, (10) MAUNG LU BU, (11) MA MYA BY GUARDIAN *ad litem* MAUNG PO HTE, (12) MA KIN SAW BY GUARDIAN *ad litem* MAUNG PU, (13) MAUNG PO THIT, (14) MAUNG THA WA.*

Ba U—for appellant.

Mya Bu—for 5th, 11th and 12th respondents and other respondents being called and not appearing.

Buddhist Law—Divorce—Husband previously married—Wife a spinster at time of marriage—Division of property.

A, widower, married B, a spinster. After several years they were divorced by mutual consent without any fault on either side. B sued for her share in the *payin* property.

Held,—that the relation of *nissaya* and *nissita* existed and that there was no justification for applying a different rule in the case of a woman who had not been married before because the husband had been previously married. The rule to be applied was the rule laid down for the case where neither party had been married before and B was entitled to one-third of the *payin* property.

Ma Dwe Naw v. Maung Tu, S.J.L.B., 14; *Mi Myin v. Nga Twe*, (1904-06) 2 U.B.R., Div., p. 19; *Ma E Nyun v. Maung Tok Pyu*, (1897-01) 2 U.B.R., Div., page 39—referred to.

Robinson, C. J. :—U Ma La, an old man of 70 years of age, who had been previously married, married Ma Ngwe Hnit, a spinster, age 38. U Ma La was a rich man. Ma Ngwe Hnit was poor and brought nothing to the marriage. The marriage was arranged by the elders, and Ma Ngwe Hnit no doubt claimed that a substantial *kanwin* should be settled on her. On the day of the marriage U Ma La merely sent over Rs. 450 whereas he had promised to give 40 acres of paddy land. Ma Ngwe Hnit objected, and the elders went to U Ma La and obtained from him a document purporting to transfer about 44 acres of paddy land. The marriage then took place. After a few years there was a divorce by mutual consent without any fault on either side. She then brought a suit to recover her *kanwin* and her

* Civil 1st Appeal against the decree passed by Maung Ba U, Additional District Judge of Ma-ubin.

share in the *payin* and *lettetpwa* properties. The learned District Judge has held that the document transferring the 44 acres of paddy land not being registered is void and of no effect and that she has no claim to these as *kanwin*. As regards the *payin* property he held following the decision in *Ma Dwe Naw v. Maung Tu* (1) that on a divorce each party takes his or her own *payin*, and dismissed this portion of her claim. As regards the *lettetpwa* properties he held that as the debts greatly exceeded the property there was none to divide and further that she had taken at least Rs. 1,000 worth of property with her when she left after the divorce. An appeal has been filed as regards the findings. That as regards the *kanwin* property has been abandoned and also as regards the *lettetpwa* properties as a decree even if obtained would be worthless. The appeal is however pressed as regards the finding in respect of the *payin* property, and it is as to that alone that we have to come to a decision.

The decision relied on by the learned District Judge does not show whether both of the parties had been previously married or not. The decision is based on Chapter 12 of the *Manukye*, section 3, and if the parties were both *eindaunggyis*, this decision may have been correct, but as it does not appear whether they were so or not, it is of very little assistance to us in the present case. The law as to the division of property on a divorce by mutual consent, neither party being in fault, is to be found in Chapter 12, section 3 of the *Manukye*. Neither the translation in Richardson's work nor that in the *Kinwunmingyi's Digest* is correct, and Sir George Shaw in *Mi Myin v. Nga Twe* (2) has given [what he offered as a correct translation of the relevant parts of this section and that translation is according to Mr. May Oung in his work at page 110 undoubtedly correct. Taking that translation we find that two cases are provided for; where neither party had been married before and the separation is by mutual consent without fault on either side, and the relation of *nissaya* and *nissita* existed, the *payin* property is to be divided in the proportion of two-thirds to one-third. The second case provided for is where both parties had been married before and separate by mutual

(1) S.J.L.B., 14.

(2) (1904-06) 2 U.B.R., Div., p. 19.

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 HMU.

consent with no fault on either side. Each party then takes his or her own *payin*. There is practically no provision in the Dhammathats for a case such as that before us where the wife is a spinster and the husband a widower at the time of their marriage. Counsel for the appellant urges that the relation of *nissaya* and *nissita* is clearly established in this case and that the rule to be applied as regards the division of the *payin* is that prevailing in a case where neither party had been previously married. Counsel for the respondent on the other hand urges that the rule to be applied should be that prevailing in the case where both parties had been previously married.

There are two authorities to which I will refer. Both are cases in which the husband was in fault having been guilty of a matrimonial offence, but in both the husband had been previously married while the plaintiff was a maiden at the time of the marriage. In *Ma E Nyun v. Maung Tok Pyu* (3) Sir Herbert Thirkell White says as regards the division of the *payin*: "So far as can be ascertained, there is no authority in the texts or elsewhere by which this question can be decided. The texts deal with divorces between persons who have both been married before; with divorces between persons neither of whom have been previously married; and in certain circumstances, other than those of the present case between persons of whom only one has been married before. It is for the Courts to extract, if possible, an equitable rule from such analogies as the texts and decisions may afford. I think it may be assumed that the position of the wife in this case is probably more favourable, certainly not less favourable, than that of the wife when both were previously unmarried or when both had married before." At the end of his judgment he holds, "It may, however, be laid down with certainty that the decision is within the law, that the rules regulating the divorce of a husband and wife not previously married should be applied to cases in which one of the parties to the marriage has been previously married and the other has not been married before." The other case is the one to which I have already referred—*Mi Myin v. Nga Twe*. In that the learned Judge said that the

(3) (1897-01) 2 U.B.R., Div., p. 39.

rule of *nissaya* and *nissita* seems to be equally applicable to persons who have been married before, and he suggests that the ordinary rule of partition in the case of person previously married, *viz.*, that each takes his or her *payin*, is probably based on the assumption that such persons ordinarily both bring *payin* to the second marriage.

In the present case it is perfectly clear that U Ma La brought considerable *payin* property to the marriage and that Ma Ngwe Hnit brought none and therefore the relation of *nissaya* and *nissita* clearly existed. Had U Ma La not been previously married Ma Ngwe Hnit would have been entitled to one-third share in that *payin*. In the present case, if any other rule were adopted, it would be in the words that Sir Herbert Thirkell White used in *Ma E Nyun v. Maung Tok Pyu* certainly unjust to give the husband the benefit of his previous marriage and to deprive the wife of the benefit of her previous maidenhood. In my opinion the fact that the husband in this case has been guilty of no matrimonial fault is not a sufficient reason for depriving the wife of all share in the *payin*, especially considering the circumstances of the case and the conduct of the husband. It appears to me that there is considerable force in the suggestion of Sir George Shaw that the rule laid down in the *Manukye* as regards persons both of whom had been previously married was based on the assumption that both brought property to the marriage. Further there seems to be no justification for applying a different rule where the relation of *nissaya* and *nissita* existed in the case of a woman who had not been married before because the husband had been previously married. Under section 261 of the Digest a provision is made for the case of a man who had previously married marrying a spinster and divorcing her not long after the marriage and before there was time for any property to have been jointly acquired by them. It allows the wife compensation, and it appears to me that all these provisions point to a recognition of the necessity of making a husband, who is able to do so, provide for a wife who comes to the marriage with nothing.

For the above reasons I would hold that in the case where the wife is a spinster but the husband had been previously

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married, where the husband brings *payin* to the marriage and the wife nothing, the rule to be applied is the rule laid down for the case where neither party had been married before and separate by mutual consent without fault, and where the relation of *nissaya* and *nissita* exists, and I would only add that U Ma La's conduct in respect of the *kanwin* promise renders the application of this rule more than equitable. The appeal therefore should, in my opinion, be accepted to the extent of allowing the wife's claim to one-third of the *payin* property, and I would also allow her the costs of this appeal.

Heald, J.—I concur.

Criminal
 Appeal No.
 167 of 1921.
 April 29th,
 1921.

Before Mr. Justice Heald.

NGA BA TU v. KING-EMPEROR.*

Indian Penal Code, section 304—Culpable homicide not amounting to murder.

A, who professed by tattooing to render persons immune from the effect of snake bite, caused a poisonous snake to bite B whom he had tattooed and B died. A was convicted under section 304, Indian Penal Code.

Held,—that the burden of proving that he was justified in believing and did believe that he could give immunity lay on A, and that as he failed to discharge the burden, he was rightly convicted under section 304, Indian Penal Code.

The Queen v. Poonai Fattemah, 12 Sutherland's Weekly Reporter, Criminal, page 7=3 Bengal Law Reports (A.C.), 25; *The Empress v. Gonesh Dooley*, (1880) I.L.R. 5 Cal., 351; *Queen Empress v. Nga Po Kyin*, U.B.R. (1897-01), Vol. 1, page 298 at page 307; *Nga Po Kyaw and others v. King-Emperor*, U.B.R. (1902-03), Vol. I, Penal Code I; *Queen Empress v. Jamaludin*, Bom. Unreported Cases (1892) 603; *Pika Bewa v. Emperor*, I.L.R. 39 Cal., 855; *Emperor v. Ramava Channappa*, 17 Bom. Law Reporter, 217; *Queen Empress v. Kangla* (1898), All., W. Notes, 163; and *Shwe Kin v. King-Emperor*, 8 L.B.R., 166—referred to.

Appellant, who professed to be able by tattooing to render persons tattooed by him immune from the effect of snake bite, tattooed a number of villagers and then allowed a poisonous snake, which he was himself handling, to bite one of them. The man who was bitten died at once, although appellant tattooed him again after he was bitten. Appellant has been convicted of culpable homicide not amounting to murder and sentenced to three years' rigorous imprisonment.

* Criminal Appeal against the sentence passed by H. C. Moore, Esq., I.C.S., Sessions Judge of Myaungmya.

He appeals and his appeal has been admitted in order that the correctness of the conviction under section 304 may be considered.

In the text books two old Indian cases are cited as authority for holding that the offence in such cases is culpable homicide.

The first of these is the case of *Poonai Fattemah* (1) which was decided in 1869. In that case the accused, who professed to be snake charmers, persuaded a number of coolies to allow themselves to be bitten by a venomous snake, believing that they would be protected by charms. Three of the persons who were bitten died, and the Court held that the offences would have been murder but that the persons whose death was caused took the risk of death with their own consent. By reason of that consent the offence was held to be reduced to culpable homicide not amounting to murder and the accused were sentenced to five years' rigorous imprisonment.

The second case was that of *Gonesh Dooley* (2) decided in 1879, and was very similar to the present case. There two snake charmers were giving a performance before a crowd and put a snake on a boy's head. The boy tried to push away the snake and was bitten on the hand so that he died. It was held that the snake charmers did not think that the snake would bite the boy but that nevertheless their act was done with the knowledge that it was likely to cause death, though not with the knowledge that it was so imminently dangerous that it must in all probability cause death. The accused were therefore convicted of culpable homicide not amounting to murder, and the principal offender was sentenced to three years' rigorous imprisonment.

A case which was somewhat similar in principle, though the facts were different, arose in Lower Burma in 1881 (3). There one Aung Ban told his companions that if they were tattooed by him in a certain way they would be miraculously loosed from bonds. One of them, after being tattooed by him in that way, agreed to be bound hand and foot and dropped overboard from a boat. He was drowned, though his

(1) 12 Sutherland's Weekly Reporter, Criminal, page 7=3 Bengal Law Reports (A.C.) 25.

(2) (1880), I.L.R. 5 Cal., 351.

(3) U.B.R. (1897-01), Vol. 1, p. 298 at p. 307.

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companions including Aung Ban made efforts to rescue him when they found that he did not come to the surface. Aung Ban was found guilty of culpable homicide not amounting to murder and was sentenced to three years' rigorous imprisonment.

In an Upper Burma case (4) superstition played a somewhat similar part. A young woman consented to be beaten by a "saya" in order to exorcise an evil spirit of which she was believed and believed herself to be possessed. She was given more than 100 strokes with a cane and died of exhaustion. The "saya" and his companions were convicted under section 304A and not under section 304 and the principal offender was sentenced to six months' rigorous imprisonment. Dr. Gour (Penal Law, 2nd Edition, page 1322) is however, of opinion that that decision was wrong and in a somewhat similar case in India (5) the accused were convicted under section 304 and sentenced to three years' rigorous imprisonment.

There are several Indian cases (6) in which death was caused by the administration of poison in the belief that it was a philtre and in those cases it was held that the offence fell under section 304A, but on the other hand there is a case (7) in which the accused struck a white object at night, believing it to be a ghost, and found that he had killed his friend, and in that case he was convicted under section 304 but sentenced to only two months' rigorous imprisonment.

In *Shwe Kin's* case (8) a man who cut another with a *da* believing that by reason of charms the man whom he cut was proof against such injury was acquitted by this Court, although the man who was cut died, the grounds of the acquittal being that the deceased believed that he was proof against *da* cuts and offered himself to be cut, and that the accused also believed that the man was invulnerable.

The real question which arises in such cases is whether the act was done with the knowledge that it was likely to cause death, or that it was so imminently dangerous that it

(4) U.B.R. (1902-03), Vol. 1, Penal Code, 1.

(5) Bom. Unreported Cases (1892), 603.

(6) e.g. 39 Cal., 855, 17 Bom. Law Reporter, 217.

(7) All. W. Notes (1898), 163.

(8) 8 L.B.R., 166.

must in all probability cause death. In considering that question the learned Judicial Commissioner of Upper Burma in Aung Ban's case said: "The believer in miracles must, before he proceeds to imminently dangerous actions, be as diligent, as careful, as full of good faith as anybody else. Before putting his belief to any irrevocable test, he ought to verify . . . Men must act with ordinary circumspection and on reasonable beliefs, although, so long as they confine themselves to mere belief and do not proceed to action or omission, they may hold what beliefs they please. . . I do not suppose that prisoner had altogether given up his belief in a natural order. I think he must have known that "the act was so imminently dangerous that it must in all probability cause death," and that words "in all probability" must be taken objectively, *i.e.*, with reference to the facts of the world in which we live, not with reference to prisoner's mere opinion or belief about them." On these grounds he agreed with the earlier rulings to the effect that the offence would have amounted to murder but for the consent given by the deceased.

With all due respect for so eminent an authority, I find it difficult to accept this view in its entirety. Knowledge is essentially subjective not objective, and if a man really believes that a certain result will not follow, I fail to see how he can be held to know that it is likely to follow. Suppose for instance that a number of men are swimming together and some of them in fun push one of their companions under water and he is drowned. They must of course be held to know that a person pushed under water is likely to be drowned, but they also know that their companion can swim, and I doubt whether they could be found guilty of more than a rash and negligent act not amounting to culpable homicide. Similarly in the present case, appellant must have known that a person who is bitten by a poisonous snake is likely to die, but he also knew that the deceased had been tattooed by him and if he really believed that his tattooing gave immunity, the two cases would seem to be very nearly parallel. But the burden of proving that he was justified in believing and did really believe that his tattooing gave immunity was on him, and in this particular case I am inclined to agree with the learned Sessions Judge

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that he failed to discharge that burden. He called one witness who swore that after he had been bitten by a cobra, appellant tattooed him and he suffered no ill-effects from the bite, but even if that evidence is true, which there is reason to doubt, it would not prove that the immunity was due to the tattooing. He also called a woman who swore that appellant tattooed her small son, aged two, and then allowed him to handle a cobra, which bit him on the arm. The arm swelled and appellant treated it, and the child did not die. I doubt whether as a result of two such experiences appellant could really have believed that he was able to produce immunity from the effects of snake bite, and therefore I agree with the Sessions Court that he failed to show that the natural presumption of knowledge did not apply to him. Under these circumstances although I am inclined to think that if appellant had been able to prove that he honestly believed himself to be able to produce immunity he would have been guilty merely of a rash and negligent act not amounting to culpable homicide, I am of opinion that in this particular case he was rightly convicted of culpable homicide not amounting to murder because he caused death by an act done with the knowledge that it was likely to cause death but had neither the intention nor knowledge necessary to make his offence murder. Under these circumstances I am not prepared to hold that a sentence of three years' rigorous imprisonment was unduly heavy and I dismiss the appeal.

Civil and
 Appeal
 No. 167 of
 1920.
 May 2nd,
 1921.

Before Mr. Justice Maung Kin.

MAUNG PO THIN v. 1. KO THA YE, 2. KO AT GYI
 3. MA HLA BYU, 4. MAUNG PO BYU, 5. MAUNG E.*

Chari—for Appellant.

Kyaw Htoon—for Respondents.

Civil Procedure Code, section 11—Suit based on declaratory decree—Maintainability of—

A declaratory decree having been passed in an administration suit, a fresh suit was filed praying that the shares declared by the decree be distributed under the orders of the court. The Court held that the suit was *res judicata* by reason of the former administration suit.

* Second appeal from the decision of W. Carr, Esq., Divisional Judge of Hanthawaddy, confirming the decree of Maung Kyaw, District Judge of Insein.

Held,—that as the decree in the administration suit was declaratory and the plaintiff had therefore no remedy by way of execution of the decree, a suit based on the decree was maintainable and was not *res judicata*.

Lakhrani Kuar v. Dhanraj Singh, (1916) 14 A.L.J.R., 102; *Attermoney Dossee v. Hurry Dos Dutt*, (1881) I.L.R. 7 Cal., p. 74; *Kalicharan Nath v. Sukhoda Sundari Debi*, (1915) 20 C.W.N., 58; *Manchharam Kalliandas v. Bakshe Saheb Mir Mainudin Khan*, 6 Bom. H.C.R., 231; *Pritchett v. English and Colonial Syndicate*, (1899) 2 Q.B. 428; *Grant v. Easton*, 13 Q.B.D., 302; *Gustave Nouvion v. Freeman*, 15 Appeal Cases, 1; *Pemberton v. Hughes*, (1899) 1 Ch., 781; *Hodsoll v. Baxter*, E. B. & E., 884 (E.R., 120., p. 739); *Williams v. Jones*, 13 M. & W., 628; *Fakirapa v. Pandurangapa*, (1882) I.L.R. 6 Bom., 7—referred to.

There was an administration suit in respect of the estate of Ma Nyein, deceased. Eventually the case came up to this Court on appeal with the result that a decree declaring the shares of the heirs to the estate, the amount of the funeral expenses and the costs to be paid was passed. The successful party then applied to the Original Court for an order appointing a Receiver with power to distribute the shares to the heirs. That Court passed the order prayed for. One of the parties to the suit then appealed from this order to the Divisional Court, and that Court held that the decree of this Court was merely declaratory and was therefore incapable of execution and that the remedy of the successful party was to have the decree amended or to proceed by a regular suit.

Ko Ne Dun was one of the heirs to the estate, as declared by the decree. He had died during the proceedings, and after the disposal of the said appeal to the Divisional Court the heirs of Ko Ne Dun assigned their shares in his share in the said estate to Maung Po Thin.

Maung Po Thin then filed the present suit praying that a distribution should be made of the shares declared by the decree in the said administration suit. The trial Court held that the suit was *res judicata* by reason of the former administration suit. The appeal to the Divisional Court was dismissed on the same ground.

It appears to me that the point for decision is very simple.

The declaratory decree is binding on the parties to the administration suit and their representatives in interest. The decision as to the shares of the heirs will be *res judicata* if the present plaintiff asks for a fresh decision on the same point. It is obvious that he does not. He holds himself bound by that

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decision, but as the decree was declaratory in form, he could not execute it and he therefore files the present suit based upon the decree praying that the shares declared by the decree may now be distributed under the orders of the Court.

The question, then, is whether this suit to enforce the rights declared by the decree will lie.

In *Lakhrani Kuar v. Dhanraj Singh* (1) Walsh, J., held that such a suit will lie, provided the decree cannot be enforced in some other way. He relies on the cases of *Attermoney Dossee v. Hurry Dos Dutt* (2), *Kalicharan Nath v. Sukhoda Sundari Debi* (3) and *Manchharam Kalliandas v. Bakshe Saheb Mir Mainudin Khan* (4), in which cases the general principles on the subject are dealt with. Walsh, J., also held that there is nothing in the Civil Procedure Code which indicates that such suits are not admissible in India.

In *Kalicharan Nath v. Sukhoda Sundari Debi*, Mukerjee and Beachcroft, JJ., observed that it was not necessary for the purposes of the case under consideration to enter upon a discussion of the circumstances under which a suit would lie upon a judgment in British India, but that an examination of certain cases cited therein, of which *Attermoney Dosee v. Hurry Dos Dutt* is one, showed that there was considerable divergence of judicial opinion upon the subject and that the Courts were by no means agreed as to the circumstances under which a suit may be instituted in this country on what may be called a domestic as distinguished from a foreign judgment. It was well known that in England there had been divergence of judicial opinion on the subject (Freeman on Judgments, Chapter 17, Black on Judgments, Chapter 24) and it was only in recent years that the principle had been adopted that although an action lay on a judgment which finally established a debt, whether the judgment be English or foreign, it would be an abuse of the process of the Court to bring an action upon an English judgment, if it can be enforced in some other way. The cases of *Pritchett v. English and Colonial Syndicate* (5), *Grant v. Easton* (6), *Gustave Nouvion v. Freeman* (7),

(1) (1916) 14 A. L.J.R., 102.

(3) (1915) 20 C.W.N., 58.

(5) (1899) 2 Q.B., 428.

(2) (1881) I.L.R. 7 Cal., p. 74.

(4) 6 Bom. H.C.R., 231.

(6) 13 Q.B.D., 302.

(7) 15 Appeal Cases, 1.

Pemberton v. Hughes (8) and *Hodsoll v. Baxter* (9) were cited as showing the recent tendency of the English Courts to recognise an action on a judgment establishing a debt with the limitation referred to. On reference to Halsbury's Laws of England, Volume 18, page 219, the following passage is found:—
 "An action will lie on a judgment which finally establishes a debt, whether the judgment be English or foreign. Foreign judgments can be enforced in this country (England) in this way alone, but if an English judgment can be enforced in some other way, it is an abuse of the process of the Court to bring an action upon it. . . . The right to sue on a judgment becomes statute barred in 12 years." The English cases cited by the learned judges as shown above are given in the foot-notes as authorities for the propositions contained in this passage. Thus it seems that whatever might have been the law in early times, the passage in Halsbury ought to be regarded as embodying the law of recent times. The passage quoted by the learned judges of the Calcutta High Court from the judgment of Baron Park in *Williams v. Jones* (10) is very significant:—
 "The principle is that where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another a legal obligation arises to pay that sum on which an action of debt to enforce the judgment might be maintained." And the learned Judges proceeded to say, "No mischief can result from the acceptance of this principle, if it is adopted subject to the qualification recognised in modern English Law, namely, that an action is permissible only where the judgment cannot be enforced in some other way." In *Manchharam Kalliandas v. Bakshe Saheb Mir Mainudin Khan*, the Chief Justice of Bombay recognised the principle that judgments and decrees may be sued upon when it is the only practicable remedy open.

In *Fakirapa v. Pandurangapa* (11) it was held by a Bench of the Bombay High Court that a suit will not lie upon a decree the execution of which is barred by the provisions of the Limitation Act. There are other cases which express the same view, but it does not appear to be necessary to refer to them in

(8) (1899) 1 Ch., 781.

(9) E.B. & E. 884 (E.R., 120, p. 739). (10) 13 M. & W., 628.

(11) (1882) I.L.R. 6 Bom., 7.

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this case, because the decree in question is not capable of execution, so that there is no question that the plaintiff has no remedy by way of execution of the decree.

In the present case there is no question of limitation arising with reference to the suit or in any other way. The plaintiff only says: "I have a decree declaring certain rights in my favour, but I cannot execute it, because it is not capable of execution. I therefore, by this suit, ask for the enforcement of the rights declared by the decree." The principles above cited from English Law are in favour of recognising a suit of this kind. There can be no mischief resulting from its acceptance, because it is clear that there is no other way of enforcing those rights. The learned Counsel for the respondents pointed out that the plaintiff should have come to this Court and asked for an amendment of the decree and that the prayer would have been granted, because from the judgment of the Court it was clear that the Court intended to pass an administration decree. The plaintiff might have done this if he liked, but he was not bound to do so, and in considering the question of the maintainability of the suit the Court is not at liberty to say to him that the suit would be dismissed and that he should go and ask that the decree be amended into one for administration. We are not concerned with what he might have done before he filed the suit. We are only concerned with the decree as it stands and we are to say whether the suit for the enforcement of the rights under the decree will lie or not, and I think it would lie if the plaintiff could not have the rights enforced in some other way. There appears to me to be no other way. I would therefore hold that the suit was not *res judicata*.

For these reasons the judgments and decrees of the Lower Courts are set aside. The respondents will pay costs throughout. The proceedings are remanded for trial on the remaining issues. As the appeal is on a preliminary issue, the appellant will be granted a certificate under section 13 of the Court Fees Act for the return by the Collector of the Court fee paid on the appeal.

Before Mr. Justice Robinson, Chief Judge,
and Mr. Justice Heald.

S. R. M. M. CHETTY FIRM 2. S. R. M. R. M. CHETTY
FIRM v. P. L. N. N. NARAYANAN CHETTY.*

Burjorjee—for Appellants.

Das—for Respondent.

Civil
Revision
No. 82

1920

February
21st,
1921.

Civil Procedure Code—section 115. *Revisory powers of High Court*
—*Interlocutory orders.*

The Court has power under section 115 of the Code of Civil Procedure to deal with interlocutory orders and may set aside such an order when no appeal lies directly from the order and sufficient grounds exist peremptorily calling for its interference even though the substance of the order may be one that could be brought up on appeal from the final decree in the suit but the Court should not as a rule interfere with orders passed in the exercise of a discretion when there has been some attempt to exercise that discretion judicially, and it should not interfere unless irreparable damage would be caused by its refusal.

Dhapi v. Ram Pershad, (1887) I.L.R. 14 Cal., 768 followed.

Amjad Ali v. Ali Hussain Johar, 15 C.W.N. 353; *Chandi Ray v. Kripal Ray*, 15 C.W.N., 682; *Motilal Kāshibhai v. Nana*, (1894) I.L.R., 18 Bóm. 35; *Maharaja Sir Rameshwar Singh Bahadur of Darbhanga v. Sadanand Jha and others*, 55, Ind. Cas., 445; *Sawan Singh v. Rahman*, 55 Ind. Cas., 739; *Rameshwar Narayan Singh v. Rikhanath Koeri*, 58 Ind. Cas., 281; *V. V. M. Chetty Firm v. R. M. A. R. Arunachallum Chetty*, 8 L.B.R., 77—referred to.

Robinson, C. J. and Heald, J.:—The sole question for decision in the suit out of which this application arises was whether a document purporting to transfer certain properties to the firm of S.N. was *benami* or not. Issues were fixed in the case on the 22nd June 1918 and on the same day the present petitioner applied for the issue of a Commission to examine five witnesses and six of the defendants. The Court refused to issue commissions for the examination of the defendants on the ground that it was most important in order to watch their demeanour to have them examined before the Court itself. An order was passed granting commissions for the examination of the witnesses. A fortnight or so later respondent's counsel applied for an order that the commission should not issue until the defendants had been examined in Court, and on the 1st March 1919 the Court passed an order in terms of the prayer. The present petitioner came up to this Court on revision, and the revision was

* *Civil Revision of the order passed by the District Judge of Pyawón.*

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rejected but it resulted in great delay in proceeding with the suit. Two of the defendants were then examined, and on the 2nd of August 1919 an order was passed granting the issue of commissions for the examination of the plaintiff's witnesses at the same time as the commission for the defendant's witnesses should issue. On the 21st May 1920 the Court again refused to allow commission to issue for the examination of the other defendants who had by that time returned to Madras. Much time had elapsed since the list of witnesses to be examined on commission was originally made out. The examination of the defendants and their cross examination elicited a large number of accounts and documents, and for the present petitioner it was said that it was essential to examine many more witnesses to prove handwritings and to prove various accounts and that they were kept in the ordinary course of business. Many of these witnesses, who had at the time of the first application been present in Burma, were then absent in Madras and the pleaders for both parties filed lists of witnesses whom they wished should be examined on commission in Madras. The Court passed an order of a very diffuse and rambling character. The Judge appears to have made up his mind that both parties were blind to their real interests and he constantly repeats that the parties must remember that the Court did not exist for the benefit of the Chetty Community only, and if the parties choose to enter into private arrangements and effect *benami* transactions in their own country they should abide by their consequences. He apparently came to the conclusion that it was not to the real interests of either party that matters should be delayed by issue of these commissions and he exhorted them to take his order in good spirit as it was really to the interests of both of them that he passed the order that he did. His order contains one paragraph as follows:—
 "So it is to avoid all expense, time and trouble that I want to accelerate the progress of the case by refusing to examine 38 witnesses on commission in India on behalf of the defendants and 18 witnesses on behalf of the plaintiff and also when I think they are not material witnesses. I want to avoid also any application of the plaintiff for a receivership again before next harvest and finish the case on the 23rd to 29th June

during my next trip." The true fact of the matter seems to be that the learned Judge had fixed six days for the hearing of this case specially, and it would dislocate the tour programme if the case was not ripe for hearing on those dates. He had no evidence before him whatsoever to show that these witnesses were not material. There was only the affidavit in support of the application in which it is positively affirmed that they were material. He therefore refused to issue any commissions even for the witnesses for whose examination on commission an order had been previously passed and although both sides agreed to the issue of a commission.

Against this order an application in revision is filed and the main question that we have to decide is whether this Court has power under section 115 of the Code of Civil Procedure in revision to deal with this interlocutory order. On the general question of the power of the Court to deal in revision with interlocutory orders there was at one time a general consensus of opinion that it could not do so. But in 1887 in the case of *Dhapi v. Ram Pershad* (1) the previous rulings were considered and it was held that the word "case" is wide enough to include an interlocutory order and that the words "record of any case" include so much of the proceeding in any suit as relate to the interlocutory order. The learned Judges proceed to point out that there would be cases where irremediable injury may be done to a party by an interlocutory order made without jurisdiction, and unless the words of the section are clear beyond all doubt to the contrary, they could not believe that the Legislature intended such an injury to remain without a remedy. This view was also taken in the case of *Amjad Ali v. Ali Hussain Johar* (2) though it is true that in a later case of *Chandi Ray v. Kripal Ray* (3) Woodroffe, J., expressed the view *obiter* that speaking for himself he should have thought that interlocutory orders did not come within the scope of section 115. The Allahabad High Court had however taken a contrary view, and the Bombay High Court in *Motilal Kashibhai v. Nana* (4) agreed with Allahabad though the learned Chief Justice appears to have accepted the view that

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

(3) 15 C.W.N., 682.

(2) 15 C.W.N., 353.

(4) (1894) I.L.R. 18 Bom., 35.

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he word "case" was wide enough to include an interlocutory order. In *Maharaja Sir Rameshwar Singh Bahadur of Darbhanga v. Sadanand Jha and others* (5) the Patna High Court held that an error of procedure resulting in a failure of justice is a material irregularity and is open to correction by High Court under section 115. That was a case in which the suit has been dismissed on the ground that the plaintiff was defective without affording the plaintiff an opportunity of curing the defect. In *Sawan Singh v. Rahman* (6) the Lahore High Court held that a High Court has power under its revisional jurisdiction to deal with and to set aside, if necessary, an interlocutory order, but the interference was only permissible when the interlocutory order was so unjust and likely to put things into so inconvenient a position that irreparable harm would be done to the applicant. The matter was again considered by the Patna High Court in *Rameshwar Narayan Singh v. Rikhanath Koeri* (7) and the Court held that it had the power in cases where irreparable damage would result. A bench of this Court in Civil Revision 108 of 1919, took the other view but they gave no reasons and merely followed the preponderance of authorities. The later cases were not noticed by them.

In our opinion the expression "case" used in section 115 is deliberately used in place of the word "suit" or any other such expression, because it is an expression of wide application and would cover everything that would require to be dealt with by the High Court in the exercise of its revisional jurisdiction. We agree with the decision in *Dhapi v. Ram Pershad*, and we hold that the Court has power under section 115 to deal with interlocutory applications and will do so by way of setting aside the order complained of when no appeal lies directly from the order and sufficient grounds exist peremptorily calling for its interference even though the substance of the order may be one that could be brought up on appeal from the final decree in the suit. The Court should not as an ordinary rule interfere with orders passed in the exercise of a discretion provided there has been some attempt at any

(5) 55 Ind. Cas., 445.

(6) 55 Ind. Cas., 739.

(7) 58 Ind. Cas., 281.

rate to exercise that discretion judicially. It should not interfere unless irreparable damage would be caused by holding its hand. This view was taken in *V. V. M. Chetty Firm v. R.M.A.R. Arunachallum Chetty* (8).

Dealing with the present application, we find that it was open to the Court in the exercise of its discretion to refuse the application to examine witnesses on commission. But the Court has made no effort whatever to consider in the exercise of its jurisdiction the essential facts. It was the duty of the Court in the first place to call for proof that the witnesses were material. It should have satisfied itself that their examination was of real importance and that the evidence that they would give would refer to matters that were essential to a right decision. It made no effort to do this at all. The Court overlooked the fact that as regards 5 or 7 of the witnesses included in the subsequent list orders had already been passed allowing them to be examined on commission, and the fact that they had not already been examined was due to its own order directing that they should not be examined until a later stage in the case. The Court failed to consider what facts brought out in the examination and cross-examination of the defendants it was necessary to prove or support by the evidence of other witnesses. It jumped to the conclusion that both parties were acting merely to serve their private spite and not with a view to placing their cases before the Court in the best possible manner. This was an error of procedure which amounted to material irregularity and would bring the case within the powers of this Court to act in revision. In the next place, as regards the question whether the Court should act at the present stage to set aside this order we have to consider what the result would be if we did not act. Both parties would come to trial without the evidence that they considered essential being taken. It is no doubt true that this order could be dealt with in appeal from the decree when it is passed. But if the evidence of these witnesses is really material, there would be no course open to the Appellate Court but to remand the case in order that an opportunity might be given to the parties to adduce their evidence. The

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decision in appeal would be passed a year or more at least after the decree in the suit, and by that time many of the witnesses might be dead, or it might be impossible to find them with the result that the party who desired to cite them would be deprived of their evidence. To come to trial and judgment without evidence must lead in such a case as this to the whole of the proceedings being set aside. It involves great expense and delay and in our opinion it can rightly be said that irreparable damage might be done to one or other of the parties. Mr. Das for the respondent before us expressed the hope that we should be able to hold that we had power to interfere in revision and would set aside the order and he merely referred us to a certain number of decisions and put before us the point that ought to be decided. Both parties desire that we should interfere, and in our opinion the Court has power to interfere and this is a suitable case in which we should interfere. We therefore accept the application and set aside the order of the 28th May 1920, and remand the case to the Lower Court with directions to readmit the original application for the examination of the witnesses on commission, or to receive a fresh application. This is because it is said that some of the witnesses entered in the original list have now returned to Burma and could be examined before the Court. We further direct the Court to satisfy itself that the witnesses whose examination is asked for are material witnesses whose evidence is of importance for the decision of the real issue in the case, and then having considered the matter in a judicial manner it should grant or refuse the application in respect of one or more or all of the witnesses. We will allow as advocate's fees 5 gold mohurs. These costs to follow the result of the suit.

Before Mr. Justice Higinbotham.

MAUNG YAUNG SHWE v. MAUNG SIN BY HIS ATTORNEY
MAUNG MYAT LON.*

Kyaw Din—for Appellant.

Ginwala—for Respondent.

Wild animals—Trained elephant—Right of property on recapture.

Where an elephant which had been trained was lost in the jungle for a year but on recapture was found to be tame and could be put to work almost at once,

Held,—that the elephant was not a wild animal and that the original owner had not lost his property in the animal.

Mahadar Mohanta v. Balaram Gagoi, (1908) I.L.R. 35 Cal., p. 413—followed.

In this case the plaintiff sued the defendant for the return of his elephant which he had caught in his keddah. The plaintiff sometime in 1915 purchased the elephant from Maung Ba Dwe and had it in his possession until the 6th June 1917, when it got lost in the jungle. It remained in the jungle until June 1918. The defendant in his written statement took up the attitude that he knew nothing of any such purchase and that he had caught the elephant in the keddah according to law. The Court framed one issue only, with consent, namely, "whether the elephant in suit belongs to the plaintiff or not?" The evidence was led on the question of identification of the elephant as the one which the plaintiff had purchased, and both Courts have held that the plaintiff has succeeded in proving that the elephant caught by the defendant was the same as the elephant purchased by the plaintiff.

The appellant-defendant has brought the case up on second appeal and the grounds of appeal 1 to 7 raise a legal question which was not raised in either of the Courts below, namely, whether the elephant having returned to its wild state, the plaintiff had not lost his property in it.

The point should have been raised by the defendant in the Original Court and it could not be raised in the second appeal to the detriment of the plaintiff who had no opportunity of calling evidence having a bearing on the point. But the

* Civil Second Appeal from the decision of A. J. Darwood, Esq., Divisional Judge of Tenasserim, confirming the decree of Maung Po Chit, Subdivisional Judge of Tavoy.

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defendant having raised the point for the first time in this Court if the point is to be decided the decision must rest on the recorded evidence, although no evidence was specially adduced bearing on the point.

By the common law of England which is applicable to this case, a person can have only a qualified property in a wild animal, and if such animal escapes to its former liberty, such qualified property in it is lost, Volume I, Halsbury's Law of England, paragraphs 798, 799. It is necessary therefore in this case to consider whether on the evidence the defendant-appellant's contention, that when he recaptured the elephant it was a wild animal, can be sustained. Elephants are animals which, though by nature wild, are peculiarly amenable to training and quickly become tame. If any such tame and trained animal should go off with a wild herd of other elephants and remain at liberty so long, that when recaptured it had to be dealt with and trained as if it were a wild animal, which had never before been tamed and trained, I think it would be correct to say that it had reverted to its natural state and was in fact a wild animal. In such case, the former owner would have lost all property to it. But if on recapture it was found to be tame and could be put to work again almost at once, I think it would be incorrect to say that it was a wild animal. The view that there are animals, which although naturally wild may cease to come within the category of wild animals, is supported by the decision in *Mahadar Mohanta v. Balaram Gagoi* (1) which was a case very similar.

The facts as found by both the Lower Courts show that the elephant in question was purchased by the plaintiff respondent from Maung Ba Dwe in 1915 after it had been in his hands for about six months, and had been trained. It remained in the plaintiff's possession for over one year and a half and was then lost in June 1917. The plaintiff made a search for it and then offered a reward for its recapture. In June 1918 it was recaptured by the defendant-appellant in his keddah. When it was recaptured it seems to have been able to be put to work within a very short time, which indicates that it was already a tamed animal. Both Courts have held that it was tamed and

(1) (1908) I.L.R. 35 Cal., p. 413.

trained and not wild at the time of its recapture and since it had been working for over eighteen months before it escaped, the finding would seem to be correct. The defendant appellant therefore is not able to show that the elephant in this case was in fact a wild animal and his contention that the plaintiff has lost his property in the elephant consequently fails.

The appeal is therefore dismissed with costs.

Before Mr. Justice Duckworth.

(1) H. M. EUSOOF (2) ABDUL KHUDUS v. KING-EMPEROR.*

Giles—for Appellants.

McDonnell—for the Crown.

Simultaneous Trials—Illegality not curable under Section 537, Criminal Procedure Code.

A Sessions Judge, sitting with Assessors, tried two separate cases simultaneously. The two sets of accused were placed in the dock together. Each witness was examined first in the one case and then in the other, each set of accused standing up in turn when the evidence against them was being given. This resulted in several of the depositions being identical or almost identical in their phraseology and form.

Held,—that the two cases were not tried separately but were contrary to law tried together in what amounted to simultaneous trials, and that this was an illegality which could not be cured under section 537, Criminal Procedure Code.

Hossein Buksh v. The Empress, (1881) I.L.R. 6 Cal. 96; *Queen v. Shaik Bazu*, 8 Weekly Reporter, Crim., 47; *Queen-Empress v. Chandra Bhuiya*, (1893) I.L.R. 20 Cal., 537; *Sahadev Ahir v. Emperor*, (1903) 8 C.W.N., 344; *Ala Dya v. King-Emperor*, (1906) 41 P.R. Crim. Case No. 5; *Subrahmanya Iyer v. King-Emperor*, (1902) I.L.R. 25 Mad., 61—referred to.

For several years complaints had been made to Messrs. the Irrawaddy Flotilla Company that goods consigned from Rangoon by their steamers to up-country stations were found on arrival to have been tampered with. It was suspected by the authorities concerned that a gang was at work engaged in systematic pilfering of goods from steamers. The Criminal Investigation Department were requested to enquire into the matter, with the result that five men were placed on their trial at Prome.

* Criminal appeal against the order passed by J. P. Doyle, Esq., J.C.S., Sessions Judge of Prome.

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The present appellants, H. M. Eusoof and Abdul Khudus, were convicted by the Sessions Court, Prome, under section 413 and section 413 read with section 109 of the Indian Penal Code, respectively, and were sentenced to rigorous imprisonment for five and three years.

This judgment deals with the preliminary point taken up by Mr. Giles on behalf of these two appellants, that the trial of his clients was illegal, inasmuch as they were, in effect, tried jointly at one trial with the other three accused persons (Kassim, Ismail and Nural Huq) in another case (Sessions Trial No. 79 of 1920). The Magistrate had committed five accused to stand their trial before the Court of Session, but the learned Sessions Judge split the case into two trials, namely, the present case against the two appellants and Sessions Trial No. 79 against Kassim, Ismail and Nural Huq. He thought apparently that the trial of all five accused together would be void on account of misjoinder of charges and accused persons. In the case now under appeal the two appellants were, as I have stated, convicted. In the other case Sessions Trial No. 79 the learned Judge acquitted all the three accused, chiefly, it would seem, because he held, after taking the opinion of the assessors, that there was still a misjoinder of charges and accused persons. I might add that the Local Government has since filed an appeal against the order of acquittal in this latter case. Mr. Giles' contention is that, in spite of the action taken by the learned Sessions Judge, all five accused persons, including his two clients, were placed in the dock at once, and were, in effect, all tried together at one trial—the witnesses being really only examined once against the two sets of accused, the evidence taken against his clients, while they stood up, being then copied out and utilized against the other three accused, as they, in turn, were made to stand up in the dock. At the same time he urges that there was only one set of assessors, who contrary to law, heard the two cases *simultaneously*, instead of *successively*, while neither case was ever adjourned by any order in writing in order to enable the other case to proceed. In fact, he contends that it would be farcical to say that there were two separate trials, whilst his clients (not to mention the three men

concerned in the other case) were gravely prejudiced, so that justice has miscarried—that very much more than an irregularity curable by section 537 of the Criminal Procedure Code was committed—and that the trial of his clients (and of course of the other three men) was void *ab initio* for illegality. Mr. Giles pressed this point with so much insistence, when the question of bail was under consideration, that, with the consent of Mr. McDonnell, who appeared for the Crown in both cases before the Sessions Court and who appeared for the Crown here, I called for a report from the learned Sessions Judge as to what had actually occurred in his Court. I was led to take this course also owing to the close similarity between many of the depositions of the witnesses in one case and the other, and because Mr. McDonnell denied categorically that Mr. Giles had been correctly instructed as to the procedure adopted in the Sessions Court.

I will now give the report of the Sessions Judge *verbatim*. It is as follows:—“In these two cases the five accused appeared in the box simultaneously. As there were a number of witnesses common to both cases my practice was to examine each witness first in case No. 67 and then if necessary again in case No. 79. The accused were divided into two distinct groups and, in order that there might be no mistake, each group was ordered to stand up before the examination of the witness in his particular case and was told that evidence was being taken in his case. There could be no possible ground for mistake as to which case was proceeding. A certain amount of routine information in the second case was elicited by questions from the record of the first case by the advocate for the prosecution, who was furnished for this purpose at his request with a copy of the record of the first case. This copy was taken simultaneously with the deposition to my dictation by my Bench Clerk as I was unable to write. This explains certain similarities of phraseology in the opening sentences of the depositions in both the first and second cases. The evidence of the Magistrate Ba Shin (19th prosecution witness in case No. 67) was read aloud by him and recorded a second time in case No. 79 by the Bench Clerk in my presence and hearing. This explains the curious error by which a

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totally irrelevant cross-examination appeared on the record of case No. 79 and was struck out by me as by an oversight I had allowed Ba Shin to continue reading after the end of the examination. No two depositions were taken simultaneously and the procedure followed by me appears to be warranted as well as convenient. I would point out that whatever objections might possibly be raised to the procedure, if valid, would apply only to case No. 79 which does not form the subject of the present appeal."

Mr. Giles at once contended that even on this report, there was sufficient material to show that the trials were really simultaneous, and so were void for illegality, but, at the same time, he pressed the point that the report must be inaccurate, not only according to his instructions, but also judging from the internal evidence of the two records. Mr. McDonnell, on the other hand, stated that the report of the learned Sessions Judge was substantially correct, but that it omitted certain facts, which not only tended to prove that there had been two separate trials, but also explained the similarity in the depositions in the two cases to which I have already referred. He added that the procedure adopted was to be accounted for by the desire of the Sessions Judge and himself to avoid undue harassment of witnesses, who came from riverine stations as distantly situated as Yenangyaung and Danubyu. He admitted that it was correct that all five accused were placed in the dock at the same time, and that, when a witness was examined in one case, the accused concerned were made to stand up, while the others sat down. He stated that the clerk who typed the deposition, as dictated by the Judge, made a carbon copy thereof, which in the form of a "proof," was handed to himself (Mr. McDonnell). Thereupon the other accused were caused to stand up in the dock and the first set to sit down, and Mr. McDonnell, from the "proof," questioned the same witness in detail. In each case, he adds, each set of accused had full opportunity to cross examine. In this way the clerk (who again typed the second deposition as dictated by the Judge) in answer, usually to the same question, wrote out, usually, the same answer.

I must here add that the learned Sessions Judge, owing to

an injury to his hand, was unable himself to write or type the depositions.

Mr. McDonnell produced before the Court some of the carbon copies to which he alluded. Mr. Giles contended that he was quite unable, in the interests of his clients, to accept this as correct. He was aware, he said, that his position involved imputations upon both the Judge and the learned counsel concerned, but he would not abate therefrom. He urged that, when the depositions in one case are compared with those in the other, it is impossible to believe that what both the learned Judge and Mr. McDonnell have stated can be the truth. He stated that he relied on the internal evidence of the records themselves* to show that, as a matter of fact, there can only have been one trial of the two cases, and on the fact that the two cases were tried simultaneously by one set of assessors.

Mr. Giles called attention more especially to the following witnesses:—

(1) Maung Ba Shin, a Magistrate, prosecution witness 20 in this case and prosecution witness 19 in Sessions Trial No. 79. It is stated by the learned Sessions Judge and Mr. McDonnell that after this witness had been examined in Sessions Trial No. 67 the witness himself read out his deposition as evidence in the other case—a fact which led to the anomaly of a cross-examination which was irrelevant in the second case appearing in the deposition taken down by the clerk from what was read out. This of course was irregular and illegal. However, Mr. Giles argues that the second deposition was nothing more than a typed copy of the first, and that the facts as stated above are inaccurate. I would state that the condition of the deposition is such that either version might be correct.

(2) The examination in chief of Maung Po Kyaw, 5th prosecution witness, is almost in the same words as it is in Sessions Trial No. 79 where he figures as 6th prosecution witness.

(3) It is the same with the evidence of Po Han, 6th prosecution witness in this case and 7th prosecution witness in Sessions Trial No. 79, and

(4) with that of Aung Gyaw, 23rd prosecution witness and 22nd prosecution witness in the other. In regard to the

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deposition of this last mentioned witness, Kassim, one of the accused in Sessions Trial No. 79, purports to have been given an opportunity of cross-examining in Sessions Trial No. 67.

(5) Prosecution witness 28, Kin Poon's deposition in this case is identical with that in Sessions Trial No. 79.

(6) Maung Ba Kyaw, 38th prosecution witness and 34th prosecution witness, apparently made depositions in both cases (as in the other instances, on the same day) which are, to all intents and purposes, identical, and I note similar corrections in each deposition. Further, in each deposition occur the words "I have had several times complained," which, if twice dictated by an English Judge, is a strange solecism indeed.

(7) Bagilal, 39th prosecution witness and 35th^a prosecution witness, has two practically identical depositions to his credit.

(8) The depositions of Maung Po Thit, 43rd prosecution witness and 39th prosecution witness commence identically.

(9) Those of Saw Yu Byan, 44th prosecution witness and 40th prosecution witness are in the same words. It is the same with (10) 48th prosecution witness and 45th prosecution witness Tan Teo Weong and with that of (11) 52nd prosecution witness and 51st prosecution witness, Man Singh, except for the last few lines. There are also slight corrections in ink.

Besides these witnesses referred to by Mr. Giles, I have noted some others:—

The evidence of Maung Pyu, 40th prosecution witness and 36th prosecution witness, tends to show by the deposition in Sessions Trial No. 67 that the two cases were in reality tried together. The accused in Sessions Trial No. 79 are referred to in Sessions Trial No. 67 as though evidence was being given against them there. I would also refer to the depositions of prosecution witness No. 2, Ali Azzam, who is prosecution witness No. 2 in the other case. When Battercharjee was recalled on the 19th January 1921 and examined in Sessions Trial No. 67 he is made to give evidence against Nural Huq and Ismail, two of the accused in Sessions Trial No. 79, and the two statements are very similar in each case.

I would refer to the evidence of Chein Swan, prosecution witness 25 and 24, Chie Seng, prosecution witness 27 and 26,

Tan Po Su, prosecution witness No. 31 and 29, Kar Hin, prosecution witness 23 and 30 and Lim Khee Jan, prosecution witness 46 and 43.

The evidence of Abdul Rahim, prosecution witness 35 and 49, is important. In Sessions Trial No. 79 his evidence deals with Eusoof's case, though Eusoof is the first accused in Sessions Trial No. 67.

The evidence of Tun Baw, prosecution witness 36 and 52, is remarkable for the same reasons as that of Abdul Rahim. He speaks of "Eusoof now before the Court" in Sessions Trial No. 79, though Eusoof is not an accused person in that case.

These instances are sufficient to show pretty clearly that there are grounds for thinking that matters were, to say the least, very much mixed up in the two trials, and that many depositions, except as to cross-examination, are identical.

I must now decide which version is correct—that asserted by the Sessions Judge and Mr. McDonnell, who were of course both present throughout all the proceedings, or that now urged by Mr. Giles and deduced by him principally from the internal evidence of the records.

I may say at once that in other depositions I find divergencies of language, contents, and form, which go to corroborate the versions of the Judge and counsel as to the procedure adopted.

Taking all the circumstances into consideration, I think there can be no doubt that I must accept as correct what the learned Sessions Judge and Mr. McDonnell have said.

That being so, I then have to decide whether the two cases were tried separately as required by law (section 233, 2nd portion, Criminal Procedure Code), or whether they were, contrary to law, tried together in what amounted to two simultaneous trials.

There are, of course, separate and complete records with separate judgments in each case, but it is admitted that this in itself is not sufficient. The question is were the two cases tried separately, apart from the actually written records.

No doubt the learned Sessions Judge (and Mr. McDonnell if, as would appear, he acquiesced in the arrangement) was guilty of very grave irregularities. On the facts stated by him

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the question is whether these grave irregularities were such as can be cured by section 537, Criminal Procedure Code, or whether there has been such illegality as would vitiate the trial.

In order to decide whether section 537 applied, the Court might have to go into the merits, in order to determine whether there has in fact been a failure of justice—the fact being borne in mind that objections to the mode of trial do not appear to have been raised before the Sessions Court.

As to whether these irregularities were such as to render the trial illegal, it must first be remembered that, according to law, the first case should have been tried quite separately from the second. The first case might have been adjourned by an order in writing under section 344, Criminal Procedure Code, for sufficient reasons, whilst the second was taken up, but it is quite clear that nothing of the sort was done. Further, although under section 272, Criminal Procedure Code, it is laid down that the same jury may try, or the same assessors may aid in, the trial of as many accused persons “successively as the Court thinks fit,” in this instance the same assessors heard the two cases simultaneously.

In *Hossein Buksh v. The Empress* (1) it was stated “By the words the same jury may try as many cases, etc., we understand that one trial is to follow the other. The law does not contemplate that two trials shall be conducted piecemeal.” I must point out that this case refers to trials by jury, whose verdict is final, whilst in the present instance we are dealing with trials with the aid of assessors, whose opinions are not binding on the Judge in any manner. The case just quoted clearly differentiates the two points of view and implies that in the opinion of the learned Judges it was conceivable that the same rule, *i.e.*, that the trials were contrary to law, would not hold good in the case of trials with assessors. They referred to an older case of *Queen v. Shaik Bazu* (2).

These two cases were what is known as trials held “in parrallel lines,” that is to say, when there are cross-cases between two factions in a riot. Naturally, the facts are not similar to those of the present case.

(1) (1881) I.L.R. 8 Cal., 96.

(2) 8 Weekly Reporter, Crim. 47.

In *Queen-Empress v. Chandra Bhuiya* (3) such trials were held to be opposed to the ordinary law, but it was found that it was not necessary to set aside the convictions in all instances, and the distinction between jury trials and trials with assessors pointed out in 6 Cal., page 96, was once more emphasized.

The case of a trial by jury is very different from that of a trial with the aid of assessors. The distinction is readily grasped. What might reasonably be held illegal in the case of the former, that is to say, two cases coming before the jury simultaneously, appears to have been in at least two cases held to have been not necessarily illegal in cases tried with assessors, but in my opinion the law as laid down in section 272 of the Criminal Procedure Code, is equally clear in regard to either case, and that law is that the two cases must be heard separately and successively, in order that the minds of the Jury or assessors may not be confused. Section 285 of the Criminal Procedure Code shows that the opinion of the assessors is necessary, even though the Sessions Judge is not bound thereby, and it would be a mere farce to hold that it made no difference, even supposing that the opinion of the assessors was based upon utter mental confusion.

I regard the simultaneous hearing of two cases by one set of assessors as more than a mere irregularity.

In *Sahadev Ahir v. Emperor* (4) it was held that the simultaneous trial of cross rioting cases was not a fatal illegality, that it was an irregularity curable by section 537, Criminal Procedure Code, and that in some ways the two rival sets of accused were actually benefited thereby.

However, in the case of *Ala Dya v. King-Emperor* (5) it was held that such trials were not merely irregular, but also altogether illegal. In this case the judgment of their Lordships of the Privy Council in *Subrahmanya Iyer v. King-Emperor* (6) was relied upon in support of the decision.

It is now moreover generally held that trials in parallel lines cannot take place.

(3) (1893) I.L.R. 20 Cal., 537.

(4) (1903) 8 C.W.N., 344.

(5) (1906) 41 P. Record Criminal Case No. 5.

(6) (1902) I.L.R. 25 Mad., 61.

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I think there can be no doubt that in this instance the five accused were substantially tried together in two simultaneous trials.

These were not cross-cases of rioting, and, in effect, were in no way connected with one another, excepting in so far as the same class of offences, with reference to the same sort of property and complaint, were dealt with in each case. It is manifest that neither set of accused could be benefited by the two cases being heard simultaneously and that nothing but prejudice to them could arise therefrom.

In *Subrahmanya Iyer's* case their Lordships laid down (clearly with reference to the 2nd portion of section 233, Criminal Procedure Code),* that they "were unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity" and again "when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, to say that this contravention of the Code comes within the description of error, omission, or irregularity, would be an extraordinary extension of that branch of the Criminal Law"—i.e., "The remedying of mere irregularities, familiar in most systems of jurisprudence."

I think that the learned Judges in *Sahadev Ahir's* case overlooked these passages when they referred to this Privy Council decision. It is to be observed, moreover, that their reference thereto was extremely brief, and that they apparently did not note that the decision laid down broad principles of law relating to joint charges and trials.

To use their Lordships' own words, I regard these two trials as being "prohibited in the mode" in which they were conducted.

The matter regarding the simultaneous hearing of the cases by one set of assessors and the matter of neither case having been legally adjourned under section 344, Criminal Procedure Code might be curable under section 537, but where, as I hold to be the case here, the mode of trial is illegal, I consider that section 537, Criminal Procedure Code, is not applicable.

* That their Lordships did refer to section 233, Criminal Procedure Code, was thought by Rampini and Murkerjee, J.J., in *Johan Subarna v. K.-E.*, X C.W.N., 520, at p. 522, and by Harington, J., in the case of *Abdul Majid v. Emperor, idem.*, p. 912 at p. 921.

I therefore consider that the trial of the appellants, quite apart from any question as to failure of justice, was vitiated for illegality, and must be set aside.

ORDER.—The convictions of the appellants and the sentences passed upon them are set aside, and in the meantime, they will be kept as undertrial prisoners. As to whether I should order a fresh trial of the appellants, I will pass orders after hearing Messrs. Giles and McDonnell further.

*Before Mr. Justice Robinson, Chief Judge, and
Mr. Justice Heald.*

MAUNG TIN v. MA MAI MYINT.*

May Oung—for Appellant.

Sin Hla Aung—for Respondent.

Fraudulent transfers—Possession of subject of fraud—When a person may plead his own fraud.

A in order to defraud his creditors, effected a *benami* transfer of part of his property to his minor son B. Several years later a suit was filed on behalf of B for a declaration that the partition was valid, for possession and for mesne profits. This suit was dismissed. On appeal it was argued, firstly, that it was not open to A to plead in defence his own fraud, and secondly, that the minor's suit was not tainted as he was no party to the fraud and was ignorant of it.

Held,—*firstly*, that where the contesting parties have both been parties to the fraud, the Court will not assist either to obtain possession from the other; and that therefore although while a plaintiff cannot be allowed to plead his fraud in order to obtain possession of the subject of the fraud from a defendant, a defendant who is in possession can be allowed to plead the true nature of the transaction; and

secondly, that while a minor may not be answerable for the fraud of his guardian, he cannot take advantage of it.

The appeal was accordingly dismissed.

Babaji v. Krishna, (1894) I.L.R. 18 Bom., 372; *Mandaya v. Ma E and others*, 5 Bur. L.T., 166; *Petherpermal Chetty v. Muniandi Servai*, (1908) I.L.R. 35 Cal., 551; *Preo Nath Koer v. Kazi Mahomed Shazid* 8 C.W.N., 620; *Sidlingappa v. Hirasa*, (1907) I.L.R. 31 Bom., 405; *Maniram v. Ganesh*, (1909) 4 Ind. Cas., 233; *Girdharlal v. Yashodabai*, (1914) I.L.R. 38 Bom., 10; *Eugene Pogose v. The Delhi and London Banking Co., Ltd.*, (1884) I.L.R. 10 Cal., 951—referred to.

Robinson, C.J.—These are appeals in two suits which were tried together and may be disposed of by one judgment.

* *Civil first appeal against the decree passed by Maung Ba Kyaw, Additional District Judge of Henzada.*

1921.
H. M.
EUSOOF
v.
KING-
EMPEROR.

*Civil First
Appeal
No. 84 of
1919.
February
22nd, 1921.*

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Maung Po Saw was married first to Ma Net and there is one surviving son of this marriage Maung Tin, the appellant, before us. Ma Net died in Waso 1272 B.E. corresponding to July 1910. In Tabodwe 1272 B.E. some seven months later Po Saw married Ma Mai Myint. After his mother's death Maung Tin went to live with his maternal grandfather U San Ko and has lived with him ever since. Po Saw was in debt to Chetties and a suit was filed against him by his Chetty creditor on the 28th July 1911. This was decreed on the 2nd September 1911. A second suit was filed against him on the 22nd November 1911. Po Saw confessed judgment, and a decree was passed on the 17th January 1912. On the 14th July 1911, Po Saw executed three deeds of partition in favour of his son Maung Tin who was then a minor, his maternal grandfather U San Ko acting on his behalf. At the same time Po Saw transferred certain other properties to his second wife as *kanwin* or a gift or settlement made on marriage. These documents were executed some five months after the marriage, and it is alleged that they were *benami* transactions entered into merely to protect the property from being attached by Po Saw's creditors. In execution of their decrees the Chetties attached the lands that had been transferred to Maung Tin and on his behalf U San Ko applied to remove the attachment setting up the deeds of partition which were filed in Court. The Chetties on learning of these deeds withdrew the attachment and then proceeded to settle with Po Saw compounding their claims by accepting a fairly large reduction of the amount due. If therefore the transfers were made for the purpose of defeating the creditors, the fraud was completely effected. The second wife also applied for removal of the attachment so far as the property transferred to her was concerned. The properties have all along remained in the possession of Po Saw and he has drawn and enjoyed the rents and profits thereof. It is said that it was agreed that he should continue to manage the properties on behalf of his son and retain the profits which were to be handed over to the son on his attaining his majority. It is not denied that the net profits amount to Rs. 900 a year and that in the six years preceding the suits with which we are now concerned only Rs. 220 had

been paid by Po Saw towards the maintenance of his son. Po Saw then brought a suit to have it declared that the three deeds of partition were merely *benami* transactions executed with intent to defeat his creditors and were void. U San Ko in reply on behalf of Maung Tin filed a suit for a declaration that the deeds of partition were valid, and for possession of the lands, and for the mesne profits that had accrued during the time they were in the possession of Po Saw. The learned District Judge has granted Po Saw a decree declaring the deeds to be void, and he has dismissed Maung Tin's suit. Appeals are filed from both these decrees. As regards Po Saw's suit it is not denied now that it must fail and should have been dismissed, and if it is established that these documents were executed merely to defraud the creditors, that is undoubtedly the case. As regards Maung Tin's suit it is urged that it is not open to Po Saw to plead in defence his own fraud and secondly that the minor was no party to that fraud and was ignorant of it and therefore that his suit is not tainted and should have been decreed.

It is perfectly clear that at the time these transfers were made Po Saw was heavily in debt. Whether he was absolutely insolvent or not cannot be decided on the material on the record, but it is clear that his debts were considerable and that the deeds of partition related to a very large share of his landed properties. They conveyed some 105 acres out of 135. This is a much larger amount than the share of inheritance to which Maung Tin would have been entitled. In addition to the lands granted to his son other properties were granted to his wife, and it seems perfectly clear from other facts which cannot be disputed that the transactions were not *bona fide* ones. The Chetties were pressing for payment and it was from Po Saw that the suggestion first came that he should give his son at once his share in the joint estate of Po Saw and his mother. There is the fact that for many years the property has remained in Po Saw's possession and that he has kept the rents and profits thereof. Had this been a *bona fide* transaction, it is impossible to believe that U San Ko would not have taken possession of the lands and managed them himself on behalf of the minor as whose guardian he was

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acting. It is certainly most unusual to make a settlement on the wife several months after marriage and it is quite unnecessary to do so having regard to the relationship which exists between a Burmese husband and wife with reference to their property. The deeds themselves remained in Po Saw's possession and were apparently only handed over to San Ko in order that he might effect a removal of the attachments. After the attachments had been withdrawn Po Saw obtained the documents from the Court to the knowledge of San Ko who has allowed him to remain in possession of them ever since. Taking therefore all the facts into consideration it appears that Po Saw was heavily in debt, that his creditors were pressing him and that he made these most unusual transfers very shortly before the suits were filed, and we think there can be no doubt that these transfers were made merely to defraud the creditors by keeping these properties, if possible, out of their reach. The transfers therefore were *benami* and fraudulent, and it is settled law that a plaintiff cannot be allowed to come into Court and plead his own fraud in support of the claim that he makes. Po Saw's suit therefore should obviously have been dismissed, and we accept the appeal as to his suit and set aside the decision of the Court below with costs in both Courts.

As regards Maung Tin's suit the question arises whether Po Saw can be allowed to plead that the transactions were *benami* in order to defeat the apparent title created by the deeds. In *Babaji v. Krishna* (1) judgments of their Lordships of the Privy Council were cited and held to show that it is open to the defendant to defend his possession by showing that the real transaction between him and the plaintiff was to defraud, whether a third party or the defendant's creditors generally. In *Mandaya v. Ma E and others* (2) it was held that where the deed of sale was found to have been executed *benami* and with a view to defraud the creditors of the vendors it was not open to the purchaser to recover possession, and in that case it did not matter whether the object of the fraudulent transfer was actually effected or not. In the present case as in that case the Court is asked to take the property from the rightful owner and hand it over to the *benamidar*.

(1) (1894) I.L.R. 18 Bom., 372.

(2) 5 Bur. L.T., 166.

That is a different case to one in which the real owner sues for possession which was the position in *Petherpermal Chetty v. Muniandy Servai* (3) in which their Lordships of the Privy Council held that the vendor could recover the property and to hold otherwise would have been to allow a pretended purchaser to retain the property from the rightful owner when no fraud had been effected in consequence of the fraudulent intention. Again in *Preo Nath Koer v. Kazi Mahomed Shazid* (4) it was held that the reason of the rule laid down is that the Court will refuse relief to a party who sets up his own fraud and leave matters where they are. The same principle does not hold good where the defendant in possession seeks to show the real nature of a transaction to defend his possession. In *Sidlingappa v. Hirasa* (5) it was held to be the sounder policy to accept the rule which will be most apt to deter persons from frauds of this kind. In that case it was said that "the defendant is not resisting the enforcement of a contract but is invoking the aid of the Court to enable him to escape on the strength of his own fraud from the consequences of the sale deeds which ostensibly create a valid title in the plaintiff. In these circumstances it is we think by not displacing the plaintiff's apparent title that we give true effect to the maxim, 'Let the estate lie where it falls.'" There was another ground in that case, viz., that it was the plaintiff's father and not the plaintiff who had joined the defendant in the fraud which may have influenced the Court though it was not decided or made an actual ground for the decision. In that case also it must be noted that the plaintiff alleged that he was in legal possession of the lands. This case was distinguished in *Manirram v. Ganesh* (6) where it was held that the fact that a creditor of the defendant has actually been defeated by the sale does not debar the defendant from pleading that the conveyance was *benami* to defeat the creditors. The maxim *in pari delicto potior est conditio defendentis et possidentis* was held to apply. It was further held that there was no reason why the Court should assist the transferee to perpetuate a new fraud by giving him the property. Sidlingappa's case was

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(3) (1908) I.L.R. 35 Cal., 551.

(4) 8 C.W.N., 620.

(5) (1907) I.L.R. 31 Bom., 405.

(6) (1909) 4 Indian Cases, 233.

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further considered in the case of *Girdharlal v. Yashodabai* (7). In this case the defendant's creditor had not been defrauded, and it was held that there was no reason why the Court should punish the defendant's intention to defraud by passing a decree against him. Mr. Justice Beaman, who was a party to Sidlingappa's case, explained it by pointing out that there the contract was not executory but executed and that the real basis of the decision in Sidlingappa's case was that no fraud was actually effectuated.

The balance of authority is in favour of that which is in my opinion the true rule for decision in these cases, namely, that where the contesting parties have been parties to the fraud the maxim "Let the estate lie where it falls" should be enforced. In other words, that the Courts will not assist a party to a fraud to obtain possession of the subject of the fraud and they will not allow him to succeed by preventing the other party to the fraud from showing the true nature of the transaction. It is one thing to forbid the pleading of a fraud to obtain an advantage and quite another thing to refuse to allow a party to the fraud to plead the true nature of the transaction. In the one case the Courts would be lending themselves to helping a party to a fraud to obtain the benefit of his fraud, while in the other case it would be preventing a party to the fraud from pleading and thereby permitting a further fraud to be committed. Where the fraud had actually been effectuated the sound rule in my opinion is to leave the parties exactly as they are, that is to say, to leave the property in the possession of whichever of the two parties to the fraud it happened to rest with. I would therefore hold that even though the fraud had been effectuated where the defendant is still in possession of the property the plaintiff cannot be allowed to plead his fraud, and though the deeds may show a title in him the Court should not lend its assistance to enable him to recover possession, and that to enable the Court to dispose of the matter with justice and equity the defendant ought to be allowed to plead the true nature of the transaction. This is, I consider, the view their Lordships in *Petherpermal's* case approved.

There remains the plea that Maung Tin was a minor and was not a party to the fraud. In *Eugene Pogose v. The Delhi and London Banking Co., Ltd.* (8) it was laid down that, if a guardian whilst acting for a minor is guilty of a fraud or illegality in contracts which he makes on the minor's behalf, the minor can no more enforce such contracts than the guardian could, if he were acting on his own behalf. It may be true that no suit can be brought against the minor for any fraud or misrepresentation of which his guardian has been guilty, but that is a different matter. A minor may not be answerable on the one hand for the fraud of his guardian, but on the other hand he cannot take advantage of it. That decision, as far as I know, had never been differed from, and in my opinion as U San Ko was perfectly aware of the object with which these transfers were made, it is not open to Maung Tin by pleading infancy and ignorance to take advantage of the fraud of his guardian. These transfers were clearly *benami* and the property in these lands still remained in Po Saw and as Po Saw is in possession there is no ground whatever for decreeing Maung Tin's suit.

The appeal should be dismissed with costs.

Heald, J.—I concur.

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

MAUNG PO ZU AND ONE v. MAUNG PO KWA AND SIXTEEN OTHERS.*

Leach—for 1st Appellant.

Ba Dun—for Respondents.

Benami Transactions—Burden of proof.

A transferred his land to his son B in order that the latter might appear to be a man of property and so get the post of headman. Thereafter B mortgaged the land and then retransferred it to A, who fearing that the mortgagee might proceed against the land, executed a registered deed of sale in favour of another son C. The land remained in the possession of A till his death when C seized the property. A's other heirs brought a suit for the administration of the estate, contending that the sale was a *benami* transaction.

(8) (1884) I.L.R. 10 Cal., 951.

* Civil first appeal against the decree passed by Maung Ba, District Judge of Bassein.

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v.
MA MAI
MYINT.

Civil First
Appeal
No. 146 of
1919.

May 23rd,
1921.

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 v.
 MAUNG PO
 KWA.

Held,—that the question involved was as to the party on whom lay the onus of proving that the sale was a mere colourable transaction; that the plaintiffs having proved that the sale to C was made to defeat any claim which the mortgagee might bring, it was for C to prove the payment of consideration, and that as he had failed to do so, the Original Court was right in holding that the transaction was a *benami* one and in granting an administration decree.

Robinson, C.J., and Duckworth, J.—The parties to this suit are Karen Christians. The father of the family was U Tike Pyu. He had numerous sons and daughters. He owned two pieces of paddy land, a garden and a house. One of his sons Nyan Baw was anxious to be appointed thugyi and to assist him to this end he desired to show himself as an owner of immoveable property. A petition was presented to the Revenue Surveyor to transfer the paddy lands and garden from the name of Tike Pyu to that of his son Nyan Baw, and this was done. We think there can be no doubt that it was done with Tike Pyu's consent and with the knowledge of the family. Nyan Baw was appointed thugyi. On the 12th March 1914 he mortgaged the lands to U Shwe Thin for Rs. 4,000. On the 27th November 1914 another petition was presented to the Revenue Surveyor, and the lands were retransferred to the name of Tike Pyu. When U Shwe Thin became aware of the fraud that had been committed upon him, he took criminal action against Nyan Baw who was convicted of cheating on the 18th April 1916. As Tike Pyu was afraid that Shwe Thin might proceed against his property in execution of his mortgage, he executed a registered deed of sale of all his properties in favour of another son Po Zu present appellant. At least this is what the plaintiffs in this case allege. They sued for a declaration that this deed of sale was a mere colourable transaction entered into with this object and that no consideration passed. Tike Pyu died on 13th December 1917, and it is alleged that after his death Po Zu seized all the properties and hence this suit is brought for the administration of the estate.

The principal question involved is as to the party on whom the onus lies of proving that the deed of sale was a mere colourable transaction. Outwardly, the deed of sale which is duly registered purports to create a title in Po Zu, and, that being so, it is ordinarily not for him to prove the *bona fides* of

the transaction, or that there was valid consideration. It is for the plaintiffs who allege that that was a fraudulent transaction to defeat a creditor to prove the fraud alleged and the want of consideration. But when they have established circumstances pointing to the truth of the facts they allege, the onus will become shifted and it will be for defendants to prove consideration. Plaintiffs are the children and grand children of Tike Pyu. They stand in his shoes, and the contest therefore is between the vendor and the vendee and the law as to the right and duty of the Court to interfere between parties guilty of a fraud is clear. If there has been a fraud—if the deed of sale was executed with the object of defeating any claim which Shwe Thin might bring—and that fraud has been carried into effect to any material extent, the Courts will not aid either party to take advantage of his fraud but will let the estate lie where it falls. But where the fraud has not been carried out—where nothing has been done under it, then the Courts will aid the vendor to retain possession of his property and will not allow the vendee to take it, that is, to effectuate the fraud to which he was a party.

It is therefore necessary to see what facts the plaintiffs have been able to establish as against this primarily valid deed of sale. There can be little or no doubt that the first mutation of names in favour of Nyan Baw was effected with the consent of Tike Pyu and with the knowledge of the family or at any rate of Po Zu. Indeed, that is not denied. It cannot be denied also that after Nyan Baw had falsely induced Shwe Thin to lend him Rs. 4,000 the property was retransferred back to Tike Pyu's name in order to defeat any suit that Shwe Thin might bring on his mortgage. It may be that Shwe Thin could not have proceeded against this land in execution of any mortgage-decree he may have obtained, although Tike Pyu had allowed Nyan Baw to occupy the position of an ostensible owner it might be argued that he could not defeat Shwe Thin's claim. But however that may be, we have no doubt that the sale to Po Zu was made to defeat any claim which Shwe Thin might bring. If then there was no consideration paid for the sale, it is clear that the transaction must be regarded as a mere colourable transaction that was never

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intended by the parties to have any effect. As to the payment of consideration there is on the part of the plaintiffs only negative evidence. Po Zu alleges that the payment was made in two sums of Rs. 1,600 and Rs. 3,400. To prove the payment of Rs. 3,400 two witnesses are called. One went to buy a buffalo and took the other with him. By chance as they passed Tike Pyu's house they entered it to have a drink of water and they arrived at the opportune moment and saw the money paid and heard it stated to be the final payment. It is admitted that this evidence is extremely weak. The buffalo was of course not bought, and we have no hesitation in holding that there is no proof that Rs. 3,400 was paid. As regards the other sum of Rs. 1,600 the allegation is that Po Kwa, another son of Tike Pyu, had purchased a fishery license, and that that sum of money was required to pay for it. Po Zu alleges that he advanced that money to his brother. Nyan Baw and another man were said to have become sureties when the license was purchased. Two of the sons of Tike Pyu have given evidence as to it. Nyan Baw states that the amount had previously been deposited with Po Zu by Po Kwa and was merely taken back from him for the purpose of payment. The other brother Aung Nyein states that the money was borrowed from Po Zu but was repaid a few days later. This evidence is clearly entitled to no weight, but on the other side a headman is produced who deposes that happening to go into Tike Pyu's house he saw Tike Pyu paid Rs. 1,600 by Po Zu. The money, it was said, was to prevent auction of the license on account of revenue. Po Zu says that his father asked him to provide the Rs. 1,600 for his brother's license and that therefore he paid the money to his father. That he should have done so is improbable, and when we find that the only witness to prove it is a chance comer and is Po Zu's brother-in-law, it is obvious that it cannot be held that this amount was advanced by Po Zu. According to Po Zu credit for it was taken and Rs. 3,400 paid in cash to make up the purchase price. It is admitted that the property sold was the whole of the estate possessed by Tike Pyu, and Po Zu admits that it is worth between Rs. 6,000—7,000. The other children were thus deprived of all chance of inheritance, and the father accepts a

sum which is considerably less than the amount he might apparently have obtained for his property.

After the deed of sale was executed possession was apparently allowed to remain with Tike Pyu. He and some of his children continued to live in the house, and Po Zu admits that he cultivated one of the two pieces of paddy lands and that his father cultivated the other. It is alleged that the sons who cultivated the other paid rent to their father. It has been said that the present suit had not been brought until four years had elapsed from the date of the deed of sale. Seeing that the position had not been in any way altered, that the cultivation of the lands continued as before, and that it was only after the death of Tike Pyu that Po Zu set up a claim to be the sole owner of the lands by virtue of his deed of sale, the delay is sufficiently accounted for.

Having regard therefore to the evidence and to the circumstances which led up to the execution of this deed of sale, we are of opinion that the plaintiffs have sufficiently discharged the onus that lay on them primarily and that Po Zu has failed to establish that the transaction was a genuine and not merely a colourable one. We are of opinion therefore that the Lower Court was right in holding that the transaction was a *benami* one and in granting an administration decree. We should perhaps mention that a ground of appeal based on Section 190 of the Succession Act was raised but that after considering the provisions of Act 7 of 1901 it was admitted that that contention could not be supported. We therefore dismiss the appeal with costs throughout.

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*Civil
First Appeal
Nos. 82 and
98 of 1920.
May 30th,
1921.*

*Before Mr. Justice Robinson, Chief Judge, and
Mr. Justice Duckworth.*

1. SANTHAYI AMMAL, (2) S. A. ARUTHAYA UDAYAR
BY HIS DULY CONSTITUTED AGENT SANTHAYI AMMAL v.
M. K. MAHOMED.*

Higinbotham—for Appellants.

Moore—for Respondent.

Sale—Specific performance—Suit for—when deed of sale is not valid.

A received Rs. 3,000 from B on giving the latter possession of some land, a house and boats. Subsequently A tendered the money with interest and claimed the return of the property, alleging that the transaction was a loan, but B refused to return the property and brought a cross suit for specific performance of an agreement to sell. It was proved that the document executed was a deed of sale but it was improperly stamped and the description of the immoveable property contained therein was insufficient for its identification. B could therefore not have proceeded under the Registration Act to complete the validity of the document. The transaction was carried through in haste and B alleged that there was an agreement that A should later execute a proper document. A on the other hand alleged that the deed of sale was obtained by fraud. The Lower Court gave a decree for specific performance.

Held,—that from the evidence it was clear that the transaction was intended to be a sale and not a loan; that since under section 55 (1) (d) of the Transfer of Property Act the seller is bound to execute a proper conveyance, the suit for specific performance was rightly decreed; and further, that it was open to B to plead as a valid defence to A's suit for possession that he was in possession under a contract of sale although he had no valid registered sale deed.

Venkatasami v. Kristaya, (1893), I.L.R. 16 Mad., 341,—dissented from.

Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh, 12 Cal. Law Journal, 464; *Chinnakrishna Reddi v. Dorasami Reddi*, (1897) I.L.R. 20 Mad., 19; *Nallappa Reddi v. Ramalingachi Reddi*, (1897) I.L.R. 20 Mad., 250; *Essaji Adamji v. Bhimji Purshotam*, 4 Bom. High Court Report, 125; *Karamath Khan v. S. P. L. Latchmi Achi*, 13 Bur. L.T., 119—followed.

Robinson, C.J.—This appeal deals with two cross suits brought by the parties under the following circumstances:—The appellant and her son, who is the 2nd plaintiff in her suit, were going to Madras for the son's marriage. Appellant was anxious to raise Rs. 3,000 for this purpose and instructed one Pakiri Mahomed to raise the money, saying that she would give possession to the lender of 3 acres of land, a house and ten fishing boats as security. She obtained a loan of Rs. 3,000

* *Civil first appeal against the decree passed by Maung Po Han District Judge of Insein.*

from the defendant and handed him possession of the properties. On her return from Madras, she tendered the money with interest and demanded the return of the properties but defendant refused to return them, alleging that she had sold them to him. She claims possession of the immoveable property and possession of the boats or their value. Defendant alleged that these properties had been sold to him for Rs. 3,000; that the document which he produced was hurriedly executed as the plaintiffs were leaving at once for Madras, and that it was not a proper document but plaintiffs agreed to execute and register a valid document on their return. In his cross-suit he sues for specific performance of this agreement.

I will deal with the suit for specific performance first. The two suits were heard together, and the evidence in one was by consent treated as evidence in the other. The appellant gave evidence that she had instructed one Pakiri Mahomed to raise a loan of Rs. 3,000 for her on interest at 6 per cent. per annum. She says that Pakiri Mahomed and her son negotiated the loan, acting under her instructions. She deposes that after their first interview with the defendant they brought back Rs. 50 as earnest money, and that the next day the balance was given to her and she was asked to execute Exhibit A, which her son told her, contained the agreement she had made with defendant. She says that two or three days after receiving the money she left for Madras. Respondent says she left the next day. What admittedly happened was that Pakiri Mahomed and the 2nd plaintiff interviewed the defendant who agreed to the bargain and gave them Rs. 50 to bind it. Next day they went to a petition writer who drew up a document on the instructions of the 2nd plaintiff and the respondent. That document is a deed of outright sale. It was written on an eight anna stamp paper, although the petition writer demurred, pointing out that for a deed of sale a stamp of Rs. 30 would be required. It was nevertheless accepted owing to the short time at their disposal and it was executed, the parties knowing that it was of no value to transfer the immoveable property. Pakiri Mahomed deposes to all these facts. He admits that the respondent and the 2nd plaintiff gave instructions to the petition writer, and that both their instructions were to the

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same effect. He was not asked about the interest arranged except by the Court at the end of his evidence. He then deposes that the 2nd plaintiff told him that the Rs. 3,000 bore interest at 6 per cent. per annum, and that this was only after he had received this money. Had the transaction therefore been a loan, we have the peculiar feature of Rs. 50 being given as earnest money and the fact that the man specially deputed to negotiate the loan knew nothing about the interest which was at an extraordinarily low rate until after the money had been advanced. The petition writer corroborates the facts as set out above. He deposes to informing them that the document to be of any value would require a Rs. 30 stamp, and he declares that he explained the contents of the document to the 2nd plaintiff and the respondent, and in that he was supported by Pakiri Mahomed. The 2nd plaintiff has not given evidence, and it is clear that, on the evidence tendered by the parties supported by their conduct, the transaction was intended to be an outright sale and not a loan. The difficulty as to the stamp on the deed of sale has been adjusted by the deficient stamp having been made good under the authority of the Collector, but it is clear that the description of the immoveable property given in the document is quite insufficient for its identification, even the district in which it lies is wrongly recorded, and that that document would never have been admitted to registration. It was impossible therefore for the respondent to have proceeded under the Registration Act to complete the validity of the document, and the question is whether a document of this nature having been given by the appellant it is open to the respondent to now bring a suit for specific performance of the original agreement.

For the plaintiff the case of *Venkatasami v. Kristayya* (1) was relied upon. It was there held that the agreement having been carried out by the execution of an invalid document no suit would lie to compel defendant to do that which he had already done. With that decision with all respect I am unable to agree. The document in that instance was one as to which procedure under the provisions of the Registration Act was possible. In the present instance it was not possible. But

(1) (1892) I.L.R. 16 Mad., 341.

beyond that, the decision has been dissented from by the Calcutta High Court in *Surendra Nath Nag Chowdhury v. Gopal Chunder Ghosh* (2) where it was held that the mere execution of a lease by the defendants did not convert an executory contract into an executed contract, and that the agreement by the parties was that the defendants would execute in favour of the plaintiff a lease and register it so as to make it an instrument operative in law, and that the mere execution of the document, which was never registered by reason of the default of the defendants, was not a complete performance of the contract. It is pointed out that this Madras decision has subsequently been dissented from in *Chinnakrishna Reddi v. Dorasami Reddi* (3) and *Nallappa Reddi v. Ramalingachi Reddi* (4). In the case of a sale of immoveable property section 55 (1) (d) makes it a bounden duty of a seller to execute a proper conveyance of the property and the execution of a document which for various reasons could not be operative to effect a legal transfer is in no way a complete performance of this bounden duty. On the appellant's return from Madras she was called upon to execute a proper document as she had promised, but she refused to do so and it was not therefore necessary for the respondent to go through the useless form of tendering a conveyance to her for execution before he brought this suit for specific performance. (*Essaji Adamji v. Bhimji Purshotam* (5)).

The learned District Judge was not satisfied that any promise had been made to execute a proper document on her return from Madras, but I can see no reason for disbelieving the defendant's evidence on this point, having regard to the undoubted circumstances prevailing at the time of the alleged promise. At that time boats to Madras were few and sailings uncertain. A boat was leaving for Madras, and it may well be that the appellant was most anxious to catch it. She admits that she left very shortly after the money was paid. There was not sufficient time to obtain the necessary information descriptive of the land for the purposes of the sale deed, and the document that was executed was known to the parties

(2) 12 Cal. Law Journal, 464.
 (3) (1897) I.L.R. 20 Mad., 19.

(4) (1897) I.L.R. 20 Mad., 250.
 (5) 4 Bom. High Court Report, 125.

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 ———
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to be ineffective and was only taken with the idea that it would afford proof of the agreement. As to whether it would be admissible in evidence to show what the agreement actually was, I do not care to decide. There are authorities both ways. But on the evidence and the probabilities of the case I have no doubt that the agreement was one of sale and under the circumstances a promise to execute a legal and binding document may well have been given.

As regards the suit for specific performance therefore, I am of opinion that it was rightly decreed, and the appeal should be dismissed with costs. This really disposes of the appellant's case also. But in reply to her prayer for possession it was open to the respondent to plead as a valid defence to the suit that he was in possession under a contract for sale, although he had no valid registered sale deed. *Karamath Khan v. S. P. L. Latchmi Achi* (6). Her appeal is therefore also dismissed with costs throughout.

Duckworth, J.—I have had the privilege of reading the judgment of the learned Chief Judge, and I have but few remarks to add. The appellants in these two appeals admitted the receipt of the money from the respondent, and stated that, in consideration therefor, they agreed to make a mortgage of the immoveable as well as the moveable property in question, but their contention was that, under the influence of fraud on the part of respondent, what they executed was a conveyance. They sue for restoration of the property on repayment by them, less damages to be ascertained. The respondent, on the other hand, set up that they contracted to sell the properties. It is not part of his case that the deed executed is a valid conveyance, (it has not been registered), but he pleaded that the appellants agreed to execute a proper and binding conveyance in his favour after their return from Madras.

He is in possession, in any case, under the appellant's license, and, unless the appellants succeed in proving the fraud alleged, is not a trespasser. I have no hesitation in stating that the appellants have not succeeded in proving the fraud. It is admitted and proved that the 2nd appellant arranged the transaction with the respondent in company with Pakiri

Mahomed, and the evidence of the latter as well as that of the petition-writer shows beyond reasonable doubt that what was arranged was a sale of the property. The 2nd appellant never appeared in the matter of these suits, and this point is most significant. It is shown that the appellants were in a hurry to get ready money and leave for India, and that neither of them knew anything about the fishing business, with which the boats and the plots of land were concerned. I agree with the learned Chief Judge that it may be taken as proved that the appellants did agree to give the respondent a conveyance on return from Madras.

Apart from this, it seems to me that the respondent can, in any case, plead that the moveable property was sold to him, even on the deed which we have before us. I have no doubt that he has proved this sale of moveables. As regards the immoveable properties, even though the deed may be inadmissible in evidence, inasmuch as the appellants failed to prove fraud on the part of the respondent, I am of the opinion that they are not entitled to oust him, since he is not a trespasser, and that he is entitled, on the other hand, to a decree for the execution of a proper and binding conveyance of the properties.

I think, therefore, that both the suits were rightly decided in the District Court, and I would dismiss the appeals with costs throughout.

FULL BENCH.

Before Mr. Justice Robinson, Chief Judge, Mr. Justice Maung Kin, and Mr. Justice Heald.

MAUNG GALE v. MA HLA YIN.*

Sin Hla Aung—for Appellant (defendant).

Nyun Maung—for Respondent (plaintiff).

Burmese Buddhist Law—Marriage—Breach of promise—Appeals in suits regarding—

Suits for compensation for breach of promise of marriage between Burmese Buddhists are suits involving questions regarding marriage, and appeals in such suits lie under section 30 of the Lower Burma Courts Act.

Maung Hmaing v. Ma Pwa Me, (1872-92) S.J.L.B., p. 533; *Kan Gaung v. Mi Hla Chok*, (1907-09) 2 U.B.R., Contract, p. 5; *Maung Nyein v. Ma Myin*, (1918) 3 U.B.R., p. 75; *Maung Myat Tha v. Ma Thon*, (1892-96) 2

* Reference made by Duckworth, J., under section 11 of the Lower Burma Courts Act, 1900.

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Civil
Reference
No. 1 of
1921.
February 9th
1921.

1921. U.B.R., p. 200; *Mohori Bibi v. Dharmodas Ghosh*, (1903) I.L.R. 30 Cal., 539; *Maung Thein v. Ma Thet Hnin*, 8 L.B.R., 347; *Maung Po Thaw v. Maung Tha Hlaing*, (1918) 3 U.B.R., 106; *Tun Kyin, a minor v. Ma Mai Tin*, 10 L.B.R., 28,—referred to.

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No. 88 of
1920.

January 4th,
1921.

The following reference was made by Mr. Justice Duckworth to a Full Bench under Section 11 of the Lower Burma Courts Act, 1900 :—

This was a suit for Rs. 200 by way of damages for breach of promise of marriage.

The parties are Burman Buddhists, resident in Burma.

The Township Court dismissed the suit, holding that the promise was not proved, but the District Court came to a different conclusion and decreed the claim.

Maung Gale, the defendant, now appeals to this Court, and the preliminary question arises as to whether an appeal lies under section 30, Lower Burma Courts Act, or merely under section 100, Civil Procedure Code.

It is an unclassified suit, and no second appeal will lie under section 30, Lower Burma Courts Act, unless the value of the subject matter exceeds Rs. 500 or the suit is of a nature described in sub-section (1), section 13, Burma Laws Act, 1898.

The value is below Rs. 500.

Sub-section (1), section 13, Burma Laws Act, lays down :—

Where in any suit or other proceeding in Burma, it is necessary for the Court to decide any question *regarding* succession, inheritance, marriage or caste, or any religious usage or institution, the Buddhist Law, in cases where the parties are Buddhists shall form the rule of decision

The point for decision now is whether, in a suit for breach of promise of marriage, the Court has to decide any question regarding marriage, or in other words, whether a promise of marriage, and breach of such promise, are questions of marriage to be determined, in the case of Buddhists, according to Buddhist Law.

In the case of *Maung Hmaing v. Ma Pwa Me* (1) at page 534, Fulton, J.C., stated :—“ It will, of course, be remembered that this (a suit for damages for breach of promise of marriage) is not a case of succession, inheritance, marriage, or religious usage, and consequently must be decided rather by

(1) S.J.L.B., p. 533.

the Contract Act than by Buddhist Law, but still, in assessing damages, due consideration must be given to the opinions of the people, which are doubtless in part founded on the law books to which they are accustomed to look for guidance."

This statement has apparently remained unchallenged ever since it was made in the year 1891, but there is a course of judicial decisions in Burma, which assumes that a promise of marriage and breach of such promise are questions of marriage. It is only necessary to refer to *Kan Gaung v. Mi Hla Chók* (2) where on page 8, Shaw, J.C., now Sir George Shaw, clearly decided that the question was one regarding marriage.

In *Maung Nyein v. Ma Myin* (3) at page 76, Heald, A.J.C. stated that the breach of a promise of marriage is a matter of marriage. He followed Kan Gaung's case.

On the other hand, Mr. Nyun Maung, though he did not refer to Maung Hmaing's case, nor quote any rulings, contends that the question is solely one of contract and implies that it could only be a question of marriage, or an incident of marriage, if marriage follows the promise.

The promise to marry is a necessary preliminary to, and incident of, marriage. Breach of such a promise would come under the same category.

The matter is important for these reasons:—It has been held in Lower and Upper Burma that parents cannot sue, or be sued, for damages for breach of promise to marry their son or daughter (8 L.B.R., 347, and U.B.R., III, 1918, 106). It has been held further that, if it is merely a matter of contract, a minor cannot sue for compensation for breach of promise of marriage (*see* Kan Gaung's case).

Unless, therefore, it is decided that the matter is more than one of contract, suits by minors will be excluded.

My view is that a promise to marry and breach thereof are matters of contract, but, in addition, are also matters regarding marriage. In fact, I accept U May Oung's view, as expressed at p. 23, *Burman Buddhist Matrimonial Law*, 1914.

The result is that I hold that an appeal lies under section 30, Lower Burma Courts Act, and that appellant can appeal on the facts as well as law.

(2) (1907-09) 2 U.B.R. Contract, p. 5.

(3) 1918, U.B.R., Vol. III, p. 75.

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However, the matter is not clear from doubt, and divergent opinions have been expressed in Upper and Lower Burma.

I think therefore that the question should be referred to a Bench or a Full Bench, as the learned Chief Judge shall decide.

The question referred is :—In suits for compensation for breach of promise to marry, as between Burman Buddhists, residing in Burma, is the matter involved merely one of contract, or does it include any question regarding marriage? In other words, whether a promise of marriage, and breach of such promise, are questions of marriage, to be decided, in the case of Buddhists, according to Buddhist Law?

The opinion of the Full Bench was as follows :—

Robinson, C.J.—Ma Hla Yin, a spinster, brought a suit alleging that Maung Gale made her a promise of marriage and that relying on that promise she allowed him to seduce her. He refused to carry out his promise, and she sues for damages for breach of promise of marriage. The first Court dismissed the suit holding that no promise was proved. The District Court held the promise was proved and decreed the claim. An appeal was filed to this Court and a preliminary question arose as to whether an appeal lay under section 30 of the Lower Burma Courts Act, which would permit appellant to raise questions of fact, or merely under section 100 of the Civil Procedure Code only on points of law. If the suit is one of a nature described in sub-section 1 to section 13 of the Burma Laws Act, 1898, an appeal would lie under the former provision and the question for decision therefore is whether this is a suit regarding marriage which is to be decided under the provisions of Burmese Buddhist Law, the parties being Burmese Buddhists, or under the ordinary law of the land as a simple matter of contract.

The decisions in Burma have not been consistent. In 1891 the Special Court in the case of *Maung Hmaing v. Ma Pwa Me* (1) apparently assumed that the matter was one of simple contract only. Mr. Fulton said, "it will, of course, be remembered that this is not a case of succession, inheritance, marriage, or religious usage, and consequently must be decided

(1) S.J.L.B., (1872-92), p. 533.

rather by the Contract Act than by Buddhist Law, but still in assessing damages due consideration must be given to the opinions of the people, which are doubtless in part founded on the law books to which they are accustomed to look for guidance." Mr. Agnew said, on the question whether between Burmans an action of breach of promise of marriage will lie, that the question should be answered in the affirmative. He said, "the action is one for damages for the breach of a contract and unless forbidden by the Burmese Law it will lie. There is nothing, so far as I am aware in Burmese Law to prohibit such an action." In *Maung Myat Tha v. Ma Thon* (4) which was a suit for restitution of conjugal rights against a Buddhist girl under the age of 18, Mr. Burgess remarked, "the learned Judge treats marriage as a mere contract, but it is something more than a contract, or at any rate is subject to special conditions." In *Kan Gaung v. Mi Hla Chok, a minor* (2) it was held that a female minor cannot sue for compensation under the Contract Act for a breach of promise of marriage made to her. Reliance for this proposition was based on the well-known case of *Mohori Bibi v. Dharmodas Ghosh* (5). It was further decided that where the circumstances entitle her to compensation under the Buddhist Law, she can succeed independently of contract. Sir George Shaw stated in the course of his judgment after referring to previous cases, some of which I have noted above, "they assume what is obviously the fact, that a promise of marriage, and breach of such a promise are questions of marriage, to be determined in the case of Buddhists according to the Buddhist Law," and he went on to say, "I am therefore of opinion that where, as in the present case, the Contract Act cannot be relied upon, a suit for damages for breach of promise will still be maintainable if the Buddhist Law authorises compensation in such a case," which he held it did. In *Maung Thein v. Ma Thein Hnin* (6) Sir Charles Fox held that 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, and that the breach by a father of his promise to give his son in marriage and to give suitable marriage presents does not

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(2) 2 U.B.R. (1907-09), Contract, 5. (5) (1903) I.L.R. 30 Cal., 539.

(4) 2 U.B.R. (1892-96), p. 200. (6) 8 L.B.R., 347.

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afford a cause of action. In *Maung Nyein, a minor v. Ma Myin, a minor* (3) my brother Heald following Kan Gaung's case held that a suit for damages for breach of promise of marriage will be maintainable (apart from the Law of Contract) if the Buddhist Law authorises compensation in such a case. He held that a Burmese Buddhist youth can make a valid promise of marriage at any time after he is physically competent for marriage, and that he can be sued for damages for breach of such promise although he is under 18 years of age. And in *Maung Po Thaw v. Maung Tha Hlaing* (7) Mr. Saunders held that the consent of the parties is necessary to a valid marriage, and that an action for damages for breach of promise of marriage cannot be maintained against the parents of a Burmese Buddhist in respect of a promise made by such parents to give their son in marriage. In the case of *Tun Kyin, a minor v. Ma Mai Tin* (8) it was held that a promise of marriage made by a Burmese Buddhist male under the age of 18 years, without the consent of his parents, is ordinarily voidable. But if he has clandestine intercourse with the woman his parents are not at liberty to withhold their consent to the marriage, and he is bound by his promise and can be sued for its breach. In the course of his judgment Ormond, J., said, "I think the validity of a contract of marriage is a question of contract, though it may involve a question regarding marriage, e.g. a contract of marriage between two persons who are within the prohibited degrees of affinity; the validity of such a marriage would be determined by the personal law of the parties, and if such a marriage would be void, the contract would be void under sections 23 and 24 of the Contract Act, because the object or consideration was unlawful and immoral." And again "a person may attain majority for some purposes, e.g. of 'acting in the matter of marriage' though not for other purposes." And later, "thus under the Contract Act the competency of a Burmese Buddhist youth under 18 years of age, to make a contract of marriage, must be determined by the Burmese Buddhist Law."

The consensus of opinion therefore from the decided cases is clearly in favour of the view that the question, whether a breach of promise of marriage will afford a cause of action,

(3) (1918) 3 U.B.R., 75. (7) (1918) 3 U.B.R., 106. (8) 10 L.B.R., 28.

and the decision of other questions that may arise in such a suit as, for instance, whether the marriage is between parties within the prohibited degrees and the question of the liability of minors, is to be decided according to the principles of Burmese Buddhist Law.

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Every marriage must be preceded by an offer and its acceptance. This prior agreement to marry is an integral part of every marriage. Any question therefore arising in connection with this promise must be held to be a question regarding marriage. Whenever a suit for breach of promise of marriage is brought the Court has to determine whether the suit will lie, that is, whether there is a cause of action, and to decide that point the Courts must look to the Burmese Buddhist Law and must decide in accordance with its rules. The authorities clearly show that a different decision would have to be arrived at in the case of minors if the matter was to be decided according to the principles of the ordinary law of contract to that which would prevail if the principles of Burmese Buddhist Law were applied. As to whether the promise is valid or not by reason of questions regarding the consent of the parents, the Courts would have to resort to the Burmese Buddhist Law to decide it. It is clear that Burmese Buddhist Law does contemplate compensation for seduction under a promise of marriage, and it is also clear that that law does not forbid a suit based on a promise to marry. I would have no hesitation in holding that in suits for breach of promise of marriage between Burmese Buddhists the questions that may arise in the case are questions regarding marriage.

It has been suggested that in this case where the parties were both adults no question whatever involving Burmese Buddhist Law arises and that therefore, since it is not necessary for the Court to decide any question regarding marriage, section 13 of the Burma Laws Act does not apply while in the Lower Burma Courts Act suits of a nature described in section 13 (1) of the Burma Laws Act are referred to. I do not think that the matter should be decided on such narrow considerations as these. The intention of the Legislature clearly was that in respect of such personal matters as succession, inheritance, marriage or caste or religious usage, the personal law of the parties should be applied and the wording

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of the Courts Act was merely intended to refer to cases in which such personal questions arose. It would be wrong to give any narrow or restricted interpretation to the provisions regarding the application of the personal law.

I am of opinion therefore it should be held that suits for breach of promise of marriage between Burmese Buddhists are suits involving questions regarding marriage, and that appeals in such suits would lie under section 30 of the Lower Burma Courts Act and not merely under section 100 of the Civil Procedure Code.

Maung Kin, J.—The question is whether a suit for a breach of promise of marriage between Burmese Buddhists is a suit of a nature described in section 13 of the Burma Laws Act.

That section provides that where in a suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution—

(a) the Buddhist Law in cases where the parties are Buddhists,

* * * * *

shall form the rule of decision.

The question, therefore, is whether in a suit for a breach of promise of marriage between Burmese Buddhists it is necessary for the Court to decide any question regarding marriage.

What is the meaning of the words, "when it is necessary for the Court to decide"? Do they mean and include only the issues which arise between the parties at the trial? To hold that that is so would, in my opinion, be too narrow a construction. The Court can dismiss a suit *ex-parte*. One of the important matters which the Court has to pay attention to when it receives a plaint, is whether it discloses a cause of action. The plaintiff in a suit for a breach of promise of marriage has to satisfy the Court that the contract sued on is valid, otherwise the plaint will not disclose a cause of action. It will not disclose a cause of action if the parties to the contract were not competent to make a valid marriage. To decide this question the Court will have to have recourse to the personal law of the parties. The personal law of the

Burmese Buddhists allows adults, otherwise competent, to marry. Other systems of law ordain to the same effect. Nevertheless, the decision of the Court as to the competency of the parties to make a valid marriage is made under the personal law of the parties concerned. It has been argued that this question was not raised by the parties and that it was therefore unnecessary to decide it and that the questions which the lower Courts had to decide were not questions regarding marriage at all. But as shown above, the question had to be decided by the Court before admitting the plaint.

For the above reasons I would hold that the suit is one of a nature described in section 13 of the Burma Laws Act.

Heald, J.—The question referred for the decision of the Bench is as follows:—

“In suits for compensation for breach of promise to marry as between Burman Buddhists, residing in Burma, is the matter involved merely one of contract, or does it include any question regarding marriage?”

The Burma Laws Act says that where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding marriage the Buddhist Law in cases where the parties are Buddhists shall form the rule of decision except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law.

We have therefore to decide whether in a suit for damages for breach of promise of marriage it is necessary for the Court to decide any question regarding marriage.

The judgment of the learned Chief Judge shows clearly the state of the case law on the subject and it is unnecessary for me to discuss it.

It is clear that in a suit for damages for breach of a promise of marriage one of the chief questions which the Court has to decide is whether or not there was a valid promise, since damages are not ordinarily awarded by the Courts for breach of an invalid promise. The validity of a promise of marriage can only be determined by reference to the marriage laws to which the parties are subject, and therefore it seems clear that in such a suit it is necessary for the Court to decide a question regarding marriage.

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I would therefore hold that in suits for compensation for breach of a promise to marry as between Burman Buddhists residing in Burma it is necessary for the Court to decide a question regarding marriage, and that such suits are suits of the nature described in sub-section (1) of section 13 of the Burma Laws Act.

Civil Miscel-
 laneous
 Application
 No. 25 of
 1920.
 May
 16th,
 1921.

Before Mr. Justice Maung Kin and Mr. Justice Duckworth.
 PONNAMMAL v. (1) THE BANK OF RANGOON, (2)
 M. P. CHETTY FIRM.

Naidu—for appellant.

Lentaigne (Junior)—for 1st respondent.

Civil Procedure Code, Order XLV, Rule 7—Appeal to Privy Council—Extension of time for the deposit of security.

An applicant who asks for an extension of time for furnishing security and depositing costs is bound to show that he has exercised due diligence in endeavouring to obtain the necessary money.

Barjore and Bhawani Pershad v. Bhagana, (1884) 1.L.R. 10 Cal., 557; *Rangasayi v. Mahalakshamma*, (1891) 1.L.R. 14 Mad., 391; *Bagga v. Salihon*, (1910) Vol. 45, Punjab Record, p. 138; *Roy Jotindra Nath Chowdhury v. Rai Prasanna Kumar Banerjee Bahadur*, 11 C.W.N., 1104,—referred to.

Maung Kin, J., and Duckworth, J.—The applicant was granted leave to appeal to His Majesty in Council on the 21st March 1921.

On the 2nd May 1921 she filed an application supported by an affidavit, praying that the time for furnishing security and depositing costs may be extended for a further period of one month. Six weeks allowed by Order 45, Rule 7, of the Code of Civil Procedure expired on the 3rd May 1921. The application was heard on the 9th following. In her affidavit sworn on the 2nd May 1921 the applicant says that she owns a piece of land measuring about 64 acres and worth over Rs. 30,000, and that she has been trying to raise a loan on the security of this land to enable her to make the necessary deposit in this case, but that she has not so far succeeded. She further says that owing to old age and illness she has not been able to go about and raise a loan for the past three weeks. The applicant was present when the application was heard, and although she was said to be 64 years of age, she appeared to be very well preserved, and we came to the conclusion that, in spite of her old age, she was strong enough to go about. As to her

alleged illness there is only her affidavit and nothing else to support her. The statement that she has been trying to raise a loan on the security of the land is also uncorroborated, and she does not show in her affidavit what steps she had taken to raise the necessary money, so that the Court may be in a position to determine whether she has been diligent in due time to be prepared to lodge the deposit within the limited period. So that there is only her bare word that she has been trying to raise a loan. One would have thought that it would be easy to raise Rs. 5,000 on the security of a piece of land worth Rs. 30,000, and that if by any chance any difficulty arose, the applicant ought to have explained the nature of that difficulty to the Court. The applicant does not refer to any arrangement she had made within the prescribed period for obtaining a loan which fell through from some cause for which she was not to blame.

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In *Barjore and Bhawani Pershad v. Bhagana* (1) their Lordships of the Privy Council laid down that the Court has the power to extend the time, but that it ought not to do so without some cogent reason.

In *Venkatachalam v. Mahalakshamma*, reported at the foot of the report of the case of *Rangasayi v. Mahalakshamma* (2), it was held that the "cogent reasons referred to by the Privy Council (in Barjore's case) must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from making his deposit not owing to absence or difficulty of getting funds but owing to some circumstances accidental or otherwise over which he had no control or owing to mistake which the Court would consider not unreasonable or caused by negligence." In *Rangasayi's* case Muttusami Ayyar, J., held that it is necessary for the petitioner to show that he was diligent in due time to be prepared to lodge the deposit within the limited period. The facts alleged were that the petitioner had letters in his possession from certain persons who promised to lend, if he waited till the jaggery season in the local market, but there was nothing to show that he had applied to them for loans in

(1) (1884) I.L.R. 10 Cal., 557.

(2) (1891) I.L.R. 14 Mad., 391.

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sufficient time before the expiration of the prescribed period. The learned Judge held that a mere promise by the petitioner's friends to lend on the arrival of a particular season is not a sufficient cause for extending the prescribed time. Best, J., observed that on the facts he would have held that sufficiently cogent reasons had been shown for the extension of time, but felt bound by the ruling in Venkatachalam's case. He further said, "It seems to me that the absence of funds or difficulty in raising the same, if true, is a very cogent reason for granting an application such as the present one for extending the time and accepting the money now brought into Court."

In *Bagga v. Sahion* (3) Johnstone & Chevis, JJ., held that the interpretation of the Privy Council case by the Madras High Court in Venkatachalam's case is a mere gloss upon the ruling of the Privy Council, and that it is not a necessary consequence of that ruling, and they declined to accept it. The facts of the Punjab case are that three days before the date on which the prescribed time expired an application was made for an extension on the ground of poverty. At the expiration of the period more than three-fourths of the amount had been deposited in Court. The learned Judges held that the applicant had shown due diligence by having paid in three-fourths of the money required, and they held that sufficient reasons had been shown for extending the prescribed period.

In *Roy Jotindra Nath Chowdhury v. Rai Prasanna Kumar Banerjee Bahadur* (4) the ground for the extension the petitioner asked was contained in the following paragraph of the petition:—"That your petitioners expected that the said amount of Rs. 2,460 would come to them from their zamindaries, but instead of that amount the sum of Rs. 2,000 reached them during the Christmas vacation." Maclean, C.J., who delivered the judgment of the Court said, "There is no plea of poverty. The applicants knew on the 12th November that they must find the money within six weeks: there is no case of mistake or surprise: and the paragraph I have cited is very vague as to dates. The petitioners are zamindars, and there is nothing to indicate that, if they had given proper directions, they could not have obtained the whole amount from the

(3) (1910) Vol. 45, Punjab Record, p. 138. (4) 11 C.W.N., 1104.

zamindaries. In these circumstances can we say that any cogent reason has been shown? I think not."

In the present case the applicant has not, as we said before, given any facts from which we may draw the inference that she had been diligently endeavouring to get the necessary amount by raising a loan on the security of her land. She has not spoken to any arrangement, which she had made, falling through for some reason for which she was not to blame. The prescribed period of six weeks is ordinarily sufficient for raising funds on credit. Therefore, an applicant who asks for an extension of the time is bound to show that during that period he exercised due diligence in endeavouring to obtain the necessary money. The mere statement that she has been trying to raise a loan and has failed, as the applicant in the present case has said, will not be considered to be a sufficient or, to use the word used by the Privy Council, "cogent" reason.

We will therefore reject the application, with costs, advocate's fee two gold mohurs.

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Before Mr. Justice Maung Kin and Mr. Justice Duckworth.
IN THE MATTER OF MAUNG TUN AUNG GYAW, 3RD
GRADE PLEADER OF NGATHAINGGYAUNG, BASSEIN DISTRICT.

Surty—for applicant:

Legal Practitioners Act, 1879—Section 14—Jurisdiction to enquire into misconduct.

Any Court in which a pleader practises is competent to enquire into a charge of misconduct if the charge is brought in that Court. Section 14 of the Legal Practitioners Act does not limit the consideration of the charge to the Court in which the misconduct is alleged to have been committed.

Radha Churn Chuckerbutty, 10 C.W.N., 1059—dissented from.

In the matter of the Petition of Ganga Dyal and others, (1882) I.L.R. 4 All., 375—referred to.

In the matter of Babu Het Ram, (1901) Punjab Law Reporter, Vol. 2, p. 715—followed.

Maung Kin, J.—Maung Tun Aung Gyaw is a pleader of the third grade practising at Ngathainggyaung. He has been charged by this Court (1) with removing a record containing police diaries, police papers and the Station House Officer's confidential instructions to the Court Prosecutor, and (2) with having copies taken of the police record from his

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laneous
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dictation without having previously obtained permission from the presiding officer of the Court in which the record was.

The police sent up one Maung Sein Hmon to the Court of the Township Magistrate, Ngathainggyaung, to stand his trial under section 420, Indian Penal Code. The Magistrate transferred the case to the Court of the Additional Magistrate. That Magistrate thought he should not try the case as he was related to the accused and passed orders for the record to be sent to the Court of the Subdivisional Magistrate for orders on the point raised. The clerk of the Court then got the record and the police file stitched together to be sent under cover to the Subdivisional Magistrate. He had not put it under cover, when he had to go to the Additional Magistrate. In his absence the pleader is alleged to have removed the record to some other table and there read out the contents of the police record to Maung Sein Hmon who took down what was read to him.

A report was made to the Township Magistrate of Ngathainggyaung of the conduct of the pleader. The Magistrate then made a preliminary enquiry examining all the witnesses named, with the result that charges were framed as aforesaid against the pleader, and he was called upon to show cause why his conduct should not be reported to this Court. This order was passed on the 15th November 1920 and served on the pleader on the same date. The date fixed on which the charges were to be taken into consideration was the 3rd of December 1920. On the 2nd of December the pleader filed his explanation in writing, in which he said he had notes made by Maung Sein Hmon of the date of the First Information Report and as to who the witnesses were, but that he did not look at any confidential letter on the police record and did not know whether there was such a document on it. He further stated that he did not take away the record from the clerk's table, and that the notes were made only at that table. On the day fixed for the consideration of the charges he did not appear before the Court. It is perfectly clear that there were witnesses present ready to be examined, but, as the pleader did not appear, the Magistrate considered that it was not necessary to record the evidence *ex-parte* because the result

would be a mere repetition of what had been done before, and he proceeded to write his report to this Court, recommending that the pleader be dismissed. The District Magistrate also recommends the same punishment, but the Sessions Judge recommends that the pleader be suspended from practice for a period of two years.

The pleader has now appeared before this Court to show cause. His pleader, Mr. Surty, contends that the Township Magistrate was not competent to enquire into the charges because they were not committed in his Court but in that of the Additional Magistrate; secondly, that his client had not been given 15 days' notice of the hearing of the charges; and thirdly, that the Township Magistrate did not, on the day fixed for the hearing, record any evidence in support of the charges. These contentions are made under section 14 of the Legal Practitioners Act and Mr. Surty submits that any one of them is sufficient to vitiate the Township Magistrate's proceedings.

In support of the first contention Mr. Surty cites the case of *Radha Churn Chuckerbutty*(1) in which Mitra and Holmwood, JJ., held that the improper conduct, if any, of the pleaders related to suits then pending in the Court of the Munsiff, and that that Court was the proper Court to make an enquiry under section 14 of the Act. The Subdivisional Magistrate had made the enquiry and the pleaders were Civil and Criminal Courts' *mukhtars* and were authorised by their certificates to practise in both classes of Courts. The learned Judges held that the Subdivisional Magistrate acted improperly and without jurisdiction in framing a charge for the purpose of holding an enquiry into the alleged misconduct of the petitioner. With great respect to the learned Judges I am unable to follow their ruling. The first paragraph of section 14 which has reference to the point under consideration is as follows:—"If any such pleader or mukhtar practising in any subordinate Court, or in any revenue office, is charged in such Court or office with taking instructions except as aforesaid, or with any such misconduct as aforesaid, the presiding officer shall send him a copy of the charge, and also a notice that, on a day to be therein appointed, such charge will be taken into consideration." The important words are "If any

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(1) 10 C. W.N., 1059.

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such pleader or mukhtar practising in any subordinate Court is charged in such Court." "Such Court" must, in my opinion, be the Court in which the pleader practises and not necessarily the Court in which the pleader commits the offence charged against him. Section 32 which punishes persons illegally practising as pleaders runs (leaving out what is immaterial for the present purpose) as follows:—"Any person who practises in any Court . . . shall be liable by order of such Court to a fine." *In the matter of the Petition of Ganga Dyal and others* (2) the expression "such court" was held to be the Court in which the pleader proceeded against practices. Two pleaders and a mukhtar, who were entitled to practise in the Courts of the Cawnpore District, appeared in a case in the Court of the Deputy Magistrate, Fatehgarh. For so doing they were convicted by the Magistrate of the latter district. They applied to the High Court to revise the order of the Magistrate on the ground, amongst others, that he was not competent to proceed against them under section 32 of the Act, XVIII of 1879, as they had not practised in his Court. Oldfield, J., held that the objection was valid and that section 32 only rendered a person practising in a Court liable by order of such Court to a fine. Therefore, the Court which might impose a penalty was the Court of the Deputy Magistrate and not that of the Magistrate of the district, who would have no jurisdiction under the terms of the sections. *In the matter of Babu Het Ram* (3), Reid and Robertson, JJ., of the Chief Court of the Punjab, held that the first clause of section 14 of the Legal Practitioners Act empowers any Court in which a pleader practises to consider a charge of misconduct made against him in such Court, and that the section does not limit the consideration of the charge to the Court in which the misconduct is alleged to have been committed. So that it seems immaterial that the misconduct charged was committed in another Court. If the charge is made in the Court in which the pleader practises, that Court is competent to enquire into it. In my opinion the expression "such Court" in the first clause of section 14 cannot be construed to mean the Court in which the misconduct is alleged to have been committed. The

(2) (1882) I.L.R. 4 All., 375.

(3) (1901) Punjab Law Reporter, Vol. 2, p. 715.

section only means that any Court in which a pleader practises is competent to enquire into a charge of misconduct, if the charge is brought in that Court.

As to the second contention there is no substance in it. A copy of the charges was sent to the pleader together with a notice that on the 3rd of December such charges would be taken into consideration. The notice and the copy of the charges were served on the 15th of November 1920, so that the copy and the notice were served on the pleader more than 15 days before the day appointed for the consideration of such charges.

* * * *

Duckworth, J. - I concur.

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice
Duckworth.

NGA KHAN v. KING-EMPEROR.*

Maung Lat—for appellant.

Murder—Blows on the head—Intention—Indian Penal Code, section 300.

A killed E by striking him one blow on the head with a long and heavy bamboo. The nature of the injury indicated that very great force was used.

Held,—that although the weapon used was not one that would of necessity cause fatal injury, the force used was so great as to show that the appellant intended to cause injury sufficient in the ordinary course of nature to cause death, and that he was therefore rightly convicted of murder. It cannot be laid down, as a principle, that, in all cases in which a man strikes another over the head with a stick, and thereby causes death the offence is one falling under section 304, Part I, Indian Penal Code.

Shwe Hla U v. King-Emperor, 2 L.B.R., 125; *Shwe Bin v. King-Emperor*, 3 L.B.R., 122; *Nga Na Ban v. King-Emperor*, (1904-06) U.B.R., Vol. 1, Penal Code page 33—referred to.

Robinson, C.J., and Duckworth, J.—The appellant, Nga Khan, had been away from home for a few days and on his return his uncle-in-law Tha Dun E went to see him. They sat in Nga Khan's house. Then Aung Kin, who is his uncle twice removed, joined them. Shortly after Po Khaing, the deceased, joined them. After the four men had chatted for a while the deceased went down followed by Aung Kin and Tha Dun E. They had only gone a few yards when Nga Khan followed.

* *Appeal against the capital sentence passed by J. P. Doyle, Esq., Sessions Judge, Prome.*

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picked up the exhibit bamboo and struck Po Khaing a heavy blow on the head from behind. He then ran off to the headman's house. Po Khaing fell and died almost immediately. To the headman Nga Khan said that Po Khaing and Aung Kin had come into his compound armed with *dahs* and he wanted the headman to come and enquire. Almost immediately after Aung Kin arrived and told the headman that Nga Khan had struck Po Khaing and he did not know whether he would live or die. The headman told Pan Tha who was there to watch Nga Khan and went to Po Khaing. He found him dead and took charge of a bamboo lying near him which Aung Kin told him was the weapon used. Nga Khan was arrested and sent with deceased and the bamboo to the police-station where Pan Tha made a clear report.

There is no ground for doubting the evidence. The two principal witnesses are connections of accused and it is not suggested that either has any ground for falsely charging him. Another witness, Tha Han, who was in a house nearby corroborates them. No motive for the assault is forthcoming and none is suggested. In cross-examination it was suggested that the men had been drinking but there seems to be no substance in this and it is clear that none of them were to any extent affected by drink. The defence is the right of private defence. Nga Khan says Aung Kin and Po Khaing entered his compound armed with *dahs* and the latter demanded a debt of ten pies and then thrust at him with a *dah*. He jumped down, picked up a small bamboo lying there as his house was being built and waved it and ran to the headman for protection. That any of the men had *dahs* is denied by all. Nga Khan did mention *dahs* to the headman but it is significant that he did not tell this story to the headman. It seems to be an after-thought and it is clearly a false tale as the blow that killed Po Khaing was dealt from behind.

Only one blow was struck and with a hollow bamboo 5 feet $11\frac{1}{2}$ inches long and $4\frac{1}{2}$ inches in circumference. It weighed 116 tolas. There was a contused lacerated wound $3\frac{1}{2}$ inches long and 1 inch broad and scalp deep exposing the underlying bone on the right parietal bone 5 inches above the right ear. The sagittal suture was so loosened that the skull could be practically

divided into two parts. On the right side there was a lineal fracture of both tables of the skull 4 inches long and 4 inches from the right ear. The skull was of normal thickness and presented no sign of being abnormally brittle. The loosening of the whole suture is extremely uncommon and indicates that very great force was used.

That Nga Khan caused the death of Po Khaing is clearly established and indeed having regard to the defence set up it can only be taken to be admitted. The question therefore is whether in striking him this one blow on the head he intended to cause bodily injury sufficient in the ordinary course of nature to cause death or merely injury that was likely to cause death. Having regard to the weapon used, the violence of the blow inflicted, and the part on which the blow was given, an intention to cause any lesser injury cannot be considered.

In the present case the weapon used was not one that would of necessity cause fatal injury but it was nevertheless a very dangerous weapon to use on a man's head. The length gives a leverage that enables a very serious blow to be given. It weighed 116 tolas. Very great force was employed in giving the blow. How capricious are injuries to the head in their after effects is pointed out in *Shwe Hla U v. King-Emperor* (1) and we agree with the opinion expressed in *Shwe Bin v. King-Emperor* (2) that, speaking generally, where a man strikes another on the head with a not very formidable weapon, one blow only, no greater intention can be attributed to him than that of causing injury likely to cause death. But each case must depend on its own facts, on the circumstances surrounding the assault, on the motive and the particular weapon used. If accused had been actuated by a fierce motive urging him on to commit serious hurt and if he had used a heavy male bamboo or a weighted stick or club, then, having regard to the injury actually caused and to the great violence used, we should have had no course open to us but to hold him guilty of murder. As it is, the case is very near the border line, and requires careful consideration. We do not know the motive, and something seems to us to have been concealed by the more important prosecution witnesses.

(1) 2 L.B.R., 125.

(2) 3 L.B.R., 122.

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We would note, once more, that the weapon used was a long and heavy one, and that uncommonly great force must have been used by appellant, as evidenced by the actual injuries caused by him in the case of a normal skull. The case thus differs very materially from the case of *Shwe Ein v. King-Emperor* (2) and *Nga Na Ban v. King-Emperor* (3), in which it was held that death caused by a single blow with a stick was, in those specific instances, not murder but an offence punishable under the first portion of section 304 of the Indian Penal Code.

In our judgment it would be most unsafe to suggest that, in all cases where death is caused by a single blow from a hollow bamboo, the offence is not murder, *i.e.* that the sole criterion is the nature of the weapon used. The size, and the weight of the stick, the manner in which it is used, and the actual injuries caused by the blow must all be considered. Here the injury caused was so severe and uncommon, and the force used must have been so terrific, that we are of the opinion that the offence of the appellant fell under section 300 thirdly Indian Penal Code, *i.e.*, that he intended to cause injury sufficient in the ordinary course of nature to cause death. He was therefore rightly convicted of murder. However, since he is a young man, and we do not know the motives which actuated him, and we are not certain that we are in possession of all essential facts, we do not consider it necessary to confirm the sentence of death.

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

(2) 3 L.B.R., 122. (3) (1904-06) U.B.R., Vol: I, Penal Code, p. 33.

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

S.P.S. CHETTY FIRM v. (1) MAUNG PYAN GYI, (2) MA TAU, (3) MAUNG PO AUNG, (4) MAUNG THA HAN, (5) MA OHN KIN.*

Special Civil
Second
Appeal No.
172 of 1919.

June 20th
1921.

Burjorji—for appellant.

Chari—for respondents.

Mortgage decree, Sale in execution of—Rights of auction-purchaser as against prior purchaser from mortgagor

A obtained a simple mortgage on a piece of land which the mortgagor, B, subsequently sold to C and D. Later A brought a suit on his mortgage against B alone, and when the land was sold in execution of the decree, A bought it. When A sought to obtain possession he was resisted by C and D and he then brought a suit for possession by ejectment and for a declaration that the sale to C and D was inoperative as against him. The District Judge held that A was entitled to possession provided that C and D's right of redemption was preserved. The Divisional Judge on appeal reversed this decision.

Held,—on appeal to the Chief Court, that the possession and rights of C and D as purchasers were not affected by the decree in A's mortgage suit. The mortgage being a simple one, the right of possession remained with B and he transferred it to C and D, whose purchase was however subject to the mortgage. A had no right to possession under the mortgage and when he brought the property to sale he purchased what rights B had and no more. These rights did not include the right of possession. A's proper remedy was a suit to enforce his mortgage against C and D. The appeal was accordingly dismissed.

San Bwin v. A. N. K. Nagamutu, 8 L.B.R., 266; *Mulla Vettil Seethi v. Korambath Paruthooli Achuthan Nair*, 21 Mad. Law Journal, 213; *Balli Singh v. Vindeswari Tewari*, 35 Ind. Cases, 532,—followed.

Chhattur Dhari Chowdhury v. Gaya Prosad Singh, 23 Ind. Cases, 791,—referred to.

Robinson, C.J., and Duckworth, J.—It is necessary to set out the facts of this case in order thoroughly to appreciate the point to be decided. The plaintiff-appellant obtained a registered mortgage, dated the 30th June 1903, from the mortgagor. The mortgage deed has not been filed in the present suit but it is said to have been a mortgage in English form. This was strenuously opposed and Mr. Burjorji for the appellant stated that he did not press any rights on that basis. The mortgage

Special Civil Second Appeal from a decree of A. T. Rajan, Esq., I.C.S., Divisional Judge, Hanthawaddy, reversing a decree of D. D. Nanavati, Esq., I.C.S., District Judge, Hanthawaddy.

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must therefore be treated as a simple mortgage. In consequence it gave him no right to the present possession of the land mortgaged and that right remained in the mortgagor. On the 24th of April 1911, the mortgagor sold the lands now in suit by registered deed to respondents 1 and 2. On the 20th December 1912 the plaintiff-appellant brought a suit on his mortgage against the mortgagor. He did not implead respondents 1 and 2. He obtained a decree on the 22nd April 1915 and in execution thereof he brought the lands to sale including the land in the suit and purchased them himself. On the 16th November 1917, respondents 1 and 2 transferred the land in suit by a registered deed of sale to their children, respondents 3, 4 and 5. When the appellant sought to obtain possession by virtue of his sale certificate, he was resisted by the respondents and then on the 6th January 1919 he brought the present suit which was for possession by ejection and a declaration that the deeds of sale referred to above were inoperative and of no effect as against him. He further asked for mesne profits for a small sum of revenue alleged to have been paid by him and for costs. It appears from the examination of the parties at the commencement of the suit that on the purchase of this land by respondents 1 and 2 they obtained immediate possession and that fact has not been contested.

The learned Judge held that plaintiff would be entitled to possession provided that the respondents were given an opportunity of redeeming on payment of the full amount due on the mortgage after accounts had been taken in his presence and that on failure to pay the amount so found due within the time fixed by the decree, the appellant should be given possession. He declined to follow the ruling of this Court in *San Bwin v. A. N. K. Nagamutu* (1) in which Sir Charles Fox considered a recent decision of the Madras High Court in *Mulla Vettil Seethi v. Korambath Paruthooli Achuthan Nair* (2) and which he held undoubtedly to state the law correctly, on the ground that these judgments dealt with the converse case. The learned Divisional Judge held that this fact made no difference and that he was bound by the decision of this Court and accepted the appeal.

(1) 8 L.B.R., 266.

(2) 21 Mad. Law Journal, 213.

The question then for decision before us is whether under the circumstances set forth above, the appellant is entitled to possession and to oust the respondents, even though the decree be in the form suggested which would preserve respondents, right of redemption and provide for the mortgage accounts being again gone into in his presence.

A very large number of cases have been referred to but a great majority of them have been discussed and analysed in the decision of the Madras High Court referred to above. We have very carefully considered these decisions with a view to ascertaining on what grounds and arguments they were based and in order to learn what, if any, legal principles were applied. We think no useful purpose will be served by our again dealing with them in detail. In some, the Courts were influenced by the idea that the omission to implead a puisne mortgagee or the purchaser from the mortgagor was sharp practice: in others they apparently regard the fact that a fresh suit by the mortgagee to enforce his mortgage rights would be barred as justifying the grant of relief in another form: in others the claim was made in the alternative for possession or to be allowed to redeem or to compel the puisne mortgagee or purchaser to redeem: in some the fact that the puisne mortgagee had only a right to redeem the prior mortgage was held to justify a decree if he be given an opportunity to do so. In several the puisne mortgagee accepted the position offered and in others the decree was based on the pleadings: in many of the cases subsequent to the Madras Full Bench decision, that decision was not referred to. Speaking very generally, the result of the decisions is that the Allahabad and Patna High Courts and also this Court have agreed with the Madras view. The Bombay High Court had not decided the exact question rising in this case, but the Calcutta High Court has taken a different view while not always unanimously. In *Chhattur Dhari Chowdhury v. Gaya Prosad Singh* (3) in which the decision of the Madras High Court was strongly relied on, Mr. Justice Coxe referring to two decisions of his own High Court taking a different view said, "It is not impossible that these rulings may have to be considered further, but the

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(3) 23 Ind. Cases, 791.

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present is certainly not a case for dissenting from them when the defendant's purchase was made just at the time that the plaintiff was suing on his mortgage."

We will therefore proceed to give our reasons for holding that this appeal should be dismissed.

There is no doubt that the purchaser's possession and rights were not in any way affected by the decree in the appellant's mortgage suit to which he was not a party and it is therefore necessary to see what exactly his position and rights were after his purchase. The mortgage being treated as a simple mortgage gave no right of possession to the mortgagee, the right of possession remained with the mortgagor and it continued until he transferred that right by sale to the respondents. It would have continued, had there been no sale, until the mortgagee by suit caused it to be taken away. While the mortgagor still had that right, he sold the land to the respondents and they at once received possession as of right and were in possession as of right when the present suit was filed. Their purchase was admittedly subject to the mortgage. This is a most important point for consideration and its importance is pointed out in *Balli Singh v Vindeswari Tewari* (4). In that case it was vigorously contended that the mortgagee was entitled to the decree for *khas* possession. The Court was referred to a large number of cases and in the judgment it is said in all the cases referred to it will be found that the person occupying the position of the plaintiff in that suit was entitled to the possession of the mortgaged property on the day of suit, and later on it is said, "The reason why he gets a decree for possession of property is that on the date of the suit he was entitled to possession of the property against all the world." The judgment then goes on to point out that the purchase at the execution sale of the rights of the mortgagor did not give the plaintiff a right to possession of the property against the prior purchasers.

The respondents admit that their purchase was subject to the mortgage but the rights that that mortgage gave to the appellant was a right to bring the property to sale; it conferred no right to present possession. The appellant's rights were to enforce his mortgage and this he could do against the

(4) 35 Ind. Cases, 532.

purchaser even though he did not make him a party to the prior suit. Had he proceeded to enforce those rights the respondents would have had the opportunity to question the accounts, whereas if a suit for simple possession is to be permitted they may be deprived of that right. It is true that the learned District Judge would have re-opened the accounts but this shows the result of not compelling the plaintiff appellant to adopt his proper remedy. The decree he purported to give was practically one of foreclosure and that in a suit that was not based on the mortgage at all. A remedy by foreclosure is not one of the rights that the mortgagee was entitled to. If the judgment be held in fact to allow an amendment of the plaint, without that being actually carried out, it overlooks the fact that the character of the suit is entirely altered. It would direct a mortgage decree in a suit in which it was not asked for and in which the deed of mortgage was not proved and not even produced.

A puisne mortgagee and also a purchaser may have the right to redeem a prior mortgage but that is a right which may or may not be exercised, at his option. A decree of the nature proposed or such as is given in many of the rulings considered, turns what is merely a right to be exercised or not at his sole option, into a liability to redeem.

The mortgagee in this case can still enforce his rights as mortgagee, it is said, and if so, there is still less reason to allow him to bring a suit which he is not entitled to bring and thereby improperly impose on the other party conditions which he should not be compelled to fulfil.

The question is as to which party is entitled to possession? The respondents are so entitled by reason of their having purchased this right from the mortgagor at a time that he possessed that right and had the power to transfer it. The appellant had no right whatever to possession arising out of his mortgage. When he enforced his mortgage decree and brought the property to sale he purchased whatever rights the mortgagor then had. Amongst these rights, the right to possession was not included.

A mortgagee in enforcing his mortgage rights may or may not be entitled to possession and in this case he was not so

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entitled. The possession of the respondents is the result of his not doing that which he should have done in his first suit, and if either party is to suffer it should be the mortgagee rather than the purchaser. As between two persons entitled to possession, the party who acquired that right first cannot be deprived of it by the other.

We are therefore of opinion that the appellant was not entitled to possession and that no effort should have been made to grant that which he sought in the present suit. He should have been relegated to his proper remedy which was a suit to enforce his mortgage against the respondents.

For the above reasons, the appeal is dismissed with costs.

Civil
 First Appeal
 No. 21 of
 1920.
 May 31st,
 1921.

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

MA NYUN SEIN v. (1) MAUNG CHAN MYA (2) MA MA GYI.*

Higinbotham—for appellant.

Leach—for respondents.

Buddhist Law—Adoption—Effect of entering the priesthood on status of kittima adopted son.

When a *kittima* adopted son enters the priesthood he completely severs all ties that existed before and on re-entering civil life he does not *ipso facto* resume his position as adopted son. It is possible that evidence and circumstances may show that he has resumed his position as a *kittima* adopted son,—in other words that he has been re-adopted, but a lesser degree of proof would probably be necessary than in the case of the original adoption.

Shwe Ton v. Tun Lin, 9 L.B.R., 220; *Ma Saw Ngwa v. Ma Thein Yin*, 1 L.B. R., 198—referred to.

Duckworth, J.—This is an appeal from the decision of the learned Judge on the Original Side of this Court.

The second respondent, Ma Ma Gyi, is the widow of one Maung Ba Than. In the suit it was claimed that this Maung Ba Than was a *kittima* son of U Phoo and Ma Ywet, both deceased. First respondent, Maung Chan Mya, is the assignee of the interest of Maung Ba Than in the estate of Ma Ywet. Ma Nyun Sein, the appellant, is the granddaughter of Ma Ywet by a previous marriage of hers with Ko

* Appeal against the judgment of Rigg, J., on the Original Side.

Po Sin. In the Court of first instance Maung Ba Than was himself joint plaintiff with Maung Chan Mya, but he died pending the suit, and he is now represented by Ma Ma Gyi.

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The suit is one for the administration of the estate of Ma Ywet who died on 6th January 1918 and for a declaration that Maung Ba Than is her sole heir as the *kittima* adopted son of her and her deceased husband, U Phoo.

Ma Nyun Sein denied that Maung Ba Than was ever adopted by U Phoo and Ma Ywet, and she claimed to be the sole heir entitled to inherit. It was further contended that even if Ba Than had been adopted by U Phoo and Ma Ywet, he lost all his rights as their heir by becoming a Rahan and continuing as such for several years.

Four issues were framed by the learned Judge on the Original Side and he decided that Ba Than was the adopted *kittima* son of U Phoo and Ma Ywet; that he did not entirely exclude Ma Nyun Sein as grand-daughter of Ma Ywet from inheriting; that the said Ma Nyun Sein was entitled to a one-fourth share of the estate; and that the fact that Ba Than had entered the Buddhist Priesthood for a time did not exclude him from his rights as heir of Ma Ywet. Against this decision Ma Nyun Sein has appealed. She has really raised only two points, firstly, that, as admittedly there was no public ceremony of adoption, the learned Judge erred in holding on the evidence that Ba Than was adopted with a view to inherit, and, secondly, that Ba Than by becoming a Rahan and continuing in the religious life for several years severed all ties with the secular world and cancelled the adoption, if any such adoption had taken place, and that there is no evidence of any fresh adoption by either U Phoo or Ma Ywet after he had left the priesthood.

Cross objections were filed by the respondents Maung Chan Mya and Ma Ma Gyi in respect of the finding that Ma Nyun Sein was entitled to a one-fourth share in the estate. They contend that the learned Judge on the Original Side should have decided that the appellant was only entitled to one-eighth share in the said estate. There are thus really only three points to be decided in this appeal, *viz.* :—

1. As to the adoption of Ba Than,

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2. As to whether, if adopted, his position as an heir was destroyed by his entering the monastic life for a time, and
3. As to whether, in the event of his being held still to be an heir, the appellant, Ma Nyun Sein, should get a one-fourth or a one-eighth share in the estate.

In regard to the first point, *viz.*, the adoption of Maung Ba Than, there is, in my opinion, a great deal of evidence to support it. According to this evidence, there was no public ceremony of adoption, but the evidence of what may be styled habit and repute is, in my opinion, very strong indeed. There can be no doubt that Ba Than was received into the house of U Phoo and Ma Ywet when he was some five or six years of age. His mother, a Burmese woman, had died when he was still an infant, and he had been left to be looked after by Ma The U, sister of Ma Hnin U, who used to visit Ma Ywet's house in her capacity as a bazaar seller. Ba Than appears to have gone there too. He was an attractive little boy and after some time, it is clear that he lived permanently with U Phoo and Ma Ywet at their own house. It is not certain when Ba Than's father, who was a Shan, died, but it is apparent that from the time he entered the house of U Phoo and Ma Ywet, his relations with his own family and guardians were completely severed. He continued to live in U Phoo's house and was brought up by him right up to the time when he entered the priesthood in fulfilment of a vow and again for several years after he had given up his monastic life. I might here point out that Ma Nyun Sein's case is that Ba Than, though he permanently resided with U Phoo and Ma Ywet, was kept there as a mere menial servant. I think it will be clear that the evidence as to his position in the house renders it impossible to hold that such was the case. Maung Kyaw Zan, the twelfth witness for the defence, who to my mind appears to be largely responsible for the line taken by the defence in this case, was bound to admit that Ba Than was certainly more than a menial and describes him as being "something like a manager." U Phoo and Ma Ywet paid for the expenses of Ba Than's schooling, and for his *shinpyu* ceremony, and there is evidence that after U Phoo's death, when Ma Ywet and Ba Than were quarrelling about

his right to claim a one-fourth share of the estate as *orassa*, she offered to pay the expenses of his marriage.

U Shwe Zin, fifth plaintiff witness, states that U Phoo gave his own name as father of Maung Ba Than when he brought him to his school.

Ko Po Sin, the fourth witness for plaintiff, states that U Phoo and Ma Ywet told him that they had adopted Ba Than, and that it was generally reputed in the quarter that he had been adopted with a view to inherit. This witness, Ko Po Sin, had known the parties for seventeen years.

Ma Thaw, the third plaintiff witness, is Maung Chan Mya's wife, but she was related to Ma Ywet. She definitely states that both Ma Ywet and U Phoo told her that Ba Than was their adopted son, and had been adopted with a view to inherit. She also states that there was general repute in the quarter to this effect. This witness used to live with Ma Ywet after the latter's marriage with U Phoo and she continued on intimate visiting terms with the family. She states further that Ba Than's position in the house was that of the son and not of a servant—that when he was young he slept with Ma Ywet and U Phoo, and that when he was sick U Phoo and Ma Ywet used to look after him. There is a great deal of corroboration of her evidence in the statement of Ko Po Sin already referred to. U Pe is a trader and, according to his evidence, U Phoo told him that Ba Than was adopted with a view to inherit. He says that Ba Than was reputed in the quarter to be U Phoo's adopted son, and that Ba Than was regarded as U Phoo's son.

The learned Judge on the Original Side has expressed some doubts as regards this evidence of U Pe, on the ground that it was unlikely that U Phoo would have made such a statement on the occasion of a mere quarrel between Ba Than and U Pe's son, but after reading the evidence in question, I see no reason to doubt the statement. It was quite natural for U Pe when his own son had had a quarrel with another boy to find out the social status and antecedents of his son's antagonist. I think it was a natural action on the part of a parent, and that in order to reassure U Pe, U Phoo may very well have told him that the boy was his adopted son and that he had adopted him as his heir.

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Maung Po Gaung, Inspector of Police, speaks of the reputation of Ba Than in the quarter as the adopted son and heir of U Phoo and Ma Ywet. He goes further and says that Ma Ywet told him that Ba Than was her son and adds that before he came to know Ba Than personally, U Phoo had told him that they had an adopted son.

The evidence of U Tha Nyo (Honorary Magistrate), U Tun Lin, Ma The Bwin, Ma Lon Tin and Minus corroborates in so far as to show that they looked upon Ba Than as an adopted son, while Tha Nyo, Ma The Bwin and Ma Lon Tin depose that they were told by U Phoo and Ma Ywet that Ba Than was an adopted son. U Tun Lin states that Ba Than addressed U Phoo as father and that both U Phoo and Ma Ywet addressed him as son. He adds that Maung Ba Than took his meals with Ma Ywet and U Phoo. Further, from the evidence of U Tun Lin, Ma The Bwin and Minus, it is apparent that from the general way in which Ba Than was treated by U Phoo and Ma Ywet or spoken of by them, they looked upon him as adopted with a view to inherit.

On the side of the defence, the evidence of Ma Nyun Sein, her husband Maung Ba Yin, Ma Pwa and Po Hlaing is interested and, as the learned Judge below said, they are all more or less concerned with the devolution of the property in favour of Ma Nyun Sein.

The evidence of Po Thit, the fifth defence witness, is quite unreliable, for it has been proved that he committed perjury in denying convictions of criminal offences and that he was under police supervision. Ma Ka Doe and Ma Ma Gyi have given the most discrepant evidence on all material points. Mahomed Dawood's evidence is not to be relied upon. He was put the witness box to prove that Ba Than worked under him painting signboards for about a year after he had left the monastery. It is sufficient to say that Ba Than could not have worked for him at the period stated, as he was then living with U Phoo. Further, he admits that his own work and profits had been greatly diminished by the War, and it is, to say the least, unlikely that he would engage a man to assist him at such a time. He also admitted that Ba Than was the only man whom he had ever taken as an assistant.

The defence witnesses attempt to explain Ba Than's return to U Phoo's house after he left the monastery by saying that there was a fear that Ba Aye's ghost might haunt U Phoo's house. Not only is this a farcical story but it is contradicted by the evidence of Pleader Kyaw Zan. This witness says that the sole reason why Ba Than did not return at once from the monastery to U Phoo's house was on account of some quarrel which was soon settled, Ba Than then returning to his old home.

I consider that the position of Ba Than in the house of U Phoo and Ma Ywet was entirely inconsistent with his having been a servant, and that the only reasonable explanation is, that he was their adopted son, and, inasmuch as they had no son of their own, an adopted son with a view to inherit.

I have not referred at any length to the position of Maung Ba Than after he gave up monastic life because I shall deal with it in my remarks on the second question arising in this appeal.

In regard to the second question, *viz.* as to whether Ba Than forfeited his rights as an heir by becoming a Monk and continuing so for several years, the point is not an easy one because learned Counsel on both sides have been unable to put before me any decisions in the Courts or any *Dhammathats* which really bear upon the question, and, in spite of a diligent search, I have been unable to find any authority directly bearing on the matter.

It is proved, I think, that when Ba Than was lying sick with plague at about the age of 20 years, he made a vow that if he recovered from his malady he would become a Monk and devote his life and energies to religion. In due course he recovered and carried out his vow, in so far that he entered the priesthood. He remained a Monk for a period which is described in the evidence as from three to seven or at the most eight years. His adoptive father, U Phoo, was a ward-headman in Rangoon, who would naturally be a well-known personage in the neighbourhood. There is every reason to believe that U Phoo and Ma Ywet paid the expenses of his ordination, and that all the time during which he was a Monk they regarded him as still their son so far as due religious observance permitted.

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It is very significant that when Maung Ba Than took up monastic life, U Phoo and Ma Ywet adopted another son named Ba Aye. It is pretty clear that it was on Ba Aye's decease some years later that Ba Than left the priesthood and, after a very short interval, rejoined U Phoo and Ma Ywet in his old home.

The evidence shows beyond all reasonable doubt that he not only took up his life in the family from where he had left it, but that his position was in many ways improved. There are two documents on the record, exhibits D and E, in the latter of which Ba Than is spoken of as the son of U Phoo. There is no doubt, in connection with these documents, which are dated in the year 1914, that U Phoo who paid the consideration money permitted Maung Ba Than's name to appear publicly as his son. This was subsequent to Ba Than leaving the monastic life. Further, there is evidence that Maung Ba Than managed the theatrical business of U Phoo and Ma Ywet, and after U Phoo's decease in 1917 Ba Than completely managed the *pwe* business. Further, some ten days after U Phoo's decease, Ba Than was appointed, in succession to him, ward-headman of the quarter. Inspector Po Gaung himself recommended Ba Than as U Phoo's successor, stating that he was his son and as such best entitled to succeed his father. At this time there was not yet any dispute about the succession to U Phoo's estate, and I agree with the learned Judge on the Original Side that this fact must have been well-known to Ma Ywet who lived in the same house as Ba Than. Then there was no doubt that about two months before Ma Ywet's death, she and Ma Nyun Sein had quarrelled about some sovereigns and some jewellery of which Ma Nyun Sein was in possession, and that after this quarrel plaintiff's witnesses, Tha Nyo and Po Sin, came and interviewed the parties. Tha Nyo is a well-known man and was believed implicitly by the learned Judge below, and, after perusing Tha Nyo's evidence, I see no reason whatever to doubt him. He has evidently acted on more than one occasion as an intervenor in the disputes of this family. The most important point in connection with this quarrel is that during the conversation which took place between U Tha Nyo and

Ma Ywet the latter stated that she could not permit her grand-daughter to keep all this property because she had already given her Rs. 10,000 and there was a son whose interests she had still to consider. In answer to further questions, Ma Ywet declared that Ba Than was this son, and that he had been adopted with the intention of his becoming their heir. This conversation took place approximately three hours after the altercation between Ma Nyun Sein and Ma Ywet. This unfortunate quarrel between Ma Ywet and Ma Nyun Sein appears to have gone on during the latter half of November and up to the 27th of December, when Minus sent a letter to Ma Ywet on Ba Than's behalf, claiming his quarter share of the property belonging to U Phoo's estate, on the ground that he was the *orassa* son. There can be no doubt that Ma Ywet received this letter. Witness U Tun Lin deposes that she brought some such letter to him and told him to tell Ba Than not to ask for his inheritance *then*, as she had already given a share to Ma Nyun Sein, and he would get all the property at her death. Pleader Maung Kyaw Zan wrote a reply on the 3rd January, exhibit 8, which, in my opinion was the forerunner of the defence in the present suit. Further, Kyaw Zan states that Ba Than came to him the next day (that would be the 4th January), and informed him that matters had been settled amicably. Kyaw Zan contends that he is ignorant of the terms of that settlement, but Minus states that they were that Ba Than should have Rs. 1,500 instead of Rs. 3,000 which he was asking for, and that Ma Ywet told Ba Than not to trouble her any more as he would obtain all her property on her decease. On the 6th of January Ma Ywet died. After her death there can be no doubt that U Tha Nyo sent for Ba Than at Ma Nyun Sein's request, and that in his presence there was a meeting between Ma Pwa, Ma Nyun Sein and Ba Than. There can be no question that this interview referred to a division of Ma Ywet's estate. U Tha Nyo deposes that Ma Nyun Sein asked him to divide the property equally between her and Ba Than. Ma Nyun Sein contends that the object of this interview was to obtain property from Ma Thaw, but she does not explain why, if that was so, U Tha Nyo should have written the letter, exhibit 1, to Maung Ba Than.

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I agree with the learned Judge below in accepting U Tha Nyo's version of this story and in thinking that the reason for Ma Nyun Sein's visit to U Tha Nyo was that she feared that Ba Than, as the adopted son, would claim the whole estate, and she desired Tha Nyo to make an equal division.

I have gone into these facts in some detail because it is my opinion that on entering the priesthood, Maung Ba Than must be held to have severed himself from all rights to inherit and from all family ties. I come to this conclusion after reading the full bench case of *Shwe Ton v. Tun Lin* (1), and page 175 of Mr. May Oung's Burman Buddhist Law. It is shown that, before the outbreak of the great European War, Maung Ba Than had left the monastery and had rejoined his family as an ordinary member of society. The Burmese expression for leaving the monastic life is "Lu Twet," viz. to come out a man. I expressly wish to avoid attempting to decide the question of whether in such a case a new ceremony of adoption is necessary. What I do wish to say is that in this case the evidence, which I have detailed above, shows that Ba Than was received back in his home on the old status and that the obvious intention was that he should resume his old position as adopted son and heir. It appears to me that the real reason for his leaving the monastery was that the old folk desired to have him about the house as a son, since they had lost Ba Aye, whom they adopted when Ba Than became a Monk. I think there can be no doubt from the evidence that he must be held to have resumed his old position of *kittima* son and that the years spent in the monastery have not in his case in any way affected his right to inherit the estate of Ma Ywet.

In regard to the third question raised by the respondents in their cross-objections, it seems to me that the learned Judge on the Original Side, by an oversight, misapplied the case of *Ma Saw Ngwe v. Ma Thein Yin* (2). If Ma Saw Ngwe's mother had survived, her share would, I think, have been one half. It has not been contended that her mother was the *orassa*. As the Law stands at present, Ba Than would

(1) 9 L.B.R., 220.

(2) 1 L.B.R., 198.

undoubtedly be the *orassa* of the family. Therefore I consider that Ma Nyun Sein is only entitled to one-fourth of a half share (or one-eighth share) in the estate and not to the one-quarter share assigned to her by the learned Judge below.

On these findings, I would dismiss Ma Nyun Sein's appeal with costs throughout on the division of the estate as now awarded and would allow the respondents' cross-objections with costs on Rs. 1,000.

Robinson, C.J.—I entirely concur and would only wish to add a few words as to the effect of Ba Than entering the priesthood. There can be no question that this completely severed all ties that existed before he did so and that therefore on his re-entering civil life he would not *ipso facto* be entitled to resume the position and rights he might have been possessed of before. It was open to U Phoo and Ma Ywet to take him back and to again adopt him as their *kittima* son but that they did so must be proved. I do not think that the same degree of proof would be necessary in all cases and that it would depend on the facts and circumstances of each case whether a readoption had taken place or not.

In the present case not only did Ba Than resume his former position in its entirety but the evidence clearly shows that U Phoo and Ma Ywet meant him to do so and that he agreed. He lived with them as before and he performed all the duties of a son attending on his adoptive parents and assisting them in their business. It is shown he was accepted and recognized in the quarter as their son and they openly acknowledged him as such. It is certain that U Phoo provided the purchase price of the houses bought and deliberately allowed Ba Than's name to appear *benami* for his own attesting the deeds describing Ba Than as his son. In every way therefore that was possible they expressed their intention of taking him back and replacing him in the position he had formerly occupied. His appointment as Ward Headman because he was the son of the deceased Ward Headman is strong proof of how he was regarded in the quarter and this was done to Ma Ywet's knowledge and with her consent.

I also agree as to the share of Ma Nyun Sein. Her mother was not the *orassa* child and she would be entitled to only one-quarter of what her mother would have got.

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The appeal is dismissed with costs throughout on the division of the estate as now awarded and the cross objections are accepted with costs on Rs. 1,000.

Before Mr. Justice Maung Kin.

NGA HAN KYI v. KING-EMPEROR.*

Burma Excise Act, 1917—Sections 36 (a), 37 and 44—Possession of an excisable article of a quantity within that allowed by law.

Under the Burma Excise Act, 1917, possession of an excisable article of a quantity which does not exceed that allowed by law may be an offence and in certain circumstances a man may be bound to account for such mere possession and if he cannot will be guilty of an offence under section 37.

Queen-Empress v. Tun E, 1 L.B.R., 43—referred to.

This is a reference by the District Magistrate of Hanthawaddy recommending that the conviction and sentence be set aside.

The accused was found in possession of four quarts of *kazaw* which he stated he purchased from a certain licensed shop. The Magistrate found that he could not satisfactorily prove his purchase which is tantamount to saying that he could not satisfactorily account for his possession. The accused was found guilty under section 37 of the Excise Act and sentenced to pay a fine.

The learned District Magistrate contends that the conviction was wrong on grounds appearing in the following passage in his order of reference :—“The Magistrate convicted the accused holding that the burden of proof was for the accused to show that he purchased the *kazaw* from a licensed shop and each purchaser must be given a receipt showing that the *kazaw* purchased is from a licensed shop. There is no provision in the Excise Act or rules regarding the issue of receipts to purchasers. According to the Act any person may possess four quarts bottles of country fermented liquor.”

The trial Magistrate held that the presumption allowed by section 44 of the Act must be drawn against the accused as he

* Reference made under section 438, *Criminal Procedure Code*, by B. W. Perkins, Esq., District Magistrate, Hanthawaddy, recommending that the conviction and sentence of fine of Rs. 20 or one month's rigorous imprisonment passed by Maung On Ket, 1st Class Additional Magistrate of Kyauktan, be set aside.

could not satisfactorily account for his possession and that he failed to rebut the presumption.

Because the quantity was within the limit allowed for possession, the accused could not have been convicted under section 30 (a) of the Excise Act. But section 37 provides that whoever without lawful authority has in his possession any quantity of excisable article, knowing or having reason to believe that the same has been unlawfully imported, transported, manufactured, cultivated or collected, or that the prescribed duty has not been paid thereon, shall be punishable. This section is directed against the illicit manufacture, importation, etc., of *any* quantity of excisable article and it is in the nature of things necessary to provide for a presumption against a person in possession of an excisable article and throw on him the onus of proving that his possession is not illicit, as the matter would naturally be within his special knowledge. So the Legislature provides by enacting section 44 that the presumption is, until the contrary is proved, that the accused has committed the offence charged under section 37 in respect of *any* excisable article for the possession of which he is unable to account satisfactorily.

The trial Magistrate has not grounded the conviction upon the fact that the accused must produce but had not produced a receipt from a licensed shop. What he said was:—"To my mind the only safe means to protect purchasers who take liquor home is to obtain a receipt from the vendor for every purchase." *Prima facie* this is not a bad suggestion.

The conviction was correct. The papers will be returned.

The proposition laid down in *Queen-Empress v. Tun E* (1) that possession of half a quart of country spirit is no offence and a man is not bound to account for such mere possession is not wholly correct under the provisions of the present Excise Act.

(1) 1 L.B.R., 43.

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—
*July 12th,
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—

Before Mr. Justice Maung Kin.

NAN MA MYA v. KING-EMPEROR.*

Burma Excise Act, 1917—Sections 12 (c) and 30 (d)—Yeast balls.

Yeast balls are not excisable articles, but as they are materials for the manufacture of an excisable article, the possession of them is prohibited by section 12 (c) and made punishable under section 30 (d) of the Act.

Queen-Empress v. Nga Lu Gale, S.J.L.B., 571—overruled.

The question is whether the possession of yeast balls is punishable under the present Excise Act.

In *Queen-Empress v. Nga Lu Gale* (1), it was held that yeast balls were not intoxicating drugs as defined in clause (h) of section 3 of the old Excise Act and that they were not spirit or fermented liquor either.

Yeast balls are balls of flour soaked in the sap or juices of different plants, such as toddy-tree roots, kaing-grass roots, and cocoanut roots, and a little sugar added and when they are mixed with rice-water or jaggery, after three days or so there results a ferment as yeast, which is used only for the manufacture of liquor and nothing else.

Section 12 (c) of the present Excise Act says that no person shall use, keep or have in his possession any materials, or apparatus whatsoever for the purpose of manufacturing any excisable article.

Yeast balls are materials for the purpose of manufacturing liquor and liquor is an excisable article. Possession of them is therefore prohibited by section 12 (c).

The District Magistrate in his order of reference says he considers that yeast balls do not come within the definition of excisable article and that in view of the case above cited, the conviction was wrong. Subsequently he wrote to say that his opinion was wrong and that he had overlooked section 12 (c) of the Excise Act.

The law as regards yeast balls may be stated thus:—Yeast balls are not excisable articles but as they are materials for

* Reference made under section 438, Criminal Procedure Code, by S. Z. Aung, Esq., District Magistrate, Tlaton, recommending that the conviction and sentence of fine of Rs. 10 or seven days' rigorous imprisonment passed by Maung Po Yein, Township Magistrate, Pa-an, be set aside.

(1) S.J.L.B., 571.

the manufacture of an excisable article, namely, liquor, the possession of them is prohibited by section 12 (c) and made punishable under section 30 (d) of the Act.

The conviction in this case was under section 30 (a). It should have been under section 30 (d).

The case above cited is obsolete. Return the papers.

Before Mr. Justice Robinson, Chief Judge, and
Mr. Justice Duckworth.

MAUNG PHO MYA AND MA MYA MAY v. A. H. DAWOOD
& Co. (BY ITS ATTORNEY ALIMAHOMED JIVARAJ).*

Chari—for appellants.

Auzam—for respondents.

Partnership—Liability of one partner for another's borrowings, when the partnership is not a trading one—Suit on a pro-note.

A, the indorsee of some promissory notes executed by B, deceased, brought a suit for the recovery of the amount due against C and D, B's partners in a rice mill. The partnership was admitted and it was not denied that the money was lent for the purposes of the partnership. The defence was that B had no authority to execute negotiable instruments on behalf of the partnership and that the pro-notes were executed in her personal capacity.

Held,—that as the partnership was not a trading partnership, there was no implied authority of one partner to bind the others by negotiable instruments.

Held,—further, that there is a distinction between suits based on a pro-note and those on the original consideration: An indorsee can claim only on the notes.

Maung Po Sin v. V. E. S. V. Vellayappa Chetty, 10 L.B.R., 321; *Karmali Abdulla Allarakia v. Vora Karimji Jivanji*, (1915) I.L.R. 39 Bom., 261—distinguished.

M. R. F. R. S. Shanmuganatha Chettiar v. K. Srinivasa Ayyar, (1917) I.L.R. 40 Mad., 727; *Fremabhai Hemabhai v. T. H. Brown*, 10 Bom. H.C.R., 319; *Thaith Attathil Kutti Ammu v. Purushotham Das*, 9 Mad. L.T.R., 120—referred to.

Duckworth, J.—The plaintiff-respondents, A. H. Dawood & Co., are the indorsees of several promissory notes executed by Ma Kyaw, deceased, in favour of one Jamal Aboo. As holders in due course, they brought a suit against the present appellants and certain others for the recovery of Rs. 7,818-10-6 alleged to be due on 18 pro-notes. The heirs and legal representatives of Ma Kyaw, deceased, were included as defendants. The other

* *Appeal against the judgment of Young, J., on the Original Side.*

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defendants including the present appellants, Maung Po Mya and Ma Mya May, were added as partners of Ma Kyaw, deceased. In fact, it was sought to hold the defendants liable on the pro-notes executed by Ma Kyaw, because they were her partners, and because the partnership passed under the name and style of Ma Kyaw.

The execution of the pro-notes by Ma Kyaw was not disputed, and it was not denied that the money was lent by Jamal Aboo for the partnership purposes.

The partnership also is admitted.

The real defence was that Ma Kyaw had no authority to execute negotiable instruments on behalf of the partnership, or to take loans from outsiders, and that the deed of partnership specified the manner in which a loan of money could be borrowed for purposes of the partnership.

Another point raised by the defence was that Ma Kyaw was not the name of the firm, that the words "Ma Kyaw" used in the pro-notes represented her name and her personal signature, and that the pro-notes bore her name alone, and were executed by her in her personal capacity.

The learned Judge on the Original Side found that Ma Kyaw was the name of the firm, and that Ma Kyaw, who obviously managed the business of the mill which was the subject of the partnership, had authority to borrow money and to bind the firm by executing negotiable instruments as security for the loans. He, therefore, gave the plaintiff-respondents a decree for the amount claimed with costs.

Mr. Chari on behalf of appellants, Maung Po Mya and Ma Mya May, who alone have appealed against the decree, argued the case at very great length, but I do not think it necessary to enter into all points argued by him, because, in my opinion, it is quite clear that the partnership in question was not a trading partnership, and, therefore, there must be evidence of the authority of any partner to borrow money on behalf of the firm, or to bind the firm by executing negotiable instruments.

The main business of the mill was to mill other people's paddy, convert it into rice and sell, taking its profit in its milling charges. There is no sufficient evidence to show that it was habitual for this mill to buy paddy, convert it into rice

and sell that rice. It is, therefore, impossible to hold that this was in any sense a trading partnership, in regard to which the law is now settled. In such a case as this, as already stated, evidence of authority to contract loans for the partnership business is necessary, but there is no such evidence on the record.

This is not a case in which it is possible to infer that there was implied authority to bind the firm in this manner, and the mere fact that it may be very common in Burma to execute pro-notes for goods supplied on credit or for loans will not warrant me in holding that, in this instance, Ma Kyaw had authority to borrow money or execute bills so as to bind her co-partners by those transactions.

I am quite unable to agree with the learned Judge on the Original Side in holding that Ma Kyaw was the name and style of the partnership. There was a notice board at the mill which bore the sign "Oktan Rice Mill," and if there was a name of the partnership at all, I think that the designation aforesaid must be taken as the name of the business.

It is perfectly true that Ma Kyaw was apparently allowed by the other partners to manage the business, and it is apparent that in doing so she used her own name, but with one exception the documents showed clearly enough that that name was used by her in her personal capacity and not in any sense as the name of the partnership in question. The sole exception to which I refer is the document, Exhibit B, filed in Civil Regular No. 55 of 1918 which bears the words "On Demand I the undersigned, Ma Kyaw of Dallah, mutually and severally promise to pay, etc."

It has been argued that this document was sufficient to show that Ma Kyaw was used as the name and style of the firm, but I am unable to agree that this is the case. The words "mutually and severally" were obviously put in by the writer of the document, because he thought that that was the correct and legal way of writing a document of this description, and it would be going much too far to lay so much stress upon the use of these words as to deduce therefrom that they were intentionally used to show that Ma Kyaw was not acting in her personal capacity, but was using her name to represent the

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partnership. I am therefore unable to hold that the words "Ma Kyaw" represent the name of the business. That being so, it is manifest that, inasmuch as the notes did not bear the name of the partnership, the other partners cannot be held to be liable under them.

I am, of course, dealing with this appeal on the understanding that the respondents' suit must stand or fall on the notes. He is, as stated, merely the holder in due course, and the notes were not made in his favour, but in that of Jamal Aboo. The case of *Maung Po Sin v. V. E. S. V. Vellayappa Chetty* (1) is to be distinguished for two reasons:—(1) the managing partner was given a power-of-attorney, under which he was entitled to borrow money, and (2) the plaintiff was not the indorsee of the bill. In the same way the Privy Council case of *Karmali Abdulla Allarakia v. Vora Karimji Iwanji* (2) is readily distinguishable, inasmuch as the plaintiff was not an indorsee of the Negotiable Instruments, as is the case here. In the case of *M. R. P. R. S. Shanmuganatha Chettiar v. K. Srinivasa Ayyar* (3) this distinction was referred to in the judgment of Srinivasa Ayyangar, J., on page 732, though, indeed, his remarks were in the nature of *obiter dicta*. The point, however, seems to be that, in the present case, the suit of the respondents, as indorsees, can only be on the notes as such, and that the considerations, which appear to have influenced their Lordships of the Privy Council in *Karmali Abdulla's* case have no bearing. This was, moreover, shown by the learned Judge on the Original Side in his judgment.

There is little doubt, therefore, that, in the present case, the other partners cannot be held liable on the notes in suit.

On the other hand, there is no doubt that Ma Kyaw was personally liable, and that, since she is dead, her legal representatives are liable, so far as regards such estate of hers as came into their possession.

So far as regards the present appellants, Maung Po Mya and Ma Mya May, the appeal must be allowed, and the suit of the respondents, as against them, must be dismissed with costs in both Courts.

(1) 10 L.B.R., 321.

(2) (1915) I.L.R. 39 Bom., 261.

(3) (1917) I.L.R.

Robinson, C.J.—I agree. The distinction between suits based on the pro-note and those on the original consideration for the note must be clearly borne in mind. We are dealing here with an indorsee who can claim merely on the notes and who cannot fall back on the original loan.

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In the case of partnerships not of a mercantile character there is no implied authority in one partner to bind the others by negotiable instruments. He must have express authority. It is otherwise in the case of an ordinary trading partnership. The present partnership is not what is ordinarily recognized as a trading partnership and there is no proof on the record that would entitle us to regard it as such. Evidence as to the nature of the business and as to the practice of persons engaged in such businesses would be admissible but none has been given. There is no express authority and therefore the appeal must succeed. In addition to the authorities cited I would refer to *Premabhai Hemabhai v. T. H. Brown* (4) and *Thaith Ottathil Kutti Ammu v. Purushotham Das* (5).

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

S. K. R. S. L. CHETTY FIRM v. AMARCHAND
MADHOWJEE & Co.*

Leach with Chari—for appellants.

N. M. Cowasjee—for respondents.

Sale of Goods—C.i.f. contract—Breach—Measure of Damages.

Defendants agreed to sell to plaintiffs a quantity of rice at so much per bag, c.i.f., Colombo. The rice was to be shipped from Bassein before a certain date and payment was to be made on delivery of the documents to plaintiffs at Rangoon. Defendants did not ship any rice at Bassein.

Held,—(1) that a c.i.f. contract is not a sale of documents relating to goods but a sale of goods to be performed by delivery of documents:

(2) that the breach of contract was the failure to ship the rice at Bassein and not the failure to deliver documents which, the principal breach having been committed, could never have come into existence:

(3) that damages must be awarded to place plaintiffs in the same position they would have been in had the goods been delivered on due date and the true measure of damages was the loss of the market at Colombo. Plaintiffs were therefore entitled to the difference between the contract rate and the rate at which the rice could have been sold at Colombo had it been delivered on due date.

(4) 10 Bom. H.C.R., 319.

(5) 9 Mad. L.T.R., 120.

* *Appeal against the judgment of Maung Kin, J., on the Original Side.*

Civil
First Appeal
No. 59 of
1920.
August 16th,
1921.

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Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co., (1916) 1 K.B., 495; *Biddell Brothers v. E. Clemens Horst Co.*, (1911) 1 K.B., 214; *Johnson v. Taylor Brothers & Co., Ltd.*, (1920) Law Reports A.C., 144; *Dunn v. Bucknall Brothers*, (1902) 2 K.B., 614; *Williams Brothers v. Ed. T. Agius, Ltd.*, (1914) Law Reports A.C., 510; *Sally Wertheim v. Chicoutimi Pulp Co.*, (1911) Law Reports A.C., 301—referred to.

Robinson, C.J., and Duckworth, J.—The sole question for decision in this case is what is the true measure of damages for breach of a certain c.i.f. contract. The defendant-respondents agreed to sell to the plaintiff-appellants 590 bags of rice at Rs. 18-8 per bag, c.i.f., to Colombo. The terms of the contract were that shipment was to be made per S.S. "War Panther" or any other steamer from Bassein before the 20th December 1918, payment to be made on handing over bills of lading by sellers to buyers at Rangoon. Defendant-respondents did not ship any rice at Bassein under this contract before the 20th December 1918 or at any time. It was therefore impossible that any documents in pursuance of the contract should ever have come into existence, and none could therefore be handed over at Rangoon or anywhere else. The learned Judge on the Original Side of this Court held that the damages to be awarded were the difference between the contract rate and the market rate prevailing at Rangoon on the 20th December 1918. He apparently held that a c.i.f. contract is a contract for the sale of documents and not a contract for the sale of goods. He apparently followed the case of *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* (1).

It is contended before us on appeal that the measure of damages is the difference between the contract rate and the market rate at Colombo at the time that the goods might be expected to have reached there, had the contract been duly carried out.

What a c.i.f. contract is is fully laid down in *Biddell Brothers v. E. Clemens Horst Co.* (2). The seller undertakes to sell the specified goods, to ship them to the place agreed upon, to obtain a contract of the affreightment and policies of insurance and to hand over the bill of lading and the policies to the buyer. Such a contract provides for delivery

(1) (1916) 1 K.B., 495.

(2) (1911) 1 K.B., 214.

of the goods to be made by handing over the documents, and when this is done, the seller has performed the contract in full and is relieved of further liability. In the present case the seller did nothing to carry out the contract, and it is contended that the breach of the contract consisted in his not handing over the documents at Rangoon.

In the case relied on in the Court below the learned Judge appears to have acted on the opinion of Scrutton, J. He had held that a c.i.f. contract is not a sale of goods but a sale of documents relating to goods, and damages were awarded on the ground that regard must be had to the breach committed by him, which was the failure to hand over the documents. But in the Court of Appeal, two of the Lord Justices distinctly held that this was not a correct view of a c.i.f. contract. Bankes, L.J., said, "The contract on the part of the sellers is a contract for the sale of goods whereby the sellers also undertake, *inter alia*, to enter into a contract of affreightment to the appointed destination, which contract will be evidenced by the bill of lading, and secondly to take out a policy or policies of insurance upon the terms current in the trade," and dealing with the statement made by Scrutton, J., in his judgment that "the key to many of the difficulties arising in c.i.f. contracts is to keep firmly in mind the cardinal distinction that a c.i.f. sale is not a sale of goods but a sale of documents relating to goods," he said, "I am not able to agree with that view of the contract that it is a sale of documents relating to goods. I prefer to look upon it as a contract for the sale of goods to be performed by the delivery of documents, and what those documents are must depend upon the terms of the contract itself." Warrington, L.J., in his judgment said, "Incidentally I desire to say that I entirely agree with Bankes, L.J., in the remarks he has made about the statement made by Scrutton, J., that such a contract as this is a contract for the sale of documents. I need not say that it is with much deference that I express my disagreement with a statement of that sort made by a judge with such extensive knowledge of commercial matters as Scrutton, J., but it seems to me that it is not in accordance with the facts relating to these contracts. The contracts are contracts for the sale and purchase of goods,

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but they are contracts which may be performed in the particular manner indicated by that passage from the judgment of Hamilton, J., which I have just read; in particular that the delivery of the goods may be effected first by placing them on board ship, and secondly by transferring to the purchaser the shipping documents."

The judgment of Hamilton, J., referred to was given in the case of *Biddell Brothers v. E. Clemens Horst Co.* That this view is the correct view is clear from the judgments in the House of Lords in *Johnson v. Taylor Brothers & Co., Ltd.* (3). Their Lordships were dealing with the question as to whether leave should be given for service out of the jurisdiction of a writ of summons. Where the breach of a contract which is the foundation of the action was committed within the jurisdiction, leave would be granted, but where the breach was committed outside the jurisdiction, leave is not, as a rule, granted. The facts of the case were practically the same as the facts before us. The seller had shipped no goods. That breach had been committed outside the jurisdiction and the breach to deliver documents was committed within the jurisdiction and it was sought to obtain leave by reason of this latter breach. The Lord Chancellor held, "The real complaint of the respondents against the appellant is that he did not, according to his contract, put on board ship the goods which he had contracted to sell. It is ludicrous to suppose that their substantial complaint lies in the withholding of paper symbols which could have no meaning, and which indeed could have no existence when once the original breach had been committed." Lord Dunedin said, "Turning now to the present case, what is it that the plaintiff really complains of? It is that the ore was not shipped in order to be forwarded. That is the gist of the whole matter. The non-tender of the shipping documents might have constituted a breach if the ore had been shipped, but when the ore was not shipped, no shipping documents could be called into existence, and the breach of non-tender was, so to speak, swallowed up by the prior breach of non-shipment." Lord Atkinson said the same. "But here the seller has in breach of his agreement failed to ship the goods. By

doing so he has made the creation, and of course the tender, of the shipping documents impossible. That is a necessary but collateral consequence of the main and substantial breach of his contract," and Lord Buckmaster said, "In the present instance the refusal to ship the goods is in my opinion the whole of the breach. Unless and until the goods are shipped, the shipping documents cannot come into existence, and refusal to tender such documents is consequent upon the refusal to put the goods on board. It is perfectly true that without the documents the title to the goods is not complete, that delivery is not effected, and it may be that in an action for non-delivery of the documents the measure of damage would be the same as that for non-delivery of the goods."

Regarding therefore a c.i.f. contract as a contract for the sale of goods and not as a contract for the sale of documents relating to goods and having regard to the fact that the seller put no goods on ship board and that consequently the shipping documents could not come into existence, it is clear that the failure to tender the shipping documents has no relation to the damages arising from the breach of the contract as a whole.

It was at one time contended that damages could not be recovered for loss of market on a contract of carriage by sea, but this view was rejected in *Dunn v. Bucknall Brothers* (4). Collins, M.R., said, "Wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea as of a land transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases."

The rice in this suit was purchased to be delivered at Colombo with a view of resale there. The time that would be occupied in the transit from Bassein to Colombo would be four or five days under ordinary circumstances. The plaintiff-appellants therefore would be able to calculate the time of arrival and the probable fluctuations of the market, and they bought with reference to the probable rate of the market and this

(4) (1902) 2 K.B., 614.

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fact the defendant-respondents must be taken to have realized.

The ordinary rule as to the measure of damages is to be found in section 73 of the Indian Contract Act. The party who suffers by the breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

The loss that would be caused to the plaintiff-appellants in this case would be the loss of the market at Colombo and not the loss of the market at Rangoon. That loss was due in the present case solely to the breach by the seller of his contract to ship the rice at Bassein and send it to Colombo. That, as has been shown, is the principal and substantial breach of the contract. The failure to deliver the shipping documents has either nothing to do with the loss arising from the breach of the contract, or has been swallowed up in the principal breach.

In *Williams Brothers v. Ed. T. Agius, Ltd.* (5), it was held that the true measure of damages was the difference between the contract price and the market price at the time of the breach. That was also a c.i.f. contract case. In the course of his judgment in that case Lord Dunedin drew attention to the distinction which must be made between cases in which damages were claimable in consequence of a total breach and cases in which damages arose from delay. Referring to *Wertheim's* case (6) he said, "The buyer, therefore, got the goods, and the only damage he had suffered was in delay. Now delay, might have prejudiced him; but the amount of prejudice was no longer a matter of speculation, it had been put to the test by the goods being actually sold; and he was rightly, as I think, only held entitled to recover the difference between the market price at the date of due delivery and the price he actually got. But when there is no delivery of the goods the position is quite a different one. The buyer never gets them,

(5) (1914) Law Reports A.C., 510.

(6) (1911) Law Reports A. C., 301.

and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day—and barring special circumstances, the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward resale at over the market price, nor can he take benefit of the fact that the buyer has made a forward resale at under the market price.”

The authorities therefore clearly show that in this case the only breach or, at any rate, the principal and substantial breach for which damages are to be awarded was the failure to ship the goods in order that they might be delivered to the buyer at Colombo, and, under the law, damages are to be awarded to place the buyer in the same position as he would have been in had the contract been duly carried out and the goods delivered to him on due date. In order to put plaintiff-appellants in the position that they would have been in had this contract been duly performed, the damage to which they are entitled is the difference between the contract rate and the rate at which the goods could have been sold by them at Colombo had they been delivered on due date.

The parties are agreed that the rate prevailing at Colombo, which is to be taken to calculate the amount of damages, is Rs. 26 per bag.

The appeal will, therefore, be accepted and the decree of the lower Court will be set aside, and a decree will be passed in favour of the appellants for the sum of Rs. 4,425 with costs on that amount in this Court and in the Court below.

We certify for two Counsel.

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S. K. R. S. J.,
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Civil 2nd
Appeal No.
241 of 1920.

August 30th,
1921.

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

QUAH CHENG GWAN v. MAUNG PO MYI AND OTHERS.*

Shaw—for appellant.

Maung Lat—for 1st and 2nd respondents.

Transfer of Property Act, section 59—Attestation of document.

Mortgage deed—Effect of inoperative mortgage deed—Promise to pay—Personal obligation.

To satisfy the requirements of section 59 of the Transfer of Property Act the witnesses who attest a signature on a mortgage deed must sign their names after seeing the actual execution of the deed.

A mortgage deed, which is inoperative as such, because not duly attested, is admissible in evidence to prove a personal covenant to pay; and where consideration is proved and the agreement to repay is not qualified in its terms, the lender is entitled to a decree for the amount of the loan with the interest due.

Shamu Patter v. Abdul Kadir Ravuthan, (1912) I.L.R. 35 Mad., 607; *Ethel Georgina Kerr v. Clara B. Ruxton*, (1906) 4 Cal. L.J., 510—followed.

Bunseedhur v. Sujaat Ali and another, (1889) I.L.R. 16 Cal., 540; *Narotam Dass v. Sheopargash Singh*, (1884) I.L.R. 10 Cal., 740; *Kalka Singh v. Paras Ram*, (1895) I.L.R. 22 Cal., 434—distinguished.

Robinson, C.J., and Duckworth, J.—The plaintiff-appellant has brought this suit on a mortgage deed dated the 18th September 1917 executed by Maung Po Myi and his mother Ma Yaing. The deed recites that they desired to mortgage the properties specified for Rs. 3,000 at the rate of Rs. 1-4 per cent. per mensem, and it continues, "we will repay the principal with interest at once when the money-lender demands the same. If we fail to do so, the money-lender may sell these mortgaged properties according to law and return the excess money, if any, to us. We will make up the amount, if it is short," and later on the deed recites, "Under these conditions the rich man Quah Cheng Gwan lent the amount of Rs. 3,000 to the mother and son." When the suit was brought, Ma Yaing was dead, and her heirs and legal representatives had been brought on the record. Maung Po Myi did not defend the suit, and a mortgage-decree was passed against him. As regards Ma Yaing's liability, the mortgage failed, as it had not been properly attested in respect of her signature. The deed

* Second Appeal against the judgment of A. J. Darwood, Esq., Divisional Judge, Tenasserim, confirming the decree passed by Maung Hla, Additional District Judge, Tavoy.

was first executed by Maung Po Myi, and his signature was duly attested by two attesting witnesses. At that time Ma Yaing was ill in bed, and after execution by Po Myi the deed was taken to her. The two attesting witnesses stood at the door and saw her write on the deed, but they did not sign themselves as attesting witnesses to her signature. To satisfy the requirements of section 59 of the Transfer of Property Act the witnesses must sign their names after seeing the actual execution of the deed. See *Shamu Patter v. Abdul Kadir Ravuthan* (1).

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Plaintiff asked for a personal decree, and the question is whether, the mortgage failing in respect of Ma Yaing, a personal decree for the money can be given. The learned Divisional Judge has felt constrained by the decision in *Bunseedhur v. Sujaat Ali and another* (2), which follows the decision of their Lordships of the Privy Council in *Narotam Dass v. Sheopargash Singh* (3), and another decision of their Lordships of the Privy Council in *Kulka Singh v. Paras Ram* (4) to hold that no personal liability accrued or could be enforced. In this we think he is clearly wrong.

In the first Privy Council case cited their Lordships were dealing with a particular case, and they held that the document in question contained no personal covenant to pay the debt out of personal estate, or any other estate than the particular taluq that had been hypothecated. In *Bunseedhur's* case the mortgagor promised to repay the principal on a certain specified date, and interest in a certain month year by year. If the interest was not paid the mortgagee was to be at liberty to recover the same by suit. The document then proceeded that if the mortgaged property should ever be sold by auction for arrears of Government revenue or for any other reason, then the mortgagee might recover both the principal and interest in any manner they might consider feasible, either from the person or other moveable or immoveable property of the mortgagor; and that if the principal was not paid by the agreed date, then the mortgagee might institute a suit to recover from the mortgaged property. In other words, it was

(1) (1912) I.L.R. 35 Mad., 607.

(3) (1884) I.L.R. 10 Cal., 740.

(2) (1889) I.L.R. 16 Cal., 540.

(4) (1895) I.L.R. 22 Cal., 454.

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held that a special agreement had been made as to the remedies which were to be open to the mortgagee, and that therefore he could not recover his loan in any other way. In Kalka Singh's case the same principle is laid down. Their Lordships stated, "In the next place, although an unqualified admission of a debt no doubt implies a promise to pay it, their Lordships are not prepared to hold that this is necessarily so where there is an express promise to pay in a particular manner. It must depend on the construction of the instrument in each case." In all three cases it will be observed that it was held that there was no general promise to pay but only a promise to pay in a particular way, and therefore these authorities do not apply to a case where the mortgagor has not limited his liability to pay only in a particular manner, and that was the view of the law taken in the case of *Ethel Georgina Kerr v. Clara B. Ruxton* (5).

It is unnecessary to refer to the authorities which lay down that mortgage deeds which are invalid for want of registration or by reason of defective registration are admissible in evidence to prove a personal covenant to pay. What has to be considered therefore in each case is the terms of a particular document.

In the present case there is no doubt that the consideration money was paid. There are concurrent findings by both the lower Courts as to this, and we see no reason to differ from them. There is an express promise to repay, and the document provides that on failure to do so, the mortgagee may proceed against the mortgaged property. There is further the express admission of liability to pay any balance that might still remain outstanding after the property had been brought to sale. There is nothing in the document to show that the agreement to pay was qualified in its terms, or that there was any idea of substituting a remedy against the property for the initial liability to repay the loan. The plaintiff therefore was entitled to a decree against the estate of Ma Yaing for the amount of money lent with the interest due.

We accept the appeal and reverse the decisions of the Courts below with costs throughout.

Before Mr. Justice Pratt.

MA E DOK v. (1) MAUNG PO THA, (2) MAUNG PO HTIN, (3) MAUNG BA NGWE.*

Halkar—for applicant.

K. B. Banerjee—for respondents.

Compensation in criminal cases—Award of compensation by Magistrates in a case triable by Court of Session—Criminal Procedure Code, 1898, section 250.

Where a case ordinarily triable by a Court of Session is tried by a Magistrate empowered under section 30 of the Criminal Procedure Code, the Magistrate is not competent to award compensation. The special provisions of section 30 which enable a Magistrate to try offences only triable by a Court of Session "as a Magistrate" do not make such offences "triable by a Magistrate" for the purposes of section 250, Criminal Procedure Code.

Crown v. Qadu, (1902) Punjab Record, Vol. XXXVII, p. 74 (Criminal)—followed.

Ma E Dok was ordered by the District Magistrate, Thayetmyo, to pay compensation to the accused in Criminal Trial No. 5 of 1921 for having brought a false charge of an offence under section 376, Penal Code, against them. On revision it is urged that an offence under section 376 is triable by the Court of Session and not by a Magistrate and that therefore the District Magistrate had no power to pass an order for compensation under section 250 of the Code of Criminal Procedure.

The words used in the section are "if . . . a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused." The words 'triable by a Magistrate' would *prima facie* appear to refer to the schedule of statement of offences, column 8 'by what Court triable,' appended to the Procedure Code.

This is the view taken in Sohoni and Row's commentaries and in the Punjab case of *Crown v. Qadu* (1) in which it was laid down that where a case ordinarily triable only by a Court of Session is tried by a Magistrate empowered under section 30 of the Criminal Procedure Code, the Magistrate is not competent to award compensation. The special provisions of

* Revision of the order of Major H. F. M. Brown, I.A., District Magistrate, Thayetmyo, directing the applicant to pay compensation of Rs. 50 to each of the respondents.

(1) (1902) Punjab Record, Vol. XXXVII, p. 74 (Criminal).

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section 30 which enable a Magistrate to try offences only triable by a Court of Session "as a Magistrate" do not make such offences "*triable by a Magistrate*" for the purposes of section 250, Criminal Procedure Code. I feel no doubt that this is a correct statement of the law. The object of the legislature was apparently to exclude offences of great gravity from the provision of section 250.

I set aside the order accordingly.

Civil
Miscellaneous
Application
No. 32 of
1921.

August 25th,
1921.

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

MAUNG BYA AND 1 v. MAUNG KYI NYO AND 4

OTHERS.

Higinbotham—for appellants.

Leach—for respondents.

Civil Procedure Code, section 110—Appeal to Privy Council—Valuation for purposes of appeal.

In the Court of first instance the plaintiffs obtained a decree for less than Rs. 10,000 for the tort complained of, *viz.* the erection of a bund and the alleged consequent inundation of their paddy-fields. On appeal this decree was set aside and the plaintiffs were thus forced to acquiesce for the future in the alleged damage to their fields which were worth more than Rs. 10,000.

Held,—on application being made for permission to appeal to His Majesty in Council, that the subject-matter of the suit in the Court of first instance exceeded Rs. 10,000 and the decree or final order involved indirectly a question respecting property worth over that sum; and that therefore a certificate should be granted.

John Joseph DeSilva v. John Joseph DeSilva, (1904) 6 Bom. L.R., 403; *Gosain Bhaunath Gir v. Bihari Lal*, (1919) 4 Patna Law Journal, 415—referred to.

Andrew Macfarlane v. Francois Leclair, 15 English Reports P.C., 462; *Lala Bhugwat Sahay v. Rai Pashupati Nath Bose*, 10 C.W.N., 564; *Biraj Mohini Dasi v. Chintamani Dasi*; *Sri Kishan Lal v. Kashmiro*, (1913) I.L.R. 35 All., 445; *A. V. Subramania Aiyar v. Sel. Iammal*, (1916) I.L.R. 39 Mad., 843—followed.

Duckworth, J.—The value of the suit exceeded Rs. 10,000. By the first Court's decree a sum of Rs. 8,821-8 was decreed by way of damages for the tort complained of, *viz.* the erection of the bund, and the alleged consequent inundation of plaintiffs' paddy-fields about 1½ to 2 miles away, whereby some 13,500 baskets of paddy were lost to them. On appeal, the Bench of this Court dismissed the suit, setting aside the decree of the District Court, thereby in effect, holding that defend-

ant was entitled to maintain the bund, and thereby preventing the plaintiffs from suing again for its removal, and forcing them to acquiesce for the future in the alleged extensive damage to their fields. Now these fields are obviously worth more than Rs. 10,000 and so would any portion thereof be, which could yield over 13,500 baskets of paddy in one year, if ordinary prices of land and yield per acre, prevailed.

It is manifest therefore that section 110, Civil Procedure Code, will permit the appellant-respondents to appeal to their Lordships of the Privy Council. The value of the subject-matter of the suit in the Court of First Instance was worth over Rs. 10,000, and the decree or final order appears to involve indirectly a question respecting property worth over Rs. 10,000.

Further the District Court and the Bench of this Court differed on the facts of the case, and as to the Law applicable, the latter involving questions of substantial difficulty.

It was argued that this was merely a suit for damages, and that, in dealing with applications for leave to appeal to the Privy Council, this Court could not go beyond the amount of damages actually decreed by the Court of First Instance more especially as there had been no prayer for an injunction restraining defendants from closing the Bund. The cases of *John Joseph DeSilva v. John Joseph DeSilva* (1) and *Gosain Bhaunath Gir v. Bihari Lal* (2) which followed Sir Lawrence Jenkin's decision in the Bombay case, were relied on, but they relate to a state of affairs which is entirely different from that in question here, and seem to me not to apply. In *Andrew Macfarlane v. Francois Leclair* (3) (an appeal from Canada)—their Lordships laid down that the correct principle in such a case as this was to look at the judgment, as it affects the interests of the parties, who are prejudiced by it, and who seek to relieve themselves from it by an appeal. This principle has been adopted in India.

In the case of *Lala Bhugwat Sahay v. Rai Pashupati Nath Bose* (4) Maclean, C.J., and Mookherjee, J., dealt with a case where it had to be decided whether the valuation for purposes

(1) (1904) 6 Bom. L.R., 403.

(3) 15 English Reports P.C., 462.

(2) (1919) 4 Patna Law Journal, 415. (4) 10 C.W.N., 564.

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of the appeal depended upon the value of plaintiffs' share in an estate or the value of the whole estate. They decided that the latter value was in that case the true criterion. They followed the unreported case of *Biraj Mohini Dasi v. Chintamani Dasi* in which Maclean, C.J., and Bannerjee, J., had come to the same conclusion. In my opinion these decisions were correct. Further I consider that the case of *Sri Kishan Lal v. Kashmiro* (6) was rightly decided. There Sir Henry Richards, C.J., and Banerjee, J., dealt with the case of an award by which all the property, including the mortgage rights, was divided amongst defendant Kashmiro, the widow of the deceased, and certain other persons, including the plaintiff. The lady obtained thereunder an eight-anna share in the mortgage rights, while plaintiff was given four annas. The lady alone filed a suit on the mortgage and recovered the money. The plaintiff thereupon brought the suit in question to recover his four-anna share in the mortgage money. The suit was valued at over Rs. 10,000. The first Court gave plaintiff a decree for Rs. 8,800. On appeal the High Court held that the award was fraudulent and collusive, and dismissed the suit. The learned Judges held, in the matter of the application for leave to appeal to the Privy Council, that the provisions of section 110, Civil Procedure Code, applied, inasmuch as the award, if the High Court's decree became final, would be invalid as regards property other than the property in dispute in the suit—the said award admittedly relating to property far exceeding Rs. 10,000 in value.

Applying this decision to the present case, I think that there is no doubt that section 110, Civil Procedure Code, is applicable, and that a certificate should issue.

It will issue accordingly. Respondents will pay appellants, costs, 3 gold mohurs.

Robinson, C.J.—I am of the same opinion. The value of the subject-matter of the suit in the Court of First Instance was over Rs. 10,000. In addition to this the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards or the decree must involve directly or indirectly some claim or question to or

respecting property of like amount or value. The matter to be decided now is whether this Court's decree involves indirectly some question to or respecting property of like amount or value.

The second paragraph of section 110 in my opinion is intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order. If the decree affects the petitioner's rights in or to such other property, that may be taken into consideration in estimating the amount or value of the subject-matter in dispute on appeal to His Majesty in Council. The whole question is very fully argued in *A. V. Subramania Aiyar v. Sellammal* (7) and with the decision arrived at therein I entirely agree. The petitioner's rights are clearly thus affected.

A certificate will therefore be granted. I concur in the order as to costs.

This disposes of both applications and the two appeals may be consolidated, one security of Rs. 4,000 only need be taken and one paper book printed.

PRIVY COUNCIL.

ON APPEALS FROM THE CHIEF COURT OF LOWER BURMA.
Before Viscount Haldane, Lord Atkinson, Lord Phillimore and Sir John Edge.

MA YAIT v. MAUNG CHIT MAUNG, AND MAUNG
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(Consolidated Appeals.)

Burma Laws Act, 1898—Status of Kalais for the purposes of—Criteria for determining status of new castes or sects evolved from Hinduism.

The combined operation of migration, intermarriage with people of another race and religion, and new occupations, may produce from the descendants of Hindus a community, with its peculiar religion and usages, which is outside Hinduism in the proper meaning of the word. The Kalais form such a community and are not Hindus within the meaning of section 13 of the Burma Laws Act.

Abraham v. Abraham, 9 Moore I.A. 195; *Bhagwan Koer v. Bose*, 30 I.A. 249; *Muthusami Muddaliar v. Masilamani*, 33 I.L.R. Mad.,

*N.B.—For judgments of the Original and Appellate Sides, see *Civil Regular No. 404 of 1913 and Civil 1st Appeals Nos. 64 and 65 of 1915.*

(7) (1916) I.L.R. 39 Mad., 843.

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342 ; *Abdurahhim Haji Ismail Mithu v. Halinabai*, 43 I.A., 35—referred to.

Judgment delivered by Viscount Haldane.—These are consolidated appeals from the judgments of the Chief Court of Lower Burma, which varied judgments of that Court on its original side. The real question to be determined is whether one Maung Ohn Ghine, who died on the 10th June, 1911, and who was an opulent and prominent merchant in Rangoon, was a Hindu within the meaning of section 13 of the Burma Laws Act, 1898. If he was, it is not in controversy that Hindu law so governed the succession to his estates that a voluntary settlement made by him of the 5th May, 1908, could not be fully operative. Section 13 of the Act referred to is in these terms :—

“(1) Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, (a) the Buddhist law in cases where the parties are Buddhists, (b) the Muhammadan law in cases where the parties are Muhammadans, and (c) the Hindu law in cases where the parties are Hindus, shall form the rule of decision except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law.

“(2) Subject to the provisions of sub-section (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction.

“(3) In cases not provided for by sub-section (1) or sub-section (2) or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience.”

The consolidated appeals arise out of two suits. In one of these a declaration was sought that the settlement referred to was wholly inoperative, and alternatively for a declaration that the dispositions in favour of persons unborn at the date of the settlement were void. The other suit was for adminis-

tration of the estate under the direction of the Court. The Judge of first instance held that Maung Ohn Ghine was not a Hindu or a Buddhist within the meaning of the Act, and it was not suggested that he was a Muhammadan. He therefore held that the law which applied was that provided by the Indian Succession Act of 1865, according to which, excepting in the case of succession to some one belonging to one of these three classes, there are laid down provisions equivalent to rules of justice, equity and good conscience, which permitted the validity of the settlement of the 5th May, 1908. Under this Maung Ohn Ghine conveyed property, reserving his life interest in it, to trustees for his wife and children and their issue, some of whom might be unborn, as in the deed provided. If the learned Judge was right in thinking that the settler did not come within any one of the three specified classes, it is not disputed that this further conclusion was correct.

The answer to the question raised in these appeals therefore turns on the question of the status of Maung Ohn Ghine. If he was not a Hindu within the meaning of the two Acts cited, in each of which the term Hindu is used in the same sense, this decision of the learned Judge was right. But the Chief Court on appeal held him to be a Hindu.

In order to decide which of the views of his status was right, it is necessary to turn to the story of Maung Ohn Ghine's life. He was a merchant in Rangoon who died during a visit to England. Among other positions he held that of a municipal commissioner and magistrate in Rangoon. It is clear that he was a Kalai, which means that he was the descendant of a Hindu who had married a Burmese woman. His parents also were Kalais, and he himself married a Kalai. His paternal grandfather was apparently a Hindu who had migrated from Madras to Burma and had married a Burmese. His son was therefore a Kalai, and the latter married a Kalai. Maung Ohn Ghine was therefore a Kalai, and he lived in Burma all his life, excepting when absent on short visits. Twomey, J., when delivering his judgment in the Court of Appeal, gave a description of Maung Ohn Ghine's career which is instructive :—

" In matters of daily life, apart from his religion, Ohn Ghine was hardly distinguishable from the Burmese Community in general, and it appears that it was as a prominent member of the Burmese Community

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that he was sent to England at the time of King Edward's Coronation. Great stress has been laid on the leading part taken by Ohn Ghine in supporting various important Buddhist interests. In 1900 he wrote to the Governor of Madras urging that certain Buddhist relics lying in the Madras Museum should be made over to him to be placed in a shrine which he was preparing at Rangoon, and he referred in this letter to his Buddhist Co-religionists.' In a letter dated the 18th February, 1901, to the Colonial Secretary, Ceylon, he joined with several others in advocating the cause of the Burmese Buddhist pilgrims to the Buddhist temple of the Sacred Tooth Relic at Kandy, and the writers of this letter describe themselves as 'Burmese pilgrims now on a visit to Ceylon.' As one of the community of the Buddha Gaya Missionary Society he also championed the cause of the Burmese Buddhists against the mohunt of a Hindu temple at Gaya with reference to a certain zayat erected there by King Mindon for the use of the Burmese pilgrims. He was one of the residents of Rangoon who presented an address on behalf of the Buddhist community to the Viceroy, Lord Curzon, on his visit to Rangoon in 1901."

The learned Judge goes on to make some observations on this evidence:—

"At first sight these incidents in his career appear to support the contention that Ohn Ghine was as much a Buddhist as a Hindu. To understand their real meaning it is necessary to look at Ohn Ghine's career and aspirations as a whole. He was a man of ambition who had amassed a considerable fortune by his business capacity and industry. Sprung from an obscure class, he had little prospect of taking a leading place so long as he was identified merely with the Kalais. Caste prejudices kept Indian Hindus aloof from him and would prevent him from any kind of leadership among the Hindus generally. But by throwing in his lot with the tolerant Burmese, who formed the bulk of the population of the province, he could hope to attain some distinction. He was as much Burmese as Indian by blood, and in dress, language and manner of life he was more Burmese than Indian. He admired the Buddhist doctrines and found much that was attractive in Buddhist religious practices. Material interests chimed with his inclinations, and Ohn Ghine stood forth as a representative of the Burmese. He received more than one mark of distinction from Government, and probably hoped for more. In these circumstances no special significance can be attached to his posing as a member of the Burmese Buddhist Community, by associating with which he had achieved most of his success in life. His readiness to figure as a co-religionist of Buddhists in 1901 may be compared with his attitude of conservative Hinduism in Ma Nu's case five years later. On each occasion there was exaggeration with a purpose, and neither incident affords a safe guide to Ohn Ghine's actual religious status. The evidence shows that he never renounced or repudiated his membership of the Kale Community, and in spite of his liberality to Buddhist monks and his liking for Buddhist prayers and practices, he drew the line at having his sons *shinbyued* (that is, initiated as Buddhist novices). He continued his Hindu worship at the Kale Temple, and when he died it did not occur to his family to have his obsequies conducted according to any rites except those of the Hindus, and his ashes were sent to Benares.

The marriage of his son, Chit Maung, with a Burmese girl, according to Burmese custom in 1910, was no doubt a serious lapse from rectitude for a Hindu, but this incident can only be regarded as an example of the general laxity of the marriage customs of the Kale Community as compared with those of the recognised Hindu castes."

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This description of Ohn Ghine's life their Lordships have but little occasion to question, excepting in the conclusions which the learned Judge draws about the religious status of the dead man. Before, however, proceeding to this it is desirable to supplement the narrative on certain points. The case of Ma Nu in 1906, to which reference is made by Twomey, J., was one in which Ohn Ghine was prosecuting a Burman for abducting his daughter, and the question was whether she was abducted or had merely eloped. Ohn Ghine, who objected to any suggestion of marriage, swore that he himself was a Hindu, in which case no marriage could properly have taken place. He had obviously a special motive for taking this course, and the incident comes to very little. As against it may be set the fact that he sent his sons to a Buddhist Kyaung for instruction in the Buddhist faith, and that to one of his sons who was in England he despatched a card of admonition enjoining him to "daily think of the Buddha." This was in August, 1907. As for the sending of Ohn Ghine's ashes to Benares, this seems to have been permitted by his widow in consequence of some suggestion made to her. When Ohn Ghine's daughter, Ma Mya, died in 1910, he appears not to have himself sent her ashes to the Ganges. They were only sent there after his death along with his own. No doubt Ohn Ghine's body was cremated when it was brought to Rangoon from England. But the cremation took place in a compound which was not an exclusively Hindu cemetery, and, although Hindu rites were observed, Buddhist priests or *pongyis* were standing round the body and received offerings, while the burning was carried out by Burmans. It is true that Ohn Ghine had supported the Hindu temple in Phayre Street, Rangoon, and was a trustee of it. But this temple was built by subscriptions from Kalais who frequented it, and does not appear to have been one where strict Hinduism was observed. Moreover, he also supported and went to Buddhist pagodas and worshipped there regularly, observing the Buddhist lents, and making gifts to the priests.

Their Lordships have examined the evidence relative to Ohn Ghine's religious life, and the conclusion to which they

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have come is that Robinson, J., the learned Judge who tried this case, was right in thinking that Ohn Ghine observed to a certain extent the rites and ceremonies of the Hindu religion, but that he also observed and followed the Buddhist religion to a great extent and was far from being an orthodox Hindu. That this should have been so appears to them to have been far from unnatural, considering the nature of the Kalai Community, of which he was a member. They think that the real question in the appeal is whether the Kalais as a community are Hindus within the meaning of the expression as used in the Burma Laws Act of 1898. It is not necessary for their Lordships to express any opinion upon the construction which Ormond, J., put upon the judgment of the Judicial Committee in *Abraham v. Abraham* (1). Whatever might be the conclusion on that matter would not dispose of the present controversy. If Ohn Ghine had been born a Hindu, mere deviation from orthodoxy would not have been sufficient to deprive him of Hindu status. He might have continued to possess it had he become a member of the Brama Somaj, as was decided by this Board in *Bhagwan Koer v. Bose* (2), and he would not have the less possessed the status if he had been, say, a Sikh or a Jain, or probably if he had even at times worshipped with Buddhists. But Ohn Ghine was not born a Hindu unless the Kalai Community generally is Hindu, and this raises a question of much more difficulty than that which arises in the case of a single individual to whom considerable latitude of action is extended before he is deemed to have deprived himself of the religion which gave him his law by anything that does not amount to clear renunciation of that religion. In the instance of a community the question must always be whether there has been continuity of character. No doubt there may develop gradually among a set of people who live and worship together, variations from the regular practices of those who are Hindus which, though considerable, ought not to be taken to be such as have destroyed continuity of relationship.

In the valuable judgment delivered in 1909 by Sankaran Nair, J., in *Muthusami Mudaliar v. Masilamani* (3), that learned

(1) 9 Moore I.A., 195.

(2) 30 I.A., 249.

(3) 33 I.L.R. Mad., 342.

Judge considers the criteria according to which new castes which have been evolved among the descendants of Hindus are to be considered as having retained the Hindu religion. He points out that the formation of new castes is a process which is constantly taking place. Usage has modified old principles and it governs in the sects which have adopted such usage. Contact with other religions may well have evolved sects which have discarded many characteristics of orthodox Hinduism, and have adopted ideas and rites which are popularly supposed to belong to other systems. Continuity may not in such cases have been destroyed; but there is a limit to such processes. Continuity may be so broken that the new sect is outside the original pale. The Hindu law which the Courts administer rests on the Shastras, which claim divine sanction and are followed by Brahmins generally. There may have been introduced usages which constitute a departure from the principles of the Shastras so great that the community which has adopted them must be taken to have lost the character of being one in which Hindu religion governs. In the case of a sect at a distance from Hindu centres, where the surroundings are Burman and Buddhist and the mode of life is different from that of the Hindu communities in India proper, popularly known as such, it is easier to determine it as being outside Hinduism than it is in the case of an isolated individual who has merely lapsed into unorthodox practices. It is obvious that few influences can be more potent in producing new communities of this separate kind than the combined operation of migration, intermarriage and new occupations. When these influences have operated for sufficiently long a different community, with its peculiar religion and usages, may well result and be so outside Hinduism in the proper meaning of the word. To the members of such a community the expression Hindu in the Indian Succession Act and the Burma Laws Act would not be applicable.

Of the mode in which this principle is applied, the judgment of this Committee, delivered in 1908 by Sir Arthur Wilson in *Bhagwan Koer v. Bose*, is a good illustration. There it was explained how Sikhs and Jains can properly be treated as Hindus, and how even entry into membership of the Brahmo

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Somaj does not necessarily destroy continuity with a religion which is so elastic in its scope as is Hinduism. It is plain that the application of any merely abstract principle may be insufficient to solve the problem in concrete cases. A method which takes account of historical as well as other considerations must be applied, and the subject-matter must in each instance be looked at as a whole. In the recent appeal of *Abdurahhim Haji Ismail Mithu v. Halimabai* (4), a case of migration of a sect from India to East Africa, their Lordships laid down that where a Hindu family migrates from one part of India to another, *prima facie* they carry with them their personal law, and if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted; but where such a family emigrate to another country and, having earlier become themselves Muhammadans, settle among Muhammadans, the presumption that they have accepted the law of the people whom they have joined should be made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environment. It was observed that the analogy is that of a change of domicile on settling in a new country, rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from circumstances.

If a twice-born Hindu migrates across the sea to Burma and marries a Burmese woman, that in itself may not necessarily deprive him of his Hindu status in the eye of the law. But if he has descendants who have been born and have always lived in Burma, and who have intermarried with its people, then, even though they may form a community of their own which inherits many traces of Hindu usage, if the usages and religion are of a character so divergent from Hinduism as those of this community are, the community cannot, in their Lordships' opinion, be regarded as Hindu. They think that the Kalais acquired a non-Hindu status of their own of this kind, and, further, that Maung Ohn Ghine had so distinctly identified himself with the Kalais that his status was determined by theirs.

(4) 43 I.A., 35.

They are therefore unable to draw the inferences made by the learned Judges of the Appellate Court. They think that the contention of Ma Yait is well founded, and that her appeal ought to succeed, while the cross-appeal of Maung Chit Maung must fail. It follows that the decrees of the Appellate Court in the two suits should be set aside and the decrees of Robinson, J., restored, excepting in so far as that in the Appellate Court costs were given out of the estate. This part of the decrees may stand.

Their Lordships will humbly advise His Majesty accordingly. Maung Chit Maung must pay the costs of the appeals.

*Before Mr. Justice Robinson, Chief Judge, and
Mr. Justice Duckworth.*

S. C. DAS GUPTA v. (1) THE BURMA RAILWAYS
CO., LTD., (2) B. LALL DWARKADAS.*

Halker—for appellant.

Leach—for 1st respondent.

Dantra—for 2nd respondent.

Appellate Court's Judgment and Decree—Form of—Circumstances under which original decree may be executed.

The Appellate Court's judgment should state whether the original decree is confirmed, varied or reversed; and if it is reversed or varied, the relief to which the appellant is entitled. The Appellate Court's decree should contain a clear specification of the relief granted or other adjudication made, and orders regarding costs both in the original suit and in the appeal.

In general the Appellate Court's decree, if properly drawn, is the sole decree to be executed in the case, but in certain circumstances it may be incumbent on the Courts to permit execution of the decree of the Original Court.

Balkishen Das v. Bedmati Koer, (1893) 1.L.R. 20 Cal., 388; *Kistinkinker Ghose Roy v. Burrodacaunt Singh Roy*, 10 Ben. L.R., 101; *Chowdhry Wahid Ali v. Mullick Inayet Ali*, 6 Ben. L.R., 52; *Noor Ali Chowdhuri v. Koni Meah*, (1886) 1.L.R. 13 Cal., 13; *Muhammad Sulaiman Khan v. Muhammad Yar Khan*, (1889) 1.L.R. 11 All., 267; *Kallash Chandra Bose v. Girija Sundari Debi*, (1912) 1.L.R. 89 Cal., 925; *Satwaji Balajirav Deshamukh v. Sakharlal Atmaramshet*, 16 Bom. L.R., 778—followed.

Robinson, C.J., and Duckworth, J.—The appellant sued the Burma Railways in Civil Regular No. 154 of 1913. The suit was dismissed with costs, the decree being dated the 28th May 1915. In Civil Execution No. 325 of 1915 the first respondent applied for execution by transfer of the decree to Mandalay

* *Miscellaneous Appeal against the order passed by Rigg, J., on the Original Side—vide 10 L.B.R., 280.*

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This was on the 11th September 1915, and his application was granted. The appellant appealed from the decree in Civil First Appeal No. 106 of 1915. The appeal was dismissed on the 10th April 1916 with costs. The judgment of the Appellate Court did not comply with the provisions of Order 41, rule 32, which directs that the judgment may be for confirming, varying or reversing the decree from which the appeal is preferred. It did not state that the decree of the Court below was confirmed, and it is silent as to the costs awarded by the Original Court. The decree of the Appellate Court followed the judgment exactly. In that it merely stated that the appeal is dismissed, and set out the costs awarded by it. The portion of the form for Appellate Court's decrees drawn up in accordance with Order 41, rule 35, was not filled up, the printed portion being scored out. After the decree of the first Court was transferred to Mandalay for execution, notice was issued to the judgment-debtor to show cause why he should not be committed to civil prison. That was on the 22nd December 1915. The judgment-debtor raised various objections under Order 21, rule 40. He offered to give security, but continually obtained adjournments, and matters were allowed to drag on for a very long time. He mentioned the fact that an appeal was pending, and obtained adjournments on the ground that judgment had not yet been delivered. After it had been delivered, nothing more was said about it, and finally an order was passed on the 20th July 1917 allowing him to satisfy the decree by instalments of Rs. 50 a month. The first instalment was to be paid on the 1st September 1917, and on the 31st August 1917 he paid in Rs. 50. He has paid no instalment subsequently. The Court then *suo motu* took action with a view to his arrest and imprisonment to compel him to pay the instalments due. He protested against the action of the Court, and, counsel for the decree-holder admitting that the Court having acted *suo motu*, he could not press the matter, no further action was taken. On the 20th March 1920 the first respondent assigned the decree of the original court in writing to the second respondent for Rs. 500, and on the same day the second respondent applied in Civil Miscellaneous No. 78 of 1920 that he may be substituted on the record as the decree-holder. The petition was signed by his own counsel and by

counsel for the first respondent who recorded their consent on the application. Notice was ordered to issue to the present appellant for the 17th May 1920. The appellant had in the meantime obtained a decree against one Bissesserdas in the District Court of Mandalay, and as some time must elapse before the sanction of the court to the substitution of the second respondent's name could be obtained, and as both respondents were afraid that the appellant might execute, or assign, his decree before they could take action, the first respondent on the 24th March 1920 applied in Civil Execution No. 67 of 1920 for execution of the decree of the first court by attachment of the decree in Civil Regular No. 94 of 1913 of the District Court of Mandalay which had been passed in favour of the present appellant. This application was not in a tabular form as required by the Code of Civil Procedure, but in that of an ordinary petition. It contained no mention of the fact that an appeal had been filed against the decree, execution of which was sought, or that it had been decided. The second respondent recorded his consent to the prayer of the petition on it. It is perfectly clear that the first and second respondents were acting together in both these applications. On the 25th March 1920 counsel for the first respondent appeared and stated that it was impossible to give the amount for which the decree to be attached had been passed, and he asked for attachment without notice under Order 21, rule 22. On this the following order was passed:—"Order made as prayed," that is to say, an *interim* attachment was issued. On the 13th May the present appellant filed an application asking that the order for interim attachment of the decree of the District Court of Mandalay might be set aside, and that the decrees passed against him in both the original and appellate Courts be held incapable of execution. Finally, on the 2nd June 1920 the present appellant's counsel asked that the application to substitute the second respondent's name and the application for execution by attachment of the Mandalay decree be set down before the Court for hearing. This was done. The present appellant applied for an open commission to examine witnesses with reference to an objection raised by him that the second respondent was merely a benamidar, and that therefore his name could not be substituted. The matter, however, stood

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over until the hearing before the Original Side of this Court on both these applications.

The principal objection taken by the appellant was that the decree of the Original Court had become merged in the decree of the appellate Court, and that the appellate Court's decree was the only decree which was capable of execution in this case. The learned Judge on the Original Side held that under the circumstances of the present case there was no decree that the first respondent could execute relating to the costs awarded them by the original court except that court's decree, and that therefore there was no question of the Appellate Court's decree superseding it, and his final order reads as follows:—"There will be an order substituting Dwarkadas (Respondent 2) as transferee of the Burma Railways' (1st respondents) decree and an order allowing him to attach the decree in Civil Regular No. 94 of 1913 of the District Court of Mandalay."

It is necessary to set out one or two matters of fact. At the time of the first application for execution, no appeal had been filed, and the only decree in existence, and therefore the only decree of which execution could be taken out, was the decree of the Original Court. That application was in order, and no objection could be taken to it. In spite of a decree having been subsequently passed by the appellate Court, no objection was raised that the decree, of which execution was being had, had merged in that of the appellate Court, or that it could not therefore be any longer executed. On the contrary the appellant sought for and obtained an order for payment of the costs awarded by that original decree by instalments. In the next place, at the time that Civil Execution No. 67 of 1920 was filed the first respondent's name was still on the record as the decree-holder, and no order of substitution having been passed, the application was clearly competent.

It is not quite easy to understand exactly what orders were passed by the original court on the two matters that were before it. They were to be heard and disposed of together. This was on the suggestion of the appellant consented to by the respondents. After a careful consideration of the orders passed, we have come to the conclusion that its decision amounts to this:—That the name of second respondent was to

be substituted as transferee of the decree, that it was to be taken that his name was also substituted in the application for execution, and that both these applications were accordingly granted.

There was an application before the Court for execution by attachment of the Mandalay decree, and the transferee was given an order allowing him to attach that decree. The first objection urged before us was that the first respondent had no *locus standi* to apply for execution after he had completely assigned the decree to the second respondent. There is no force in this objection. It is not until the transferee obtains the sanction of the Court to the substitution of his name on the record that the transferee acquires any rights, and until such an order is passed, the person whose name appears on the record as the decree-holder is competent to take action by way of execution. The next objection is that the petition for execution was not in a tabular form. We do not think that this is in itself a sufficient ground for rejecting the application. The petition contains all the facts that the law requires to be mentioned in such applications, except the fact that an appeal had been filed. That fact is required to be mentioned in order that the Court should be aware whether the decree sought to be executed was still in existence or not. No objection on this ground was taken in the first instance, and, as the facts were brought entirely and fully before the Court before the decision was passed, we are not prepared to interfere on this ground.

It is further urged that no notice was issued before an order was passed, but the order passed was not the final order on the application, but only one allowing an interim attachment to issue. Notice of the application was given to the appellant, and he had been heard fully before final orders were given.

A further objection was raised that the second respondent was merely a benamidar for the judgment-debtor in the decree that was sought to be attached.

We agree with the opinion expressed in *Balkishen Das v. Bedmati Koer* (1):—"The legality of the proceedings taken in pursuance of an application made and allowed under section

(1) (1893) I.L.R. 20 Cal., 388.

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232 must depend not on the reality of the transfer but on the sanction accorded ; and if the result was to obtain satisfaction wholly or in part, we know of no authority for the proposition that the proceedings would, as regards the judgment-debtor, be invalid, merely because the person at whose instance they were taken with the sanction of the Court turned out to be a benamidar of the decree-holder." The learned Judge of the Court below was therefore perfectly right in refusing to issue commission for the examination of witnesses to support the allegation that the second respondent was merely a benamidar.

The principal ground of objection and the principal ground of appeal to us is that the decree of the original court which alone it has been sought to execute was incapable of execution, and that an appeal having been filed therefrom and a decree passed by the appellate Court, the decree of the original Court merged in that of the appellate Court which latter was the only decree that was capable of execution. This question has been considered by most of the High Courts, and was considered by their Lordships of the Privy Council in the case of *Kistokinker Ghose Roy v. Burrodacaunt Singh Roy* (2). There has been some difference of opinion as to the result of the decision on this point. Their Lordships set out the questions that had been argued before them. The first two points are set out as follows:—

First—Is the execution of a decree of the High Court made on appeal from one of the Courts in the Mofussil to be governed by the 20th or by the 19th section of Act XIV of 1859; or, in other words, is it subject to the three years', or to the twelve years', rule of limitation ?

Secondly—What is the effect of a decree of the High Court affirming a decree of Zillah Court ? Is it to be taken to incorporate the latter in itself, so that, for the purposes of execution, the decree to be executed is to be taken to be a decree of the High Court ?

They decided that the execution of decrees of the High Court made on appeal from the District Courts is subject to the three years' rule of limitation. Their Lordships then proceed to say, " If this be so, the consideration of the second question is not necessary for the determination of this appeal,

(2) 10 Ben. L.R., 101.

since it is admitted that the period of three years, if calculated from the date of the decree of the High Court, had expired before the application for execution was made. Nor, indeed, is the general question, upon which there have also been conflicting decisions in India, of much practical importance, since it is admitted that the date from which the three years are to be calculated is the date of the decree of the Appellate Court,—whether that decree is to be treated as the decree to be executed, or the appeal of which it is the termination is to be deemed ‘a proceeding taken to keep the original decree in force.’

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“In the case before us, the High Court obviously proceeded on the principle that a simple decree of affirmance did not so incorporate the mandatory part of the original decree as to make, for all purposes, the decree of the Appellate Court the sole decree to be executed. And this ruling appears to have been followed in the case of *Chowdhry Wahid Ali v. Mullick Inayet Ali* (3), in which it was ruled that, in order to make the decree of the Appellate Court the final decree in the suit for all purposes of execution, it was necessary that it should have decreed a material modification of the original decree. The rule so expressed seems open to the objection of vagueness.” They then refer to a Full Bench decision of the High Court of Bengal in which it had been laid down that whether the decree of the Lower Court is reversed, or modified, or affirmed, the decree passed by the Appellate Court is the final decree in the suit, and as such the only decree which is capable of being enforced by execution, and to a decision of the Madras High Court to the same effect. Their Lordships’ conclusion is thus stated:—“If the question were *res integra*, their Lordships would incline to the view taken by the Judges of the High Court in the present case, *viz.*, that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, that, for the reasons already given, the question is not of much practical importance, their Lordships will not express dissent from the rulings of the Madras Court and of the Full Bench of the Bengal Court, further than by saying that there may be cases in which the Appellate Court, particularly on special

(3) 8 Ben. L.R., 52.

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appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal."

Since that decision was passed, there have been decisions of the High Courts in India in which it has been considered. In *Noor Ali Chowdhuri v. Koni Mcah* (4), it was held that the decree and the only decree of which execution could be taken out was the appellate decree, and that the decree must be presumed to have incorporated the terms of the original decree. In *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (5), it was held by a majority of the Full Bench that where a decree has been affirmed on appeal, the only decree which can be amended is the decree to be executed, and the decree to be executed is that of the Appellate Court and not the superseded decree of the first Court, though the latter may, if necessary, be referred to for the purpose of executing the appellate decree. Mr. Justice Mahmood, in dissenting, held that where a decree had been simply affirmed on appeal, it is not to be implied that the appellate decree supersedes the original decree so as to render it ineffective for purposes of execution. The majority of the Full Bench apparently regarded the decision of their Lordships of the Privy Council in the case quoted as *obiter*. With that with great respect we are unable to agree. It is true that the particular question was not necessary for the decision of the case before their Lordships but it appears to us that even if it may be regarded as *obiter* on that ground, the decision contained a full consideration of the question, and though no final and positive result was arrived at and though they stated that they would not dissent from the view taken in Bengal and Madras their Lordships' views must be considered and must be allowed the great weight which any pronouncement of their Lordships has always received. In *Kailash Chandra Bose v. Girija Sundari Debi* (6) it was also held that, where there is a decree on appeal which confirms the decree against which the appeal is made, it is the appellate decree to which regard must be had, and the appellate decree supersedes the original decree. The same view

(4) (1886) I.L.R. 13 Cal 13. (5) (1889) I.L.R. 11 All., 247.

(6) (1912) I.L.R. 39 Cal., 925.

was taken by the Bombay High Court in *Satwaji Balajirav Deshamukh v. Sakharlal Atmaramshet* (7).

Order 41, rule 31, lays down what the appellate Court's judgment shall state, and amongst other things that it shall state (d) *where the decree appealed from is reversed or varied*, the relief to which the appellant is entitled, and by rule 32 the judgment may be for confirming, varying or reversing the decree from which the appeal is preferred. Rule 35 lays down (2) the decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made; (3) the decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs *and the costs in the suit* are to be paid.

We are dealing in this case only with the decree confirming the decree of the Court below, and if the rules contained in the Code of Civil Procedure as to the contents of the appellate Court's decree had been observed, we think there could be no question that the decree of the original Court would have been merged in that of the appellate Court, and that the appellate Court's decree is the only decree in the suit to be executed. It appears, however, that there has been for a long period a practice of executing the decree of the original Court and of omitting from the appellate Court's decree the statement which the form provides for including the costs in the suit. That practice has been stopped, and we must direct that in future all decrees by appellate Courts shall strictly comply with the provisions of the Code.

The question, however, that we have to decide is, what is to be done where those provisions have not been complied with, and how the rights of decree-holders are affected by the omission which renders the appellate Court's decree executable only if it is to be inferred that it has confirmed the decree of the Court below in all respects. If the decree of the appellate Court in this case is the only decree which could be executed, it would be necessary for the executing Court to refer to the original Court's decree to obtain a clear specification in respect of the relief granted. It would, in fact, amount to two

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decrees being executed in one suit, a position which, it is clear that the Code does not contemplate. Mr. Justice Mahmood held that different considerations would apply where the appellate Court varies, or reverses, the decree of the Court below, from those that would be applicable when it merely confirms the decree. The opinion to which their Lordships of the Privy Council were inclined is clearly the same, namely, that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. They further point out that, while not expressly dissenting from the rulings of the Madras Court and of the Full Bench of the Bengal Court, there may be cases in which the appellate Court might see good reasons to limit its decision to a simple dismissal of the appeal.

In the present case the appellate Court's judgment did not expressly or impliedly confirm the decree of the Court below in all respects. It merely dismissed the appeal. It was silent as to the order of the original Court as to costs. It expressed no opinion as to whether costs should have been awarded and if awarded to the extent decreed. There was nothing mandatory in its decree in this respect, and under these circumstances we are of opinion that it was open to the successful litigant to apply for execution of the decree of the original Court, the only decree which contained any express decision as to the relief granted. That the present appellant was liable for these costs has not been denied. Indeed, on the contrary, in the proceedings, before the District Court of Mandalay he admitted his liability and obtained an order for payment by instalments, and it would be a grave denial of justice, were we to permit him to avoid liability on the technical pleas, which have been raised before us.

While therefore holding that, in general, the rule must be that the appellate Court's decree, if properly drawn, is the sole decree to be executed in the case, we must hold that there may be cases (and that this is one of them), in which that general and ordinary rule cannot and should not be invariably enforced.

In this instance, if the appellate Court's decree could alone be executed, the decree-holder would have nothing to execute for, except the costs awarded by the appellate Court, which

would be absurd. It is true that the decree-holder *might have applied* for the amendment of the decree, so as to execute the decree of the appellate Court, but was he bound to do so? We cannot hold that he was. From these considerations, it is clear enough that there may arise circumstances in which it is incumbent upon the Courts to permit execution of the decree of the original Court. Moreover, as stated above, it is manifest that this was the view taken by their Lordships of the Privy Council. It is sufficient to state that the occasions on which such a necessity should arise must be few and far between. In the present case, the importance of the matter also depends upon the fact that, by now, execution of the appellate decree would be barred by lapse of time. Further, the judgment-debtor has acquiesced all through the proceedings, and has only raised the objections with which we have dealt in this appeal at the eleventh hour. Though we do not suggest that any question of estoppel arises, it is necessary to point out this acquiescence on his part.

As to the final order passed, we have set out at the beginning of this judgment what we understand to be the intention and result of the judgment of the Court below. We have been much pressed by the argument that the learned Judge granted attachment to a party who had never applied for it, but there was before the Court an application by the decree-holder and an application which he was at the time perfectly entitled to make, for execution by attachment of the Mandalay decree. Had that application been taken up first and separately from the application of the 2nd respondent an order could have been made, and would have undoubtedly been made, granting the prayer. When the order on the 2nd respondent's application had been passed, he would have been entitled to take advantage of the previous action of his assignor. Both applications were, however, heard together, at the request of the appellant, and we can find no grounds for holding that for that reason similar orders could not have been passed.

For the above reasons we dismiss the appeal with costs in both Courts, Advocates' fees in this Court to be Ten Gold Mohurs.

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Civil
Revision
No. 125 of
1920.
March 10th,
1921.

Before Mr. Justice Duckworth.

PALAWAN v. (1) B. KANU, (2) C. KANU.*

N. S. Aiyer—for applicant.

Burjorjee—for respondent.

Negotiable instruments—Assignment of promissory note otherwise than by endorsement—Right of Assignee to sue.

Before the Transfer of Property Act came into force, there existed a right to transfer negotiable instruments as chattels by a written assignment, and in places to which the relevant sections of that Act have not been extended, such a right still exists. Under such circumstances the written assignment is valid and gives the assignee a right of suit.

Benode Kishore Goswami v. Ashutosh Mukhopadhyaya, 16 C.W.N., 666; *K.M.U.R. Ulagappa Chetty v. Ramanathan Chetty*, 32 I.C., 821; *Muhammad Khumarali v. Ranga Rao*, (1901) I.L.R. 24 Mad., 654; *Muthar Sahib Maraikar v. Kadir Sahib Maraikar*, (1905) I.L.R. 28 Mad., 544; *Sowcar Lodd Govinda Doss v. Lepati Muneppa Naidu*, (1908) I.L.R., 31 Mad., 534; *Lodd Govinda Doss v. Karnam Munusawmi Pillai*, 8 I.C., 881; *T.A.R.A.R.M. Chetty v. S. E. Solomon*, 13 B.L.T., 37; *Babu Goridut Bogla v. Ebrahim Esoof Doopley*, 14 Bur. L.R., p. 25 at pp. 29 and 30; *Basant Singh v. The Burma Railways and another*, 8 L.B.R., 288—referred to.

This was a suit for Rs. 366-3-3, alleged to be due on a promissory note, payable to order, which had been assigned to the plaintiff-applicant by the payee by means of a bond. The transactions took place in Pegu District.

The first Court decreed the suit, but the learned Judge of the District Court dismissed it, holding, in effect, that, inasmuch as section 130 of the Transfer of Property Act is not in force in Pegu District, a pro-note can only be transferred by indorsement and delivery under the provisions of the Negotiable Instruments Act, or, in other words, that in Pegu District, or where the Transfer of Property Act is not in force, a pro-note cannot be transferred as an actionable claim but solely as a negotiable instrument.

In this case there was no indorsement of the note.

The sole point taken up on revision before me is that the learned Judge erred in law in overlooking the fact that a pro-note may be transferred under the general law, as well as under the Transfer of Property Act or by the Law Merchant, or that, in the alternative, the Judge erred in not

* Application for revision of the order passed by Maung Maung, District Judge, Pegu, reversing the decree passed by Maung Po Win, Township Judge, Nyaunglebin.

holding that the principles deducible from section 130 of the Transfer of Property Act should be enforced as rules of equity, justice, and good conscience.

I will deal with the last point first. It seems to me that the real point in such a case as this is that we have to consider what was the law in India, in regard to assignments of "choses in action," before the Transfer of Property Act was brought in at all. I also think that, whereas the Negotiable Instruments Act codified the law relating to pro-notes, in so far as they are Negotiable Instruments, the Transfer of Property Act codified the law relating to them as "actionable claims," which law existed, before the latter Act was brought into force. If this is correct, and I consider that it is so, it simplifies the matter under discussion to a great extent.

I am now asked to hold that there are three ways in which a Negotiable Instrument, such as this pro-note in suit, may be transferred, *viz.*:—

1. By indorsement and delivery, as a Negotiable Instrument, under section 48 of the Negotiable Instruments Act.

2. By written assignment under section 130, Transfer of Property Act.

3. By transfer under the General Law applicable before the Transfer of Property Act was put into force in India, *i.e.*, by delivery for value or assignment for value, just as a mere chattel may be transferred.

The first method would be good anywhere. The second method is equally indisputable in places to which the Transfer of Property Act has been extended, but, of course, it would not render the transferee a "holder in due course." In regard to the third method, there are authorities in support of its existence. *Benode Kishore Koswami v. Asutosh Mukhopadhyaya* (1) shows that *there is a general law*, which regulates the transmission and transfer of Negotiable Instruments "as chattels." I refer especially to page 667 of this decision. The case quoted and relied upon by the learned District Judge, *K.M.U.R. Ulagappa Chetty v. Ramanathan Chetty* (2), was the work of a single Judge, and it does not seem that he exhausted the authorities. The gist of his decision, that a

(1) 16 C.W.N., 666.

(2) 32 I.C., 821.

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man cannot sue on a note which is not indorsed to him, is not, therefore, of great weight. *Muhammad Khumarali v. Ranga Rao* (3) and *Muthar Sahib Maraiakar v. Kadir Sahib Maraiakar* (4), support the view that this third method of transfer exists. The case reported in 31 Madras 534, *Sowcar Lodd Govinda Dass v. Lepati Muneppa Naidu* (5), appears to be a parallel case, supporting the contention that a promissory note may be transferred independently of the Negotiable Instruments Act and the Transfer of Property Act, and that, too, even without a written assignment. I should say that this case deals with a transfer by the Court of Wards. It was followed in *Lodd Govind Das v. Karnam Munusawmi Pillay* (6) where also the Court of Wards made the transfer. There can be no doubt that the cumulative effect of these decisions is that a negotiable instrument may be transferred so as to enable the transferee to maintain a suit thereon by mere transfer, even without indorsement or written assignment. It would apparently be much more so when, as here, we have a written assignment.

At the same time, it is odd that I can find no authorities amongst the published decisions of other High Courts.

Here, in Burma, we have a single Judge decision of Maung Kin, J., in *T.A.R.A.R.M. Chetty v. S. E. Solomon*, (7) dated in 1919, which lays down that a negotiable instrument can be transferred as a negotiable instrument by indorsement and delivery, and as an actionable claim by assignment in writing but that it cannot be transferred by mere delivery, so as to entitle the transferee to sue upon it. The learned Judge was, of course, dealing with a Rangoon case, where the Transfer of Property Act is in force, and, so far as the present case is concerned, his decision amounted to nothing more than this :—that a verbal assignment of a promissory note is invalid. In the case of *Baboo Goridut Bogla v. Ebrahim Bsoof Doopley*, (8) even a verbal assignment appears to have been contemplated by Fox, C.J., and Irwin, J.

(3) (1901) I.L.R. 24 Mad., 654. (4) (1905) I.L.R. 28 Mad., 544.

(5) (1908) I.L.R. 31 Mad., 534.

(6) 8 I.C. 881.

(7) 13 B.L.T., 87.

(8) 14 Bur. L.R., page 25 at pages 29 and 30.

In the present case, there can be no doubt that, if the Transfer of Property Act was in force in the District, the transaction would be covered by section 130, the fact that no notice was given under the provisions of section 131 being of no consequence. However the said Act was not in force at the time with the exception of certain sections of which section 130 is not one.

The question, therefore, is whether the written assignment of this pro-note was valid, and gave to the Plaintiff-Applicant a title to maintain a suit on the instrument.

I consider that the assignment in writing *was valid* and that it *did give the plaintiff* a right of suit upon the note.

In the case of *Basant Singh v. The Burma Railways and another* (9) Sir Charles Fox, C.J., assumed that such a transfer of an actionable claim could be effected within the Henzada District, but it does not appear that his attention was called to the fact that the sections in question were not in force in that District, and really, he did not have to consider and decide the point. His decision, therefore, is of little assistance with reference to the present case.

Relying on the principles of the rulings quoted, I hold that this written assignment was valid, and gave the plaintiff a right of suit, quite apart from the Transfer of Property Act, which was not in force, and that this right arose under the general law, referred to by Chalmers in his work, which is quoted in the C. W. Notes case already referred to above. I am of the opinion that, before the Transfer of Property Act came into force at all, such a right existed, *i.e.*, a right of transfer by a written assignment, and that in places to which the sections of the Act concerned have not been extended, such a right still exists. Taking the view which I do, I consider that the learned Judge of the District Court acted illegally and without jurisdiction in deciding the case on this point adversely to the Plaintiff-Applicant, and that this Court is entitled to interfere on revision under section 115, Civil Procedure Code.

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The decree of the District Court is set aside and the case is remanded to that Court for a decision on the merits. Respondent will pay the costs of this application.

*Special
Civil 2nd
Appeal No.
215 of 1919.*

*June
20th, 1921.*

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

C. R. M. CHETTY FIRM v. K. M. M. A. K. MUTHU
MAHOMED & Co.*

Anklesaria—for appellant.
Moore—for respondents.

Lower Burma Courts Act, section 30—Second Appeal—Matters which may be considered on—Concurrent findings of fact.

In an appeal under section 30, Lower Burma Courts Act, the whole case is reopened, but the Court will not interfere with concurrent findings on pure matters of fact, unless very good grounds for such interference are made out.

Robinson, C.J.—The plaintiff-appellant brought a suit against Pavadai Padayachi and obtained an order for attachment before judgment on certain laterite lying on some land of his. The respondent then applied to have the attachment removed, claiming to be the owner of the laterite by virtue of an agreement with the defendant. His application was rejected and he thereupon brought this suit for a declaration that he was the owner of the laterite, and for damages for wrongful attachment.

Both Courts have held that he is the owner of the laterite and have granted him damages for wrongful attachment, but the lower Appellate Court has varied the decree in respect of the damages by a sum of about Rs. 200. A further appeal was then filed in this Court under section 30 of the Lower Burma Courts Act.

A question has been raised as to whether any appeal lies in regard to the ownership of the laterite, there being concurrent findings of fact as to this.

It was brought to our notice that the question whether the appeal allowed by section 30 reopens the whole case or only

* *Special Civil Second Appeal against the judgment passed by A. T. Rajan, Esq., I.C.S., Divisional Judge, Hanthawaddy, modifying the decree passed by Maung Po Han, District Judge, Hanthawaddy.*

that portion of it on which the decree of the first Court has been varied is one that is constantly raised and has never been decided by this Court in any case that has been printed. We therefore decided to hear counsel on this matter before we continue the appeal any further.

Under the ordinary law there would be no further appeal except on points of law or procedure as allowed under section 100 of the Code of Civil Procedure. The Lower Burma Courts Act allows a special appeal whenever the decree of the Appellate Court varies or reverses otherwise than as to costs the decree of the Court below. It allows special appeals on any ground which would be a good ground of appeal, if the decree had been passed in an original suit. The question of concurrent findings of fact as to one or more of the issues arising in the case is not dealt with, and, taking the section as a whole, it is clear that an appeal lies on the whole case. If the decree is varied or reversed, the appeal will lie, and to that extent it must be taken that the whole case is reopened, but it does not therefore follow that the Court should depart from the well-established rule as to concurrent findings of fact, and the general rule must always be that the Court will not interfere with concurrent findings of pure matters of fact, unless very good grounds for that interference are made out. In our opinion the Court should be guided by the principles which are acted on by their Lordships of the Privy Council in this matter, and those principles are to be found collected in Woodroffe and Amir Ali's Civil Procedure Code, 2nd Edition, at page 441, etc.

In the present case therefore, we will hear counsel as to whether this is a case in which we should go into the question of the ownership of the laterite which it is open to us to do, if good cause therefor be assigned. It may be that in this case it is not a pure question of fact but rather one of mixed law and fact, and we should have to consider whether all matters arising and necessary for the decision of the question have been considered and weighed.

The appeal will therefore be set down for further hearing and be placed first on the list as a part-heard case.

Duckworth, J.—I concur.

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Civil 1st
Appeal
No. 81 of
1920.
July 25th,
1921.

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice
Duckworth.

GEORGE HENRY PAUL v. (1) THOMAS THOMPSON,
(2) THE SECRETARY OF STATE FOR INDIA.*

McDonnell with Villa—for appellant.

Ray—for 1st respondent.

Higinbotham—for 2nd respondent.

Will—Genuineness of—Onus of proof when there are suspicious circumstances.

When a will is prepared under circumstances which raise suspicion that it does not express the mind of the testator, it is for the person propounding the will to remove such suspicion; but the suspicion must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction. In this case there was no internal evidence in the will itself sufficient to raise any real doubts as to its genuineness and it was therefore for those alleging fraud to prove it.

Prasannamayi Debya v. Baikuntha Nath Chatteraj, 25 C.W.N., 779—followed.

Tyrrell v. Painton, (1894) L.R.P.D., page 151; *Shama Churn Kundu v. Khetromoni Dasi*, 4 C.W.N., 501—referred to.

Robinson, C. J., and *Duckworth, J.*—The appellant, G. H. Paul, seeks probate of the will of T. M. T. Thompson which is dated the 15th August 1919. Probate was opposed by the testator's son who raised numerous objections, all of which, however, except that of forgery, have been abandoned. The forgery alleged by the respondent is two-fold. In the first place, it is suggested that the signature of the testator on the will has been forged. In the second place, a contrary suggestion is made that the appellant received on several occasions from the testator sheets of paper of the size of that on which the will is written, blank, except for the genuine signature of the testator. The Secretary of State for India in Council has been allowed to intervene in the case on the ground that, if the will is not proved, the estate would escheat to the Crown.

The grounds on which the appeal has been contested before us are based on the dictum of Lindley, L. J., in *Tyrrell v. Painton* (1). It runs as follows:—"The rule in *Barry v. Butlin*, *Fulton v. Andrew*, and *Brown v. Fisher* is not, in my opinion,

* Civil First Appeal against the judgment passed by Rigg, J., on the Original Side.

(1) (1894) L.R.P.D., page 151.

confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court ; and whenever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on, to displace the case made for proving the will." It is, no doubt, perfectly true that whenever a will is prepared under circumstances which raise suspicion that it does not express the mind of the testator, it is for the person propounding the will to remove such suspicion, and it is necessary that the Court should be satisfied that no such suspicions exist as throw doubts upon the genuineness of the will and the capacity of the testator. It was pointed out in *Prasannamayi Debya v. Baikuntha Nath Chatteraj* (2) that the suspicion alluded to in *Tyrrell v. Painton* (1) must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction. That this is so had already been pointed out in the judgment of their Lordships in *Shama Churn Kundu v. Khettromoni Dasi* (3).

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* * * * *

We have then a will which might well have been executed by the testator. We have evidence of the two attesting witnesses whose testimony has not been broken down. There is no internal evidence in the will itself which, we think, is sufficient to raise any real doubts as to its genuineness, and it was for the respondent to prove, at any rate, the fact that Paul had a paper signed by the testator which might have been used in the manner suggested, and that he has entirely failed to do.

After a careful consideration therefore of all the circumstances, we are of opinion that there was no just ground for

(2) 25 C.W.N., 779.

(3) 4 C.W.N., 501.

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refusing probate of this will, and probate therefore will be granted.
 The appeal is accepted with costs throughout.
 Advocate's fees eight gold mohurs.

Civil
 1st Appeal
 No. 100 of
 1920.

June 16th,
 1921.

Before Mr. Justice Maung Kin and Mr. Justice Pratt.

HUNT HUAT AND COMPANY. v. SIN GEE MOH AND COMPANY.*

Burjorjee—for appellants.
 Ah Yain—for respondents.

Contract—Breach of—Sale of Goods—Tender of Goods in accordance with Contract.

By a contract defendants bought goods from plaintiffs, delivery to be taken in all October. On the 2nd of the month plaintiffs asked defendants to take delivery but the latter refused. The plaintiffs repeated their demand which was again refused and they then sold the goods to another firm. Later the plaintiffs offered to deliver the goods on any date between the 15th and the 31st, but defendants refused to take delivery on the ground that by the resale the plaintiffs had rescinded the contract. Plaintiffs sued for damages assessed at the difference between the contract price and the market rate of the 31st.

Held,—that the contract gave the plaintiffs the right to deliver at any time during the month and that the buyers had not the option to take delivery whenever they liked; that at the time of resale the goods had not passed to the buyers and that the plaintiffs therefore could not exercise the right of resale under section 107, Contract Act; that though plaintiffs could have sued on the first breach of the contract, the second tender did not prejudice their position; that it was immaterial on which breach of the contract they sued; and that the damages claimed were assessed upon a proper basis.

Borrowman v. Free, (1879) L.R. 4 Q.B.D., p. 500; *Leigh v. Paterson*, (1818) 8 Taunt., 540; *Phillpots v. Evans*, 5 M. & W., 476; *Boorman v. Nash*, 9 B. & C., 145; *Hochster v. De La Tour*, 2 E. & B., 678; *Frost v. Knight*, (1872) L.R. 7 Ex., 111; *Mansukadas v. Rangayya Chetti*, 1 M.H.C.R., 182; *Mackertich v. Nobo Coomar Ray*, (1903) I.L.R. 30 Cal., 477—referred to.

Maung Kin, J.—This is an appeal from a decree on the Original Side of this Court.

The facts are correctly stated in the judgment of the trial Court as follows:—

By a contract, dated the 20th August 1919, the defendants bought from the plaintiffs 2,000 bags of new white beans

* *Civil 1st Appeal against the decree passed by Young, J., on the Original Side.*

delivery to be taken *ex-scale* in all October 1919. On the 2nd October 1919 the plaintiffs wrote to the defendants requiring them to come and take delivery. The defendants refused on the 3rd, saying the notice was "insane." The plaintiffs repeated their demand on the 4th, and on the 9th threatened to re-sell, if delivery was not taken. On the 10th the defendants descended from invective to explanation and stated that they had all October in which to take delivery and would not take delivery at present. On the 11th, plaintiffs wrote that they had resold to Messrs. Latham Black & Co. for Rs. 8,278-4-0 and called on defendants to come and pay the difference. On the 15th the plaintiffs who had hitherto conducted the dispute themselves placed the matter in their lawyers' hands who wrote on that date stating that plaintiffs were willing to give delivery on any day between the 15th and 31st October, convenient to defendants and cancelling all previous correspondence. The defendants in turn, now placed the matter in legal hands, and on the 18th wrote through their advocate that the re-sale having taken place before the expiration of the contract time, they had exercised their option to treat the contract as rescinded and stated that they had already so informed them verbally. They therefore declined what they called plaintiffs' new offer. On the 20th October, the plaintiffs wrote, denying that the contract was or could be rescinded and threatening an action for breach of contract, if delivery was not taken in accordance with their letter of the 15th. On the 1st November they wrote, claiming the difference between the contract price and the market rate of 31st October.

The learned trial Judge stated in his judgment that it was not disputed that the words in the Bought and Sold Notes, "delivery to be taken *ex-scale* in all October 1919," meant that it was to be taken whenever in all that month sellers called on defendants to do so. He held that the tender by the plaintiffs was made at a proper time and place, and that the buyers having refused to take delivery had committed a breach of the contract and could have been sued by the sellers. But he held that the re-sale was of the plaintiffs' goods but not of the defendants, and as before the sellers can exercise the right of re-sale under section 107, Contract Act, the property

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In the goods must have passed to the sellers, the plaintiffs would not have been able to sue for damages on the footing of the results of the re-sale. I agree with this view. The goods were unascertained goods, and although it may be said that the sellers had appropriated part of the goods in favour of the buyers, the latter never assented to the appropriation. Therefore, at the time of the re-sale the property in the goods sold had not passed to the buyers, and the plaintiffs, the sellers, were not entitled to exercise the right to re-sale.

The plaintiffs on the 15th treated the previous tender as bad and made a fresh tender. On the 18th defendants repudiated the contract and committed a breach of it. The plaintiffs then sued on that breach, assessing the damages at the difference between the contract rate and the market rate of the 31st October.

The learned Judge held that although the plaintiffs could have sued on the previous breach by the defendants, the second tender did not in any way prejudice their position. He observed that all that happened was that plaintiffs said they would accept defendants' contention, that their tender was improper, that they withdrew their claim for the loss on the re-sale and tendered again, and that the defendants could not prevent plaintiffs from accepting defendants' own contention. See *Barrowman v. Free*, (1). Under the circumstances the learned Judge saw no defence and granted a decree for the amount claimed with costs and interest on the judgment debt at the Court rate from the date of decree till realisation.

In *Leigh v. Paterson* (2) the contract was for delivery in all December. It was held that the seller had the whole month for delivery. This case has been followed in many other cases in England and India, as would appear presently.

The plaintiffs tendered delivery on the 2nd October. The defendants refused on the 3rd as stated before, so there was then a breach of the contract on the part of the defendants. The plaintiffs were then entitled to sue. If that tender can be held to have been treated as of no effect by the consent of both parties, the fresh tender made on the 15th having been refused on the 18th, the plaintiffs would then be entitled to

(1) (1879) L.R. 4 Q.B.D., p. 500. (2) (1818) 8 Taunt., 540.

sue. It appears to me that it is immaterial whether the suit is based on the breach of the contract committed on the 3rd or on the breach committed on the 18th, because the damages to which the plaintiffs are entitled will have to be assessed in exactly the same way, that is to say, they would be measured by the value of the goods on the 31st October, that being the due date of performance. This principle as to the measure of damages was first laid down in 1818 in *Leigh v. Paterson* (2), the case above cited.

The facts in that case are:—The defendant had agreed to supply the plaintiff with a certain quantity of tallow to be delivered all in December at 65s. per cwt. On October 1st, when tallow was 71s. per cwt., the defendant informed the plaintiff that the goods were sold to another and that he would not execute the contract. On the 31st December the price of tallow was 81s. per cwt. It was held that the tender of this should be regulated by the price on the 31st December. The Court said that the contract, being mutually made, could only be dissolved by the consent of both parties. The defendant had all the month of December to deliver the tallow in, and the plaintiff is bound to receive it until after the 31st. The law laid down in this case was affirmed by *Phillpotts v. Evans* (3).

In that case the contract was made early in January, to supply a quantity of corn to be delivered at Birmingham as soon as vessels could be obtained. On the 26th January the defendant gave notice to the plaintiff that he would not accept the corn, if delivered. It was at that time on its way to Birmingham, and on its arrival there, the defendant was required to accept it, but refused, and upon this action was brought. The question was whether the damages should be calculated according to the market price on the 26th January when the notice was given, or the price on the last day when the contract could have been completed, *viz.* when the wheat was tendered for acceptance. The latter was held to be the proper rule.

In *Boorman v. Nash* (4) the same rule was laid down.

In *Hochster v. De La Tour* (5) it was laid down that where the defendant has utterly renounced a contract, or has put it

(3) 5 M. & W., 476. (4) 9 B. & C., 145. (5) 2 E. & B., 678.

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out of his power to perform it, the plaintiff may, at his option, sue at once, or wait till the time when the act was to be done. But the measure of damages is the same in both cases, viz. the difference between the contract rate and the market rate on the due date.

Mr. Burjorji contends that damages should, in this case, be measured by the value of the goods on the 18th when the defendants definitely repudiated the contract. The above cases show the contention to be unsustainable. See *Frost v. Knight* (6).

Leigh v. Paterson (2) has been followed in Scotland, C.J., in *Mansukadas v. Rangayya Cheiti* (7) and also by the Calcutta High Court in *Mackertich v. Nabo Coomar* (8).

It may be contended that in *Phillips v. Evans* (3) and *Frost v. Knight* (6) the plaintiff did not treat the breach of repudiation as a breach of the contract, and that that was the reason why he was allowed to sue on the basis of the value of the goods at the due date. *Hochster v. De La Tour* (5) shows that view to be incorrect, and Mayne says on this point as follows :-- "Even when the plaintiff has exercised his option of treating the contract as rescinded before the time for its completion has elapsed and has commenced his action before that time, the damages could still be calculated with reference to the date at which it should have been carried out" (page 205 Mayne on Damages, 8th Edition). Sir Frederick Pollock in his Indian Contract Act says that the election to take advantage of the repudiation of the contract goes only to the question of breach and not to the question of damages, and that the damages are to be calculated with reference to the date of breach only where no time was fixed for acceptance, because there is then no other measure possible. (Contract Act, 4th Edition, pages 562 and 563.) It follows then that the plaintiffs in this case were entitled to sue for damages on the footing of the market price on the 31st October, whether their suit was based on the breach of the 3rd of October or of the 18th.

(6) (1872) L.R. 7 Ex., 111.

(7) 1 M.H.C.R., 162.

(8) (1903) I.L.R. 30 Cal., 477.

Mr. Burjorji contends that the words "delivery to be taken *ex-scale* in all October 1919," give the option to the buyers to *take* delivery whenever they like in all October, and that it was not the option of the sellers to *give* delivery. Although it was not disputed in the trial Court what the meaning of these words was, counsel for the appellants can now dispute the correctness of the meaning assigned in that Court, because the point was one of law. I do not however agree with the contention. The words appears to me to mean clearly that delivery was to be given *ex-scale* in all October, and that it was to be accepted when given. I think the point is quite simple. One cannot take delivery, until it is given. Therefore, the words in question give the sellers the right to deliver at any time during the month of October. Even if Mr. Burjorji's contention in this particular is correct, it does not appear to me to make any difference as to the result of the case. His clients, the defendants, told the plaintiffs that they would not accept the tender made on the 2nd, and also the tender made on the 15th. The breach was, on the part of the defendants in either case, and as I held before, damages would be assessed on the footing of the market rate of the 31st October.

If it was right that the plaintiffs were entitled to claim damages only on the footing of the market rate of the 18th October, the date on which the defendants were said to have clearly and distinctly broken the contract, the question would arise as to whether the plaintiffs should be allowed to amend their plaint accordingly. But the view I take being contrary to Mr. Burjorji's contention, there is no necessity to decide the question whether amendment should be allowed or not.

I would dismiss the appeal with costs.

Pratt, J.—I concur.

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Before Mr. Justice Maung Kin and Mr. Justice Higinbotham.

AYESHA BEE alias HANSA BIBI BY HER ATTORNEY
ESOOF EBRAHIM MOOLA v. (1) GULAM HUSEIN
SULEMAN ABOO, (2) ESOOF SULEMAN ABOO,
(3) MARIAM BIBI, (4) ADJIM SULEMAN ABOO,
(5) GULAM MAHOMED SULEMAN ABOO, (6)
ESOOF SULEMAN ABOO, ADMINISTRATOR.*

Davies—for appellant.

Giles—for 3rd respondent.

N. M. Cowasjee—for other respondents.

Administration Suit—Jurisdiction—Power of Court to pass orders relating to Property situated out of its jurisdiction.

The appellant was one of the defendants in an administration suit the subject matter of which was mainly in Rangoon. The deceased however left certain immoveable property in a Native State and this was found to be in the possession of appellant who was ordered to account for it before she could claim a share in the properties of the deceased in the hands of the administrator. Against this order she appealed.

Held,—per Maung Kin, J.—that the order of the Court of first instance was merely to the effect that unless the appellant allowed the value of the estates in the Native State to be taken into account, her share of the properties situated within the Court's jurisdiction should be withheld: and that this order was right and proper.

Per Higinbotham, J.—that an administration suit is not a suit for land: that the Court can assume jurisdiction in regard to immoveable property outside its jurisdiction when it can act *in personam*, and the Court in this case had jurisdiction to pass the order appealed against.

Penn v. Lord Baltimore, (1751) 1 Ves. Sen., 444; *Momein Bee Bee v. Ariff Ebrahim Malim*, 5 Bur. L.T., 5—referred to.

Nistarini Dassi v. Nundo Lall Bose, (1899) I.L.R. 26 Cal., 891; *Benode Behari Bose v. Nistarini Dassi*, (1906) I.L.R. 33 Cal., 180; *In re Akerman*, (1891) L.R. 3 Ch., 212 at page 219—followed.

Maung Kin, J.—This appeal arises out of an administration suit in which the appellant is 2nd defendant. The bulk of the subject-matter is mainly in Rangoon. The appellant was not living in Rangoon at the time of the institution of the suit, nor has she ever lived there or at any other place in Burma since. She has lived in the Baroda State. She has, however, filed her written statement through her attorney, contesting the suit.

A preliminary administration decree was passed in due course and a Commissioner was appointed to take accounts.

* *First appeal against the order passed by Rutledge, J., on the Original Side.*

There was no list of property constituting the subject-matter attached to the plaint. Among other things the Commissioner found in his report that the deceased left at Variav in the Baroda State two houses, a piece of agricultural land and a garden and that it was admitted that these items of property were in the possession of the appellant. The administrator, who is a defendant in the suit, had before the Commissioner filed his accounts wherein he had valued the property at Variav item by item. The Commissioner came to the following conclusions :—“ They are properties outside the jurisdiction of the Courts in British India, but the 2nd defendant, who has taken possession of them, must account for the value before she can claim a share in the properties of the deceased in the hands of the administrator of the estate.” And he proceeded to say that he had no alternative but to value the Variav properties according to the valuation made by the administrator, because no other basis is supplied by the 2nd defendant. He then directed the 2nd defendant to account for the Variav property at the said valuation, or hand over possession of them forthwith to the administrator, so that he could sell them and realize their proper market prices for the benefit of the estate. The 2nd defendant objected to the Commissioner's report as follows :—“ That the learned Commissioner erred in law in including in the accounts income of the estate in the territory of the Gaekwar, of Baroda of which no administration has been taken.” The learned Judge on the Original Side of this Court overruled the objection, and in the course of his order he observed as follows :—“ The Commissioner in dealing with this objection says the properties are outside the jurisdiction of the Courts of British India. The 2nd defendant who has taken possession of them must accept account for the value before she can claim her share of the property of the deceased in the administration suit. In order to ascertain what is the share of each heir, I think an enquiry must be made into the whole estate of the deceased so far as is known. It is admitted that the bulk of the property of the deceased's estate was in British India and within the jurisdiction of the Court. I think the Commissioner was not excluded from taking into account the property belonging to the estate outside British India,

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when it was admitted that this property was in the hands of one of the claimants asking for a share in the assets of the estate in British India. It might be a very great hardship to the other heirs if the widow is allowed to take up the position that she could retain and refuse to account for the property belonging to the estate in her hands outside the jurisdiction of the Court and at the same time take her share in the assets within the Court's jurisdiction. In that case she would have an unfair advantage over the other heirs."

The question involved is important. It seems to me clear that this Court cannot pass a full administration decree against the property in the Baroda State, for such a decree would involve a direct dealing with the property such as the partition or the sale of it under the orders of the Court. Section 16 of the Civil Procedure Code provides that suits for the recovery of immovable property with or without rent or profits; for the partition of immovable property * * shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. Section 17 provides for a case where the immovable property is situated within the jurisdiction of different Courts, and in such a case it says that the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate. Section 16 is subject to a proviso which allows a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant to be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain, provided that the relief sought can be entirely obtained through his personal obedience. The Explanation, however, says that the word "property" in the section means property situate in British India. The proviso is based upon the maxim of English Equity Courts, *viz.*, equity acts *in personam*. But it appears that the whole principle of English law has not been recognised by the Indian Legislature in enacting the proviso to section 16. In England equity acts *in personam* with reference to land in Scotland and Ireland, in the Colonies and

in foreign countries where the defendant himself is within the jurisdiction of the Court upon a ground of a contract or some equity subsisting between the parties respecting immoveable property situate outside the jurisdiction.

In *Penn v. Lord Baltimore* (1) specific performance was ordered of an agreement relating to land in America, the defendant being in England. The Courts of Equity in England generally act in this way in order to compel the performance of contracts and trusts but the Courts in India are not given jurisdiction over property outside British India.

The proviso would appear to enable one Court in British India to act *in personam* against immoveable property in another jurisdiction in British India where the relief sought can be entirely obtained through the personal obedience of the defendant who actually and voluntarily resides, or carries on business, or personally works for gain within the jurisdiction of the Court in which the action is tried. The interpretation of section 16 including the proviso by Mulla appears to me to be absolutely correct. (See Mulla's Civil Procedure Code, 6th Edition, page 71). The subject matter of the suit must not be situate beyond British India. The proviso applies only to suits to obtain relief respecting, or compensation for wrong to, immoveable property. The relief sought must be such as can be entirely obtained through the personal obedience of the defendant. So that suits for the recovery of immoveable property and for partition of immoveable property do not come within the proviso.

As I said before one of the incidents of an administration decree is the partition of the estate and, where necessary, the sale thereof, under the orders of the Court. Such suits cannot be filed in places other than the place where the property is situate except where the property is situate within the jurisdiction of different Courts in British India, in which case the plaintiff is at liberty to choose his forum. I will endeavour to make my meaning clearer by giving some examples. Suppose there is a piece of land within the jurisdiction of a Court in British India and the suit is for the recovery of that property or for the partition of it, the suit must be filed in the Court within

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whose jurisdiction the property is situate. It cannot be filed in the Court within whose jurisdiction the defendant actually and voluntarily resides, or carries on business or personally works for gain. The proviso to section 16 does not apply to such a case, because the relief sought cannot be entirely obtained through the personal obedience of the defendant. Suppose the property is situate within the jurisdiction of different Courts, the plaintiff may choose any of those Courts. But if the defendant resides or carries on business, or works for gain outside the jurisdiction of all those Courts, the suit cannot be filed in the Court within whose jurisdiction the defendant resides, or carries on business, or works for gain, the reason being the relief sought cannot be entirely obtained through his personal obedience. Where the property is situate outside British India, such suits cannot be filed in any Court in British India at the place where the defendant resides, carries on business, or works for gain. The following are suits which can be filed in any Court in British India within whose jurisdiction the defendant resides, etc., although the immoveable property involved is situate elsewhere in British India :—

(1) A suit to declare that a person resident in Calcutta holds certain lands in the mofussil subject to certain trusts is not a suit for land and may be tried in Calcutta (*Bagrau v. Moses*, 1 Hyde, 284).

(2) A suit to enforce the right of parties to act as co-sebaitis to an idol endowed with lands in the mofussil where the possession of any land is not claimed (*Juggodumba v. Puddomone*, 15 B.L.R., 318).

(3) A suit for specific performance of a contract to sell lands outside Calcutta (*Ramdhone Shaw v. Mabamoney Dassee*, Bomke, 218. See also *Halkar v. Dadabhai*, I.L.R. 14 Bom., 353 ; *Contra* see 19 Cal., 358, *Sreenath Roy v. Cally Doss*, I.L.R. 5 Cal., 821).

(4) A suit for an injunction to restrain a nuisance in Howrah (*Ramjmohan Bose v. East India Railway*, 10 B.L.R., 241).

(5) A suit to recover title deeds to land (*Jagganath Doss v. Brijnath*, I.L.R. 4 Cal., 32).

(6) A suit for trespass to land in the plaintiff's possession outside the limits of the Court's jurisdiction, and for injunction (*Crisp v. Watson*, I.L.R. 20 Cal., 689).

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The above suits are all suits for reliefs respecting land where the relief sought in each case can be entirely obtained through the personal obedience of the defendant who is within and subject to the jurisdiction of the Court.

In view of the Explanation to section 16 such suits will not lie in British India if the property respecting which relief is sought is situate outside British India.

But it is contended in this case that the Court is not asked to act directly on the property in the Baroda State, all that it is asked to say being that so long as the second defendant does not account for the value of that property, or allow the administration of the estate to go on upon the basis that it is part of the estate, whatever share she may be entitled to in the property within British India will be withheld from her.

In *Momein Bee Bee v. Ariff Ebrahim Malim* (2), it was held on the authority of the English cases cited therein that if one of the heirs owes a debt to an estate, even though it be time-barred under the Limitation Act, the Court is entitled to retain funds in respect of the debt when calculating the account due to the heir. On the analogy of that case I do not see any objection to the Court directing the second defendant to account for the value of the property in the Baroda State before she can obtain her share from this Court.

I must here point out that the learned Judge on the Original Side has not, by his order, endorsed the second portion of the following passage in the Commissioner's report:—"The second defendant must account for these properties at the above values, or hand over possession of them forthwith to the sixth defendant administrator, so that he could sell them and realize their proper market prices for the benefit of the estate," all that the learned Judge endorsed being the following passage only:—"They are properties outside the jurisdiction of the Court, but the second defendant who has taken possession of them must account for the value before she can

(2) 5 Bur. L.T., 5.

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claim a share in the property of the deceased in the hands of the administrator of the estate." That only means that, unless the second defendant allows the value of the property in the Baroda State to be taken into account in the administration of the estate, her share in the estate will be withheld. The Court would be acting without jurisdiction, if it ordered the second defendant to hand over possession of the property to the administrator to enable him to sell it and realize its proper price for the benefit of the estate.

I would therefore dismiss the appeal with costs.

Higinbotham, J.—This is an appeal from the order of the Judge of the Original Side of this Court passed in C.R. No. 74 of 1916 confirming the order of the Commissioner appointed to take accounts. The suit in which the order was passed was an administration suit filed by the first respondent against the administrator of the estate of Mahomed Ebrahim Aboo, deceased, late of Rangoon and against the heirs and legal representatives of the said deceased praying for an account of the moveable and immovable properties of said estate and for their administration by and under the direction of the Court. The second respondent who resides within the jurisdiction of this Court had previously obtained Letters of Administration of the estate in C. M. No. 39 of this Court and he was sued in his personal and representative character.

The appellant, who was the second defendant, resides at Variav but was represented by her attorney and filed a separate written statement objecting to the suit on various grounds and stating that she was always ready to have the properties amicably divided.

On 31st July 1916 a preliminary decree was passed ordering accounts to be taken and amongst such accounts, an account of what property, if any, has come into the hands of the plaintiff or the defendants or any of them, or to the hands of any other person by the order or for the use of the plaintiff or the defendants or any of them. The Commissioner took the accounts as ordered and in those proceedings the second defendant-appellant on the 22nd November 1916 filed her accounts. In his report of the 19th April 1919 the Commissioner has found that the deceased left two houses and a plot

of agricultural land and aogarden at Variav, and held as follows:—"They are properties outside the jurisdiction of the Courts in British India but the second defendant, who has taken possession of them, must account for their value before she can claim a share in the properties of the deceased in the hands of the administrator of the estate. On the evidence before me I am compelled to value the properties at the prices stated against them in the list of properties in the second defendant Asha Bee's hands, filed by the administrator with his account, Exhibit 1, namely Rs. 10,000, 5,000, 1,500 and 1,000 respectively. The second defendant must account for these properties at the above values or hand over possession of them forthwith to the sixth defendant administrator so that he can sell them and realize their proper market prices for the benefit of the estate."

On the 9th July 1919 the second defendant filed the following objection to the Commissioner's report:—"That the learned Commissioner erred in law in including in the accounts income of the estate in the territory of Gaiikwar of Baroda of which no administration has been taken." The Judge of the Original Side overruled this objection in his order dated 21st July 1919 and confirmed the Commissioner's report.

The second defendant-appellant has filed this appeal against this order and has raised a similar objection in her grounds of appeal Nos. 1 and 2. But she has also raised other objections which were not raised before the Original Court. In ground of appeal No. 3 the objection is taken that the Lower Court erred in holding that "it is admitted that the Variav property was in the hands of the widow." But the Commissioner in his report stated that the second defendant had taken possession of these properties and no objection was taken to this finding before the Lower Court and cannot now be further considered. Of the other two grounds of appeal No. 4 has been abandoned and No. 5 has reference to costs. It is attempted in this Court to show that this last ground of appeal has reference to the costs awarded by the Commissioner but in addition to the form of the objection not being apt for this purpose, there is the fact that no objection to the Commissioner's report on the ground of costs was taken

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in the Lower Court, which has had no opportunity of considering the question and has not dealt with the matter.

The only substantial matter before this Court is that which is contained in the first two grounds of appeal. The second defendant contends that that portion of the order of the Commissioner which is set out above was made without jurisdiction as the property referred to is outside the jurisdiction of any Court in British India. It is urged that under section 5 of the Indian Succession Act the law of succession is governed by the rule *lex loci rei situ* and that the Letters of Administration do not include such properties. That an administration suit cannot include properties outside the jurisdiction. That no order of any kind with reference to such properties can be passed in an administration suit and that the Court cannot order them to be sold or touch them in any way or order the second defendant to account for them. It is also stated that if any such orders are passed the second defendant may be seriously embarrassed by other orders passed by the Courts in Baroda in connection with the land and it is urged that in any event it is wrong to place the burden on the shoulders of the second defendant-appellant of collecting these properties and bringing them into account. These objections seem to show that the order passed by the Commissioner has been misunderstood. It is not an order against the property itself but an order affecting the right of the second defendant to share in the distribution of the estate in the hands of the administrator who is now subject to the orders of the Court under the decree in the administration suit. That is to say it is a personal order against the second defendant-appellant. This being the case it is unnecessary to consider what might be the position if the Court had passed an order against the property itself. The fact that the property is not included in the Letters of Administration does not appear to affect the question of the legality of the Commissioner's order for the reason just mentioned.

With reference to the right of the Court to pass an order having reference to property outside its jurisdiction in an administration suit it has been suggested that a suit for the administration of an estate which includes immoveable

property is a suit for the recovery of immoveable property and therefore the Court has no jurisdiction to pass any such order. But there is ample authority that an administration suit is not a suit for land but is a suit for the administration of the real and personal estate of the deceased as completely as the circumstances will permit. In the case of *Nistarini Dassi v. Nundo Lall Bose* (3), it was objected that the Court could not set aside certain leases of property belonging to the estate which was situate outside the jurisdiction of the Court. But it was held that the suit was merely one to have the property administered by the Court and to make the trustees or executors personally liable for any maladministration of the estate. That this did not turn the suit into one for the recovery of immoveable property and that the Court assumes jurisdiction in regard to immoveable property situate outside the jurisdiction in cases where it can act *in personam*. This case went on appeal to the Privy Council and the right claimed by the High Court to set aside leases of lands situate outside the jurisdiction of the Court for the due administration of the estate was expressly approved by their Lordships (4).

This principle seems to be applicable to the present case as the existence of immoveable property belonging to the estate outside the jurisdiction of the Court is only an incident to the winding up of the estate. So long therefore as the Court can act *in personam* with reference to this property and has the means of enforcing its order the Court can assume jurisdiction for the purpose of winding up the estate. In this case the deceased was domiciled within the jurisdiction of the Court and the Administrator resides within the jurisdiction and the cause of action arose wholly or in part within such jurisdiction. This would seem to be amply sufficient to give the Court jurisdiction under section 20 (c), Civil Procedure Code, to entertain the suit for the administration of this estate. The 2nd defendant-appellant moreover is merely one of the beneficiaries entitled to notice of such suit with the right to come in and support or object. The 2nd defendant-appellant in fact did come in and object for various reasons to a decree being passed for administration of the estate and stated that

(3) (1899) I. L. R. 26. Cal., 891. (4) (1906) I. L. R. 33 Cal., 180.

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she was ready to have the estate divided up. But she took no objection as she should have done under section 21, Civil Procedure Code, to the jurisdiction of the Court to entertain the suit.

The Court has ascertained that 2nd defendant-appellant has some of the estate in her hands and although she is residing outside the jurisdiction the Court has the means of compelling her to account for such property as a condition to her obtaining her share in the estate in the possession of the administrator, because the Court has power over such share and can enforce its order by withholding and even depriving her of it unless its order is obeyed. But this is not taking action against the property itself but is the exercise of pressure on the 2nd defendant to compel her to act in accordance with the Court's decree that the estate should be wound up. I would hold therefore that the Court has jurisdiction to pass the order in question.

I think also that the Lower Court was right in passing such an order, as otherwise the estate could not be fully administered. The principle upon which the Court has proceeded is well established and it was clearly expressed in the case of *In re Akerman* (5) as follows:—"A person who owes an estate money that is to say who is bound to increase the general mass of the estate by a contribution of his own cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it." The principle underlying this order was enforced in the case of *Momein Bee Bee v. Ariff Ebrahim Malim* (2) and I think should be followed in this case.

The 2nd defendant-appellant is asking the Court for her share of the estate in the hands of the administrator and the Court has rightly placed the condition on her obtaining such share that she will account for that portion of the estate in her hands. She can do this either by agreeing to a joint valuation being taken of such property or by agreeing with the other heirs and legal representatives to the property being sold and the saleproceeds being handed over to the administrator or in any other way approved by the Court.

(5) (1891) L.R. 3 Ch., 212, at p. 219 (2) 5 Bur. L.T., 5.

This need not cause any hardship for her or throw any onerous burden on her as has been suggested in this Court.

I would therefore dismiss the appeal with costs.

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Before Mr. Justice Heald.

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 (3) MAUNG PO CHET, (4) MAUNG SAN DUN, (5)
 MA HTWE *v.* MAUNG TUN SHEIN.*

Bose—for appellants.

W. Dhar—for respondent.

Buddhist Law—Inheritance—Partition—Rights of auratha son.

While an *auratha* son cannot claim a one-fourth share of the property jointly acquired by his parents merely by reason of his mother's death, the re-marriage of his father gives him a right to claim the one-fourth share which he would not have if his father did not re-marry.

Ma On v. Shwe O, S.J.L.B., 378; *Maung Hlaing v. Tha Ka Do*, P.J.L.B., 65; *Seik Kaung v. Po Nyein*, 1 L.B.R., 23; *Ma Thin v. Ma Wa Yon*, 2 L.B.R., 255; *Mi Hlaing v. Mi Thi*, (1914-17) 2 U.B.R., 40; *Mi The O v. Mi Shwe Mi*, (1914-17) 2 U.B.R., 46; *Shwe Po v. Maung Bein*, 8. L. B. R., 115—referred to.

Plaintiff Tun Shein is the eldest surviving child of the 1st defendant Shwe Ywet and his deceased wife, Ma Nge, and since the eldest-born child, a daughter, admittedly died at the age of nine and the next-born child, a son died at the age of 6, Tun Shein is undoubtedly the "auratha" son of Shwe Ywet and Ma Nge. Ma Nge, according to Tun Shein, died about seven years ago when Tun Shein was 19 years of age, but according to Shwe Ywet she died in February 1911 when Tun Shein was only 16 years of age. The suit was instituted in July 1919 and it is not suggested that any question of limitation arises in respect of the date of Ma Nge's death. It is admitted that within a few months after Ma Nge's death Shwe Ywet married a second wife, and Tun Shein claims that by reason of Shwe Ywet's second marriage, he as *auratha* son became entitled to claim a one-fourth share of the property jointly acquired by Shwe Ywet and Ma Nge while they were husband and wife.

The lower Courts found that he was so entitled, and this appeal has been brought on the question of Burmese Buddhist

* *Second Appeal against the judgment passed by D. D. Nanavati, Esquire, Divisional Judge, Tharrawaddy, confirming the decree passed by Maung Thet Nyun, Subdivisional Judge, Zigon.*

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law, whether an *auratha* son can on his father's re-marriage after his mother's death claim a one-fourth share of the property jointly acquired by his parents.

It is now settled law that an *auratha* son cannot make that claim against his father merely by reason of his mother's death, and the question to be decided is whether the re-marriage of the father gives him a right to claim the one-fourth share which he would not have if his father did not re-marry.

It will be convenient to consider first the *Dhammathats* and then the case-law on the subject.

I will take the *Dhammathats* in the order in which I dealt with them in my judgment in the Full Bench case of *Maung Sin v. Ma Thein*.

No extract from *Vilasa* is cited in sections 44 and 45 of the Digest which deal with the subject of the rights of children on the re-marriage of the surviving parent, but in section 46 a passage is cited which says that on the death of the father the mother should divide the substance of the inheritance with her sons and daughters, even though she should not marry again.

The *Wagaru* deals only with the partition between the children and the step-parent after the death of both parents.

No extract from the *Dhammathakya*, *Kaingsa* or *Manuyin* on this subject are cited in the Digest but there is an important extract from the *Mahayazathat* which was compiled by the same writer as *Kaingsa*, and which runs as follows : "Although according to the *Dhammathats* the law is that if there be an *auratha* son or daughter, although the surviving parent takes a lesser wife, the property other than the personal belongings (of the surviving parent) shall be divided into four shares and the *auratha* shall have one share, and that the younger sons and daughters shall inherit only when both parents are dead, nevertheless because the surviving parent has not remained only looking after the children in accordance with what is right but has again taken a lesser spouse, let one-half of the property be given to the children as the share of the deceased parent and let the surviving parent take over the rest to the step-parent for their subsistence and though it be all spent by them let it be spent, but after both the parents are

dead if any property remains unspent, it shall be divided into four shares of which the children of the earlier family shall get three and the step-parent one, the step-parent getting a share because although it was property left by the children's own parents when they were young, it is due to the kindness and care of the step-parent that it has been preserved."

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The *Manugye* gives the following rules—

(1) If after the death of the mother the father lives with a lesser wife the father is to take his own personal belongings but is to make provisions for the eldest son according to his means. The eldest son is to have the mother's personal belongings. The father is to have three-fourths of the property which remains over and the house. If the said son be not old enough to separate and stays on with his father and step-mother the property is to be separated in the presence of witnesses and left in the custody of the father and step-mother, and if the step-mother has no children, then on the father's death the son is to get the property originally assigned to him and the house together with three-fourths of the property of the parents, and the step-mother is to get one-fourth of the property of the parents and the one-fourth of the value of the house.

The passage about the father's making provision for the son "according to his means" is obscure. Doctor Richardson translated the passage "Let him give to the eldest son what has been laid down above according to his means." The translator of the Digest translated it "If there is no eldest son, partition of the rest of the property shall be made according to the rule already laid down," and interpolated the words "if there is one" (that is an eldest son) at the beginning of the following passage which relates to the partition of the mother's personal belongings. The actual words of the Burmese are as follows—"After mother dead, if father live (with) little wife, as for the father, leaving riding elephant, riding horse (then follows a list of a man's personal belongings) with father, according to the words that have been said above, big son if there be none, according to there being none a share shall be given. The mother's clothes (etc., personal belongings) let big son have. As for the property left over, sharing into

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four shares, three shares let father take, house let father have."

The reference to what has been said above is to the rule for partition between the *auratha* son and the father on the death of the mother and that rule says that if there is sufficient property the *auratha* son is to get a slave, some cattle and a plot of land, or such of those things as there may be. In view of that provision the meaning of the disputed passage would seem to be as I have rendered it above, the sense of the words "according to the words that have been said above, big son if there be none according to there being none a share shall be given" being that a share shall be given to the *auratha* as directed in the rule given above according as here is or is not the property mentioned in that rule as that which should fall to his share. This rendering is strongly supported by the *Amwebon*, the compiler of which ordinarily reproduced the exact wording of *Manugye*. The text as reproduced in *Amwebon* adds the word "to" to the words "big son" and alters the word "if" in the phrase "if there is none," so that the passage reads "according as there is or is not (property) a share shall be given to the big son."

There is however a further difficulty about this passage in *Manugye* which is that it seems to imply that the *auratha* son gets one-fourth of the estate as well as the specified property, since it assigns three-fourths of whatever is left to the father. It does not say in so many words that the *auratha* son is to get one-fourth, and he certainly would not be entitled to one-fourth if the father did not re-marry, but it clearly suggests that the *auratha* is entitled to get one-fourth of the estate from his father on the father's re-marriage.

(2) If after the death of the mother the father lives with a lesser wife, let all the property mentioned above (that is, the property of the parents) be divided into four shares and let the daughter have one and the father three. Let the daughter get the mother's personal belongings and the slave woman, and let the father have the house. Let the daughter's share be made in the presence of witnesses and if the father die while the daughter, being not old enough to separate from her father and step-mother, is living in the same house with them, then if

the step-mother has no children let the partition so made remain effective, and let the father's share be divided into four shares of which the daughter is to get three and the step-mother one. The daughter is to get the house but must pay the step-mother one-quarter of its value, and the step-mother is to get half the father's clothes. The debts are to be apportioned similarly.

(3) If the father dies and the wife lives with a lesser husband, the father's personal belongings are to be divided into four shares of which the eldest daughter is to get one and the mother and the younger daughters three. The mother is to get the house. The property, animate and inanimate, allotted to the eldest daughter shall be noted in the presence of witnesses and kept separate. When the mother dies, the eldest daughter is to have the property so allotted to her and the mother's share is to be divided into four shares of which the step-father is to get one and the eldest daughter and her relations (that is presumably her brothers and sisters) three. The eldest daughter is to get the house but must pay the step-father one-fourth of its value.

(4) If the father dies and the mother lives with a lesser husband, let the eldest son's share of the property, animate and inanimate, be made in the presence of witnesses and kept separate. If he is not old enough to separate and lives together with the mother and the step-father, then when the mother dies, the eldest son shall get the whole of the share originally allotted to him, and thereafter the mother's three-quarter share shall be divided into four shares and the step-father shall enjoy one and the eldest son of the former family three. The house is to be valued and the step-father to have one-fourth of its value. The step-father shall pay one-fourth of the mother's debts.

It will be noticed that in the cases mentioned in the second and fourth of these rules the *auratha* child would be entitled to one-fourth of the property under the ordinary rule, whether the surviving parent married again or not, so that one would expect these two rules to be practically a repetition of the rules for partition on the death of the parent. That in substance is what they are, but with the addition of a direction that if the

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eldest child is not old enough to separate from the surviving parent and step-parent his or her share is to be segregated. It seems possible that these rules have been compiled from different sources, some of which used the words *thagyi* (big son) and *thamigyí* (big daughter) in the sense of the *auratha* son or daughter while the others used the same words as meaning the children of the elder family. This suggestion receives support from the use of the words "*atet thagyi*," that is the big son of the earlier family, in the fourth of the rules given above, and from the reference to the "relations," or brothers and sisters in the third rule, but it is not necessary to consider it for the purposes of the present case, since it concerns only partition after the death of the surviving parent.

I have been unable to find in the *Manusara Shwemyin* any reference to a right of partition which arises on the re-marriage of the surviving parent. The ordinary rules regarding the right of the *auratha* son or daughter to get one-fourth of the estate on the death of the father or mother respectively are mentioned, but section 25 says definitely that children do not ordinarily inherit until both parents are dead.

The *Vannana*, like the *Manugye*, gives special rules for the partition of property taken by the survivor of the parents to a second marriage, between the children and the step-parent on the death of the parent, and lends some support to the view that the rules cited above from *Manugye* are mainly rules for partition on the death of the surviving parent rather than rules for partition on re-marriage. There is however a passage from *Vannana* cited in the Digest (section 46) which says that on the father's death the mother should not refuse partition if it is claimed by the children, though she has not married again, and I find another passage also which says that if the mother, having equally divided the inheritance with her children, marries again, the children shall have no interest in the property of the second marriage. These passages certainly suggest that such partition was not unusual, though they do not prove that the children could enforce it against the wish of the surviving parent.

No passage from the *Vinicchaya* or *Vicchadani* is cited in

the Digest in support of a rule prescribing partition on the re-marriage of the surviving parent.

The *Dhammathat* known as *Amwebon* is cited in the Digest but as usual it is a reproduction of *Manugye*. But in this instance it is useful, as I have already noted, because it throws light on the corresponding passage of *Manugye* which the official translator of the Digest has mistranslated. It gives a slightly different wording of the text and shows either that the text of *Manugye* was so obscure that the compiler of *Amwebon* was compelled to alter it to make sense, or, much more probably, that our present text of *Manugye* is corrupt, some scribe having read the word «ငိုက်» (“according”) as «ငါ့» (“if”) and having possibly also changed the word «တို့» (“to”) which the writer of *Amwebon* writes instead of «မ» (“not”) after the words «ထီးကြီး» (big son). However that may be the *Amwebon* makes sense as it stands while the parallel passage in *Manugye* does not.

From this examination of the major *Dhammathats* it seems clear that there is no authority which says in so many words that an *auratha* child acquires by reason of the re-marriage of the surviving parent a right to a one-fourth share in the estate which he or she would not have had if the surviving parent had not re-married. The *Dhammathats* do clearly lay down that the *auratha* son or daughter shall receive on the re-marriage of the surviving mother or father, as the case may be, the share to which he or she had already become entitled by reason of the death of the father or mother respectively, and that if the *auratha* continues to live with the surviving parent and the step-parent he or she (probably in either case along with the other children of the first marriage) will on the death of the surviving parent be entitled to three-fourths of so much as chances to remain out of the property which the surviving parent took to the second marriage. Some of the *Dhammathats* say definitely that the children have no rights whatever in the property taken by the surviving parent to the second marriage so long as that parent is alive and that they have no right to complain if it is all consumed. But nevertheless there are clear indications that the author of these *Dhammathats* did contemplate the accrual of new rights on the

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re-marriage of the surviving parent. It is difficult on any other assumption to explain the insertion of the provision for the segregation of the *auratha* child's share in the presence of witnesses if the child is not old enough to separate from the surviving parent and the step-parent. The recognised right of the *auratha* child to take the quarter share on the death of the parent is limited to cases in which that child is sufficiently grown-up to take the place of the deceased parent, and therefore it would appear that if the child was not grown-up the right to take the fourth share on the death of the parent could not arise. The right of the child, who is not sufficiently grown-up to separate from the surviving parent, to have the one-fourth share segregated would seem therefore to be a different right from the ordinary right of the grown-up *auratha* to take the fourth share on the death of the parent. It is true that there is no actual reference to age in the *Dhammathats* which prescribe segregation. The phrase used in each case is "If the child is not 'sufficient' to separate," but I do not think that that phrase can bear any other meaning than "is not sufficiently old to separate," and the Burmese word "to be sufficient" is constantly used in the meaning of "to be old enough." One is therefore driven to the conclusion that although the writers of these *Dhammathats*, and particularly of *Manugye*, did not actually say in so many words that the right of the *auratha* to take the one-fourth share of the estate on the re-marriage of the surviving parent was a different right from that of the *auratha* to take a one-fourth share on the death of the parent, probably because there was in the older law books which they were reproducing no recognition of the right to take a share on re-marriage, nevertheless the right which they had in their minds, vaguely it may be, was not identical with the recognised right of the *auratha* to take one-fourth on the death of the parent, and was probably a right, by that time well established by custom, allowing the eldest child, whether grown-up or not, to claim one-fourth of the estate on the re-marriage of the surviving parent, although he or she was not in a position to claim that right by reason of the parent's death. It is clear that as early as the date of the *Vilasa*, that is as early as the 12th century, there

was a tendency towards a general partition of the state between the surviving parent and the children on the death of one parent and that that tendency was much more pronounced by the middle of the seventeenth century when the author of *Yazathat*, although he gave the ancient rule, nevertheless said that equal partition between the surviving parent and the children ought to be made when the surviving parent re-married. The same tendency reappears in *Vannana*, a late 18th century *Dhammathat*, and in my opinion it is particularly important in view of the conservatism of the written law and is strong evidence of the existence of a well established custom in favour of a general partition on the re-marriage of the surviving parent.

So far I have dealt only with the major *Dhammathats*, but some of the minor law-books also seem to me to give evidence of a similar custom.

The *Dhamma* which is said to be of about the same date as *Manugye* gives practically the same rule as the first of those extracted from *Manugye* above, except that it makes no reference to the special property which the *auratha* son would get from the father on the death of the mother. It also, like *Manugye*, says that the father is to take three-fourths of the estate, and merely leaves it to be inferred that the *auratha* son gets the other fourth. It gives the *auratha* daughter on the death of the mother and the re-marriage of the father the same one-fourth share of the estate which she would be entitled to receive if the father did not marry again.

The *Rajabala* as cited in section 44 of the Digest seems to say that on the re-marriage of the mother the daughter is entitled to claim one-fourth of the property remaining over after she has received the *auratha* share and the learned compiler of the Digest possibly read it in that sense, but if the passage be read in conjunction with the corresponding passage in section 45 it appears that the property of which she is entitled to claim one-fourth is not the whole estate but the deceased parent's personal belongings, and I am inclined to think that that was probably the sense of the original authority which the writer of *Manugye* mutilated in the corrupt passage with which I have dealt at length above.

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The *Kungyalinga* which as its name implies is in verse so that words sometimes have to yield to the exigencies of metre is represented in the Digest as laying down that when either parent dies the property is always to be divided into four shares of which the surviving parent gets three and the children one. but it seems possible that the translator has overlooked the word "*auratha*" before the word children ("brothers and sisters") in this passage and that it may refer merely to the ordinary *auratha* share which other *Dhammathats* also undoubtedly allow the *auratha* child to take on the re-marriage of the surviving parent.

The *Dhammasara* also according to the English version of the Digest gives a similar rule but a reference to the original shows that the translator has given merely a short paraphrase of the text, which is in verse, and has not attempted a verbal translation and it seems possible that this authority also refers only to the ordinary rights of the *auratha* child.

The *Cittara*, which again is in verse, says that when the chief husband dies and the wife lives with a lesser husband the property excepting her personal property and property set apart for religious uses is to be divided into four shares of which the mother takes three and the children (brothers and sisters) one.

The *Kyetyo*, which seems to reproduce the rules of the *Kaingsa* as to the *auratha* son's share almost word for word (*vide Kaingsa* cited in section 30 of the Digest), merely gives the *auratha* son on the re-marriage of his mother the right to the one-fourth share which he would already have by reason of the father's death apart from the re-marriage of the mother, but adds that according to some authorities even that share should be left in the custody of the mother.

It is true that most of these authorities may be interpreted, as referring only to the share to which the *auratha* child would already be entitled by reason of the parent's death, but the constant reference to the claim as arising on the re-marriage of the surviving parent seems to me to suggest that the authors themselves were under the impression that the re-marriage of the surviving parent conferred a new right to partition, and it can hardly be denied that the passages cited are evidence of a

well-established custom in favour of some kind of partition on re-marriage.

We now come to the *Attasankhepa* which was compiled by the Kinwun M'ingyi, shortly before the British annexation of Upper Burma. The learned author, who it will be remembered was also the compiler of the Digest, states the law as follows:—

“If after the death of the father the mother or after the death of the mother the father wishes to marry again, the *auratha* son or daughter must receive his or her share if it has not already been taken. If there is no *auratha* child, then the whole of the property is to be divided equally between the surviving parent and the younger children. Then unless the children continue to live with the surviving parent and the step-parent they have no interest in the property of the second marriage. If however they continue to live with the surviving parent and the step-parent in the new household and it is possible to keep their share of the property separate, then on the death of the surviving parent they are entitled to receive their share in full and shall also receive three-fourths of the property which the surviving parent took to the second marriage. If however their share has not been kept separate it is to be regarded as property taken by the surviving parent to the second marriage.”

It will be noticed that this authority, like the rest, does not say in so many words that the *auratha* acquires any new right to a one-fourth share on the re-marriage of the surviving parent. It says merely that if the *auratha* has not already received the one-fourth share he or she is to get it. This might mean that if the *auratha* son or daughter, who has already become entitled to the *auratha's* one-fourth share by reason of the death of the father or mother respectively, has not already claimed and taken that share, he or she shall be entitled, and will of course be well-advised, to take it on the re-marriage of the surviving parent. But it might also mean that although the *auratha* son or daughter has not already become entitled to the one-fourth share because it was not the father or mother, as the case may be, who died, nevertheless he or she shall be entitled to claim that share from the surviving father or mother by reason of the re-marriage. Such a rule

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would I think be eminently reasonable, and might be regarded as being supported by the ancient rule given in *Yazathat*. It would do away with the difficulty arising from the omission of any provision in *Attasankhepa* for the case of an *auratha* child who was not already entitled to the quarter share. That difficulty clearly arises if the rule in *Attasankhepa* be regarded as referring only to an *auratha* child whose share has already vested. It might of course be explained away by supposing that the learned author regarded the *auratha* whose right to the one-fourth share had not already vested as only potentially *auratha* and therefore classed him or her with the younger children, or it might merely be due to inadvertence, but neither of these explanations seems to me very probable. I have already pointed out that there is a tendency even in the older *Dhammathats* towards partition on re-marriage. The *Yazathat* recommends it; the *Vannana* recognises and approves of it; the *Panam* says in so many words that the inheritance may be claimed on the re-marriage of the surviving parent; a passage from *Kungyalinga*, cited in section 45 of the Digest, seems to recognise the children's right to claim half the property from the surviving parent at any rate in certain cases; and when the *Attasankhepa* itself says that if there is no *auratha*, the rest of the children are entitled to half the estate, I do not think that we shall be doing any violence to its meaning if we suppose that when it says that the *auratha* has not already received the one-fourth share, he or she shall receive it on the re-marriage of the surviving parent, it means that the *auratha* as such, whether already entitled or not to receive the one-fourth share, shall receive that share on the re-marriage of the surviving parent. One exception to the rule that children inherit only on the death of both parents is clearly established by the recognition of the rights of the *auratha* son or daughter on the death of the father or mother. There are clear indications of the recognition of two other exceptions, namely, the right of the *auratha*, whether or not entitled to the benefit of the ordinary *auratha* share, to take a one-fourth share on the re-marriage of the surviving parent, and the right of the children generally to partition on the re-marriage of the surviving parent. So far as this case goes, we are not concerned

with the latter of these exceptions except in so far as indications of its recognition add to the probability of the recognition of the second, and the case-law up to the present is against its recognition.

The question to be decided in the present case is whether or not the *auratha's* right to partition on the re-marriage of the surviving parent can be regarded as having been established. So far as the *Dhammathats* are concerned I am of opinion that it can, and it remains to be seen whether that opinion is borne out by the case-law on the subject.

In *Ma On v. Shwe O* (1) the passage cited above from *Vannana* was considered and it was said that although without the consent of the surviving parent the younger children cannot obtain their shares, yet the surviving parent may, if so minded, partition the inheritance retaining his or her share, and as to the part so retained it is at his or her absolute disposal. In that case the father had died and the mother had not re-married.

In *Maung Hlaing v. Tha Ka Do* (2) the passage from *Vannana* and *Attasankhepa* referred to above were considered and it was taken as settled law that if the widow re-marries she is to take her half share of the joint property and the children by the former marriage are to divide the other half, the share of the *auratha* child being one-fourth of the whole.

In *Seik Kaung v. Po Nyein* (3) the eldest-born child, a son, claimed one-fourth of the estate from his father, the mother having died and the father married again, and the learned judges said, "We do not think it open to reasonable doubt that when the father does marry again, the eldest son, especially if he be the eldest child, can claim a one-fourth share of the general joint estate of the parent." They went on to say that this is in accordance with paragraph 2 of section 2, Book X of *Manugye*, which as I have said above I consider open to doubt, but, however that may be, the case is on all fours with the present case, and, if it is good law, is sufficient for the decision of this case.

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

(2) P.J.L.B. 65.

(3) 1 L.B.R., 23.

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The Full Bench case of *Ma Thin v. Ma Wa Yon* (4) was the converse case where an only daughter sued her mother on her re-marriage after the father's death for a one-fourth share of the parents' joint estate, and it was held that she was entitled to get it, one of the learned Judges, after considering the authorities saying, "As a matter of fact partition of property is generally effected on a second marriage and the principle appears to be that a single child gets one-fourth of the joint estate, the mother getting three-fourths; while if there are a number of children the mother takes half and the other children take half between them." I may note that it is not clear what the learned Judge meant by "other" children, and that I know of no authority in the *Dhammathats* for the proposition that if there is only one child its share is only one-fourth.

In *Mi Hlaing v. Mi Thi* (5) it was said that the texts giving the *auratha* daughter the right to claim one-fourth do not authorise her to claim one-fourth from her mother at least when her mother has not married again. That is of course correct.

In *Mi The O v. Mi Shwe Mi* (6) it was held in Upper Burma that after the death of the father the eldest daughter cannot claim one-quarter of the estate from her mother even though the latter marries again. The question which arose in that case was the converse of that which arises in the present case and therefore it is not necessary for me to consider it. I may say however that I doubt whether the decision is good law, and that it is contrary to the decision of the Full Bench of this Court in *Ma Thin v. Ma Wa Yon* (4).

In *Shwe Po v. Maung Bein* (7) the mother died, and the father married again. The only son claimed that he was entitled on his father's re-marriage to half the estate. It was taken as settled law both in Upper and Lower Burma that the father was entitled to at least one half of the property, and that the son was entitled to one-fourth on the father's second marriage.

The effect of the case-law would therefore seem to be that it is settled that on the death of the mother and the re-marriage

(4) 2 L.B.R., 255.

(5) (1914-17) 2 U.B.R., 40.

(6) (1914-17) 2 U.B.R., 46.

(7) 8 L.B.R., 115.

of the father, the *auratha* son is entitled to get from the father one-fourth of the estate. This view may originally have been based on what is a doubtful text in *Manugye*, but it is reasonable and is in accordance with the tendency in the *Dhammathats* towards exceptions to the rule that children do not inherit until the death of both parents.

I hold therefore that the lower Courts were right in finding that Tun Shein is entitled as against his father to one-fourth of the property jointly acquired by his father Shwe Ywet and his mother Ma Nge during their marriage.

No other point was argued in the appeal and on the fact the two lower Courts have come to concurrent findings.

The appeal is dismissed with costs.

Before Mr. Justice Robinson, Chief Judge,
and Mr. Justice Maung Kin.

(1) MRS. KIRKWOOD *alias* MA THEIN, (2) MA SHWE YU v. (1) MAUNG SIN, (2) MA NGA MA.

Higinbotham—for appellants.

Hay with *Thein Maung*—for respondents.

Appeals to the Privy Council—Security other than cash or Government securities—Civil Procedure Code—Order XLV, Rule 7.

While an applicant for leave to appeal to the Privy Council may move the Court to permit security to be furnished in some other form than cash or Government securities, the Court must be so moved before or at the time of hearing the application for leave to appeal. If no such order is obtained at the time of the grant of the certificate, security must be furnished in cash or Government securities within the period allowed by Rule 7 of Order XLV.

Robinson, C.J., and Maung Kin, J.—The decree of the Appellate Court in this case was granted on the 18th of April 1921. On the 13th of July, 1921, an application for leave to appeal to His Majesty in Council was filed and came on for hearing on the 8th of August 1921, when an order was passed that the certificate must be granted.

Owing to a recent ruling of their Lordships of the Privy Council in respect of the contents of such certificates in certain cases, it was ordered that the draft certificate should be submitted for approval before being submitted for signature. This was done, and the draft certificate was approved on the 18th of August, 1921.

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28th, 1921.

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The usual notice to the appellants to furnish security within the time allowed by Order 45, Rule 7, of the Civil Procedure Code, was issued on the 18th of August 1921, and at the same time a copy of the certificate bearing date the 18th of August 1921, was furnished to counsel for the appellants.

On the 21st of September, 1921, an application was filed by the appellants setting out that by an order, dated the 8th of August 1921, this Court was pleased to order the issue of the certificate for leave to appeal. Petitioners prayed that one Ma Aye was willing to stand surety on the security of her paddy lands, the value of which is set out. A draft mortgage bond was filed, and it was prayed that her security might be accepted. It further prayed that, in case the time for furnishing security fell short of the period allowed, an extension of time may be granted, and that Ma Aye's attorney may be allowed to execute the mortgage bond.

On the 28th of October, 1921, a further application was filed, in which it was set out that petitioners' attention had been drawn to the amendment of Order 45, Rule 7, introduced by Act 26 of 1920, and they prayed to be allowed to file an affidavit in support of their previous application. The affidavit was intended to show that an order should be made as prayed on the ground of special hardship.

A preliminary objection has been taken that the applications are barred by time, that the time for furnishing security has already elapsed, the leave to appeal can, therefore, not be granted and that the certificate must be cancelled.

We have heard Counsel as to this preliminary objection and have reserved consideration of the merits of the applications until the objection has been decided.

It may be conceded that the procedure adopted by the petitioners was in accordance with the rules of this Court prior to the passing of Act XXVI of 1920. By that Act several important changes were made in Rule 7 of Order 45. The period within which the applicant was to furnish security was altered from six months to three months from the date of the decree, the Court being granted a discretion to extend

the period of three months up to a further period of sixty days. No change was made in the provision that security might be furnished within six weeks from the date of the grant of the certificate.

A further amendment was made in sub-clause (a) by inserting the words "In cash or in Government securities" after the word "security." The result of this amendment is that applicants are bound to furnish security in cash or in Government securities, but a proviso is further inserted allowing the Court to permit on the ground of special hardship some other form of security to be furnished. The result of these changes is that one of the two alternative periods within which security must be furnished is altered, and further that the security must be furnished in cash or in Government securities, unless a special order is obtained from the Court to the contrary, in accordance with the provisions of the proviso that has been inserted.

Security has not been furnished within three months from the date of the decree. No application for any extension of that period was made and the applicant has, therefore, to show that he has furnished security within six weeks from the date of the grant of the certificate. It is equally clear that he has not done so, but it is urged that he proceeded strictly in accordance with the rules of this Court and that, therefore, his application should be granted.

We have been referred to recent Rules which have been published by this Court only a short time ago. They were drawn up before the amending Act was passed and may have to be amended, but they do not govern the applications before us which were made before they came into force. The previously existing Rules were abrogated by the amendment of the Act with reference to which they were passed.

The proviso to sub-rule (1) of rule 7, lays down that "The Court at the time of granting the certificate may, after hearing any opposite party who appears, order, on the ground of special hardship, that some other form of security may be furnished: Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security."

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The whole of the amendments made by this Act were clearly intended to combat delays in the matter of appeals to His Majesty in Council, and special provision is made that, as an ordinary rule, the security to be furnished shall be furnished in cash or in Government securities, and while the proviso allows some other form of security, it provides against any delay by reason of such permission being given by requiring that the order for such other form of security must be passed at the time the certificate is granted. By this means the period of six weeks from the date of the grant of the certificate within which security must be furnished is not extended. While, therefore, it was open to the applicant to move the Court to permit security in any other form to be granted, it is essential the Court should be so moved before or at the time of the hearing of the application for leave to appeal when a certificate would be granted. If no such order is obtained at the date of the grant of the certificate, security must be furnished in cash or in Government securities within the period allowed by Rule 7 as amended.

Security has not been furnished and we must, therefore, allow the objection, with the result that leave to appeal will not be granted and the certificate must be treated as cancelled.

The applications are, therefore, dismissed with costs. Advocates' fees five gold mohurs.

Before Mr. Justice Pratt.

R. M. P. A. ANAMALE CHETTY v. MRS. BASCH *alias*
MA THI.*

Campagnac—for Applicant.

Parker—for Respondent.

Order for disposal of property by Criminal Court—Criminal Procedure Code, section 517—Pledge of goods received in good faith from the person in possession.

A entrusted some jewellery to B to sell for her, but instead of selling B pledged it to C. B was subsequently convicted of criminal breach of trust with respect to the jewellery and the convicting Magistrate ordered the jewellery to be returned to A. C applied to have this order set aside.

Held,—that the Magistrate's order would have been justified only if it could be shown that there was bad faith on the part of C in accepting the jewellery in pledge; and that as he appeared to have acted in good faith, he was entitled to have the jewellery returned to him.

Stephen Aviet v. King-Emperor, 4 L. B. R., 25—followed.

Kong Lone v. Ma Kay, 4 L. B. R., 13—distinguished.

Nanlal Babu v. Maung Tun Yan, 4 B. L. T., 170—dissented from.

Some time about the beginning of August 1920, the date is uncertain, Mrs. Basch made over a pair of diamond bangles, two diamond rings, a diamond pin and a pair of diamond ear-studs (Nadaungs) to Maung Gyi, a gold-smith, to sell on her account in order to raise money required by her for the purchase of a house.

Maung Gyi was a person in whom she placed the fullest confidence in fact, as she said, she considered him almost as her son.

Instead of selling the jewellery Maung Gyi pledged the diamond pin to Anamale Chetty on the 8th August, the ear-studs on the 8th September and the diamonds from the rings on the 10th September.

On each occasion Maung Gyi and his wife executed promissory notes for the sums advanced and for the money borrowed on the 8th August and 5th September. Maung Aung Nyun, a client of the Chetty, also signed the promissory notes.

Maung Gyi was convicted of criminal breach of trust with respect to these articles and the Magistrate without giving

* Revision of the order passed by Maung Ba Kin, Eastern Subdivisional Magistrate, Rangoon.

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reasons and apparently without hearing the Chetty ordered the return of the diamonds and jewellery to Mrs. Basch.

I am asked to revise this order on the ground that the jewellery was handed to Maung Gyi by Mrs. Basch for disposal, that he did not obtain possession fraudulently and that the money was advanced by the Chetty in good faith.

It is contended on behalf of the Chetty that under section 178 of the Contract Act a person, who is in possession of any goods may make a valid pledge provided that the pawnee acts in good faith, and under circumstances, which are not such as to raise a reasonable presumption that the pawnor was acting improperly; and provided also that such goods have not been obtained from their lawful owner by means of an offence or fraud.

In the present instance possession was not obtained wrongfully. Maung Gyi was entrusted with the articles to sell and had he sold them the property therein would undoubtedly have passed to the buyer.

It is difficult to see why the Chetty should hesitate to take in pledge articles which he admittedly might have bought without fear. In *Stephen Avjet v. King-Emperor* (1) A entrusted some jewels to B to sell. Instead of selling them B gave them to his niece C, who pawned them to D.

B was convicted of criminal breach of trust and the Magistrate ordered the return of the jewels to A.

Irwin, J., set aside the order and directed the return of the jewels to D, laying down the broad principle that as A had given the jewels to B to dispose of for money he was not entitled to the assistance of a Criminal Court in recovering them from a person to whom they were so disposed of.

On behalf of Mrs. Basch it is argued that the pawnee was not acting in good faith and must have known that there was something suspicious about the transactions. It is argued that the list of articles made by Inspector Xavier when he searched the Chetty's house, shows that in the course of some two months he advanced to Maung Gyi upwards of Rs. 60,000 and received in pledge property to the value of Rs. 2,50,000 and

(1) IV L.B.R., 25.

that he must have known Maung Gyi had no right to dispose of all this property. Anamale was not cross-examined as to this list and was a witness for the prosecution in the breach of trust case.

He did not attempt to conceal the articles pledged from the police, and apparently the loans and the articles pledged were duly entered in his accounts in the ordinary course of business. There is nothing on the record as it stands to show that there was anything in the transactions to raise a reasonable presumption in the pawnee's mind that the pawnor was acting improperly.

Maung Gyi was a person, who was highly trusted, and was given jewels to dispose of by jewellers of standing, as transpires in other proceedings. He was introduced to the Chetty by Maung Aung Nyun, a goldsmith and client of his, who actually signed two of the three promissory notes taken for the advances on the articles in question as a guarantee of the genuineness of the transactions.

The circumstances are not similar to *Kong Lone v. Ma Kay* (2) since in that case there was *prima facie* evidence that the jewels had been obtained by fraud.

I cannot agree with the *obiter dictum* of Twomey, J., in *Nanalal Babu v. Maung Tun Yan* (3) that, in the case of a broker, who sold jewels and misappropriated the sale proceeds, if the accused had pledged the jewels instead of selling them, it would be right to order the restoration of the jewels to the complainant.

The Magistrate would not have been justified in ordering the return of the jewellery to complainant in the present case unless it was shown that there was bad faith on the part of the Chetty. This has not been found by the Magistrate, who has, as I have already pointed out, given no reasons for his order.

The Chetty may well have regarded Maung Gyi as a broker and acted in good faith. I am quite in accord with the principle enunciated in the Aviet case (1).

It is not for the Criminal Court to usurp the functions of a Civil Court and assist complainant in recovering from the person to whom they were disposed of goods which were made

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(2) IV L.B.R., 13. (3) 4 B.L.T., 170

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over to the accused to dispose of; merely because the accused did not dispose of them in accordance with the instructions given to him.

I set aside the Magistrate's order and direct that the articles in question be returned to the applicant R.M.P.A. Anamale Chetty.

FULL BENCH.

Civil
Reference
No. 2 of
1921.

August 29th,
1921.

Before Mr. Justice Robinson, Chief Judge, Mr. Justice Maung Kin, Mr. Justice Pratt, Mr. Justice Heald and Mr. Justice Duckworth.

MAUNG SIN, MA NGA MA v. MRS. KIRKWOOD *alias* MA THEIN, MAUNG AUNG, MAUNG BYAUNG.*

Thein Maung—for appellants.

J. A. Maung Gyi—for 1st respondent.

May Oung—(Amicus Curiae).

Buddhist Law: Inheritance—Orasa—Position and Rights of—Definition of—

On a reference of certain questions regarding the position and rights of an Orasa child to a Full Bench, it was held,

Per C.J., Maung Kin, J., Heald, J. and Duckworth, J., that—

(1) in a family consisting of both sons and daughters, a child can acquire the full status of Orasa before the death of either parent;

(2) in such a family if the eldest born child is a daughter and reaches an age when she is competent to take her mother's place, no son can become Orasa;

(3) in such a family the question which child is Orasa can be decided before the death of either parent;

(4) there cannot be two Orasas in a family;

(5) sons are not as such preferred to daughters as Orasa;

(6) if the eldest born child is a daughter and is competent she is Orasa and as Orasa can on her mother's death claim from her father a quarter share of the estate. In certain circumstances her children have a claim to preferential treatment in the division of the estate.

*Per C.J., Maung Kin, J., and Duckworth, J.—*If the Orasa is the eldest born son, and predeceases his parents, his children have a right to preferential treatment. If the eldest born son dies before he becomes competent to take his father's place, a younger son, being fully qualified, may become Orasa, and if that son predeceases his parents, his children have a right to the same preferential treatment. If the eldest born child is a daughter and predeceases her parents after she becomes competent to take her mother's place, her children have a right to the same preferential.

* Reference made in Civil 1st Appeal against the judgment passed by D. D. Nanavati, Esq., District Judge, Hanthawaddy.

treatment; but it is doubtful if a younger daughter who is younger than a son can ever take the place of the eldest born daughter who is not competent or dies before she becomes able to take her mother's place.

Per Heald, J.—In a family where the eldest born child is a daughter and is competent, there can be no Orasa son and there can be no son whose children have a right to preferential treatment in the division of the parents' estate.

Per Pratt, J.—In a family consisting of sons and daughters a child can attain the full status of Orasa prior to the death of its parents, in so far that, if he or she predeceases his parents, his or her children may be entitled to preferential treatment in the division of the parents' estate.

(2) In such a family where the eldest child is a daughter no son can become Orasa until his father dies, subject to the proviso that the eldest daughter attained her majority before her death.

(3) The question as to which is the Orasa can be decided before the death of either parent so far only as the right of representation is concerned.

(4) In such a family there cannot be two Orasa children in the sense of children whose offspring would in the event of their parents' death be entitled to claim an equal share with their younger uncles and aunts. But it is conceivable that where the Orasa eldest child was a daughter and the eldest son attained his majority before his father's death, he would on his father's death be entitled to rank as Orasa for the purpose of claiming one-fourth of the estate from his mother.

(5) Sons are not always preferred to daughters as Orasa.

(6) In such a family where the eldest child is a daughter there cannot be an Orasa son, who predeceasing his parents can transmit to his children a right to preferential treatment in the division of the estate, assuming that the eldest child attained majority and did not forfeit her status as Orasa.

(7) The eldest child, being a daughter, can transmit to her children this right to preferential treatment.

Po Zan v. Maung Nyo, 7 L.B.R., 27; *Ma Mya Thu v. Maung Po Thin*, P.J.L.B., 585; *Ma Nan Gyaw v. Maung Shwe Ket*, 10 Bur.L.R., 234; *Maung San Dwa v. Ma Min Tha*, Chan Toon's L.C., Vol. II, p. 207; *Po Hman v. Maung Tin*, 8 L.B.R., 113; *Ma Saw Ngwe v. Ma Thein Yin*, 1 L.B.R., 198 and *Ma Thin v. Ma Nyein E*, 3 B.L.T., 6—overruled.

Mi Min Din v. Mi Hle, (1904-06) 2 U.B.R., Bud. Law: Inheritance, p. 11—dissented from.

Tun Myaing v. Ba Tun, 2 L.B.R., 292; *Mi The O v. Mi Shwe* (1914-16) 2 U.B.R., p. 46; *Nga Lu Daw v. Mi Mo Yi*, (1914-16) 2 U.B.R., p. 66 at p. 72; *Mi Kin Lat v. Nga Ba So*, (1904-06) 2 U.B.R., Bud. Law: Divorce, p. 3; *Ma Ba We v. Mi Sa U*, 2 L.B.R., 174 at p. 182; *Maung Hme v. Ma Sein*, 9 L.B.R., 191; *Ma Lay v. Tun Shwe*, 10 L.B.R., 10; *Ma Me v. Ma Myit*, P.J.L.B., 48; *Maung Seik Kaung v. Maung Po Nyein*, 1 L.B.R., 23; *Ma Thin v. Ma Wa Yon*, 2 L.B.R., 255, F.B.; *Tha Tu v. Maung Bya*, 4 L.B.R., 181; *Ma Ein Thu v. Maung Hla Dun*, 5 B.L.T., 73; *Ma Kyi Kyi v. Ma Thein*, 2 L.B.R., p. 8; *Mi Saung v. Mi Kun*, Chan Toon's L.C., Vol. I, p. 198 at p. 204 *per* Jardine, J.C.; *Ma Mi v. Ma Myit*, Chan Toon's L.C., Vol. I, p. 275; *Ma Mya Thu v. Maung Po Thin*, Chan Toon's L.C., Vol. II, p. 61; *Anleathan v. Mi Tha Ta U*, Chan Toon's L.C., Vol. II, p. 65; *Maung Seik Kaung v. Maung Po Nyein*, Chan Toon's L.C., Vol. II, p. 67; *Sarkar's Hindu Law of*

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- Adoption*, 2nd Edn., p. 57; *Ma Saw Ngwe v. Ma Thein Yin*, Chan Toon's L.C., Vol. II, p. 210, *Conflict of Authority*, Vol. II, p. 37; *Ma Gun Bon v. Maung Po Kywe*, (1897-1901) 2 U.B.R., p. 66; *Po Sein v. Po Min*, 3 L.B.R., 45; *Ma Su v. Ma Tin*, 6 L.B.R., 77; *Conflict of Authority on Buddhist Law*, Vol. II, p. 51; *Tha Dun v. Waing Gyi*, Civ. 2nd Appeal No. 302 of 1909 of the J.C.U.B.'s Court; *Stokes' Hindu Law Books*, 410; *Mayne's Hindu Law*, p. 82 (7th Edn.); *Tagore Law Lectures*, 1880, p. 515, cf. Forchammer's Jardine Prize Essay, p. 49; *Stokes' Op. Cit.*, p. 498; *Ma Hnin Bwin v. U Shwe Gon*, 8 L.B.R., 1; *Ma Thi v. Ma Nu*, S.J.L.B., 70; *Mi Saung v. Mi Kun*, S.J.L.B., 115; *Maung Po Lat v. Mi Po Le*, S.J.L.B., 212; *Ma On v. Ko Shwe O*, S.J.L.B., 378; *Maung Sa So v. Mi Han*, (1892-96) 2 U.B.R., p. 171; *Ma Min Tha v. Ma Naw*, (1892-96), 2 U.B.R., p. 581; *Maung Pan v. Ma Hnyi*, (1897-1901), 2 U.B.R., p. 104; *Anleathan v. Mi Tha, Ta U*, P.J.L.B., p. 625; *Maung Hnu v. Maung Po Thin*, 1 L.B.R., 50; *Ma Hnin Gaing v. Ma Tha Li*, 4 B.L.T., 74; *Mi Saw Myin v. Mi Shwe Thin*, (1910-13), 1 U.B.R., 125; *Ma Thit v. Maung Tun Tha*, 8 B.L.T., 138; *Maung Ka Gu v. Ma Hnin Ngwe*, 8 B.L.T., 196; *Nge E v. Nga Aung Thwin*, (1914-16), 2 U.B.R., 37; *Mi Hlaing v. Mi Thi*, (1914-16), 2 U.B.R., 40; *Shwe Po v. Maung Bein*, 8 L.B.R., 115; *Kyi Hlaing v. Ma Htu*, 8 L.B.R., 189; *Ma Sein Ton v. Ma Sou*, 8 L.B.R., 501; *Chan Tha v. Mi Ma Pyu*, 9 B.L.T., 95; and *Tun Tha v. Ma Thit*, 9 L.B.R., 56—referred to.

Civil
 1st Appeal
 No. 23 of
 1919.

May 2nd,
 1921.

The following reference was made by the Chief Judge and Mr. Justice Duckworth to a Full Bench under section 11 of the Lower Burma Courts Act:—

* *Robinson, C.J.*—Plaintiffs are the children of Po Cho who was the eldest son of U Baw and Daw Hmo. Their eldest child was Ma Nyein Aung. Po Cho grew up and worked with his father managing the family property. He took a more prominent part in this filial duty than most sons probably do. He was of age and fully competent to succeed his father as head of the family and he satisfied all those conditions which lead to the special recognition of a child as the Orasa. In ordinary parlance he would no doubt be the child spoken of as the Orasa of the family. He died, however, some thirteen days before his father.

Ma Nyein Aung was the eldest child of the family and it is not denied that she was of age and competent in every way to take her mother's place. She survived both her parents.

Plaintiffs claim to be entitled to a one-fourth share in the estate by reason of the fact that their father was the Orasa child. If he was not, they would only be entitled to a one-sixteenth share.

So long as both parents were alive, it is agreed that Po Cho and Ma Nyein Aung were each presumptively the Orasa and

on behalf of the defendants it is argued that the question as to which of these two children would eventually be the Orasa depended on which of the two parents died first. Daw Hmo died first and on her death it is said Ma Nyein Aung became the Orasa and Po Cho lost all chances of gaining that status. His children would, however, not be entitled to more than one-sixteenth, as on Daw Hmo's death he lost even his presumptive status, and he would only have ranked as a younger child, even if he had survived his father.

On the other hand, it is urged that Po Cho having reached full age and satisfied all the conditions required for an Orasa, he actually held that status, and this long before Daw Hmo died; and once an Orasa, always an Orasa. There cannot be more than one Orasa in a family and once there was a fully qualified Orasa, that status did not devolve on any other child. It is urged that it was impossible to hold that the question who was the Orasa was a matter of chance, to be decided according as one or other of the parents predeceased the other. It was also urged that a son, if competent, always took precedence over an elder daughter.

The *Dhammathats* clearly recognize the possibility of a child who has reached full status of Orasa predeceasing his or her parents by making provision for preferential treatment of that child's children. Reference may be made to the *Dhamma* and *Manugye* in section 162 of the Digest. Both clearly refer to an Orasa son and the former applies a similar rule in the case of females. This provision the *Manugye* omits, and it may therefore be argued that the *Dhamma* was referring to a family having daughters only. The full status of Orasa can, however, apparently be achieved before the death of either parent. If that is so, it may considerably affect the other questions that arise in this case. Counsel for both sides urge that there cannot be two Orasas in one family, but they use the argument to suit their own cases. It may be that in such a family as this, the question as to whether Po Cho or Ma Nyein Aung was to be treated as the Orasa could not be definitely decided until one or other of the parents died. Or it may be that the true view is that in such a family, the son ousts the daughter from the position, so that no question as to Ma Nyein Aung could arise. It seems clear that once a son

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has achieved the status, the fact that he predeceases his parents or his father does not permit of a younger son succeeding to that position.

There are many and difficult questions arising in the case and the state of the decisions as to one or more of them is to leave these questions in considerable doubt. The *Dhammathats* are confused and contradictory and it appears almost impossible to reconcile them. It may be that those dealing with daughters as Orasas were intended to refer only to families in which there were daughters alone. The exact meaning to be assigned to the words "*tha*" and "*thami*" must be considered and it will also be necessary to consider the exact meaning to be given to the word "*Orasa*" when the child predeceases and when he or she survives the parents.

I have I think written enough to indicate the questions that arise and the great difficulty there must be in coming to a decision. The matters involved are of the greatest importance to Burman Buddhists and some or all of them are constantly arising. It is, I therefore think, necessary to refer the following questions to a Full Bench:—

1. In a family consisting of both sons and daughters, can any child acquire the full status of Orasa prior to the death of either parent?
2. If so, in such a family where the eldest child is a daughter, can any son become Orasa until his father dies?
3. In such a family, can the question which child is the Orasa be decided before the death of either parent?
4. Can there be in such a family two Orasas?
5. Are sons always to be preferred to daughters as Orasa?
6. In such a family, can there be an Orasa son who predeceasing his parents can transmit to his children a right to preferential treatment in the division of the estate?
7. If so, can the eldest child, being a daughter, on her mother predeceasing her father, claim a quarter share as Orasa or transmit to her children a right to preferential treatment in the division of the estate.

Duckworth, J.—For the purpose of this appeal the following facts will suffice.

Daw Hmo predeceased her husband U Baw. U Baw died some years later. *viz.*, on the 28th December 1907. Their eldest son (not their eldest child) Maung Po Cho died on the 13th December 1907, or some twelve days prior to his father. He was about 40 when he died.

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Their eldest child was a daughter, Ma Nyein Aung, who died after both her parents. The plaintiff-respondents are the issue of Maung Po Cho, and the appellant-defendants are the younger son and daughter of Daw Hmo and U Baw.

The plaintiffs prayed for a quarter share in the estate as representing Maung Po Cho, whom they claim was the "Orasa" son of U Baw and Daw Hmo.

On the other hand, it is contended that the Orasa was Ma Nyein Aung, as being the eldest competent child and daughter of Daw Hmo and U Baw—the former having predeceased the latter. The real question in this appeal is, which was the Orasa—Ma Nyein Aung or Maung Po Cho? The learned Judge of the District Court following the cases of *Po Hman v. Maung Tin*, 8 L.B.R., 113, *Po Zan v. Maung Nyo*, 7 L.B.R., 27 and *Tun Myaing v. Ba Tun*, 2 L.B.R., 293 decided, with apparent reluctance, in favour of plaintiffs, *viz.*, that Maung Po Cho was the Orasa son, and that by right of representation the plaintiffs were entitled to a quarter share.

Maung Thein Maung on behalf of the appellants relied upon sections 30 to 33 and section 163 of U Gaung's Digest, sections 155 to 159 of the *Attathankepa Dhammathat*, and to the views expressed by Messrs. Tha Gywe and May Oung in their published works. Mr. Lentaigne relied chiefly upon the decision in the case of *Po Hman v. Maung Tin* already referred to. Ma Nyein Aung was admittedly an adult at her mother's death, and Po Cho was an adult and had admittedly assisted his father in his work right up to the time of his (Po Cho's) death. It is clear that both of them were competent to be the Orasa. It is not denied that if Maung Po Cho was the Orasa, the plaintiffs' share is one-quarter, and that it is only one-sixteenth if Ma Nyein Aung was the Orasa daughter. In Lower Burma, the last and most decisive case on the subject is that of *Po Hman v. Maung Tin*. Here the mother died first, but it was held that Po Hman ousted the elder daughter

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from the position of Orasa as soon as he reached competent age. In *Po Zan v. Maung Nyo* (1) it was the father who died first,—so in any case the decision was correct, but it was tacitly assumed that the result would have been the same, even if the mother had died first. Section 150 of the Digest was quoted to show that sons are preferred to daughters, but section 49 was not referred to. This latter section seems to deal with them on equal terms, at any rate in regard to their family duties. There is, I think, little doubt that there can be only one real Orasa in each family, but, in order to reach the status of an Orasa, a person must attain majority and be competent, see the case of *Tun Myaing v. Ba Tun* (2). If these conditions are fulfilled, the Orasa can pass on his rights to his heirs, if he dies. If the person is incompetent or dies before attaining majority, then no doubt his rights devolve. In the case of *Ma Mya Thu v. Maung Po Thin* (3), the father died first, so of course the son was preferred to elder daughters. Section 163 of the Digest shows that the eldest child's heirs, when she is a daughter, receive preferential treatment. The *Dhammathats* undoubtedly contemplate a female being Orasa. Of course section 163 is not applicable if there is or has been an Orasa son, but if there is an Orasa daughter I fail to see why at her death the position of Orasa should pass to the younger brother or sister, (2 *L.B.R.* 292), or why in her lifetime a younger brother on reaching competent age should be able to oust her from her position. In my opinion it is quite clear from the majority of the *Dhammathats*, quoted in sections 30 31 and 33 of the Digest that, in a family composed of sons and daughters, until one of the parents dies, there is, technically speaking, no Orasa, though the eldest son is usually so styled, and that, if the father dies first, the eldest son, if competent and a major, automatically becomes Orasa, whereas if the mother dies before the father, the eldest competent daughter, if a major, occupies that position—in either case as taking the place of the father or mother in the family. If the eldest son or daughter, as the case may be has reached competent age and then predeceased his or her parents, leaving issue behind, there is then no Orasa at all, but the said issue receives preferential treatment. The point seems to me to be that none of the

(1) 7 *L.B.R.*, 27.(2) 2 *L.B.R.*, 292.(3) *P.J.L.B.*, 585.

Lower Burma rulings has really dealt with the question of the eldest child's rights when that child is a daughter and the family consists of both daughters and sons, and the mother predeceases the father. What appears to me to be the correct Law was suggested by McColl, A.J.C., in the case of *Mi The O v. Mi Swe* (4) and in *Nga Lu Daw v. Mi Mo Yi* (5). This is with some slight difference, what I have already stated above. It appears, moreover, to have been the view taken by Mr. Chan Toon in his Principles of Buddhist Law, page 108. The eldest daughter or son, as the case may be, obtains the Orasa share or one-quarter as a right—the former on the mother predeceasing the father and the latter on the father predeceasing the mother (Digest sections 30, 31 and 33). This of course is only so when the daughter or son was competent to fill the position of the deceased parent. The *deciding factor* as to whether the privilege falls to a female or a male is *the sex of the parent who dies first*. For instance, if the mother dies first there would be no object in giving a quarter share to the eldest son because his father is still alive. In this connection sections 155 and 156 of the *Attathankepa* must be considered—they bear out the view now taken. The authority of this *Dhammathat* is questioned by the unknown author of the introduction thereto, but in my opinion, it carries great weight. It was compiled by the late Kin Wun Mingyi, U Gaung, C.S.I., a learned Minister of the Burmese Kings, who had a vast knowledge of Burmese Buddhist Law, as applied amongst his people. Its value has been recognized by the British Courts, both in Lower and Upper Burma. Sir George Shaw in the case of *Mi Kin Lat v. Nga Ba So* (6) made some observations which show his respect for it. Sir Herbert White, C.J., in the case of *Ma Ba We v. Mi Sa U* (7) expressed his satisfaction with its authority, and Sir Daniel Twomey in the case of *Maung Hme v. Ma Sein* (8) and again in *Ma Lay v. Tun Shwe* (9), laid great stress upon it. The *Yazathat*, the first *Dhammathat* quoted in sections 44, 45 of the Digest

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(4) (1914-16) 2 U.B.R., p. 46.

(5) (1914-16) 2 U.B.R., p. 66 at p. 72.

(6) (1904-06) 2 U.B.R., B.L., Divorce, p. 3. (8) 9 L.B.R., 191.

(7) 2 L.B.R., 174 at p. 182.

(9) 10 L.B.R., 10

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supports this view in the first portion set out. The remarks in the case of *Ma Me v. Ma Myit* (10) that the eldest daughter only succeeds as Orasa where there are no sons were mere *obiter dicta* as the decision of the point was unnecessary.

In the case of *Maung Seik Kaung v. Maung Po Nyein* (11) it seems to me that the real point was dimly foreseen, but it was thought that the Dhammathats did not clearly enunciate the principle that the daughter could claim a quarter share from her father on her mother's decease although there were indications of it. It was, however, admitted that some of the Dhammathats gave the quarter or Orasa share to the eldest child, (*i. e.* သား; not သား သေသည့်သူ) and that only occasional passages put the daughter in an inferior position to the son. In that case too, the mother died before the father and the son was claiming against his father on the latter's re-marriage. The references made in the ruling to sections 155 to 159 *Attathankepa Dhammathat* are vitiated by the fact that the younger "sons and daughters" are mentioned in the Burmese Script, whereas in the English translation they are collectively referred to as younger children. The learned Judge also seems to me to have misinterpreted sections 32 and 33 of the Digest and, though he referred to it, did not bear in his mind section 3, Book X of the *Manugye*. In the case of *Ma Thin v. Ma Wa Yon* (12) the converse case was discussed, but the question now raised was not decided. The *Vilasa*, section 33 of the Digest, page 84, Vol. I, entirely favours the position which I now take up. In the case of *Tun Myaing v. Ba Tun* (2) Birks J. said "It is settled Law that on the death of one parent it is only the eldest child (not son) that can claim a quarter share during the lifetime of a surviving parent." The case of *Tha Tu v. Maung Bya* (13) does not materially assist us. In that case, as reported, there were no sons but 5 daughters, and the eldest was naturally given her quarter share. The case of *Po Zan v. Maung Nyo* (1) implies that the Texts in section 163 of the Digest apply exclusively to families consisting of daughters only, but the view adopted in the case:

(10) P.J.L.B., 48.
(12) 2 L.B.R., 255, F.B.
(1) 7 L. B.R., 27.

(11) 1 L.B.R., 23.
(13) 4 L.B.R., 181.
(2) 2 L.B.R., 292.

of *Ma Ein Thu v. Maung Hla Dun* (14) is distinctly opposed to this implication, and the view taken in this last case is supported by section 15, Book X of the *Manugye*. Section 150 of the Digest referred to in Po Zan's case does indeed appear to place daughters in an inferior position to sons, even though the son may be the youngest child, but it seems to me that the superiority of the son has been judicially recognized only in cases where the father died first, excepting in the case of *Po Hman v. Maung Tin* (25) already referred to.

With some hesitation I venture to think that the decisions of this Court in Po Zan's case and in Po Hman's case are erroneous. In the latter case, if Mi Shwe Ein died after she had attained majority and was competent, then she was the Orasa, and on her death the position of Orasa, remained unfilled (see *Tun Myaing v. Ba Tun*) (2). If Po Zan's case is correct, section 163 of the Digest may become a dead letter, because there could be no Orasa daughter in a family consisting of both sons and daughters, unless there should be no competent son.

As against the view that sons should be preferred to daughters, I would set the universal practice of equal division of inheritance between sons and daughters—a practice followed not only by the Courts of this country, but also by the villagers themselves. The view in question arose I think owing to a misunderstanding. Sections 155 to 159 of the *Attathankepa* were misunderstood owing to an inadequate translation as pointed out above, and sections 2 and 3, Book X, *Manugye*, were not read together as a whole, nor were sections 4 and 5. The case of *Ma Nan Gyaw v. Maung Shwe Ket* (15), relied on in this appeal, is of little real usefulness, inasmuch as the learned Judge who decided it dealt with none of the texts applicable and the principle, that where there are sons, a daughter, though the eldest child, is not entitled to claim a quarter share on the mother's death, was deduced from cases which did not cover the real issue. *Tha Tu v. Maung Bya* (13) is quoted by Mr. May Oung at page 221 of his work on Buddhist Law as favouring the eldest daughter who was also the eldest child obtaining her

(14) 5 B.L.T., 73.

(2) 2 L.B.R., 292. (25) 8 L.B.R., 113.

(15) 10 Bur., L.R., 234. (13) 4 L.B.R., 181.

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quarter share on her mother's death where the family consisted of 3 daughters and 2 sons. Upon reading the judgment, however, I am not sure that his remark, that the headnote is wrong, is correct, as Hartnoll, J. (now Sir Henry Hartnoll), clearly stated at page 182 that the mother died leaving 5 daughters. Nevertheless, that view and the view which I venture to take is supported by the *Manugye* and the *Attathankepa* as well as the *Wagaru Dhammathat*, which, so far as is known, is the earliest of all, although it is true that the latter does not give the Orasa (whether male or female) a full quarter share.

The *Dhammathatkyaw* gives the Orasa daughter her full quarter share and the younger children, male and female, have to wait till the father dies before they get anything. The *Vinichaya*—an important *Dhammathat*—upholds the quarter share of the Orasa. The most modern work, the *Attathankepa*, has already been discussed. It remains to be said that in the present case Maung Po Cho predeceased his father and that in my opinion he was never Orasa, for I consider that Ma Nyein Aung held that position all along. Taking the view which I do, supported, as it is, by such Burmese Juris-Consults as Messrs. May Oung and Tha Gywe in their published works, I am aware that I am going counter to the previous decisions of this Court, but I think that the whole question requires careful reconsideration by a Full bench of this Court, in the light of what I have set out in this order.

I have now had the advantage of seeing the questions propounded for reference by the Learned Chief Judge, and I concur in referring those questions to a Full Bench.

The opinion of the Full Bench was as follows:

Maung Kin, J.—The following questions have been referred:

1. In a family consisting of both sons and daughters, can any child acquire the full status of Orasa prior to the death of either parent?
2. If so, in such a family where the eldest child is a daughter, can any son become Orasa until his father dies?
3. In such a family can the question which child is the Orasa be decided before the death of either parent?
4. Can there be in such a family two Orasas?

5. Are sons always to be preferred to daughters as Orasas ?

6. In such a family can there be an Orasa son who predeceasing his parents can transmit to his children a right to preferential treatment in the division of the estate ?

7. If so, can the eldest child, being a daughter, on her mother predeceasing her father, claim a quarter share as Orasa or transmit to her children a right to preferential treatment in the division of the estate ?

The facts of the case are :—

Daw Hmo predeceased her husband U Baw, who died some years later, *viz.*, on the 28th December 1907. Their eldest son, (not their eldest child) Maung Po Cho died on the 13th December 1907, or some twelve days prior to his father. He was about 40 when he died. Their eldest child was a daughter, Ma Nyein Aung, who died after both her parents. The plaintiffs are the issue of Maung Po Cho and the defendants are the younger son and daughter of Daw Hmo and U Baw.

Thus U Baw and Daw Hmo had four children.

Had they all survived both their parents, they would all have shared equally in the estate of their parents in accordance with the ruling in *Ma Kyi Kyi's* case (16). In that case the rules of distribution of the parental estate between the children of the same parents on the death of both the parents were jettisoned as being so hopelessly conflicting as to be difficult to reconcile and the rule of equal distribution was introduced as being equitable and in accordance with the practice of the people.

The plaintiffs claim a quarter share in the estate as representing Maung Po Cho whom they claim to be the Orasa son of U Baw and Daw Hmo.

As I understand it, the claim is to represent their father who predeceased U Baw and survived Daw Hmo and, bearing in mind the ruling in *Ma Kyi Kyi's* case, they put their claim as being for what their father would have got had he survived both his parents, because their uncle's share would be the same. The claim is really under section 15 of the *Manugye*, that is to say, a claim to a share equal to that of their youngest uncle. And if the distribution was to be made according to the

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Dhammathats their claim would have been less than one quarter. So it is clear that this is not a case of devolution of the share which the Orasa son or daughter may be entitled to claim on the death of one of the parents. The right claimable would be the right to represent the parent as fully as the *Dhammathats* allow.

I shall now proceed to consider the question who is an "Orasa" child.

The word is a Pali word. In the Burmese form it is ဣရဝ *auratha* and in its Romanized form it is "Orasa." It means legitimate, own son. See Childer's Pali Dictionary. The word is used in this sense in the *Dhammathats* as distinguished from other kinds of children entitled to inherit, such as, *heittima*, *keittaja*, *kittima*, *pubbhaka*, and *appatittha*. See section 16 of U Gaung's Digest, Vol. I. The distinction between an *auratha* (a child born in lawful wedlock), a *kittima* and an *appatittha* is clearly drawn in sections 190, 191 and 192 of the same Digest. Reference may also be made in this connection to sections 198 and 199 of the same Digest.

And we have now been accustomed for a considerable time to the use of the term "Orasa" as meaning the legitimate child who is entitled to claim a quarter share in the parental estate on the death of one of the parents. There is no doubt some of the *Dhammathat* writers use the term "Orasa" baldly, e.g., "Let the Orasa take a quarter of the estate," whereas some are careful to indicate which child is meant by "Orasa," while others do not call the child by that term at all but declare that the son or daughter who planned and worked with the parents and who continues the family is the one entitled to have preferential treatment in regard to inheritance.

In the texts collected in section 30 of the Digest which deals with "Partition between mother and son on the death of the father," the son who is given a preferential right (whether to certain specified property or a quarter of the parental estate either to himself solely or to be divided with his brothers) is called သားဦး or *jetthaputta* in the following *Dhammathats* :—

Pyu—jettho သားဦးသည် puttosa သားဦးထိုသို့ထည့်၍ ဖြစ် ဝံ့ =
 The eldest, if a son, or the first born child, if a son.

According to Childer's *jettho* means chief, best, eldest.

Vilasa သားဦးထောက်: The eldest child who is a son or first born child who is a son.

Waru သားဦးကြွေ = eldest or first born Orasa.

Dhammathakya } same as *Vilasa*.
Rasi }

Sonda same as *Pyu*.

Kyetyo သားဦးသီးဦး = First born son or daughter.

He is termed သားကြီး *Thagyi* in the following *Dhammathats* :—
Manukye, *Amwebon* and *Dhamma*. *Thagyi* means eldest son.

The term သားကြီးကြွေ *Thagyi auratha* is used in the following *Dhammathats* :—

Vannana, *Warulinga* and *Cittara*.

သားတင်ကြွေ “*auratha* among sons” occurs in *Warulinga*.

သား or ကြွေ is used in the following :—

Kunjalinga, *Manuyin*, *Kunja*.

မင်းသိမ်းသား “son known to the officials” is used by *Kyannet*. This means a recognised son, such as son born in lawful wedlock.

The expression သားသည့်အထဲအရထည့်ပေသည်ဖြစ်အံ့ if the son takes the place of the father, is used in *Vicchedani*.

အထန်တမ်းသောသား the son who bears the father's burden or responsibilities is used in the following *Dhammathats* :—

Mano, *Kainza*, *Myingun*, *Kandaw*, *Tejo*, *Vannadhamma*, *Manuvanna*.

In the rest of the *Dhammathats*, namely *Viniccaya*, *Paksani*, *Rajabala*, *Manu*, *Panam*, *Dayajja* and *Dhammasara* the word သား *tha* son is used.

The earliest of these *Dhammathats* are *Pyu* (89 B.E.), *Vilasa* (455 B.E.), *Waru* (643 B.E.). These use the term သားဦး *Tha-u*. Then came *Manukye* and *Dhamma* (both 1114 B.E.) which use the term သားကြီး *Thagyi*. Then in 1126 B.E. came *Vannana* which uses the expression သားကြီးကြွေ *Thagyi auratha*. Then came *Manuyin* (1129 B.E.) in which ကြွေ *auratha* or သားကြွေ *Tha auratha* is used. In 1129 B.E. *Rasi* was published and the term သားဦးထောက် *Tha-u-yaukya* is used in it notwithstanding the fact of the term သားကြီး *Thagyi*, သားကြီးကြွေ *Thagyi auratha* and ကြွေ *auratha* having been used in the meantime by some of the other *Dhammathats*. In

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1143 B.E. *Sonda* which uses the term သားဦး *Tha-u, သားကြီးကြွေဝ* *Thagyi auratha*, appeared. In 1165 B.E. *Kunjalinga* was published. It gives the rules of partition between mother and son on the death of the father and says that if the son is *auratha* he shall get one-quarter and the mother three-fourths.

Of the above *Dhammathats* in which the term သားဦး occurs, reasons are given for the preferential treatment in the following:—

Pyu—The son continues the family.

Vilasa—Because the parents obtained at the commencement of their wedded life by their earnest prayer he helps in the acquisition of property he succeeds to the father's office and continues the family.

<i>Dhammathakya</i> <i>Rasi</i> <i>Kyetyo</i>	}	same as <i>Vilasa</i> .
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All the *Dhammathats* mentioned in section 30 of the Digest when considered as a whole, lead to the inference that it is the eldest born legitimate son who is entitled to claim a quarter of the parental estate from his mother on the death of the father, provided he has helped the parents in the acquisition of property and takes the deceased father's place and continues the family. It appears that the *Dhammathats* take it for granted that the son, if competent to do so, will take his father's place and continue the family but "whether this duty is a mere moral obligation or can be enforced at law is at present undetermined so far as decisions go" (17). And this eldest born son, who is entitled to a quarter share, is by later *Dhammathats* called an *Orasa*.

According to section 62 of the Digest this eldest born son may be superseded by, and the position he might have enjoyed may go to a younger son who fulfils the conditions, while he does not.

It may be argued that what is material is the fulfilling of the conditions and not the order in which the sons are born, so that even where the eldest born is a daughter a son who

(17) *Per Jardine, J.C. in Mi Saung, v. Mi Kun, Chan Toon's L.C. Vol. 1., p. 192 at p. 204.*

fulfils the conditions would be entitled to the quarter share from the mother on the death of the father.

In my judgment the argument is not sustainable. It can only be founded on the *Dhammathats* noticed above which do not call the son entitled to the share by any description, such as *Tha-u*, *thagyi*, *thagyi auratha*, or *auratha* but which describe him only as the son who bears the father's burden or responsibilities. It appears to me that these *Dhammathats* put the matter in a comprehensive form, because whether the claim is made by the eldest born son or by a younger son, the conditions must be fulfilled. These *Dhammathats* do not, in my opinion, contradict the proposition that the eldest born son if competent can claim the share from the mother and if not competent, he will be superseded by another son who is competent, but that if the eldest-born is not a son, the right to a quarter share does not exist in favour of a son, though he may be the eldest of the sons. I have deduced this by a consideration of the *Dhammathats* alone.

I get the following results:—In dealing with the right of the child who is given a preferential right—

- (1) earlier *Dhammathats* call him "*Tha-u*" and the right is given him because he fulfils the conditions as to which the leading *Dhammathats* are in substantial agreement;
- (2) later *Dhammathats* such as, *Manukye* and *Amwebon* call him "*Thagyi*;"
- (3) other *Dhammathats* of later dates call him "*Thagyi auratha*;"
- (4) still later *Dhammathats* call him merely *auratha*;
- (5) there are some *Dhammathats* which do not call him by any description but speak of him merely as a son who bears the father's burden, their authors probably thinking that it is unnecessary to state the rule in detail, because the fulfilment of the condition is the essential thing.

Read all these *Dhammathats* together and the conclusion will be reached that those which speak of the son who bears the father's burden do not appear to contradict the others. Because they were not read in the way I suggest, did Sir George Shaw go wrong in *Mi Min Din v. Mi Hle* (18) when he

(18) (1904-06) 2 U. B.R. B.L. Inheritance, p. 11.

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held that the eldest born son means the eldest son, not necessarily the eldest child.

There is another ruling which appears to me to be contrary to my view. That is in *Ma Ein Thu v. Ma Hla Dun* (14) in which it had to be ascertained whether the second child a daughter was the *Orasa* for the purpose of section 163 of the Digest. It was not certain whether the eldest child who predeceased its parents in its infancy was a son or a daughter. Twomey, J., held that if it was a daughter the eldest surviving daughter would be *auratha*. This view is perfectly correct. But the learned Judge observed that the fact that the eldest child was a son would make no difference. He appears to have thought that the fact was a negligible quantity as he stated:—At any rate I see no reason to think that they (the texts in section 163) do not apply to a family where the only children arriving at maturity were two daughters and the only other child a son who died in infancy. No texts are cited in support of this second view propounded by the learned Judge.

The next question for consideration is the right of a daughter to a quarter share. Section 33 of the Digest which deals with the partition between father and daughter on the death of the mother has to be considered. Although the number of *Dhammathats* which gives the eldest born daughter the right to claim a quarter share from the father is smaller than that of the *Dhammathats* which give the son the right to claim this share from the mother, yet the important *Dhammathats*, viz, *Manukye*, *Vilasa*, *Dhammathathyaw* and *Amwebon* declare the right in her favour and it is well-known that the case law on the subject is to the same effect.

It is therefore correct to hold that the eldest-born legitimate daughter is the orasa who has the right to claim a quarter share from the father on the death of the mother.

It has, however, been contended that the eldest-born daughter will be ousted from her position as an *orasa*, if there is a son.

In *Mi Saung v. Mi Kun* (17) Mr. (afterwards Sir John) Jardine, J.C., observed:—

“Under certain circumstances the eldest daughter, at least when there is no son competent to assume the
(14) 5 B. L. T., 73. (17) Chan Toon's L.C. Vol. 1, P. 198.

parental duty, takes the paraphernalia of the deceased mother, * * * * * These rights are additional to the fractional share of the inheritance, which on the death of one parent the eldest son or the eldest daughter is entitled to demand from the surviving parent."

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The learned Judge cited no authority for limiting the eldest daughter's rights to the case where there are no sons. This ruling was followed by Mr. Hosking, J. C., in *Ma Me v. Ma Myit* (19) and again there were no reasons forthcoming.

In *Ma Mya Thu v. Maung Po Thin* (20) it was laid down by Mr. Birks, J. C., that where there are both sons and daughters the eldest son is preferred to any daughter. Now in that case the father had died and the claim was made by the youngest son (who was also the youngest child) where the eldest born was a daughter and the third child, a boy, had died in infancy. It was taken for granted that had he not died in infancy the third child would, if competent to take his father's place, have been the Orasa entitled to claim the quarter share from the mother. But the texts cited by the learned Judge show that it is the eldest born son who was, under certain circumstances, entitled to the share, and that, if he does not fulfil the conditions, a younger son, being competent, will step into the position. If in that case the younger son had stepped into the position of the eldest born son, then there would be no doubt the decision was correct. The case was one where the father had died and the eldest daughter could not have claimed to be the Orasa for the purpose of claiming a quarter share.

In *Anleathan v. Mi Tha^aTa^aU* (21) the eldest daughter sued her mother and her brothers for a quarter share. It was held by Mr. Birks, J. C., that the plaintiff could not claim the share while there were sons. It was, however, unnecessary to take the existence of younger sons into consideration, because the case was one in which the eldest daughter could not represent her deceased father. Sections 156, 157 and 158 of the *Attasankhīpa Vannana Dhammathat* were cited as being in

(19) Chan Toon's L.C. Vol. I, p. 275. (20) Chan Toon's L.C. Vol. II, p. 61.
(21) Chan Toon's L.C. Vol. II, p. 65.

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conformity with the principle enunciated in *Ma Mya Thu's* case which was relied on.

In *Maung San Dwa v. Ma Min Thu* (22) a sixth child, a son, was held to be entitled to demand a quarter share from the mother on the death of the father, though there were two sons older than the plaintiff. Fox, J. followed *Ma Mya Thu's* case. It was contended by Mr. Hla Baw that the son entitled to claim the share is the eldest-born son on the ground that in section 63 of the *Manu Vannana Dhammathat* and in the extracts from the *Vilasa* and *Dhammathatkyaw*, given under sections 32 and 34 of the Digest, the term used, when referring to the son who should get a larger share than the other children is "*Tha-u*" or first born son. The learned Judge disposed of the contention thus: "These terms are however not universally used; in section 5 of Book 10 of the *Manukye*, which section directly bears upon the present case, the terms used are "*Tha-gyee*" which I take to mean the *chief son* who would naturally be the eldest of them, unless afflicted with any of the diseases or defects enumerated in section 36 of the same book. Mr. Justice Birk's judgment was based upon a general view of the text bearing upon the question, and I see no sufficient reason for doubting its correctness." In this case also the claim was made against the mother and if the claimant was entitled to supersede one of his two elder brothers, there would be nothing to say against the decision. But, with great respect, the learned Judge erred in thinking that there was any difference in meaning between the terms "*Tha-u*" and "*Tha-gyi*." The very fact that the *Dhammathats* speak of the possibility of the *Thagy*i being superseded by a younger son shows that *Thagy*i is the same as *Tha-u*. "*Thagy*i" has been rendered as "big son" by advocates to suit their own cases. *Thagy*i is the abbreviated form of *Tha-akyi*, which must mean the eldest son. I have not come across in any of the *Dhammathats* any expression which is equivalent to the English expression, "eldest surviving son."

In *Maung Seik Kaung v. Maung Po Nyein* (23) a Bench of two Judges of this Court, after referring to sections 155, 157, 159 of the *Attasankhepa Vananna Dhammathat*, came to

(22) Chan Toon's L.C. Vol. II, p. 207.

(23) Chan Toon's L.C., Vol II, p. 67.

the conclusion that the rules in those sections proceed on the principle of the son getting a portion if his father dies, and the daughter if her mother dies; but that the case of both daughters and sons is not distinctly provided for. The learned Judges do not appear to have referred to the original texts. In section 155 the existence of younger sons and daughters is clearly contemplated because it says that the *kanitha* (younger) sons and daughters သားသမီး shall not demand inheritance until the mother dies. In section 156 which gives the *awatha* share to the daughter on the death of the mother it is declared that the *kanitha* sons and daughters shall not claim inheritance until the father dies. So that in both the cases of father and mother predeceasing his or her consort, the existence of younger sons and daughters is not lost sight of and the law as regards them is declared. As *Attasankhepa* is looked upon only as an exposition of expert opinion, we shall now turn to the older *Dhammathats* and ascertain whether this expert opinion is justified. In section 30 of the Digest:—

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Dhammathat kyaw speaks of နောက်သား *nauktha* in referring to the other children. No doubt သား *tha* there is used in the sense of children. The term in this connection means later children.

Manugye gives three shares to the mother and သားသမီးငယ် *tha thaminge*, younger sons and daughters.

Sonda says that to the သားငယ်သမီးငယ် *thangé thaminge*, younger sons and daughters, however, suitable shares should be given.

Amwebon } say that the three parts should go to the
Dhamma }
mother and the ငြိငယ်နှစ်ယောက် *younger brothers and sisters.*

The other *Dhammathats* are silent on the point. Of the *Dhammathats* collected in section 33 of the Digest—*Dhammathatkyaw* mentions younger sons and daughters, and *Rasi* and *Kyetyo* speak of those sons and daughters other than the eldest daughter. In the extracts given in section 31 of the Digest—*Vilasa* contemplates the existence of other children as it says သားငါးယောက်ထဲတွင် ထိုအရက်အရသာသည်။ It is only the eldest who should get.

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These materials are sufficient as showing that sections 30 and 33 of the Digest contain rules as regards the eldest child's quarter share where there are sons as well as daughters and justify the expert opinion contained in *Attansankhepa*. The author of that work was also the author of the Digest. During the regime of the last two Burmese Kings and for many years after the Annexation until his death U Gaung was the greatest living authority on Burmese Law and literature and I think his opinion may be accepted even without the materials pointed out above.

To my mind from the very fact that the *Dhammathats* speak of the eldest as having the right to claim the quarter share, it is implied that there must be other children.

The contention that the case of both sons and daughters is not provided for cannot therefore be accepted.

It has however been urged that, as the *Dhammathats* look upon the son as being superior to the daughter, the eldest born daughter cannot be allowed to claim the quarter share, where there are sons. Among others, sections 140 and 150 have been referred to in support of the contention. These sections and the others contain rules of distribution after both the parents are dead. These are the rules which this Court has disregarded in *Ma Kyi Kyi's* case. They do certainly show that the son is regarded as superior to the daughter. But they do not give him, unless he is the eldest born, any greater share than the eldest of the daughters. For if the eldest is a daughter and there is a son younger than she is, that son, instead of getting a smaller share in accordance with the order of the births of the children, gets a share equal to the eldest daughter, and in my judgment wherever, in these rules, the word *auratha* is used, it is used to indicate the eldest child but not with reference to the right to claim a quarter share from the surviving parent. When both the parents are dead the question is not who is the eldest born but who is eldest of the surviving children and all the surviving children will get their fractional shares, larger or smaller, according to the priority of birth.

In section 140 of the Digest:—

Myingun says that a woman may not say, ငါ့ကိုး ဝေခံ
 I am the *auratha*.

Vicchedâni says:—"Even if she is the eldest sister, she is not the *auratha*."

In section 150—

Rasi says:—"If a son is born after the daughter, let them both have equal shares." A woman shall not say, "I am the *auratha*."

Cittara says that although a son is the youngest among children of whom the others are daughters, he shall not be called a younger child, let him take the elder's place, the place of the father.

Kyannet says that although a son is born after a daughter, the son is more excellent than the daughter.

In my opinion when it is stated that the woman may not say, "I am the *auratha*," it only means that she may not claim the largest share in the estate or, in other words, she may not demand the eldest child's share (အငြိမ်းစား).

When *Cittara* says that the son will take the father's place, it does not mean that he is given a superior status. It only means that he gets his father's personal belongings. His elder sister is also allowed to take her mother's personal belongings. And his share in the residue is equal to that of his eldest or elder sister, as the case may be.

I am therefore of opinion that Hartnoll, J., in *Po Zan v. Maung Nyo* (1) and Birks, J.C., in *Ma Mya Thu v. Maung Po Thin* (20) were not justified in holding that the son is preferred to any daughter. It appears to me that though the eldest daughter is prevented from claiming the *orasa* share, i.e. the largest share, there is nothing to indicate that the eldest son, her younger brother, becomes the *orasa* and takes the largest share.

There is an additional reason why these rules of distribution of inheritance after both the parents are dead do not apply to cases where the eldest daughter claims a quarter share from her surviving parent, the father. It is that the claim is allowed her under very special circumstances and as a reward for her past assistance in the acquisition of property and the possibility (which the law-givers expected in the times they lived) of her taking her mother's place and continuing the

(1) 7 L.B.R., 27.

(20) Chan Toon's L.C., Vol. II, p. 81.

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family and controlling the younger children as her mother had done in her lifetime. In the extract from *Dhammathatkyaw* which is given in section 62 of the Digest we find the principle အလိုကြီးသော်လည်းကောင်း၊ အဘကြီးသည်အမိအဖ။ "The eldest brother is in the position of the father, the eldest sister in the position of the mother." This is in the mouth of every Burman and it is clear from the fact of the principle being recorded in that *Dammathat* word for word the same as it exists in the mouth of the people that it is a well-recognised principle. And so far as my experience goes the principle has never been taken to mean that in the case of the eldest daughter, only her younger sisters give her the position of their mother. The younger brothers also respect her as they had their deceased mother. This happy state of things exists to-day and long may it continue.

Another point is that even if those rules of distribution among all the children are applicable to the question of the eldest daughter's right to a quarter on the death of her mother, the younger son cannot take her place, he can only prevent her from claiming the right. Then in that case there would be no *orasa* at all, a position which the *Dhammathats* can hardly be held to have contemplated.

In my judgment it is really unnecessary to go into the question of the applicability of these rules because it is perfectly clear, as shown above, that the *Dhammathats* in giving a quarter to the eldest child have in view the case of there being both sons and daughters in the family.

Among the Burmese Buddhists equality of the sexes is recognized in the *Dhammathats* with occasional aberrations to the effect that the male is superior to the females. But when we come to consider what superior rights are given to the man, we find that his rights are hardly superior to the woman's. Although they borrowed their laws from the Hindu Institutes of *Manu*, the Burmese carefully refrained from adopting the sex inequalities of the Hindu Law. For instance in Hindu Law the term *aurasa* was applied originally only to the legitimate son. Next the Rishis evolved him into a son of a very superior type, namely, the son begotten by a man on a wife of the same caste who was espoused in an approved

form of marriage with religious rites, was a virgin at the time of her marriage and had not passed through the marriage ceremony or a part of it with another man (24). This was done on spiritual grounds. In Hindu Law a daughter is not called an *aurasa* and is not allowed to confer spiritual benefits on her father as the *aurasa* son is.

The Burmese borrowed the word *aurasa* and Burmanized it as *auratha* but gave their own meaning to it suitable to the conditions of family life which they approved. Thus they called a child (son or daughter) born in lawful wedlock an *auratha* child, putting the son and daughter generally on an equal footing.

I am therefore of opinion that it is wrong to state as in *Po Zan v. Maung Nyo* (1) that the younger child, a son, being competent to assume the duties of an *orasa* must be preferred to his eldest sister, even though she happened to be the eldest born. The case of *Po Hman v. Maung Tin* (25) followed the last case cited herein without any discussion of the texts and I must respectfully dissent from it in so far as it holds that the eldest born daughter is ousted from her position by her younger brother.

In the result I would hold that the eldest born legitimate daughter has the right to claim a quarter share on the death of her mother whether she co-exists with sons or not, and that the eldest born child is the orasa, although, as regards the claim to a quarter share on the death of one of the parents, it would depend upon the circumstances of each particular case whether the claim can be made or not, that is to say, if the child is a son he can only make the claim from the mother, on the ground that he steps into his deceased father's place; similarly if a daughter, she can only claim as one who takes the place of her mother. It is clear also that there cannot be two orasas, a male and a female, in the same family, because an orasa is either the eldest born or the one who supersedes the eldest born.

If this view is correct, there will be no difficulty in construing section 15 of the *Manugye* and sections 162 and 163 of the *Digest*. The child who is the *orasa* will be the

(24) Sarkar's Hindu Law of Adoption, 2nd Edn., p. 57.

(1) 7 L.B.R., 27.

(25) 8 L.B.R., 113.

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child whose children, being out-of-time grand-children, will get a larger share in the estate of their grand-parents than the issue of their uncle and aunts. They will under the present law [*Ma Kyi Kyi's* case (16)] get the share which their deceased parent would have got, had he or she survived his or her own parents. That deceased parent will be the eldest-born son or daughter.

In section 15 of the *Manukye* and sections 162 and 163 of the Digest words similar to those noticed above as occurring in the extracts given in section 30 of the Digest are found:—

Vilasa.—Thagyi auratha.

Myingun.—Thagyi.

Manukye.—Thagyi auratha.

Viniccaya.—Thagyi preceded by the Pali word *jettho*.

Manu }
Kyannet } Thagyi.

Kungya }
Vicchadani } Akogyi, eldest brother.
Cittara }
Kyetyo }

Vicchadani prefixes *jettho* to *Akogyi*.

The above are in section 162.

In section 163 we find.—

Viniccaya, *Manuvannana*, *Sonda* prefixing *jettha* to "Thamigyi" and "Hnamagyi" eldest sister.

So that with reference to the texts in the sections now under consideration it must be held that the eldest born child is the one spoken of.

Section 15 contains three paragraphs, of which the first is for the "*Thagyi auratha*" and the second for the "*Thamigyi*." It has been contended, as counsel for the respondent in *Ma Saw Ngwe's* case (26) did that these two paragraphs are not mutually exclusive and that at least for the purpose of claiming the larger share in favour of the out-of-time grand-children there can be two eldest children, eldest son and eldest daughter. I am unable to accept this contention. There are reasons why it should not be accepted, namely, (1) the official translation of section 212 of *Attasankhapa* is not correct. Therefore the texts indicate alternative cases. I am

(16) 3 L.B.R., 8.

(26) Chan Toon's L. C., Vol. II, p. 210.

not in favour of Mr. May Oung's translation which is given in his book at page 248. (2) Though the *Dhammathatkyaw* and *Chittara* in sections 162 and 163 of Digest mention both the eldest son and eldest daughter in the same breath, as it were, it does not indicate that the two cases are not mutually exclusive.

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In support of the argument that the first two clauses of section 15 of the *Manukye* are not alternatives the case of *Mi Min Din v. Mi Hle* (18) (an Upper Burma case) has been cited. In that case Sir George Shaw, J.C., decided that under section 15 of the *Manukye* there may be two *orasa* children, and dissented from *Ma Saw Ngwe's* case. Referring to that case, the learned Judicial Commissioner said, "It was held that there cannot be two *orasa* children (that is an *orasa* son and an *orasa* daughter) in the same family. This decision was apparently based on section 212 of the *Attasankhepa*. The published English translation of that work seems to imply that there is either an *orasa* son or an *orasa* daughter, but, not both at the same time. The Burmese is not so uncompromising, and is perhaps open to another construction, but, however this may be, I think there can be no doubt that the numerous passages of the *Dhammathats* dealing with partition among several sons and daughters refer to the special position and privileges of the eldest or *orasa* son, and of the eldest daughter as co-existing, cf. sections 153 to 161 of *Kinwun Mingyi's* Digest. There is nothing in sections 162 and 163 of that work which deals respectively with the case of the eldest or *orasa* son and the eldest daughter dying before the parents—the text is directly in point in the present case—to show that they are mutually exclusive." If Sir George Shaw's decision is correct, then in the present case both Ma Nyein Aung and Maung Po Cho would be the eldest children whose own children will get preferential treatment under section 15 of the *Manukye* or under sections 162 and 163 of the Digest. I have already expressed my view that the published translation of section 212 of the *Attasankhepa* is correct, and that it indicates that the first two clauses are mutually exclusive.

As regards the other ground also of Sir George Shaw's decision, I respectfully differ from him. Sections 153—161 of

(18) (1904-06) 2 U.B.R., Buddhist Law : Inheritance, p. 11.

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the Digest do not show the position and privileges of the eldest son and the eldest daughter to be co-existing under all circumstances. They are co-existing only in the case where the eldest son is younger than the eldest daughter. Where the eldest son is older than the eldest daughter, the son gets a larger share. In my opinion sections 153--161 of the Digest do not help us on the question whether there can be simultaneously an eldest son and an eldest daughter through whom special treatment may be claimed in regard to the inheritance of the grand-parents. I think *the eldest born child—male or female—is the child through whom his or her children may claim a preferential right in the estate of their grand-parents.* It would be absurd to allow two *orasas*—a male and a female—for the purposes of the sections now under consideration, because their children would then take away altogether one half share of the estate. This, I think, is an absurd and illogical position for the younger children will then have only the estate of their mother, namely, one-half, to inherit in. They would be deprived of their inheritance in the estate of their father. A child is entitled to inheritance in the estate of both its parents.

I have pointed out above that the eldest born daughter's right to take her deceased mother's place in the lifetime of her father is not ousted by a son born after her. That view is against the proposition that only where there are daughters the eldest daughter had that right. I have also shown above that the eldest son or daughter within the first two paragraphs of section 15, and sections 162 and 163 of the Digest is the same child who is entitled to preferential treatment on the death of one of the parents as contemplated by the extracts in sections 30, 31, 32 and 33 of the Digest. The view taken by Sir George Shaw in *Mi Min Din's* case has been dissented from by Mr. McColl, A.J.C., in the unreported case of *Tha Dun v. Waing Gyi*. Mr. Tha Gywe refers to that case in his *Conflict of Authority in Buddhist Law*, Vol. II, at p. 53. In that case the eldest born child was a daughter, the second and third were sons of U Tu and Ma Kin. Waing Gyi was the son of the eldest daughter who had survived her father but not her mother. The plaintiff claimed a one-third share in the estate of the grand-parents on the ground that he was the son

of the *orasa* daughter. It was contended for the defence that the plaintiff's mother was not the *orasa*, as she had brothers, and that the eldest competent son should be preferred to any daughter. Mr. McColl held that the plaintiff's claim was good, and he said that there was nothing to suggest that families consisting of daughters only are referred to.

In *Ma Ein Thu's* (14) case above cited Twomey, J., said that the texts stated in section 163 give the issue of the eldest daughter a share equal to that of the youngest of its aunts, and that there seems to be no authority for holding that these texts apply exclusively to families consisting of daughters only, and, as I said before, he treated the fact that there was an eldest born son who died in infancy as being negligible.

With these observations I will now proceed to answer the questions referred.

I answer—

Question 1.—In the affirmative.

Question 2.—Where the eldest child is a daughter no son can become *orasa*.

Question 3.—In the affirmative.

Question 4.—In the negative.

Question 5.—In the negative, unless the son is the eldest born.

As regards Question 6, I may say that the word "transmit" is not quite a happy term. The eldest born son is the *orasa*. If he predeceased his parents, his children will have a right to preferential treatment as laid down in the first paragraph of section 15 of the *Manukye*, or section 162 of the Digest. If the eldest born son died before he became competent to take his father's place, a younger son, being fully qualified, may become *orasa*, and, if that son had predeceased his parents, his children will have a right to the same preferential treatment. But, if the eldest born child was a daughter and predeceased her parents after she had become competent to take her mother's place, her children will have a right to the same preferential treatment. It is doubtful whether another daughter younger than a son can ever take the place of the eldest born daughter who is not competent, or died before she became able to take her mother's place.

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As regards Question 7, my answer is—the eldest child being a daughter can claim on the death of her mother a quarter share as *orasa*, and, if she then died before her father without having got the share, her children will have a right to preferential treatment contemplated by section 15 of the *Manukye* and sections 162 and 163 of the Digest and, if she then died after her father but before she had claimed her distributive share in the estate, her right of inheritance will devolve upon her children. The same would be the case of the issue of any other child who died after its right of inheritance became vested in it. Supposing the eldest born child died after it became entitled to claim a quarter share under the circumstances of the case, the question may arise whether his children will be entitled to claim the quarter share from their surviving grand-parent. This question does not arise here and need not be answered. But, if the eldest born, though it might have claimed the quarter share from the surviving parent, did not and survived that parent, then the child will no longer be entitled to claim the quarter share but will have to share with the other children and may in that case get more or less than the quarter share it might have claimed.

Pratt, J.—It is, perhaps, a matter for regret that the terms of this reference were drafted quite so broadly and were not confined more closely to the problems of the particular case from which it arose.

It appears necessary to summarise the facts briefly. Plaintiffs were the children of Maung Po Cho, eldest son of U Baw and Daw Hmo. Defendants were the younger son and daughter of U Baw and Daw Hmo.

Daw Hmo died before her husband U Baw and Maung Po Cho predeceased his father. Ma Nyein Aung, the eldest child of the family, survived both her parents.

Plaintiffs claimed one-fourth of the estate of their grand-parents, *jure representationis*, on the ground that their father, Po Cho, was the *orasa* child.

The District Court relying on *Po Hman v. Maung Tin* (25), *Po Zan v. Maung Nyo* (1) and *Tun Myaing v. Ba Tun* (2) held

(25) 8 L.B.R., 113. (1) 7 L.B.R., 27. (2) 2 L.B.R., 292.

that Po Cho was the *orasa* child of his parents, and that his children were entitled to the share of a younger uncle, *i.e.* one-fourth in this particular instance. ●

The specific problem therefore is whether, where the eldest child of the family is a daughter, and survives both her parents, the children of the eldest son, who was competent to inherit and had attained his majority, are entitled to take the share of a younger uncle on the ground that their father was the *orasa* son. ●

The term '*orasa*' originally meant nothing more than born in lawful wedlock but was usually applied in the *Dhammathats* to the eldest legitimate child in particular. In the *Manukye* (quoted in section 16 of the *Kinwun Mingyi's Digest*) children born of a union contracted by parental authority are designated '*orasa*'.

The word has, however, frequently been used in the rulings of the Courts, in a special sense, of the child, who takes the place of a parent on his or her death and is entitled to claim a one-fourth share of the estate from the surviving parent, and has been more particularly applied to the son in this connection.

I do not think there is any doubt that it is this specialised use of the term *orasa* and the double sense, in which it has been applied, that has inadvertently been the cause of some conflict in the rulings of the Courts.

It is necessary to distinguish carefully between the right of the child or children of the eldest child to take *jure representationis* a share equal to that of the younger uncle or aunt on division of the parental estate and the right of the eldest son or daughter to take the place of the parent of the same sex on his or her decease and to claim one-fourth of the joint estate from the surviving parent.

Had U Baw predeceased his wife and his son, Po Cho, survived him, it seems clear that Po Cho would have been considered the *orasa* son and have been held entitled to claim a one-fourth share of the estate from his mother on his father's death; but it does not necessarily follow that where he predeceased his father, his children can claim a larger share than other grand-children on the ground that their father was the *orasa* son.

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The term *orasa*, when applied to the eldest child, whose child or children are entitled to a larger share of the inheritance by right of representation, is to my mind ordinarily being used in a different sense to that in which it is applied to the son or daughter entitled to claim a one-fourth share of the estate from the survivor on the death of one of the parents.

The law on the question is laid down in Book X, section 15 of the *Manukye*, which following the accepted translation, runs as follows:—

“If the eldest son (*tha-gyi*) dies before his father and mother the law of inheritance between his son and his son’s uncle and aunts is this. Because in case of the death of the father and mother, the eldest son, being the *auratha* is called father, let his son and his (*i.e.*, the eldest son’s) younger brother share alike. If the eldest daughter (*thamigyī*) die before the father and mother, this is the law for the partition of the inheritance between her daughter, and her daughter’s uncle and aunts. Let the daughter of the eldest daughter and her (the eldest daughter’s) younger sister share alike, because, the eldest daughter, when grown up, stands in the place of her mother.”

It will be noticed that the term *auratha* or ‘*orasa*’ is applied here only to the eldest son and not to the eldest daughter and appears to be used in the sense of the legitimate son competent to inherit. In the passage as translated above it will be seen that it is quite possible that both the eldest son and the eldest daughter might predecease their parents, in which case it might be inferred that the children of both would be entitled to the advantage of the right of representation and to a share equal to that of the surviving uncles and aunts. A reference to the other authorities on the subject leaves, however, little doubt that it was not intended that this should be so.

The solution propounded by my learned brother Maung Kin obviates this difficulty. After an exhaustive examination of the *Dhammathats* and rulings he comes to the conclusion that it is only the child of the eldest child, whether son or daughter, who is entitled to share with the younger uncle or aunt.

If ‘*thagyi*’ in section 15 is taken to mean the eldest son, being the eldest born child, and ‘*thamigyī*,’ the eldest daughter

being the eldest child, then the passage is clear and decisive and there can be no doubt that where the eldest child is a daughter, the children of the eldest son, not being the eldest child, who predeceases his parents, are not more favoured than other grand-children.

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This is in accordance with the view taken by Tha Gywe in his Conflict of Authority in Buddhist Law, where the question is very fully discussed and the reasons for the conclusion reached stated clearly and convincingly. He used the term *orasa* in the sense of the eldest child simply in this connection (27).

As, however, the rulings on the point are not unanimous it is desirable to refer to some of the leading cases.

In the Upper Burma case *Ma Gun Bon v. Maung Po Kywe* (28) Burgess, J.C., laid down in 1897, after an exhaustive examination of the authorities, that if the eldest son or daughter die before the parents, the children are given the share of a younger brother or sister, on account of the superior claims of the *auratha* heir.

It is important to note that it is only the children of the eldest child, whether son or daughter, who are here held to be entitled to the right of representation. *Auratha* appears to be used in the sense of the 'eldest legitimate' child.

The principle involved was laid down very clearly by a Bench of this Court in *Ma Saw Ngwe v. Ma Thein Yin* (29) in these words:—

"Among grand-children whose parents have predeceased their grand-parents the only one who ranks with the surviving uncles and aunts is the eldest representative of the eldest child."

In the present reference we are not however, concerned with the question as to whether it is the eldest child only of the eldest child, or the children collectively, who rank with the surviving uncles and aunts.

The case of *Tun Myaing v. Ba Tun* (2) does not assist materially as the question there for consideration was the position of the *orasa* son only and the devolution of his status.

(27) Conflict of Authority, Vol. 11, p. 37.

(28) (1897-01), 2 U.B.R., p. 66. (29) 1 L.B.R., 198. (2) 2 L.B.R., 292.

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The principles involved were again enunciated by Sir Herbert White, C.J., in *Po Sein v. Po Min* (30). "If the *orasa* son or daughter predeceases his or her parents, his or her eldest son, or his or her children together receive the same share as their youngest uncle or aunt. But this is strictly confined, in all the texts, to the children of the *orasa* or eldest son or daughter. In my opinion, the rule relates to the *orasa* son or daughter, strictly so called. There is no indication that it has any reference to the eldest surviving son or daughter, unless he or she is technically the *orasa*."

The cases of *Ma Ein Thu v. Maung Hla Dun* (14) and *Ma Su v. Ma Tin* (31) extend the rule as to the *orasa* somewhat further, and lay down that if the eldest child die before attaining majority, he or she never becomes the *orasa* and the next child if competent becomes the *orasa*, but they do not materially vary the established rule that the eldest child or children of the eldest child rank with the younger uncles and aunts. It will be observed that in their cases as in many others there is a tendency to read a special meaning into the word *orasa*, which is not part of its strict connotation.

Up to this point there had been a practical consensus of authorities that the children of the eldest legitimate child only, usually termed the *orasa*, were entitled to the right of representation but in *Po Zan v. Maung Nyo* (1) the son of the eldest daughter was held not to be entitled to share equally with the sole surviving son on the ground that the son was the *orasa* and that the texts set out in sections 162 and 163 of the Digest giving the child or children of the eldest daughter special treatment do not apply, where there is an *orasa* son.

After careful consideration of the *Dhammathats* and previous rulings on this subject, I feel no doubt that here Hartnoll, J., was confusing the *orasa* or eldest child, whether son or daughter whose children are entitled to rank with the younger uncles and aunts on the death of both parents by right or representation as laid down in Chapter XV, Book X of the *Manugye* with the *orasa* son, who is entitled to claim a one-fourth share on the death of his mother.

(30) 3 L.B.R., 45.

(14) 5. B.L.T., 73.

(31) 6 L.B.R., 77.

(1) 7 L.B.R., 27.

The point is well brought out in *Tha Gywe's 'Conflict of authority'* (32) and I agree with his opinion that plaintiff's mother in the case under comment was the *orasa* or eldest daughter and her son was entitled to a share equal to that of his uncle.

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The rule laid down in *Po Zan's case* (1) was followed in *Po Hman v. Maung Tin* (25) under similar circumstances and here again I think the learned Judges were led to a mistaken conclusion, through confusing the claim of the *orasa* child to a one-fourth share of the inheritance from the surviving parent with the rights of the children of the eldest legitimate or *orasa* child to rank with the younger uncles or aunts on the death of both parents.

I am in entire accord with the view taken by McColl, A. J., of the Judicial Commissioner's Court in the Upper Burma case of *Tha Dun v. Waing Gyi* (33).

My experience of the actual practice among the Burmese is that it is the children of the eldest child, irrespective of sex, who are considered to be entitled to preferential treatment and that so far as the right of representation is concerned the children of the eldest child are never ousted by a son, who is not the eldest born, merely because the eldest child happened to predecease the parent of the same sex.

The rule laid down in *Gun Bon v. Po Kyaw* (28) and *Po Sein v. Po Min* (30); that it is only the children of the eldest child, whether son or daughter, who are entitled to rank with the surviving uncles or aunts, is in accordance with the weight of the *Dhammathats*.

My conclusion therefore is that in section 15, Book X of the *Manugye* the words "*Tha-gyi*" and "*Tha-mi-gyi*" mean the eldest son or daughter, being the eldest child, and the two paragraphs relate to the alternative cases in which a son or a daughter respectively is the eldest born legitimate child.

The *Manugye* being clear and unambiguous its authority is incontrovertible.

(25) 8 L.B.R. 113.

(32) *Conflict of Authority on Buddhist Law*, Vol. II, p. 51.

(33) Civil 2nd Appeal No. 302 of 1909 of the J.C.U.B.'s Court.

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I do not see my way to answer the reference without regard to the facts of the case from which it arose.

My answer would be :—

(1) In a family consisting of both sons and daughters a child can attain the full status of *orasa* prior to the death of its parents, in so far that, if he or she predeceases his parents, his or her children may be entitled to the preferential treatment prescribed in section 15, Book X of the *Manugye*.

(2) In such a family where the eldest child is a daughter no son can become *orasa* until his father dies, subject to the proviso that the eldest daughter attained her majority before her death.

(3) The question as to which is the *orasa* can be decided, so far only as the right of representation is concerned.

(4) In such a family there cannot be two *orasa* children in the sense of children whose offspring would in the event of their parents' death be entitled to claim an equal share with their younger uncles and aunts.

But it is conceivable that where the *orasa* eldest child was a daughter and the eldest son attained his majority before his father's death, he would on his father's death be entitled to rank as *orasa* for the purpose of claiming one-fourth of the estate from his mother. It is to be noted that *orasa* is here used in two distinct senses.

(5) It follows from my answers to the previous questions that sons are not always preferred to daughters as '*orasa*.'

(6) In such a family when the eldest child is a daughter there cannot be an *orasa* son, who predeceasing his parents can transmit to his children a right to preferential treatment in the division of the estate, assuming that the eldest child attained majority and did not forfeit her status as *orasa*.

(7) The eldest child, being a daughter, can transmit to her children a right to preferential treatment in the division of the estate, and there is authority for holding that on her mother predeceasing her father she can claim a quarter share as *orasa*. I do not, however, consider the determination of the latter point is necessary for the purposes of the present reference.

Heald, J.—Maung Baw and Ma Hmo had four children, namely Ma Nyein Aung, Po Cho, Maung Sin and Ma Nga Ma. Ma Hmo died first, then Po Cho, then Maung Baw and then Nyein Aung. After the death of Ma Nyein Aung, Po Cho's children sued the other surviving heirs, including Maung Sin and Ma Nga Ma, to recover one-fourth share of the estate of Maung Baw and Ma Hmo on the ground that Po Cho was *auratha* and that therefore they as his children would be entitled to one-fourth of the estate.

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The trial Court found that Po Cho was *auratha* and that his children were entitled to a quarter share of the estate.

Maung Sin and Ma Nga Ma appealed and the Appellate Bench of this Court has referred to a Full Bench the following questions:—

(1) In a family consisting of both sons and daughters can any child acquire the status of *auratha* prior to the death of either parent?

(2) If so, in such a family where the eldest child is a daughter can any son become *auratha* before his father dies?

(3) In such a family can the question which child is *auratha* be decided before the death of either parent?

(4) Can there be in such a family two *aurathas*?

(5) Are sons to be preferred to daughters as *aurathas*?

(6) In such a family can there be an *auratha* son who predeceasing his parents, can transmit to his children a right to preferential treatment in the division of the estate?

(7) If so, can the eldest child, being a daughter, on her mother predeceasing her father, claim a quarter share as *auratha*, or transmit to her children a right to preferential treatment in the division of the estate?

In considering these questions the first step is to make certain what is meant by the word *auratha*. It is of course in common use throughout the books on Hindu law in the form of *aurasa* and, so far as I know, is there always used in the sense of a son born to a man by his married wife as distinct from the various other classes of sons recognised in Hindu law, many of whom are not begotten by the father at all.

The *Mitakshara* derives the word from "*uras*" (the breast) and says "The issue of the breast (*uras*) is the legitimate son

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(*aurasa*). He is one born of a legal wife, and a son begotten by her husband on her is a true and legitimate son; and is chief in rank" (34).

The word is common in this sense in the Burmese law books also, and I need not do more than refer to the definition given in the 81st section of the 10th Book of *Manugye* which gives a list of twelve classes of children the first of the twelve classes being "children born to a young couple given in marriage by their parents and called *auratha*." This list seems to be based either on some Hindu law book or on some source on which the Hindu books also drew, since most of the Hindu books also divide sons into twelve classes of whom *aurasa* is always first (35), and the subsequent passage in *Manugye*, "Of these twelve the *auratha* only has the full right to inherit the property of the parents," also seems to have been taken either from Hindu law or from some common source, since we find practically the same words following the mention of the twelve classes of sons in *Vivada Chintamani* (36), which says "*Manu*" and other legislators have said that notwithstanding other kinds of sons, the legitimate son alone receives the whole estate of his father.

It was natural that when the writers of the Burmese law books came to translate "*auratha*" they should render the word as "*tha-gyi*" or "*tha-u*," that is "big son" or "first son" and that when they adapted the rules of the ancient law to the conditions of the Burmese family they should regard the *auratha* as the "eldest" as distinct from the younger children. I say "children" rather than "sons" because even in Hindu law the use of the word *aurasa* was not confined to sons. It was used to mean "legitimate issue" whether sons or daughters (37), and in the Burmese law books it is clearly used to include daughters as well as sons. In fact in section 73 of the *Wagaru* the phrase "*auratha* daughter" is actually used in the Pali, the parallel words in the Burmese text being "*thami-akyi*" (the eldest daughter).

(34) Stokes Hindu Law Books, p. 410.

(35) See Mayne's Hindu Law, p. 82 (7th Edition).

(36) Tagore Law Lectures, 1880, p. 515, cf. Forchammers, Jardine Prize Essay, p. 49.

(37) Stokes op. cit., p. 498.

I think therefore that "*auratha*" as used in those passages in the *Dhammathats* which it will be necessary to consider for the purposes of the present reference may be taken as meaning the "eldest child," that the parallel Burmese words "*tha-u*" or "*tha-kyi*" may also be taken as meaning the "eldest child" except where the context shows that they mean the "eldest child being a son," and that *auratha dita* (that is "*auratha* daughter") and "*thami-u*" or "*thami-kyi*" must be taken to mean the "eldest child being a daughter."

It is now necessary to review the passages in the principal *Dhammathats* which deal with the rights of the *auratha* in the sense of "eldest child," and not in the original sense of "legitimate son" as distinguished from the various inferior classes of sons, and as it will be convenient to consider them, so far as possible, in order of date, I shall take them in the order in which they are placed by Dr. Forchammer, because he gives reasons for that order and because in certain cases there is reason to believe that the dates and order given in section 4 of the Digest are doubtful. Complete copies of many of the *Dhammathats* have not yet been printed so that in many cases all that is available is the extracts given in the Digest.

The earliest *Dhammathat* is the *Vilasa* which is said to have been written in Talaing about the end of the 12th Century. A commentary on it was written about the middle of the 17th Century and it was translated into Burmese in the latter half of the 18th Century.

The rule given in this *Dhammathat*, as I read it, is that if the eldest child is a son and has helped the parents in their business, then when the father dies he gets his father's personal and official belongings and the mother gets her personal belongings. The rest of the estate is divided into four shares of which the mother and younger children get three and the eldest son one. The eldest son gets one-fourth, however many other sons there may be ("even if there be ten sons they get one share out of the three").

If the eldest child is a daughter and the mother dies, the eldest daughter gets the mother's personal belongings and one-fourth of the rest of the estate. It is to be noted however that

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the description of what I have called the rest of the estate does not mention immoveable property.

If the eldest is a son and the mother dies or the eldest is a daughter and the father dies the same rule is said to apply. Apparently therefore according to this *Dhammathat* the eldest child, whether a son or daughter, gets one-fourth of the estate, excluding personal belongings, whichever parent dies, but one is tempted to think that in cases where the compiler of a *Dhammathat* does not state the rule expressly *in extenso* but contents himself with saying that the same rule applies, he may have been misled by a certain fondness for analogies which appears throughout the *Dhammathats* and may have been led into generalisations which, if the rules had been expressly stated, would have been seen to be unwarranted.

As for the rights of grand-children, the *Vilasa* says, "If the eldest brother dies before his parent, his son, if the son is *auratha*, shall receive as his share of his father's inheritance as much as his father's younger brothers," and again "if the eldest grandchild is *auratha*, among the deceased's children let him share equally with the younger brothers (of his father). The grand-children lower than the eldest *auratha* grandchild shall receive only one-fourth of the share of their father's younger brothers." "If the eldest sister dies before her parents, the rule is the same. If the eldest sister's child is *auratha*, let him have as his mother's share of the inheritance the same share as his aunts."

I am inclined to think that the *auratha* grand-children referred to in these passages are the children of the *auratha* child, and this, as will be seen later, is the interpretation which has been put on the rule by the Courts, but it must be admitted that that is not what the *Dhammathat* actually says. It is just possible however that in these passages the word *auratha* was used in its earlier sense of "legitimate."

The next important *Dhammathat* is *Wagaru* which was written in Talaing about A.D. 1300 and was translated into Pali and Burmese by Buddhaghosa the Less about A.D. 1473. Of this we have a copy written in A.D. 1707. This *Dhammathat* is called *Manusara* in *Dhammathatkyaw* (see below) and it is admittedly the basis of many of the subsequent compilations.

It is important for our present purpose as showing that as early as the 15th Century the Burmese law writers regarded "tha-u" or "tha-kyi" ("first son" or "big son") and "thami-akyi" ("big daughter") as representing the Pali *auratha*.

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Sections 71 to 74 contain the following rules:—

"On the death of the father the 'auratha first son' shall get the personal belongings of his father and of the remaining property the mother shall receive three-fourths, the other one-fourth share being divided between the other children and the eldest son ("tha-kyi").

"On the death of the mother the *auratha* daughter ("thami-akyi") shall get the personal belongings of her mother and of the remaining property the father shall receive three-fourths and the remaining one-fourth shall be divided between the eldest daughter and the rest of the family."

On the subject of the rights of grand-children the *Wagaru* lays down no rules.

The next important *Dhammathat* seems to be the *Dhammathatkyaw* or *Kosaungchok* which is in Burmese and was compiled about A.D. 1580. It contains references to *Vilasa* and *Wagaru* (which it calls *Manusara*) and also to an older *Dhammathatkyaw*.

It gives the following rules:—

"If the father dies first, the rule for division between the mother and the *auratha* first son is as follows: If the son has been dutiful he shall get his father's personal and official belongings. The mother shall get (her own) female slaves. The rest of the estate shall be divided into four shares. The mother shall get three shares and the son one share. On the father's death the eldest son gets a share of the estate because he is the person who will carry on the father's duties. On the death of the mother the eldest daughter shall get her mother's personal belongings and one quarter of the rest of the estate. The father shall get the remaining three quarters. On the death of the father the eldest daughter, if nothing has been given to her and there is property to be divided, shall get a pair of buffaloes, ten cows, three bullocks, and one slave woman who can cook. The mother shall get the rest of the estate.

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"On the death of the mother the eldest (first) son, if he has not already received anything shall get a pair of buffaloes, a pair of bullocks, ten cows and three bulls. The father shall get the rest."

As for the share of grand-children the *Dhammathatkyaw* says:—

"If the eldest brother or eldest sister dies before the parents, then if there is a first grand-child by them, those grand-children shall receive half as much as their father's or mother's younger brothers and sisters," but this rule is almost certainly the result of a mere mistake, the writer having misunderstood the provision in the earlier books that the grand-children should "share equally" with their uncles and aunts.

The next important *Dhammathat* is known as *Kaingsa* or *Maharajadhammathat* and is referred to in *Manusara Shwe-myin* as the fourth revision of the *Manusara*, the third being the *Wagaru*. It is in Pali and Burmese and was compiled by *Kaingsa*, otherwise called *Manuraja*, about A.D. 1630. It contains references to the *Dhammathatkyaw* and the "Talaing *Dhammathats*" but rests its authority not on *Manu*, as the older law books did, but on the *ipse dixit* of the author himself who is called *Manuraja*. According to Dr. Forchammer it is the first *Dhammathat* which is distinctively Buddhistic.

It gives the following rules:—

"On the death of the father the son who is competent to bear the father's burden shall get his personal and official belongings, also his lands and house. Of the livestock and deadstock such as metals and grain he shall get one share and the mother three."

The reference to lands in this rule is unexpected, but it probably refers to lands held by the father as an appanage of his office, which are mentioned in this connection in *Vilasa*, particularly as lands are not mentioned in the following passage, which also describes the property received by the son on his father's death, but are apparently covered by the reference to the father's "office." It will be noted that all the property of which the eldest son gets a quarter share is moveable.

"On the death of the mother the mode of partition between the daughters and father is as follows: The

daughter is to get her mother's personal belongings, a pair of bullocks, a pair of buffaloes, 10 cows, 20 goats, and one slave woman who can cook. The father is to get the rest of the property.

On the death of the father the daughter is to get a married couple of slaves, a pair of bullocks and a fair portion of grain. The mother gets the rest of the property. The rule for partition between the father and sons on the death of the mother is that the son is to get a pair of buffaloes, a pair of bullocks, a pair of cows, a bull, twenty milch goats and three he-goats. The father gets the rest of the property."

Fromth is *Dhammathat* it would appear that only the eldest son is to get one-fourth of the estate on the death of the father, and that the daughter is only to get certain specified property. So far as the Digest shows, it gives no rules as to the inheritance of grand-children.

The next important *Dhammathat* is *Manuvin* which is said to be practically a rendering of *Wagaru* in verse with some slight additions. It refers to *Wagaru* and *Dhammathatkyaw* and follows the older *Dhammathats* and not *Kaingsa*. It was compiled about A.D. 1750 and was translated into prose a few years later.

It gives the rule for partition between the *auratha* son and the mother on the death of the father as follows:—

"The son is to get his father's personal and official belongings including lands attached to his office. Of the rest of the property he gets one-fourth and his mother three-fourths.

"On the death of the mother the daughter is to get her mother's personal belongings and one pair of buffaloes and bullocks, ten cows, twenty goats and one slave woman. The father gets the rest.

"On the death of the father the daughter is to get a married couple of slaves, a pair of bullocks and buffaloes and some grain. The mother gets the rest.

"On the death of the mother the son gets two pair of buffaloes and bullocks, one cow, twenty she-goats and three he-goats. The other sons shall receive small shares even if there are ten of them."

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As for grand-children the *Manuyin* says:—

“The son of the *auratha* shall receive as much as the youngest of his uncles.”

The next *Dhammathat* is *Manugye* which was compiled in A.D. 1756. Of it Dr. Forchammer says that it is not really a Code or Digest of law, but rather an encyclopaedic record of existing laws and customs and of the rulings preserved in former *Dhammathats*, and that it does not attempt to arrange the subject matter or to explain or reconcile contradictory passages. Like the Hindu *Manu* what the writer did “was simply to gather the fossil laws of a former generation and mix them indiscriminately with the laws which were current in his age. They do not harmonise with each other but present the appearance of a mechanical mixture in which the materials bear no affinity to each other.” *Manugye* has nevertheless acquired a pre-eminent position among the *Dhammathats*, largely because until the publication of Jardine’s *Notes on Buddhist Law* in 1882-3 it was the only *Dhammathat* which had been translated into English. In 1859 Major Sparks said of it “The only Burmese Code of Law which the Courts have had for their guidance is the *Dhammathat* or Burmese version of the Laws of Menoo. This book is in a great measure obsolete, and is no more applicable to the decision of suits of the present day in the Courts of Pegu than are the laws of Alfred in the modern Courts of England. It contains moreover a vast number of contradictory statements on matters of grave importance, mingled in almost inextricable confusion with the most puerile absurdities.” He admitted however that in spite of “the utter want of sequence in its component parts” “some points of this Code have retained their vitality, and are as familiar in the mouths of the people as household words” and he undoubtedly based his code on it. In 1914 in the case of *Ma Hnin Bwin v. U Shwe Gon* (38), the Privy Council referring to “*Manu Kyay* which for so long had been recognised as the leading guide in the Administration of Justice” said, “It is not seriously disputed that the authority of this text-book, where it is clear, as among the *Dhammathats*, is of the highest rank” and held that where there is no

ambiguity in the rule of Burmese Buddhist law as recorded in *Manugye* the other *Dhammathats* do not require to be appealed to. It is therefore clear that *Manugye* must now be regarded as the *Dhammathat* of pre-eminent importance.

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Manugye gives the following rules:—

“On the death of the father the eldest son (*tha-kyi*) gets the father's personal belongings. Of the rest of the property he gets one-quarter and the mother and the rest of the children three-quarters. On the death of the mother, the daughter gets her mother's personal belongings and the slave woman who cooks. Of the rest of the property the daughter gets one quarter and the father three.

“On the death of the father the eldest daughter gets one female slave, two cows, two goats, a pair of buffaloes, a plot of paddy land and the seed grain. The mother and the younger daughters get the rest.

“On the death of the mother the eldest son gets one slave, one pair of buffaloes, one pair of oxen, two goats and one plot of paddy land, and the father and younger children (or sons) get the rest. This rule and the last apply only when there is plenty of property.”

As for the rights of grand-children the *Manugye* gives the following rules:—

“If the eldest son (*tha-kyi*) dies before both his parents, the rule for partition between his son and the uncles and aunts is as follows: If the *auratha* eldest son (*tha-kyi auratha*) dies before his parents, then because the eldest brother is regarded as the father, the eldest brother's son shall share equally with the younger brothers. If the eldest daughter (*thami-kyi*) dies before both her parents, the rule of partition between the eldest daughter's daughter and her aunts is as follows:—The eldest sister's daughter shall share equally with the younger sisters, because the eldest sister is regarded as the mother.”

The next three *Dhammathats* in order of date are three compiled by Vannana Kyaw Din, namely *Manusara Shwe Myin*, *Manu Vannana*, cited as *Vannana*, and *Vinicchayapaka-sani* cited as *Vinicchaya*. These were all compiled between A. D. 1770 and 1775.

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Manusara Shwemyin professes to be a fifth recension of *Manusara*, the *Wagaru* and *Kaingsa* being the third and fourth recensions. It is based on *Wagaru* and *Kaingsa* but takes materials from *Manugye* also. It gives the following rules:—

“On the father’s death the son gets the father’s personal belongings and one-quarter of the residue because he takes his father’s place. The rest goes to the mother. On the mother’s death the son is to get certain cattle and the father the rest, and the father is to make suitable provision for his sons.

On the father’s death the daughter is to get a married couple of slaves, certain cattle and a suitable portion of grain, and the mother is to get the rest. The daughter is not to get a quarter of the residue like the son.”

I have been unable to find any definite rule in this *Dhammathat* as to the share of grand-children. Section 60 mentions grand-children after children as heirs and section 61 says that the nearer heirs shall get two shares to the more distant heirs one. This compilation does not seem to be mentioned in the Digest.

The *Vannana* which professes to be based on all the earlier *Dhammathats*, and not only on *Wagaru*, *Kaingsa* and *Manugye* gives the following rules:—

“On the father’s death the *auratha* eldest son gets his father’s personal belongings, his office and his official lands, and the mother gets her personal belongings. Of the residue, animate and inanimate, the son gets a quarter and the mother three-quarters.

On the mother’s death the daughter gets the mother’s personal belongings and also one-fourth of the rest of the property, but lands are not expressly mentioned.

On the mother’s death the eldest son gets certain cattle and the father gets the rest, but the father must make suitable provision for the younger sons.

On the father’s death the daughter gets a married couple of slaves, certain cattle, a fair portion of grain, and the mother gets the rest.”

As for grand-children the *Vannana*, as I read it, says that on the eldest brother’s death his *auratha* son (child?) gets the same share as his father’s younger brothers, and that the

eldest sister's children get an equal share with the mother's younger sisters.

The *Vinicchaya* is said by Dr. Forchammer to omit many of the contradictory, equivocal and superfluous passages in *Manugye*, *Manusara*, *Shwemyin* and *Vannana*. Its date is supposed to be about A.D. 1775.

It gives the following rules:—

“Partition between mother and sons after the death of the father.

The son gets the father's horse, official equipment and sword. The mother gets the female slaves. Of the rest of the property the son gets one-fourth and the mother three-fourths.

Partition between father and daughters after the death of the mother.

The daughter gets the mother's personal ornaments and clothes. The father gets the male slaves. Of the rest of the property the daughter gets one-fourth and the father three-fourths.

Partition between mother and daughters after the death of the father.

The mother takes all the property animate and inanimate but if the estate be large the mother should give to the daughter a suitable share.

Partition between father and sons after the death of the mother.

The father takes all the property, but if the estate be large the father should give to the sons a fair share of the grain, one buffalo, one yoke of oxen, ten cows, ten little goats and three he-goats.”

As for the shares of grand-children it contains the following rules:—

“If the eldest son (*tha-kyi*) dies, his sons and daughters should share equally with his younger brothers.

If the eldest daughter (*thami-akyi*) dies, her sons and daughters should share equally with her younger sisters.”

The *Vicchadani* (A. D. 1782) belongs to the same period during which there was evidently a revival of legal learning.

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In contains the following rules:—

“If the father dies before the mother and the son takes the father’s position, the son gets the father’s elephant, pony, clothes, his official lands, and his arm. The mother gets the slave women. Of the rest of the property, the son gets one-fourth and the mother three-fourths. Even if there are ten sons the rule is the same.

As for the partition between the father and the daughter on the death of the mother, the daughter is to get her mother’s clothes and ornaments, and also two pairs of bullocks, two pairs of buffaloes, ten cows, twenty she-goats, and one slave woman. The father gets the rest of the estate.

As between mother and daughter on the death of the father the daughter gets a fair portion of grain, a slave, and a pair of bullocks and buffaloes. The mother gets the residue.

As between father and son on the death of the mother, the son gets two pairs of bullocks and buffaloes, three he-goats, twenty she-goats, and one cow. The father gets all the rest. The rule applies even if there be ten sons.”

As for grand-children the *Vicchedani* says:

“If the eldest brother dies before receiving the parents’ inheritance, the children of that eldest brother shall share equally with the younger brothers.”

No passage referring to the eldest daughter’s children is cited from this *Dhammathat* in the Digest.

The only other *Dhammathat* among those cited in the Digest which seems to be regarded as important is that known as *Amwebon* or “Partition of inheritance.” Its date seems to be unknown, but it evidently reproduces the rules of *Manugye* with immaterial differences in some cases as to the number of animals to be given.

No extracts from it as to the rights of grand-children are cited in the Digest.

The only other text to which it is necessary to refer is what is known as *Attasankhepa Vannana* generally cited as *Attasankhepa*. It was compiled by the “*Kinwun Mingyi*”, U Gaung, who subsequently compiled the Digest, and it was first printed at the Burmese Royal Press in Mandalay in A.D.1882, that is only some four years before the British Annexation of

Upper Burma. It is said to be not, strictly speaking, a *Dhammathat*, that is a compilation giving the law as it was according to the texts, but to give instead the law as in the author's opinion it ought to be. I do not regard this criticism as entirely fair, since the author gives the original texts and then explains their meaning as he understands it, but even if it were true, it is obvious that the work is of the greatest value as representing Burmese Buddhist law as it was interpreted and, I have no doubt, administered under the last of the Burmese Kings. The author, whom I knew personally, was an undoubted authority on Burmese Buddhist law and its interpretation, and it cannot be denied that his work carries great weight. It is interesting for the purposes of the present reference because both when it gives the old list of the twelve classes of sons and where it gives another list of sixteen classes of sons, it puts the *auratha* first and in the latter case it defines the *auratha* as "a son born of a marriage where the parents on both sides consent and where the young couple co-habit by reason of like desires," and concludes the definition, exactly as the Hindu law books do, with the words "Such an *auratha* son is entitled to take the inheritance of his parents." But immediately afterwards it uses the same word *auratha* to distinguish between the "eldest" and the "younger" children, and it actually mentions the cases of families where there is no *auratha* son but only an *auratha* daughter, and where there is no *auratha* at all.

As for the shares of the *auratha* child on the death of one of the parents, it explains the law as follows:—

"As for the partition between mother and son when the father has died, let the son get the father's personal and official belongings, and let the mother retain her personal belongings, the slave women acquired during the marriage and the dwelling house. On the rest of the property, animate and inanimate, including male slaves, let the son have one-fourth and the mother three-fourths, but if there are inherited slave women, let the mother have half and the son half. This is the rule for partition between the *auratha* son and the mother. If there are younger sons and daughters, they shall have no claim to inherit while their mother is alive. They shall inherit only when the mother dies.

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As for the partition between father and daughter on the death of the mother, the daughter is to get the mother's personal and official belongings, and the father shall retain his personal and official belongings, the male slaves acquired during the marriage, and the dwelling house. Of the remaining property, including female slaves, the daughter shall get one-fourth and the father three-fourths, but if there are inherited slave men, the father shall have half and the daughter half. This is the rule of partition between the *auratha* daughters and the father. If there are younger sons and daughters they shall inherit only on the father's death.

As for the partition between father and son on the death of the mother, the father gets the whole of the property, but if there is a large estate, then let the son get a fair share of the grain, a pair of bullocks, a pair of buffaloes, a bull, two cows, twenty she-goats, three he-goats and other suitable property."

On the death of the father the rule of partition between mother and daughter is similar to that between father and son on the death of the mother.

As for the rights of grand-children the *Attasankhepa* explains the law as follows:—

"If the *auratha* eldest son or eldest daughter dies, leaving children, while the parents are still alive, those children are 'out of time' grand-children and cannot get their parents' full share. Let them get the same share as their youngest uncles and (or) aunts."

There is one other authority to which it may be well to refer shortly as it is sometimes referred to as an authority on Burmese Buddhist law, and it has already been mentioned.

In 1859 a "Civil Code of the Province of Pegu" (generally cited as "Sparks Code") was published by Major Sparks under the authority of the Local Government. The second part of that Code deals with "Burmese Law" and it is mainly based on Dr. Richardson's translation of *Manugye* which had been published in A. D. 1847.

This code omits any reference to the rights of the *auratha* the rule which it gives being as follows:—

"In the division of an estate between the surviving husband or wife and children, the widow or widower shall take

the dwelling house and three-fourths of the estate and the children divide the remaining one-fourth equally between them."

As authority for that rule it cites sections 2 to 5 of the 10th Book of *Manugye* but the rules there given, which have been quoted above, clearly do not support the rule.

It makes no reference to the rights of grand-children.

From the above survey of the *Dhammathats* I think that it is fairly clear that the word *auratha* is commonly used to mean the eldest child, whether son or daughter, and that if the eldest child, being a son, is competent on the father's death to take the father's place in the family, or, being a daughter is competent on the mother's death to take the mother's place then he or she is *auratha*, and on the father's or mother's death is according to the *Dhammathats* entitled to the father's or mother's personal property and to one-fourth of the rest of the estate, and further that if the eldest child, whether son or daughter, dies without having become entitled to that interest in the estate, his or her children are entitled to share equally in the estate with the younger brothers and sisters of the deceased.

It may be well to justify each of these propositions separately.

It must be admitted that in Hindu law the early legislators ignored the rights of women and excluded them altogether from inheritance. The original sources on which the Burmese *Dhammathats* were based, if not actually Hindu law books, had passed through Hindu hands and taken a Hindu tinge, and undoubtedly traces of an inferior status accorded to women can be detected in almost all of them. The *Vicchedani*, when dealing with the partition between brothers and sisters after the death of both parents, actually says "Though the eldest child be a daughter she does not reach the status of *auratha* and she must share equally with her younger brother" and one or two of the minor *Dhammathats* contain similar passages, which I have no doubt were taken from some old book and reproduced Hindu or possibly pre-Hindu ideas. But just as the *Dhammathats* when translating passages which are evidently taken direct from what may be called the Hindu law books use *auratha* in its original sense of "legitimate" and

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nevertheless when they come to apply it to Burmese Buddhist law use it in the special sense of "an eldest born child who is competent," so although they reproduce passages which follow the Hindu law in saying that a daughter can never be *auratha*, nevertheless when they come to the actual division of the property of the estate of a Burmese family they put the daughter practically, and in some cases entirely, in the same position as the son. Written law is eminently conservative and tends to lag far behind custom and if the law as given in the authorities on which the Burmese law books are based has been altered in those books, it may be taken as certain that the alteration is due to very firmly established custom and that the tendency suggested by the alteration has probably gone considerably further in custom than it has in law. The Burmese Buddhist law books leave no room for doubt that from the first there was a strong tendency towards equality between the sexes in matters of inheritance, and I think that the fact that this tendency appears so strongly even in the earliest of the *Dhammathats*, warrants my opinion that if the eldest child is a daughter she is in Burmese Buddhist law to be regarded as *auratha* just as a son is, if he is the eldest child.

The question then arises whether if the eldest child dies in infancy, the next child succeeds as *auratha*. The *Dhammathats*, so far as I know, give no answer to this question, though as I have said the *Attasankhepa* considers the possibility of a case in which there is no *auratha* but only younger children. I think from my experience of cases under Burmese Buddhist law for more than 20 years, that there can be no doubt that children who do not grow up are always disregarded and that the eldest child who reaches an age at which he or she would be able to take the place of the father or mother in case of death would always be regarded as *auratha*.

There can I think be no doubt that the *Dhammathats* which give a special share to the eldest child who is competent to take the place of father or mother contemplate a family in which the *auratha* is living in the family house and does actually take the place of the parent. Indeed I doubt whether the *Dhammathats* contemplated the *auratha's* taking away the special share unless he or she was ousted from the position of

head of the family by the surviving parent's marrying again. Some of the *Dhammathats* would deprive a son or daughter, who does not live with the family and take the father's or mother's place of the *auratha* child's share, *vide* the texts cited in sections 36, 37, 40, 41 and 62 of the Digest, but I think that in this case as in certain other cases, *e.g.* the cases of adopted and step children, the necessity for joint living may now be considered as archaic and obsolete and may be disregarded.

I have already said that in my opinion the eldest child who grows up is *auratha* by right of birth and that it makes no difference to the status of *auratha* which parent dies first. It is arguable, as indeed it is argued in this case, that on the death of the father the eldest son, though he be not the eldest child, succeeds to the father's place and that on the death of the mother the eldest daughter, though she be not the eldest child, succeeds to the mother's place, but I do not think that this view is in accordance with the meaning of the *Dhammathats* or with the facts of human nature. If, as I think established, *auratha* means the eldest child, then the question would seem to be settled by a reference to *Wagaru*, one of the earliest of the *Dhammathats*, which in this connection uses the words "*auratha* first son" of the son in the Burmese text and "*auratha* daughter" of the daughter in the Pali text, translating the Pali words into Burmese as "eldest daughter," and to *Attasankhepa* which actually uses the word *auratha* in this connection in the case of both son and daughter. As for the facts of human nature it seems to me unlikely that in a primitive family, and the Burmese family is still primitive, the eldest child if a son would tolerate a younger sister's taking the mother's place, or if a daughter would submit to her younger brother's taking the father's place, and in each case taking a large share of the family property.

The rights of grand-children must now be considered.

If the eldest child, whether son or daughter, actually became entitled by the death of the father or mother, to the *auratha* share, his or her children would naturally succeed to that share, and the rule that, if the eldest child dies before becoming entitled, the grand-children by that child should succeed to a similar, though somewhat reduced share, is

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intelligible. But if there is no *auratha* till one or other of the parents has died, then the rule about the rights of grandchildren seems to me to be unintelligible, and I think that it is clear that that rule must involve the assumption that a son or daughter can, as the text of *Attasankhepa* itself suggests, be *auratha* while both parents are alive, and supports my conclusion that the eldest child is *auratha* from the time when he or she becomes competent to take the place of the father or mother in case of death.

The law as expounded in the chief *Dhammathats* having thus been considered it is now necessary to consider the case law.

The earliest case seems to be that of *Ma Thi v. Ma Nu* (39) where in answer to an argument that it is the eldest grand-child who gets the special share it was said that "the passages quoted from the different *Dhammathats* do not appear to lay down any rule as to inequality of shares among grand-children sprung from the same father." The rule of equal division has since become well established and it may now be taken as settled law that in spite of the references in some of the *Dhammathats*, e.g. *Vilasa* and *Vannana*, to the "*auratha* grand-child," the children of the *auratha* divide the special share between them equally.

The next case was that of *Mi Saung v. Mi Kun* (40) where the following passage occurs: "The position of the eldest son, the *auratha* or "*thagyi*" as he is called, is superior to that of the others In the division under section 50 (of *Manugye* 10) the *auratha* has first choice. At sections 15, 22, and elsewhere it is said he takes the father's place: this may be when the father is dead or when both parents are dead. He is superseded if deaf or blind by a younger brother under section 36; and possibly section 35 imposes on the *auratha* the burden of maintaining a brother helpless from disease. He has a duty to perform; The *Manuwunnana* section 10 and *Manu Shwe Myin* section 12 describe this duty as the taking up of the father's burden or responsibility; and it is when this burden is assumed that the eldest son is to get the elephant, horse, sword, goblet, betel-box, and other articles used by his

(39) S.J.L.B., 70.

(40) S.J.L.B., 115.

father. Under certain circumstances the eldest daughter, at least when there is no son competent to assume the parental duty, takes the paraphernalia of the deceased mother, as at section 3 of Book 10 of the *Manugye*, where she takes her mother's ornaments, clothes, and the slaves who cooked her rice. These rights to paraphernalia, though expressly stated in the three *Dhammathats* above quoted, are not even mentioned in Sparks' Code. They are rights additional to the fractional share of the inheritance, which on the death of one parent the eldest son or eldest daughter is entitled to demand from the surviving parent."

After citing the section of Sparks' Code which I have already cited above the learned Judge went on to say, "The two assessors are distinctly of opinion that this is bad law: they say they never heard of the younger children sharing in the one-quarter share given to the eldest son or of this share being chargeable with the maintenance of the younger children. They say that where the *Dhammathats* award an eldest son a quarter share, he takes it absolutely."

I have quoted these passages at length because they express the views of Sir John Jardine who was the pioneer among Judges in the field of Burmese Buddhist Law, and his opinions are entitled to great weight.

In *Maung Po Lat v. Mi Po Le* (41) the same learned Judge held that an only daughter has not after her father's death and before partition with her mother, an interest in the estate capable of alienation. The following passage in the judgment is relevant to the present enquiry: "While I am of opinion on the authority of many texts, my general impression of the equality sought by Buddhist law, and what I believe to be the notion of the people, that an eldest daughter has certain rights to share in the joint property of the family I believe that these rights of eldest children are seldom exacted." If that opinion is true, the fact might explain the omission of any reference to those rights in Sparks' Code. The learned Judge was of course right in holding that the eldest child if a daughter cannot on the death of her father claim partition of the estate from her mother. According to some of the *Dhammathats* she might if there was a large estate get certain

(41) S. J. L. B., 212.

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property, but that right has, I think, become obsolete and I doubt whether any Court would now enforce it.

In *Ma On v. Ko Shwe O* (42) it was held that on the death of one of the parents the eldest son or daughter may claim his or her share. This statement of the law is clearly too broad, and the judgment has since been overruled on other grounds.

In *Maung Sa So v. Mi Han* (43) the learned Judicial Commissioner of Upper Burma held that an only son on his father's death has a right as against his mother to one-quarter of the estate. That is of course correct according to the *Dhammathats*.

In *Ma Me v. Ma Myit* (10) the learned Judicial Commissioner of Lower Burma held that where there is a son (by a first wife) competent to assume the parental duty an eldest daughter by a second wife cannot claim a share in her deceased father's estate during the lifetime of her mother, and said "There are authorities for holding that the eldest son or the eldest daughter may claim one-fourth of the property during the life-time of the surviving parent, but this rule in my opinion means the eldest son, or the eldest daughter where there are no sons." I do not think that there is any passage in the *Dhammathats* which warrants the words "where there are no sons," and I think that the statement as it stands is incorrect. The eldest child if a competent son can claim on the death of the father, and the eldest child if a competent daughter can claim on the death of the mother. In the case under reference the claimant was not the eldest child, so her claim was bad.

In the case of *Ma Min Tha v. Ma Naw* (44) a younger daughter sued, while her mother was alive, to redeem property mortgaged by her mother and it was said that under Buddhist law children have no vested interests in parental property during the life-time of either parent. The learned Judge apparently overlooked the special rights of the *auratha*, and to that extent the statement was too wide.

In the case of *Ma Mya (Thu) v. Maung Po Thin (Thein)* (3) it was said that the eldest son, if competent, is the representative of his deceased father and in that capacity is entitled to

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

(43) (1892-96) 2 U.B.R., p. 171.

(10) P.J.L.B., 48.

(3) P.J.L.B., 585.

(44) (1892-96) 2 U.B.R., p. 581.

one-fourth of the inheritance, that where there are both sons and daughters the eldest son is preferred to any daughter, and that the rights of the eldest son or daughter pass to the next eldest as representative of the father or mother. In that particular case the eldest-born son had died young and the only surviving child who was a younger son sued his mother on his father's death for the *auratha* son's quarter share. The proposition that the eldest son is preferred to any *çug* was therefore merely an *obiter dictum* and the reasons given for it were not convincing. The proposition that the rights of the eldest son or daughter pass to the next eldest would in my opinion be correct if confined to the case where the eldest-born died young, that is before becoming competent, or could never be competent.

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In *Ma Gun Bon v. Maung Po Kywe* (28) the dispute was between a niece and children of a step child, but the following remarks of the learned Judicial Commissioner of Upper Burma are relevant to the matter now under consideration. "Full representation is not allowed to grand-children, and partial representation is granted grudgingly. If the eldest son or daughter die before the parents, the children are given the share of a younger brother or sister on account of the superior claims of the *auratha* heir. But the share of the children of a deceased brother or sister other than the *auratha* is reduced to a quarter of a brother or sister's share."

In *Maung Pan v. Ma Hnyi* (45) it was assumed that where the eldest child was a son he was *auratha*, although apparently it was the mother who died first, and it is to be noted that the daughter who succeeded him in the management of the family property on his adoption into another family did not claim the *auratha* share.

In *Anleathan v. Mi Tha Ta U* (46) the learned Judge who decided *Ma Mya Thu's* case said, again *obiter*, that on the death of the father an eldest daughter cannot claim a one-fourth share if there are sons, and referred to his judgment in *Ma Mya Thu's* case. It is of course true that an eldest daughter cannot claim a quarter share from her mother on the death of her father, but it would be equally true whether there were younger sons or not.

(28) (1897-01) 2 U.B.R., p. 66.

(46) P.J.L.B., p. 625.

(45) (1897-01) 2 U.B.R., p. 104.

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Maung Seih Kung v. Maung Po Nyein (11) is the first reported case on the Buddhist Law of Inheritance decided by this Court and the first decided after the Digest was published. The texts and the earlier cases were considered and with reference to the *dictum* in *Ma Mya Thu v. Po Thein* that where there are both sons and daughters the eldest competent son is preferred to any daughter it was said that the rules in the *Dhammathats* "seem to proceed on the principle of a son getting a portion if his father dies and the daughter if her mother dies, but the case of both daughters and sons is not distinctly provided for." The case then under consideration was a claim by the eldest son against the father on the death of the mother and the conclusion reached was couched in the following terms: "In the present case the eldest son was the eldest child, and having regard to the points just noted that it is not shown that a daughter must get a share because the deceased parent is the mother and that there is a tendency to prefer the eldest child, we are brought to the following conclusion that the son should not fail in this suit on the ground that it is a daughter who can claim and not a son. It may not be very clear from the *Dhammathats* now available that a son can claim a one-fourth share from his father when he lives separately and when the father does not marry again, though this has been held: but we do not think it open to reasonable doubt that when the father does marry again the eldest son, especially if he be the eldest child, can claim a one-fourth share of the general joint estate of the parents." It is not necessary for the purposes of the present reference to consider whether or not the actual decision in that case is correct but it has been doubted. I have suggested above that one might expect the law to be that the eldest child, who being a son who has taken the place of a deceased father, or being a daughter has taken the place of a deceased mother, and who is ousted from that place by the re-marriage of the surviving parent should be entitled to claim the special share allotted to such a son or daughter, but Burmese Buddhist law is not always logical and the law possibly may be other than what one would expect.

The case of *Maung Hmu v. Maung Po Thein* (47) is only interesting because it was one in which an eldest son had previously

(11) 1 L.B.R., 29.

(47) 1 L.B.R., 50.

on the death of his father sued his mother for a one-fourth share of the estate and had obtained it.

In *Maung San Dwa v. Ma Min Tha* (22) an eldest surviving son, who was not either the eldest son, there having been two elder brothers, or the eldest child since there were five children before him, sued the mother after the death of the father for one-fourth of the estate and it was held on the authority of *Ma Mya Thu v. Po Thein* (3) that he was entitled to succeed. The learned Judge seems to have overlooked the fact that the correctness of the ruling in *Ma Mya Thu's* case had already been doubted in the judgment in *Seik Kaung v. Po Nyein* (11) and as his ruling was never officially published it was probably regarded at the time as bad law, and in my opinion it may still be so regarded.

In *Ma Saw Ngwe v. Ma Thein Yin* (29) the position of grand-children was considered at some length, and it was held that "among grand-children whose parents have predeceased their grand-parents the only one who ranks with the surviving uncles and aunts is the eldest representative of the eldest child." That judgment is contrary to the law as stated in *Ma Gun Bon v. Po Kywe* (28) and was written by the same learned Judge whose decisions in *Ma Mya Thu's* and *Anleathan's* cases have already been questioned. It was based on a rule which occurs with some ambiguity is one or two *Dhammathats* only and I have already suggested that that rule, if it ever existed, has long been obsolete. I think therefore that this ruling is bad law.

In *Ma Nan Gyaw v. Maung Shwe Ket* (15) a single Judge of this Court, following *Ma Mya Thu's* and *Anleathan's* cases, held that a daughter is postponed to sons, but the ruling in that case was not officially reported and, for reasons which I have already given, was in my opinion mistaken.

The next case in order of time is the Full Bench case of *Ma Thin v. Ma Wa Yon* (12). It deals with the claim of an only daughter to one-fourth of the estate as against her mother on her remarriage, and it decided that the claim was good. It does not of course decide that the eldest child being

(22) Chan Toon's L.C., Vol. II, p. 202.

(29) 1 L.B.R., 198. (15) 10 Bur. L.R. 284.

(11) 1 L.B.R., 23. (3) P.J.L.B., 585.

(28) (1897-01) 2 U.B.R., p. 66. (12) 2 L.B.R., 255.

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a daughter is entitled to get the quarter share if her mother does not re-marry, and, as I have said, I do not think that it is necessary for the purposes of the present reference to consider the law as to the effect of the re-marriage of the surviving parent.

Tun Myaing v. Ba Tun (2) deals with the converse case of the remarriage of the father, but the claimant was the *auratha* son's son, and it was decided that as there were surviving sons the grand-child could not sue. The ruling is relevant to the present enquiry because it stated that "the eldest-born son (meaning possibly the eldest-born child being a son, since in that case there were no daughters) is the *auratha* by right but he does not attain the complete status as such till he attains his majority and becomes fit to assume his father's duties and responsibilities. If he dies before he attains his majority, or if he is incompetent to fulfil the prescribed conditions, his next younger brother, subject to the same conditions, succeeds to his position as *auratha*. If the eldest son attains his majority and fulfils the prescribed conditions and then dies before his parents, his position as *auratha* remains unfilled and the next brother does not succeed to it." If this statement of the law be read as including daughters and sisters equally with sons and brothers, then I believe it to be correct.

The case of *Ma Kyi Kyi v. Ma Thein* (16) is relevant only as establishing the principle of equal division among children after the death of both parents, that is as abolishing as obsolete the special shares allotted by some of the *Dhammathats* to the *auratha* and other elder children on such partition. That principle has, in my opinion rightly, been applied to partition among grand-children who get a special share as children of the *auratha*.

In *Po Sein v. Po Min* (30) it was held by this Court that "If the *auratha* son or daughter predeceases his or her parents, his or her son, or his or her children together, receive the same share as their youngest uncle or aunt" and the learned Judge who wrote the judgment went on to say: "This is strictly confined in all the texts to the children of the *auratha* or eldest son or daughter. In my opinion the rule relates to the *auratha* son or daughter, strictly so called. There is no

(2) 2 L.B.R., 292.

(16) 3 L.B.R., 8.

(30) 3 L.B.R., 45.

indication that it has any reference to the eldest surviving son or daughter unless he or she is technically the *auratha*." With that statement of the law I entirely agree.

In the case of *Mi Min Din v. Mi Hle* (18) in Upper Burma, it was held according to the headnote that "eldest-born son" means the eldest son and not necessarily the eldest child, but it is difficult to extract any express decision to that effect from the judgment. What was decided was that a daughter of an eldest son, who was not the eldest child but whose elder sister had become a nun, was entitled to an equal share with her uncles and aunts in her grand-parents' estate on the ground that her father was *auratha*, and it was suggested that in the same family both the eldest son and the eldest daughter can claim the special share, usually called the *auratha* share, allowed by the *Dhammathats*. With all respect for so learned an authority on Buddhist law as Sir George Shaw, I am of opinion that that suggestion was mistaken, and that the true rule is that it is the eldest competent child, whether son or daughter, who is *auratha* and as such is, on the death of the father or mother as the case may be, entitled to the *auratha* share of the family property.

In *Tha Tu v. Maung Bya* (13) it was held that on the death of the mother the eldest daughter in a family of five daughters and no sons was entitled as against her father and sisters to one-fourth of the estate. That ruling was doubtless correct.

In *Ma Thin v. Ma Nyein E* (48) a single Judge of this Court, following the mistaken ruling in *Ma Sau Ngwe v. Ma Thein Yin*, held that it is only the eldest representative of the eldest child who ranks with surviving uncles and aunts. That ruling was not officially reported and may, I think, be disregarded.

In *Ma Hnin Gaing v. Ma Tha Li* (49) a single Judge of this Court held, following the earlier rulings, that "if the first born son dies in infancy the status of *auratha* is capable of devolving on the next eldest competent son and does so devolve when he (the next eldest competent son) attains his majority provided that he is affected by none of the disabilities or disqualifications mentioned in the texts on the subject and further that such an

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(13) 6 2 U.B.R., Buddhist Law, Inheritance, p. 11.

(18) 4 L.B.R., 181. (48) 3 B. L.T. 6.

(49) 4 B. L.T. 74.

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auratha son can transmit the superior rights to his issue. That ruling was not officially reported but if it be read with the addition that disqualification by reason of living separately is obsolete, I think that it is probably good law.

In *Mi Saw Myin v. Mi Shwe Thin* (50) it was held in Upper Burma that the *auratha* son's quarter share allotted on the death of his father is not subject to any rights of the mother but is his own absolutely, and that ruling is in my opinion undoubtedly correct, but the judgment does not seem to distinguish very clearly between the rights of the *auratha* son or daughter on the death of the father or mother respectively and their moral claims or obsolete rights on the death of the mother or father respectively.

The case of *Ma Ein Thu v. Maung Hla Dun* (14) was one in which the question of the rights of grand-children arose and it was held that where the eldest child was a son who died in infancy, the son of the next eldest child, who was a daughter and who grew up, was entitled to share equally with his mother's younger sister. That decision was in my opinion correct, but the judgment seems to suggest that if there had been a son surviving instead of two daughters, the son might possibly have been *auratha* to the exclusion of the elder sister, and that view, I think, would be mistaken. The ruling was not however officially reported.

The rights of grand-children were again considered in the case of *Ma Su v. Ma Tin* (31) where it was held that the children of a second child who was a son (the eldest child who was also a son having died in infancy) were entitled to the *auratha* grand-children's special share. This ruling interpreted the decision in the case of *Po Sein v. Po Min* as meaning that all the *auratha* grand-children are jointly entitled to the special share and applied the principle of equal division to them. It therefore in effect overruled *Ma Thin v. Ma Nyein E* and *Ma Saw Ngwe v. Ma Thein Yin*. It is to be noted that it accepts the principle that, in applying the rules of the Burmese Buddhist law of inheritance, children who die young may be disregarded.

(50 (1910-18) 1 U. B. R., 125.

(14) 5 B. L. T., 73.

(31) 6 L. B. R., 77.

In *Po Zan v. Maung Nyo* (1) the rights of grand-children were again in issue. The eldest-born child in that case was a daughter who died after her father but before her mother, the next child was a son who died in infancy, and the only other child a son who survived both parents. The eldest-born child's son sued his uncle for a half share of the estate, and it was held that because there was a son the eldest-born child being a daughter, could not be *auratha* and that therefore the son of the eldest daughter though she was the eldest-born child was not entitled to the special share allotted to *auratha* grand-children. If my view that the eldest-born child who grows up and is competent is *auratha* is correct that ruling was mistaken and it certainly does not follow the law as set forth in *Po Sein v. Po Min*, but it is interesting because it rejects as untenable the view that there can be two children in the same family whose children would be entitled to the special share as grand-children.

In *Ma Thit v. Mavng Tun Tha* (51) it was held that "the right given to the eldest son of claiming a one-fourth share of the joint estate on his father's death must be exercised as soon as possible after that event and that if the option is not exercised without unreasonable delay it lapses altogether." That decision, as will appear later, was overruled by the Privy Council which held that the *auratha* son's share vests on the father's death and may be claimed at any time within the period of limitation.

In *Maung Ka Gu v. Ma Hnin Ngwe* (52) a second son whose elder brother, the eldest-born child, had lived to the age of 25 but had died before his father, sued his mother on his father's death to recover the *auratha* son's quarter share of the estate, and it was held that because the eldest son attained the status of *auratha* before he died the second son did not succeed to the position of *auratha* and that position remained unfilled. With that decision I entirely agree.

In *Nga E v. Nga Aung Thein* (53) the learned Judicial Commissioner of Upper Burma said "I think it is clear on a perusal of the texts contained in section 30 of the Kinwun

(1) 7 L. B. R., 27.

(51) 8 B. L. T. 138.

(52) 8 B. L. T. 196.

(53) (1914-16) 2 U. B. R., 37.

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Mingyi's Digest, Vol. I, that where the *Dhammathats* give the eldest son a right to one-fourth as against the mother on the death of the father they refer to the *auratha* son or in other words the eldest capable son. It follows that where all the sons are minors there is no *auratha* son and the right in question does not accrue."

The case of *Mi Hlaing v. Mi Thi* (54) was one in which an eldest child who was a daughter sued her mother for a one-fourth share of the estate on the death of her father, and it was held that on the death of the father the eldest child being a daughter is not entitled to claim the one-fourth share. The learned Judicial Commissioner in that case said again that "the rules relating to the eldest son's or eldest daughter's right to one-fourth must be clearly understood in both cases to refer to the *auratha* son, *i.e.* the eldest capable son and the *auratha* daughter, *i.e.* the eldest capable daughter."

In *Mi The O v. Mi Swe* (4) the Upper Burma Court held that on the death of the father the eldest child being a daughter cannot claim the one-fourth share from her mother even though the mother marries again. That is what one would expect the rule to be if, as I have suggested, the right to claim on the re-marriage of the surviving parent is merely the right of the *auratha* who has been ousted from the deceased parent's place to leave the family and take away the *auratha* share which vested in him or her on the death of the parent; but the question whether or not that suggestion represents the law as it is does not arise for decision on this reference.

The following passage in the case of *Nga Lu Daw v. Mi Mo Yi* (5) is pertinent to the present enquiry. "The eldest son is generally but not necessarily the *auratha* son. The son who in case his father dies or becomes incapacitated is competent to take his place in the family is the *auratha* son. If the eldest son be blind or otherwise incapacitated his younger brother, if competent, is the *auratha* son Consequently until the eldest son reaches the age of discretion there can be no *auratha* son in the family. Again though the eldest son cannot claim one-fourth of the estate from his father

(54) (1914-16) 2 U. B. R., 40.

(4) (1914-16) 2 U. B. R., 46. (5) (1914-16) 2 U. B. R., 66.

on the death of his mother he can claim that share from his mother on the death of his father because he then takes his father's place in the family If competent to replace his father in case of the latter's death he becomes the *auratha* son as soon as he becomes so competent and does not have to wait till his father's death to attain that position." With all this I entirely agree, and I would add that in my opinion similar principles apply also in the case of a daughter if she and not a son is the eldest-born.

In *Po Hman v. Maung Tin* (25) the first born child was a daughter and there was one younger child, a son. An adoptive son of the daughter claimed to share equally with the son on the ground that the daughter being the eldest born child was *auratha*. This Court, following *Po Zan v. Maung Nyo*, held that, because there was a son, no daughter could be *auratha*. In my opinion that decision, like the one on which it was based, was mistaken in so far as it held that younger sons oust elder daughters, but I agree with the statement that "there is no authority for treating one son as the *auratha* entitled to claim a fourth share on the death of the father and in the same family allowing the children of an eldest son or daughter who predeceased the parents special treatment at the time of ultimate partition," and that it cannot 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 *auratha* child, i.e. had attained the complete status of *auratha*."

The Full Bench case of *Shwe Po v Maung Bein* (55) is interesting for the purposes of the present reference only because its suggestion that the *auratha* has an option and can either claim the one-fourth share or wait till the death of both parents and come in with the other children seems to have since been overruled by the Privy Council in the case of *Tun Tha v. Ma Thit* (59).

In *Kyi Hlaing v. Ma Htu* (56) where the claim of an *auratha* son to a quarter share on the death of his father was contested on the ground that the quarter share could only be

(25) 8 L. B. R., 113.

(55) 8 L. B. R., 115.

(56) 8 L. B. R., 189.

(59) 9 L. B. R., 56.

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claimed when the mother married again, it was held that the *auratha* son can get the quarter share whether the mother marries again or not. That view is clearly in accordance with the *Dhammathats*.

In the Full Bench reference, *Ma Sein Ton v. Ma Son* (57) the right of an eldest daughter to get certain property on the death of her father, which right, as I have said, I believe to be obsolete, was resurrected, and it was said that "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 the marriage," or as it was put by another of the learned Judges, "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 and in the case of the eldest son to a one-fourth share of the bulk of the estate." The first of these statements, which according to the headnote was the ruling of the Full Bench, clearly has a basis in the *Dhammathats* and may I think be taken as correct subject to the qualification that in my opinion the rights of both the son and the daughter to certain specified property are obsolete, but the second statement of the law is obviously too generally expressed and is in my opinion mistaken if it means that on the death of the mother an *auratha* daughter is not entitled to one-fourth of the joint estate.

The rights of grand children again arose for consideration in *Chan Tha v. Mi Ma Pyu* (58) in which my learned brother Maung Kin, J., followed *Po Sein v. Po Min* (30) and *Ma Kyi Kyi v. Ma Thein* (16) and held that the son of an eldest child, a son who predeceased both his parents, was entitled to share equally with his father's younger brother.

The case of *Tun Tha v. Ma Thit* (59) is important because in it the Privy Council overruled the decision of this Court in the same case (*Ma Thit v. Tun Tha*), and held that what the *auratha* son becomes entitled to on the death of his father is

(57) 8 L.B.R., 501.

(58) 9 B.L.T., 95. (30) 3 L.B.R., 45.

(16) 3 L.B.R., 8.

(59) 9 L.B.R., 56.

a definite one-fourth part of the estate and that he is entitled to claim that one-fourth part within any period that is not outside the period fixed by Article 123 of the Indian Limitation Act.

According to these rulings the present state of the case-law would seem to be as follows:—

- (1) When the eldest-born child is a competent son, he is on the death of his father entitled to a one-fourth share in the parents' estate and that one-fourth share vests in him from the date of his father's death. For the purposes of the present reference it is unnecessary to enquire whether Burmese Buddhist law in this connection makes the distinction between "jointly acquired" and "separate" property which has been recognised in other connections and if so whether the eldest-born child, if a competent son, has any right to claim a specific share in the father's or mother's separate property, but it may be noted that the rulings tend to confine the share to the "jointly-acquired property" while the *Dhammathats* generally seem to make no distinction between joint and separate property.
- (2) When the eldest-born child is a competent daughter and there are no sons, that daughter is on the death of her mother entitled to a similar one-fourth share in the estate.
- (3) When the eldest born child is a competent daughter and there are sons, as in the present case, this Court has hitherto held that the daughter is not entitled to the one-fourth share. That decision or rather course of decisions I believe to be wrong and I would overrule it. It is in my opinion contrary to the *Dhammathats* from *Vilasa* and *Wagaru* to *Manugye* and *Attasankhepa*, and it is based on what I consider to be an unwarrantable assumption that in the passages where the *Dhammathats* award the quarter share to a daughter they must be considering a case where there are no sons. That assumption seems to be founded on certain passages in a few *Dhammathats*

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which record archaic rules taken from pre-Buddhistic law books and is contrary to the strong tendency towards equal treatment of the sexes which is so marked a feature of the same *Dhammathats* where they disregard the ancient rules and are therefore almost certainly influenced by Burmese Buddhist customs. The rules in *Manugye* on this point seem clear and there is nothing in them to suggest that in the rule giving to the eldest-born child if a competent daughter the quarter share, only the case of a family in which there are no sons is considered. The *Attasankhepa* in my opinion makes the contrary perfectly clear, since in the passage dealing with the eldest daughter's claim it refers to younger "sons and daughters." I would therefore overrule the decisions to the effect that sons are preferred to daughters and would hold that where the eldest born child is a competent daughter she is *auratha* and is on the death of her mother entitled to the quarter share whether there are younger sons or not.

- (4) When the eldest-born child is a competent son and the mother dies or when the eldest-born child is a competent daughter and the father dies, such son or daughter cannot claim the quarter share. So far as Upper Burma is concerned the first part of this proposition is supported by *Lu Daw v. Mi Mo Yi* and the second by *Mi The O v. Mi Swe* and *Mi Hlaing v. Mi Thi*. So far as Lower Burma is concerned the cases of *Ma Min Tha v. Ma Maw* and *Po Lat v. Mi Po Le* may be taken as supporting the rule in respect of the daughter, but I do not think that either as regards the son or the daughter the law on this point can be regarded as having yet been definitely settled.
- (5) As for the rights of grand-children it was held in *Ma Su v. Ma Tin* that the *auratha* son's children are entitled to the special share allotted to them in the *Dhammathats* and in *Ma Ein Thu v. Hla Dun* that the *auratha* daughter's children were similarly entitled while in *Po Hman v. Maung Tin* it was said that it is the children of the *auratha* as such whether son or

daughter, who get the special share. I think therefore that it may now be taken as settled law that it is the children of the *auratha* as such who are entitled to preferential treatment

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In the light of the conclusions to which the above consideration of the *Dhammathats* and the case-law has led, I would answer the questions referred as follows:—

- (1) The eldest-born child who is competent to take the place of the father or mother acquires the status of *auratha* on becoming so competent and can acquire that status before the death of either parent.
- (2) If the eldest-born child is a daughter and reaches an age at which she is competent to take her mother's place, no son can become *auratha* either before or after his father's death.
- (3) The status of *auratha* in no way depends on the death of either parent. The eldest-born competent child is *auratha* in any case.
- (4) There can never be two *aurathas* in a family. If a son or daughter dies after acquiring the status of *auratha*, there is no *auratha* in the family.
- (5) Sons are not as such preferred to daughters as *auratha*. If the eldest-born child is a son and is competent he is *auratha*. If the eldest-born child is a daughter and is competent she is *auratha*.
- (6) In a family where the eldest-born child is a daughter and is competent, there can be no *auratha* son and there can be no son whose children have a right to preferential treatment in the division of the parents' estate.
- (7) If the eldest-born child is a daughter and is competent she is *auratha* and as *auratha* can on her mother's death claim from her father a quarter share of the estate. If she dies before becoming entitled to that share, her children have a right to preferential treatment in the division of the estate.

Duckworth, J.—I agree with the judgments of my learned brothers Maung Kin and Heald, J.J.

Since they very largely, though on better considered and

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more ample grounds, arrive at the same opinion as I did in my separate order of Reference, I need write very little more.

After weighing the *Dhammathats* quoted, and the use of the words therein, my conclusion is that "AURATHA" (a very loosely used term), means nothing more than "eldest legitimate issue, male or female." The term has been much misused, since it does not necessarily follow that the child who is *auratha* whilst both parents are alive, will be the child, who can obtain a one-fourth share on the death of *one* parent. This depends on the sex of the parent who dies first. At the same time I consider that I fell into an error in my Order of Reference, when I stated that, until one parent died, there was technically no *auratha*. There is, and the *auratha* then is the eldest child, irrespective of sex, legally begotten, who is of age and competent.

I will take, as an example, the following family—

1. Daughter,
2. Son,
3. Daughter,
4. Son, all legally begotten.

The eldest issue is female. Then, whilst both parents are alive, she is, if of age and competent to take her mother's place, the *auratha*. If the mother dies first of the two parents this eldest daughter is entitled to the one-fourth share, and no question then arises of a right of representation for her family if any. If, on the other hand, the father dies first of the two parents, then the eldest daughter, though *auratha*, cannot claim the one-fourth share, which lapses, neither can the eldest son succeed as *auratha*. If the eldest daughter, after attaining majority and competency predeceases her parents, then her issue alone is entitled to preferential treatment, in comparison with the other grand children, when both of the parents have died. On the other hand, if the family consisted of:—

- (1) Son,
- (2) Daughter,
- (3) Son,

(4) Daughter, all legally begotten, then, whilst both parents are alive, the eldest son, if of age and competent, would be the *auratha*, and if the father died first of the two parents, he would be entitled to the one-fourth share. If the mother

died first, then this eldest son could not claim that one-fourth share, which lapses. Again, if this eldest son, after he had attained majority and competency, predeceased both parents, his issue *alone* would be entitled to preferential treatment.

This, I think, renders the position clear.

The point is that, if a son is not the first born child, he can never be *auratha*, unless the eldest child dies before reaching majority or competency, and then only when the eldest child is a male. It is very doubtful whether, according to the *Dhammathats*, another can become *auratha* in place of the deceased eldest daughter. There is some authority for a brother succeeding a brother, but not for the converse case,—and then only in relation to the one-fourth share. Here I must point out that I can find nothing in the *Dhammathats* regarding “the eldest surviving children” being recognised as *auratha*, so as to claim the one-fourth share.

Amongst the Burmese people, generally, there is no doubt that the eldest legitimate child, whether it be a son or daughter, is regarded as taken the place of the parent of the same sex, when that parent dies. The saying “အစ်ကိုကြီးထွင်အထာ-အရေ အစ်မကြီးထွင်-အမိ-အရာ” “*Itko gyi hlyin apa aya: Ama gyi hlyin ami-aya*” is, to my knowledge, in common use, especially in the Old Royalist Districts of Upper Burma, such as Mandalay, Shwebo, Kyauksè, and Meiktila, and this is a very strong indication, as pointed out by Mr. May Oung on page 223 of his work on Buddhist Law, of what general popular opinion is. Moreover this opinion was no doubt that of the late Kinwun Min Gyi, U Gaung, when he compiled the *Attathankepa Dhammathat*, and therefore this expression of his opinion on the subject should carry due weight, inasmuch as he was a great scholar in regard to the *Dhammathats*, and was possessed of the widest knowledge of his fellow countrymen.

It must be borne in mind that, in dealing with Buddhist Law, which was an effort to purge and improve Hinduism, we must disabuse our minds of such ideas of the “*aurasa*” son as emanate from that Religion and Law. The position of women, as such, is entirely different under Buddhist Law, and shows a great advance on Hinduism. This alone should be sufficient to place us on our guard. It is to be noted, too, that in

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Burmese households, the eldest daughter, when the eldest child, holds a particularly influential position.

In regard to the former opinion that the *Dhammathats* regarded the son as being superior to the daughter, it is clear that the sections referred to, more especially sections 140 and 150, deal with distributions of estate, *after both parents have passed away*, and such rules have been disregarded by this Court when it held that the estate should be distributed in equal shares. Moreover, these and other sections do not, so far as I can find, give the son a larger share than the daughter, unless he is actually the eldest-born child of the family. In this respect, I am in agreement with Maung Kin, J.'s opinion, and consider that, inasmuch as it is clear that the *Dhammathats* contemplate the eldest child, when a daughter and competent, even in a family consisting of sons and daughters, being entitled to a one-fourth share on the death of the mother, the matter is concluded. In this connection too, I think that Mr. May Oung is right, when he suggests that sections 2 and 3 and sections 4 and 5 of the *Manukye* must respectively be read together. The first pair of sections then deal with what is to happen on the death of the mother and the second pair of sections with what is to take place upon the death of the father, in each case of course before the other parent. Further the History of the Law on the subject, (dealt with admirably by Mr. May Oung on pages 221, 222 and 223 of his work) is clearly in favour of a female *auratha*, when the female parent dies first, and the eldest issue of the marriage is a daughter.

In regard to the children of the eldest child, who predeceases his or her parents, after reaching majority and competency, it seems that, according to the *Dhammathats*, only the eldest grand-child (*Mye-U* or *Auratha Mye*) can, strictly speaking, obtain a preferential share, but this question is not now before us, and the cases of *Ma Kyi Kyi v. Ma Thein* (16) and *Ma Su v. Ma Tin* (31) require no discussion in this connection.

It is perfectly clear that section 163 of the Digest applies to families consisting of both sons and daughters, and Tyomey, J. fully recognised this in *Ma Bin Thu's* case (14) when he remarked:—"The texts cited in section 163 give the issue of

(16) 3 L.B.R., 8.

(31) 6 L.B.R., 77.

(14) 5 B.L.T., 73.

the eldest daughter a share equal to that of the youngest of his aunts, and *there seems to be no authority for holding that these texts apply exclusively to families consisting of daughters only.*" It is to be regretted, perhaps that he overlooked this, when dealing with the case of *Po Hman v. Maung Tin* (25). As a matter of fact, these Texts, when read in the Burmese, make it clear that they do not apply solely to families consisting of daughters.

I would reply to the questions referred in the same manner as my learned brother Maung Kin, J.

Robinson, C.J.—I concur in the replies proposed by my brother Maung Kin.

It is no doubt true that the questions referred were too widely stated but this arose from several causes. The appeal was based on and argued as involving the position and rights of an Orasa. Plaintiffs could not claim a preferential share as being the children of the eldest child and thus the appeal centred round the question of the Orasa; whether a son always was preferred as Orasa to a daughter even when the latter was the eldest child and whether the question as to which would ultimately become the Orasa would depend on which parent died first. The authorities also were confused and the true meaning of Orasa had not been clearly understood the term being loosely used in more than one sense. The result of this reference will it is hoped clear up many points that were in doubt.

The appeal will now be put down for disposal in accordance with the findings of the Full Bench.

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1st Appeal
No. 185 of
1919.
—
March 10th,
1921.
—

Before Mr. Justice Robinson, Chief Judge, and Mr. Justice Heald.

MAUNG PAN ON v. MAUNG TUN THA, MA THE YI,
MAUNG THEIN MAUNG, MAUNG GYI AND MA
YIN ME.*

May Oung—for appellant.

Keith—for respondents.

Buddhist Law: Inheritance—Orasa son—Right of orasa son to mesne profits on his share of the estate.

On the death of his father an *orasa* son becomes entitled to a definite one-fourth of the estate. The estate of the *orasa* son comes into existence at his father's death and he is entitled to mesne profits on it.

Robinson, C.J. & Heald, J.—U Tu died in December 1906. Six and a half years later plaintiff sued as his *orasa* son for his one-fourth share in the estate. On appeal this Court held that the question for decision was whether an *orasa* son must act with reasonable promptitude in exercising his option of taking one-fourth of his parents' joint property on the death of his father or whether he has twelve years within which he can exercise that option under Article 123 of the Limitation Act. It was held that in the interests of the family and because the mode of management of the property must vary and the prospects of the other heirs would also vary according as the option was exercised or not he should do so without delay. It was therefore held that plaintiff's right to a one-fourth share had lapsed altogether. This decision was reversed on appeal by their Lordships of the Privy Council who said that defendant's contention was that plaintiff had not in fact any share in the estate but that on the death of his father he had obtained a right to elect whether he would have that share or no, and that in the absence of an election within reasonable time the claim could not be brought forward. Their Lordships held that the whole contention depended upon the consideration of two different rules, namely, rule 5, and rule 14 of Chapter X of the *Manukye*. They did not consider it desirable to express an opinion upon the true construction of rule 14 which relates to the division of the estate on the death of the mother. They held that its determination was not relevant to

* First appeal against the judgment passed by D. O'Sullivan, Esq., District Judge, Thaton.

the question before them and that "even assuming in favour of the respondents that the rights of the eldest son would change in the event of his not having segregated his one-fourth share before his mother's death, it by no means follows that the right which he got under rule 5 was merely the right to elect within a certain limited period of time whether he would take the property or no. Their Lordships can find no ground whatever for the suggestion that he got anything under rule 5 excepting a definite one-fourth share in the property of the estate, a right which he was at liberty to assert within any period that was not outside the period fixed by section 123 of the Indian Limitation Act as the period within which a claim must be made for a share of property on the death of an intestate."

The case then returned to the original Court for a final determination of the rights of the plaintiff and from that decision the present appeal has been filed on two points only.

* * * *

The second question as to the mesne profits is much more difficult. It has been for a long time the commonly accepted view of the *orasa* son's right that it consists of an option in respect of a definite share which may or may not be exercised by him as he chooses and where the family consists of only three children or less it may be to the advantage of the *orasa* son not to exercise that option but to wait until the mother's death and then divide the estate equally with the other children whereby he would get a larger share than a fourth. This view, as it appears to us, is clearly shown to be wrong by the decision of their Lordships of the Privy Council to which we have referred above. The *orasa* son becomes entitled on the death of his father to a definite one-fourth part of the estate, and in the present case the position is that he has asserted that claim prior to his mother's death and within time. It has been suggested that the estate to which he succeeded does not vest in him until he makes his claim to reduce it into possession, but that view is in our opinion put out of Court by their Lordships' decision. On the death of his father he became entitled to a definite one-fourth part of the estate and he is

* NOTE.—Some portions being on points of fact are not printed.

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therefore entitled to recover that estate in the present suit. This being so the estate came into existence at his father's death and he is entitled to mesne profits on it. It has been held that he is entitled to mesne profits only for a period of three years prior to suit and that, we understand, is all that is now claimed on his behalf. As to the second ground of appeal also therefore we hold that the appeal fails and must be dismissed.

* * * * *

Civil
 1st Appeal No.
 148 of 1920.
 January
 11th, 1922.

Before Sir Sydney Robinson, Kt., Chief Judge, and Mr.
 Justice Maung Kin.

P. V. CHETTY FIRM. v. MOTOR UNION INSURANCE
 COMPANY. *

N. M. Cowasji—for appellants.
 Davies—for respondents.

*Fire Insurance—Right to Insurance Money—Claim by Mortgagee
 against Insurance Company.*

A mortgaged his mill to B as security for a debt and subsequently insured the mill with C. The mill was destroyed by fire, and C paid the insurance money to A, though B had requested C to withhold payment. C also sold the salvage property. B then brought a suit against C, basing his claim on the insurance policy and on the deed of mortgage which, it was claimed, subsisted as against the salvage property.

Held,—that a contract of insurance is a contract by the insurer to indemnify the insured, and there is no privity of contract between the insurer and any third party, and that therefore C was not bound to indemnify B. Further, that the insurer was entitled to sell the salvage property after having indemnified A, who had no rights left as regards the property which could pass to B, the mortgagee. The mortgagee therefore had no rights against the insurer.

Castellain v. Preston, (1882-83) L.R. 11 Q.B.D., 380 at p. 386—followed.

Rayner v. Preston, (1880-81) L.R. 18 Ch. Dn., 1—referred to.

Robinson, C.J.—One Maung Po Sin owed the plaintiff-appellant firm Rs. 6,000, and as security for the repayment of that sum with interest he executed in their favour a deed of mortgage on certain paddy land together with a mill and the machinery contents standing on the land. The mortgage was executed on the 7th November, 1917. Subsequent to that Maung Po Sin insured the premises mortgaged for their full value with the respondent company.

* First Appeal against the judgment passed by Rigg, J., on the Original Side.

In June 1918 the mill was completely destroyed by fire. All that remained was certain items of the machinery consisting of a damaged boiler, a steam-engine, an iron chimney, a large number of sheets of corrugated iron, more or less damaged, and certain other machinery—huller, pulleys, shafting, etc. which were badly damaged.

Maung Po Sin claimed from the Insurance Company payment of the insurance money. On the 29th June 1918, counsel for appellants wrote to the Insurance Company informing them of the debt due by Maung Po Sin and claiming that their clients were entitled to receive the insurance money. They requested them to withhold payment and to make no payment to Maung Po Sin without reference to their clients who, they said, were about to file a suit on their mortgage. The defendant-company took no notice of that letter, and on the 3rd and 8th of July they duly made payment in full of the whole amount due under the insurance policy.

On filing the suit on the mortgage plaintiff-appellants obtained an order from the District Court restraining the Insurance Company from paying Rs. 7,500 out of the insurance money to Maung Po Sin. This order was conveyed by telegram, but it is admitted that full payment had been made by the Insurance Company before they received that telegram.

Courts are forbidden to issue prohibitory orders by telegram, but the money having been already paid, the order was of no effect.

Plaintiff-appellants obtained a decree against Maung Po Sin on the 29th of July 1918. By that decree it was ordered that, if Maung Po Sin did not pay the sum decreed for principal, interest and costs within the time allowed, the mortgaged property or a sufficient part thereof shall be sold and the proceeds paid into Court and applied in payment of what was due to the plaintiffs with subsequent interest, and the balance, if any, to be paid to the defendant.

There was no reservation of rights to obtain a personal decree. On the 3rd July 1918, the salvage was sold, and the Insurance Company received Rs. 7,900 for it. The plaintiff-appellants now bring this suit claiming to be entitled

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to recover the amount due on his mortgage from the Insurance Company and from the alleged purchasers of the salvage.

As regards the latter, apparently a mistake was made, and the 2nd defendant is not the purchaser and it is admitted that as against him there is no claim.

Against the Insurance Company the claim is based on two grounds: First, it is based on the policy of insurance issued to Maung P. S. S. and secondly, on the deed of mortgage which, it is claimed, subsists as against the salvage property.

As regards the claim based on the policy, I am of opinion that the appellants are entitled to no relief. A contract of insurance is a contract of indemnity. It is a contract by the insurer to indemnify the insured against the loss that he may suffer in certain conditions. It is not a contract to indemnify any other persons, and there is no privity of contract between the insurer and any third party.

As regards the contract being one of indemnity, this is well-recognised, and it is not necessary to do more than to quote one passage from the judgment of Brett, L.J. in the case of *Castellain v. Preston* (1):—"The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong." And it is pointed out in Macgillivray's Insurance law at page 773 that "apart from statute the mortgagee is not *prima facie* entitled to the benefit of an insurance effected on the property by the mortgagor. *

* * * In order to entitle the mortgagee to any claim on the policy there must be a covenant not only to insure but to insure for the benefit of the mortgagee or to

(1) (1882-83) L.R. 11 Q.B.D., 380 at page 386.

apply the policy moneys in reinstatement or otherwise for the benefit of the mortgagee."

The deed of mortgage is silent as to insurance. There was no covenant by the mortgagor to insure for the benefit of the mortgagee, or at all. The mortgagee could not sue on the policy unless the mortgagor's right to sue had been assigned to him by a proper and legal assignment. There has been no such assignment, and the mortgagor has been paid in full for the loss that he suffered.

The loss was a "total loss," and a total loss means the destruction of the property or injury to it to such an extent as to render the insurer liable to pay the total sum insured. (Bunyon on Fire Insurance at p. 267).

It was suggested that by the theory of subrogation the mortgagee would be entitled to the mortgagor's rights on this policy. The mortgagor has no rights left on the policy such as are now claimed by the mortgagee.

As to any right conferred by statute, we have been referred to sections 49, 72 and 76 of the Transfer of Property Act.

Section 49 embodies a principle of law which was subsequently the view taken by James, L. J. in the case of *Rayner v Preston* (2), in which he dissented from the opinion of the other two learned Lord Justices. It deals with the case of the transfer of immoveable property which was then insured against loss by fire, and in terms it only gives the right to the transferee in the absence of a contract to the contrary to require any money which the transferer actually receives under the policy or so much thereof as may be necessary to be applied in reinstating the property. It deals with an entirely different subject and has no application to the present case.

Section 72 deals with the case when during the continuance of a mortgage the mortgagee takes possession of the mortgaged property and it allows him to insure the property subject to certain limitations. Further it lays down that nothing in the section shall be deemed to authorise the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is authorised to insure.

(2) (1880-81) L.R. 18, Ch. Dn., 1.

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Section 76 lays down the liabilities of a mortgagee who during the continuance of the mortgage takes possession of the mortgaged property. There is no statute provision by which the mortgagee is entitled to the benefit of the insurance effected by the mortgagor.

For these reasons the first part of the claim fails, and the decree of the Court below must be confirmed.

So far as the alternative claim which is based on the mortgagee's own mortgage rights is concerned, it is to be noted that in this case immoveable property was mortgaged, but owing to its destruction by fire all that remained was certain moveable property, and it is the moveable property that has been brought to sale by the insurer. What the effect of this may be it is not, I think, necessary to decide. The right that the mortgagee possesses under his mortgage and under the decree that has been granted him is to bring the mortgaged property to sale. If the property had been alienated by the mortgagor, any person purchasing the property would purchase it subject to the rights of the mortgagee and to the charge on the property, and it would be open to the mortgagee to follow the property in his hands. The purchaser would be liable to have the property sold and the mortgage-debt paid out of the proceeds of sale so far as they would go. Those rights the mortgagee does not attempt to enforce.

A contract of insurance as has been pointed out above is one of indemnity, and, when the insured has been indemnified to the full extent for a total loss, any salvage belonging to the insurers is presumed under such circumstances to have been abandoned, and anything that may remain of the property belongs to the insurers to reimburse themselves so far as they can by selling the salvage for what it will fetch. That is an essential element in a contract of insurance. The mortgagor having been paid in full could not recover anything that the insurers may have realised by the sale of the salvage from them.

In this case the mortgagor has no rights left as regards the property which could pass to the mortgagee. In the passage that I have already quoted in *Castellain v. Preston* (1) it is pointed out that the contract between the insurer and the

(1) (1882-83) L.R. 11 Q.B.D., 380 at page 386.

insured does not permit of the insured obtaining more than full indemnity. If in addition to obtaining full indemnity as he has done his debts were also to be paid, that would be in contravention of the first principle of the contract into which he entered, and as Brett, L. J. pointed out, any proposition which would have this effect must certainly be wrong. The rights that the mortgagee possessed under his mortgage have been embodied in a decree of the Court, and that right is to bring the mortgaged property to sale.

In my opinion, therefore, the plaintiff appellants have no rights against the Insurance Company before us on their mortgage, and I would confirm the decree of the Court below in its entirety and dismiss this appeal with costs throughout.

Maung Kin, J.—I concur.

Before Mr. Justice Robinson, Chief Judge and Mr. Justice
Maung Kin.

MESSRS. ROWE & Co. v. THE SECRETARY OF
STATE FOR INDIA*.

Leach—for Appellant.

Higinbotham—for Respondent.

*Indian Income-Tax Act, 1918—Section 8—Definition of House
Property—Interpretation of Taxing Acts.*

Business premises, such as shops, offices and godowns, are not included in the term "house property" as used in section 8 of the Indian Income-Tax Act, 1918, previous to its amendment by Act XLIV of 1920.

In interpreting a taxing act it is not for the Court to speculate as to the intention of the legislature; the terms of the act must be construed strictly and the person assessed is entitled to the benefit of any doubt there may be as to his liability to assessment.

Tennant v. Smith, (1892) L.R.A.C., 150; *The Attorney-General v. Milne*, (1914) L.R.A.C., 765; *Lumsden v. Commissioners of Inland Revenue*, (1914) L.R.A.C., 877; *Killing Valley Tea Company, Limited v. The Secretary of State for India*, (1921) I.L.R. 48 Cal., 161; *Commissioners of Inland Revenue v. Gribble*, (1913) 3 K.B., 212; *Whiteley v. Burns*, (1908) 1 K.B., 705; *Partington v. The Attorney-General*, L.R. 4 H.L., 100; *The Attorney-General v. Earl of Selborne*, (1902) 1 K.B., 388; *The Oriental Bank Corporation v. Henry B. Wright*, (1879-80) 5 Appeal cases, 642; *In Re Finance Act, 1892 and Studdert*, (1900) 2 I.R., 400, C.A., at p. 410, cited in Vol. 27 Halsbury's Laws of England, p. 180—followed.

* Referred by the Financial Commissioner, Burma, under section 51 of Indian Income-Tax Act, 1918.

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In the matter of *A. John and Company*, (1920) I.L.R. 43 All., 139—referred to.

Robinson, C.J.—This is a reference under the Income Tax Act VII of 1918. It refers to the business premises occupied by Messrs. Rowe and Company. They built these premises for their own use as a shop, godown and offices, and they occupy them themselves and carry on their business there.

The Collector of Income Tax held that the premises owned by Messrs. Rowe and Company were assessable under section 8 as "house property," and that in consequence thereof they were entitled to the allowance set out in section 9 (2) (1) of the Income Tax Act, 1918.

Messrs. Rowe and Company appealed to the Commissioner who relied on the words "in respect of sums paid" which appear in section 9 (2) of the Act. He held that as no sum was paid in respect of the allowance made for the annual value of their premises, no allowance was permissible under section 9 (2) (1), and though apparently he was of opinion that those premises would be included in the expression "house property," he held that there was no need to re-assess such value under section 8.

Messrs. Rowe and Company appealed to the Financial Commissioner, who would restore the order of the Collector, but he has referred two questions to this Court for decision:—

- (1) Are business premises, such as shops, offices and godowns, included in the term "house property" as used in section 8 of the Indian Income Tax Act, 1918, previous to its amendment by the Act of 1920? and
- (2) If the answer to the above is in the affirmative, does the allowance in respect of the *bona fide* annual value of business premises occupied by the owner made under section 9 (2) (1) bar the assessment of the said annual value under section 8 or section 11 of the Act?

As regards the second question referred, I do not fully appreciate the points raised by it, and the learned Government Advocate in addressing us said that it need not be considered:

In the first place, if the annual value of these premises is assessable under section 8 of the Act, there can be no question that section 11 would not apply, since that section deals only

with income derived from other sources if not included under any of the preceding heads. If the question refers to the grant of an allowance in itself, excluding assessment of the same income, then it appears to me that it is an entirely different matter and that the question of liability under section 8 is entirely separate from the question of an allowance under section 9. However, in view of the opinion that I have arrived at with reference to the answer to be given to the first question referred, it is not necessary for me to say anything more on this point.

Under the Act in question what is liable to assessment is income; all income, subject to the exceptions laid down in sections 3 and 4. Section 5 then specifies various classes of income that are chargeable to Income Tax and the following sections deal with each of these classes separately:—

Section 8 deals with income derived from house property and lays down that the tax shall be payable by an assessee under this head in respect of the *bona fide* annual value of any house property of which he is the owner. The section provides a definition of the expression "annual value" for the purposes of sections 8 and 9.

Section 9 deals with income derived from business in respect of the profits of the business, and it grants certain allowances in respect of sums paid or, in the case of depreciation, debited, and the first of these allowances is the rent paid for the premises in which such business is carried on or, where the premises are owned by the assessee, the *bona fide* annual value thereof.

It is agreed on all hands that Messrs. Rowe and Company are entitled to this allowance, and the only question that we have to decide is whether they are liable to be assessed on the annual value of these premises under section 8; in other words, the sole question is whether business premises, such as these, fall within the expression "house property."

It will be well first to consider what are the rules governing the interpretation of Taxing Acts. In *Tenant v. Smith* (1) Lord Halsbury, L.C., said:—"This is an Income Tax Act, and what is intended to be taxed is income. And when I say 'what

(1) (1892) L.R., A.C., 150 at p. 154.

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is intended to be taxed, I mean what is the intention of the Act as expressed in its provisions, because in a Taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a Taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a Taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said in *In re Micklethwait*, "it is a well established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words."

In *The Attorney General v. Milne* (2) Viscount Haldane, L.C., said:—"It may be that, if probabilities, apart from the words used, are to be looked at, there is, on the construction which the Court of Appeal have put on the statute, a *casus omissus* which the Legislature was unlikely to have contemplated. But, my Lords, all we are permitted to look at is the language used. If it has a natural meaning we cannot depart from that meaning unless, reading the statute as a whole, the context directs us to do so. Speculation as to a different construction having been contemplated by those who framed the Act is inadmissible, above all in a statute which imposes taxation," and in the same case Lord Atkinson said:—"To succeed the Crown must bring the case within the letter of that enactment. It is not enough to bring the case within the spirit of it, or to show that if the section be not construed as the Crown contends it should be construed property which ought to be taxed will escape taxation, or will enjoy . . . an immunity from successive levies of estate duty. These evils, if such they be, must, if they succeed, be cured by legislation. Judicial tribunals must in interpreting these Taxing Acts stick to the letter of the statute." Again in *Lumsden v. The Inland*

(2) (1914) 1, R., A.C., 765 at p. 771.

Revenue Commissioners (3) Viscount Haldane, L.C., said:—
 “The duty of a Court of construction in such cases is not to speculate on what was likely to have been said if those who framed the statute had thought of the point which has arisen; but, recognizing that the words leave the intention obscure, to construe them as they stand, with only such extraneous light as is reflected from within the four corners of the statute itself read as a whole.”

The High Court of Calcutta relying on those and other cases, in *Killing Valley Tea Company, Limited v. The Secretary of State for India* (1) said:—“Now there is no room for controversy that the Crown seeking to recover the tax, must bring the subject within the letter of the law, otherwise the subject is free, however much within the spirit of the law the case might appear to be. There can be no equitable construction admissible in a fiscal statute; the benefit of the doubt is the right of the subject.”

What has to be considered, therefore, is whether premises built for and used as business premises are included in the expression “house property” if their natural meaning be assigned to these words. It is not for the Court to speculate what classes of property the Legislature meant to include in the term “house property;” nor is it for the Court to speculate what the result will be from deciding the question in this way or that. There is nothing in the Act that I have discovered, or to which we have been referred, which throws any light on the interpretation to be given to these words. To my mind, the expression “house property” would convey to the ordinary person the idea of buildings used for residential purposes. It is for the Crown to show that Messrs. Rowe and Company’s premises are “house property,” and that can only be done by saying that “property” is the general word, while the expression “house” preceding it describes the kind of property referred to.

It is argued that the word “house” means any building erected for the use of man and, therefore, includes all buildings of any description. If this argument were sound, the

(3) (1914) L.R., A.C., 877 at p. 887.

(4) (1921) I.L.R. 48 Cal., 161 at p. 175.

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expression "house property" would include mills, lime-kilns, godowns, warehouses and various other classes of buildings. I find it quite impossible to hold that in the ordinary sense of the words a lime-kiln, or rice mill could be described as a "house."

It is argued that the allowance is granted under section 9, because that property would already be liable for taxation under section 8, and that, therefore, it is clear that the language used by the Legislature must be given its widest sense. It is not, however, by any means certain that the allowance was given for these reasons. What is taxable under section 9 is the income derived from, that is the profits of a business, and as it is obviously just and proper that essential expenses that must be incurred before profits can be realized should be deducted in arriving at the profits to be taxed, therefore the allowance was granted. But as I have said above, it is not open to the Court to speculate on the intention of the Legislature.

Again, it is argued that if a man builds business premises, such as these, and hires them out, the rent received by him would be liable to taxation as part of his income under section 8 of the Act, and that if such premises be not included in the expression "house property," the result of the interpretation would be that the owner who rented them out would be liable to be taxed, while the owner who occupied them himself would not.

Again, it may be doubted if this argument is sound. It assumes that he would be liable to be taxed under section 8; whereas, it may well be that he would not be liable under section 8, but under section 11 of the Act. In the one case, income is actually received, in the other case no income is actually received, though a benefit is obtained in that the owner-occupier has not to pay rent for other premises that he would have to occupy for his business.

On this point the case of *Tennant v. Smith* (1) is instructive. It dealt with the question whether a bank manager who was required to live in part of the bank's business premises as custodian of the whole premises, and also for the transaction of any special bank business after bank hours, was liable to have included in his total income the yearly value of his privilege of free residence in the bank's premises. Lord

(1) (1892) L.R.A.C., p. 150.

Halsbury said:—"Now, it is certainly true that the occupation of a house rent free is not income," and again "Now, Mr. Tennant occupies this house without paying any rent for it. It may be conceded that if he did not occupy it under his contract with the bank rent free, he would be obliged to hire a house elsewhere, pay rent for it, and *pro tanto* diminish his income. And if any words could be found in the statute which provided that besides paying income-tax on income, people should pay for advantages or emoluments in its widest sense, . . . there is no doubt of Mr. Tennant's possession of a material advantage, which makes his salary of higher value to him than if he did not possess it, and upon the hypothesis which I have just indicated would be taxable accordingly."

While, therefore, the rent received by the owner is taxable as a part of his income, the advantage derived by the owner who occupies his own premises could not be regarded as income.

The Chief Controlling Revenue Authority has referred to a case decided by the late Chief Judge and myself and has drawn attention to a sentence in Sir Daniel Twomey's judgment. "These bazaar companies are admittedly not businesses for the purpose of the Income-Tax Act any more than professions are businesses for the purposes of the Act. They are assessed to income tax as house property and not as businesses."

The question that was before us in that case was whether the bazaar companies carried on a business which made them liable to excess profits duty under the Excess Profits Duty Act. The question as to whether they were liable to taxation under section 8 was not before us, and the extract cannot be used for the purpose it is sought to put it to. There is nothing in my judgment which would support that statement, and it was not one that in any way influenced our decision.

It is my opinion, therefore, that it is for the Crown to show that these premises fall within the expression "house property" and that that could only be done by giving a very wide and extended meaning to the expression, straining the language used, and that it is not the right interpretation, and that, therefore, Messrs. Rowe and Company are not liable to be assessed under section 8. Nor are they liable, in my opinion, to

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be assessed under any other section of the Act on this head. If the intention of the Legislature was that they should get an allowance under section 9, only because they were liable to assessment under section 8, then much clearer language should have been used than has been employed, and if the result is not what was in the contemplation of the Legislature, that is the result of faulty drafting, which it is not open to the Court to make good.

I would, therefore, answer the first question referred in the negative, and this renders any answer to the second question unnecessary.

The respondent must pay the costs of this reference. Advocate's fee ten gold mohurs.

Maung Kin, J.—I have had the advantage of reading the learned Chief Judge's judgment and I have very little to add.

It is a commonplace that in statutes of taxation the imposition of a duty must be in plain terms (5); such a statute must be construed strictly and the onus lies upon the Crown to shew that the person whom it is sought to tax falls clearly within its operation (6). In *Partington v. Attorney-General* (7) Lord Cairns says: "I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." These observations were cited by Collins, M.R. in *The Attorney-General v. The Earl of Selborne* (8) and the learned Judge proceeded to say:—"Therefore the Crown fails, if the case is not brought within the

(5) *Per* Buckley, L.J., in *Commissioners of Inland Revenue v. Gribble* (1913) 3 K.B. 212 at p. 219.

(6) *Per* Lord Alverstone, C.J., in *Whiteley v. Burns*, (1908) 1 K.B., 705 at p. 709.

(7) L.R. 4 H.L., 100 at p. 122.

(8) (1902) 1 K.B., 338 at p. 396.

words of the statute, interpreted according to their natural meaning; and if there is a case which is not covered by the statute so interpreted that can only be cured by legislation, and not by an attempt to construe the statute benevolently in favour of the Crown."

In *The Oriental Bank Corporation v. Henry B. Wright* (9) Lord Blackburn who delivered the judgment of Their Lordships of the Privy Council observed with regard to a fiscal act that if the Legislature, from want of foresight or for any other cause, has omitted to provide for a case, it is the province of the Legislature itself, and not of the Courts, to supply the omission.

In *Re-Finance Act, 1894* and *Studdert* (10) Fitzgibbon, L.J., said:—"The benefit of the doubt is the right of the subject."

We have to construe the expression, "house property" in section 8 of the Indian Income-Tax Act of 1918. I think the word "property" is a general word and the word "house" limits its meaning. What is therefore referred to by the expression is house which is a kind of property. The Legislature might very well have used the word "house" alone and say "Income derived from a house" instead of what it has used, "Income derived from house property." That being the case, what is the meaning of the word "house"?

In *In the matter of A. John and Company* (11) the point arose as to whether mill premises could be treated as house property and two out of three learned Judges who disposed of the case held that they could not be so treated. Piggot, J., inclined to the view that the premises in question fell within the meaning of the expression.

To my mind the ordinary meaning of the word "house" is a building used for human habitation or as the dwelling place of human beings and when it is used with other words, as in "Coffee-house," "play-house," "ware-house," the previous word is regarded as the defining prefix indicating a meaning different to the ordinary meaning of the general word "house." We must therefore construe it as meaning a dwelling house, unless, as Viscount Haldane, L.C., said, reading

(9) (1879-80) 5 Appeal Cases, 842 at p. 856.

(10) (1900) 2 I.R., 400 C.A. at p. 410, cited in Vol. 27, Halsbury's Laws of England, p. 180.

(11) (1920) I.L.R. 43, All. 139.

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the statute as a whole the context directs us to depart from that meaning. It was pointed out by the Chief Revenue Authority which made the above reference to the Allahabad High Court that the whole tenor of section 8 concerns property of the nature of residential property. There does not appear to be any good reason for differing from this view. Piggot, J. in the course of his judgment observed that the difficulty which he had felt throughout was that, if a firm in the position of the assessee in that case had been called upon for a return of its "house property" in or about the city of Agra, he thought it would have been expected to include ware-houses and factories as falling within the meaning of that expression. These remarks came immediately after the learned Judge had indicated the view that coffee-houses, play-houses and ware-houses would fall within the meaning of the expression "house property." But my view as above stated is that in those hyphenated expressions the previous word is only a prefix defining or limiting the ordinary meaning of the word "house." So that it is not of much importance whether a man may return factories and shops as his "house property."

Moreover, under section (9) (2) (i) the assessee is given an allowance to the extent of the annual value of the premises when they are owned by him. In fact he is taxed on his balance sheet. The question then arises as to whether this allowance can be taken into consideration for the purposes of taxation under any other section, for instance, section 8. We may speculate on this question but the rules of construction of a Taxing Act debars us from doing so. If it was the intention of the Legislature to use the allowance made under section 9 (2) (i) for the purposes of section 8, clear words should have been used, and we are not at liberty to supply the omission. I have expressed this view, although the expression "house property" may probably be capable of being given the most liberal and extensive interpretation.

I would answer the first question referred in the negative. In this view it is not necessary to answer the second question referred.

FULL BENCH.

Before Sir Sydney Robinson, Kt., Chief Judge, Mr. Justice
Maung Kin and Mr. Justice Pratt.

AHLONE LAND Co., LTD. v. THE SECRETARY OF
STATE FOR INDIA.*

Civil
Reference No.
9 of 1921.

January
11th, 1922.

McDonnell—for Applicants.

Higinbotham—for Respondent.

*Indian Income-Tax Act, 1918.—Reference under section 51 (1)—
Questions of law and questions of fact.*

The Chief Revenue Authority referred to the Chief Court the question whether on certain facts the Income-Tax authorities were justified in interpreting the Act so that income should include the profit made on the resale of certain property.

Held,—that the reference was made solely on a question of fact and that the Court had no jurisdiction to decide the question referred, since under section 51 (1) of Act VII of 1918 the Court is given power to decide questions which have arisen with reference to the interpretation of any of the provisions of the Act or of any rule thereunder, and is given no power to deal with questions of fact by way of appeal from the decisions of the Revenue Authorities.

Currie v. Inland Revenue Commissioners, (1919-20) 36 T.L.R., 185 ;
Cape Brandy Syndicate v. Inland Revenue Commissioners, (1920-21)
37 T.L.R., 33—referred to.

Robinson, C. J.—This is a reference by the Chief Controlling Revenue Authority under section 51 (1) of the Income-Tax Act of 1918. Under that section power is given to this Court to decide questions which have arisen with reference to the interpretation of any of the provisions of this Act or of any rule thereunder. No power is given to this Court to deal with questions of fact by way of an appeal against decisions of the Revenue Authorities.

The learned Financial Commissioner begins his order of reference by saying that he entirely agrees with the Commissioner's order in considering that the real point for consideration is whether the purchase and sale of the property was the main object with which the company was formed or whether the development of the property in order to earn a continuing profit year by year for the company was the real object and the sale of land was only a subsidiary one to be considered in case of a particularly favourable offer. He was asked by Counsel for the company to refer to this Court the question

* Referred by the Financial Commissioner, Burma, under section 51(1) of the Indian Income-Tax Act, 1918.

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whether on the facts set out in the order of the Commissioner of Pegu and on the facts which appear on the documents placed before him the Income-Tax Authorities are justified in interpreting the Act so that income shall include the profit made in this case on the resale of the property, or to put it in another way whether the Commissioner was justified in treating it as a conclusion of law which appears from the documents filed with his order that the company were carrying on a trade of selling land and that the profits made therein were taxable as income. He was clearly of opinion that any reference was unnecessary and that it should have been refused under the last part of section 51 (1), but because of some change in the new Bill the matter is referred.

On opening the case Mr. McDonnell for the company stated that the whole question turned on what was the business of the company and that, if it was the buying and selling of land, they would be liable to be taxed.

The question of what was the business of the company is apparently a pure question of fact, and the matter is one which is for the decision of the Revenue Authorities and the Revenue Authorities alone. The learned Government Advocate thereupon raised the preliminary objection that this Court has no jurisdiction to hear the reference as it was solely made on a question of fact on which the decision of the Revenue Authorities was final.

We have been referred to certain recent decision, in England on this very point.

In the first case *Currie v. Inland Revenue Commissioners* (1) Rowlatt, J. went into the question whether on certain facts Currie was carrying on a profession. He said, "I do not think that that is a question of fact in this case. I think I have all the facts before me, and it is a question of law. It is not a question of degree or anything of that sort, as was the case in the photographer's case (*Cecil v. Inland Revenue Commissioners*, 36. *The Times L.R.*, 164)." That decision went up on appeal, and the Master of the Rolls said, "The first point to be considered was whether the question whether Mr. Currie was or was not carrying on a profession was a question of law or fact." He held that it was a question of fact and that, if

(1) (1919-20) 36, T.L.R., 185.

the Commissioners came to a decision on fact without applying any wrong principle, then their decision was final. "Mr Justice Rowlatt had thought that the facts were clear, and that it was therefore a question of law. He did not agree that that was so, and that did not appear to agree with Mr. Justice Rowlatt's own judgment in *Cecil v. Inland Revenue Commissioners*." Lord Justice Scrutton said that "he must consider the appeal from the point of view that if there were evidence from which the Commissioners could have found that the two gentlemen concerned were not carrying on professions, that was final. The Commissioners were the Judges of fact, and he was not."

Again in *Cape Brandy Syndicate v. Inland Revenue Commissioners* (2) Mr. Justice Rowlatt said, "Now in those circumstances the Special Commissioners have held that they carried on a trade, and I think it is a question of fact, and I do not think that by giving me all the evidence the Commissioners can make me determine the question of fact. Nor, indeed, can they give me authority to do so, because they cannot give me authority if I do not possess it by law. I think it is a question of fact and a question of degree, which generally is a question of fact. I need not say anything more than that. I am not prepared to say that there was no evidence before the Commissioners. I think it is just one of those cases where there was evidence. I can conceive people deciding the other way. I do not say which way I should decide myself. But I certainly think there were materials on which they could find as they did." On appeal Lord Sterndale, M. R., said, "Two points were raised, the first a question of fact, *viz.*, whether the appellants were carrying on a business," and later he says, "The first question was one simply of fact."

The circumstances of these two cases are very similar to the case of the Alhone Land Company, and I think there can be no doubt that the Revenue Authorities having considered the facts stated orally and in documents came to a decision as to what was the business of this company. That was a simple question of fact, and on that, as it appears to me, their decision was final. It is not necessary for us, and we have

(2) (1920-21) 37 T.L.R., 33.

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not, in my opinion, power to decide whether their findings of fact were correct since they do not involve any question regarding the interpretation of any of the provisions of this Act.

We have been referred to three cases decided in the Court of Exchequer, Scotland, wherein apparently the learned Judges did consider matters such as those involved in this reference. Two of those cases were considered by Mr. Justice Rowlatt in *Currie's* case, and, if they do support the argument that this is a question of law and not a question of fact, we must take it that they have not been followed by the Court of Appeal and that they should not be followed by us.

Mr. McDonnell urged that the question was whether the profits made by this company were income within the meaning of the Act. That is an entirely different matter, and one that has not been referred.

It is admitted that the sole point for decision is what was the business of the company. Was it buying and selling land? There is no difference between this question and the question whether on certain facts established Mr. Currie was carrying on a business.

The decision is a decision on a question of fact. I am unable to see any reason for supposing that the Revenue Authorities have applied any wrong principles in deciding this question, and therefore I would hold that this Court has no jurisdiction to decide the question referred, and that the reference must be returned to the Chief Controlling Revenue Authority as incompetent.

Maung Kin, J.—I concur.

Pratt, J.—I concur.

Before Mr. Justice Pratt.

1. MA ZA; 2. SAN MAY; 3. MA KUN KALAI v. 1. MA MI; 2. MANGAIK DOOT; 3. MA NGWE; 4. MAUNG TUN THA; 5. MA LIN; 6. MA CHIN; 7. PAN AUNG; 8. MA DUN KA; 9. HTA YE; 10. MAUNG KYU; 11. MAUNG KUN TI; 12. MAUNG SOUNG; 13. MAUNG TA YA; 14. MAUNG KWA; 15. MAUNG SAN YA; 16. MAUNG THA; 17. MA KIN MI; 18. MAUNG KUN ROO. *

Special
Civil Second
Appeal
No. 298 of
1920.
December
19th, 1921.

Dantra—for Appellants.

Kyaw Htoon—for Respondents.

(Lower) Burma Land and Revenue Act—Section 56—Sale for arrears of revenue—Fraud on part of purchaser—Rights of co-owners—Civil Court's jurisdiction in case of fraud.

A, who was co-owner with plaintiffs in certain undivided ancestral land, fraudulently caused the land to be sold for arrears of revenue and bought it herself in the name of her son. Plaintiffs then sued for a declaration of co-ownership and other relief. The trial Court dismissed the suit on the ground that under section 56 (a) of the Lower Burma Land and Revenue Act the Civil Court had no jurisdiction.

Held,—on appeal, that where a revenue sale has been obtained by fraud, a Civil Court has jurisdiction to declare that the purchaser is placed in the same position as a private purchaser, and that in such a case the co-owners have not lost their rights in consequence of the sale, but that all that has been actually sold is the interest of the defaulting co-owner.

Deo Nandan Prashad v. Janki Singh, (1916) I.L.R., 44 Cal., 573; *Harendra Lal Roy Chowdhury v. Salimullah*, (1910) 7 Ind. C., 21; *Sidhee Nuzur Ally Khan v. Rajah Ojooddhyaram Khan*, (1866) 10 Moore's I.A., 540—referred to

Plaintiffs were co-owners with first defendant of certain undivided ancestral land. They sued for a declaration of co-ownership and other relief alleging that the first defendant Ma Za had fraudulently caused the land to be sold for arrears of land revenue and had bought it herself in the name of her son, the 2nd defendant, for the revenue due and costs. The trial Court dismissed the suit holding that under section 56 (a) of the Lower Burma Land and Revenue Act the Civil Court had no jurisdiction. On appeal the Divisional Court relying on the principle enunciated in *Deo Nandan Prashad v*

* Second Appeal from the decision of A. J. Darwood, Esq., Divisional Judge of Tenasserim, reversing the decree of Mr. C. P. Ellis, Additional Judge of the Subdivisional Court of Amherst.

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Janki Singh (1) and *Harendar Lal Roy Chowdhury v. Salimullah* (2) held that, as it was not sought to set aside the revenue sale, and the interests of Government were in no way affected, the Civil Courts had jurisdiction to grant the declaration sought.

Under section 56 (a) of the Land and Revenue Act read with the preceding section no Civil Court may exercise jurisdiction as to questions as to the validity of a sale under section 47 of the Act. The land in suit was sold under section 47. The sole point for decision therefore is whether in view of the provisions of section 56 (a) the Civil Court has jurisdiction to grant the declaration sought. In both the cases cited by the Divisional Court the sales it was sought to impugn were under the Bengal Land Revenue Sales Act (XI of 1859).

The cases of *Deo Nandan Prashad* (1) is not quite on all fours with the present but is a valuable authority as it is throughout assumed by their Lordships of the Privy Council that a Civil Court has power to set aside a revenue sale on the ground that it has been obtained by fraud entirely irrespective of the provisions of section 33 of the Land Revenue Sales Act.

The facts in *Harendra Lal Roy* (2) are similar to those of the suit under appeal.

The proprietors of a revenue paying estate deliberately made default in the payment of Government land revenue with the object that the land might be sold free of the interests of the tenure holders under them and that they might realise the full value of the property undiminished by the incumbrances of the holders of the subordinate interests, and fixed the purchase and the price before the sale took place.

The plaintiff, a tenure holder endeavoured to prevent the sale by deposit of the arrears of land revenue, but without success.

The tenure holders appeal to the Commissioner to reverse the sale but were again unsuccessful.

They then filed a suit in Court for a decree to set aside the sale or in the alternative for a declaration that, as the sale

(1) (1916) I.L.R. 44 Cal., 573. (2) (1910) 7 Ind. C., 21.

had been brought about by a conspiracy between the proprietor and the purchaser the latter had not acquired the rights and privileges of a purchaser at a sale for arrears of revenue.

It was not alleged in the appeal before the High Court that the sale was invalid by reason of any irregularity in its conduct.

The provisions of the Bengal Land Revenue Sales Act regarding the jurisdiction of the Civil Court are not quite identical with section 56 (a) of the Lower Burma Land and Revenue Act. Section 33 provides that no sale for arrears of revenue shall be annulled by a Court of Justice, *except on the ground of its having been made contrary to the provision of the Act*, and then only on proof that the plaintiff had sustained substantial injury by reason of the Act and specifies a time within which a suit must be filed.

In the Burma Act there is no provision for annulment by a Civil Court. The wording "no Civil Court shall exercise jurisdiction as to questions as to the validity of a sale," is wider than that of the corresponding section of the Bengal Act.

In the case of *Harendra Lal Roy* (2) a suit to annul the sale would apparently not have lain under section 33 of the Land Revenue Sales Act. The Calcutta High Court nevertheless granted a decree declaring that the purchaser at the revenue sale acquired merely the status of a private purchaser, because the sale had been obtained by fraud. It does not seem to have been suggested that the Court had no jurisdiction to pass such a decree.

The Privy Council decision in *Sidhee Nuzur Ally Khan v. Rajah Ojooddharam Khan* (3) referred to in *Harendra Lal Roy* (2) is to my mind ample authority for the view taken by the learned Divisional Judge in the present appeal.

Their Lordships held that, where a sale under the revenue law had been fraudulently obtained, the sale must be considered as a private sale.

Here plaintiff's case was that the first defendant had taken advantage of the provisions of the revenue law to have land, of which she was only a part owner, fraudulently sold to her representative at a nominal price.

(3) (1866) 10 Moore's I.A., 540.

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It is not alleged that the actual conduct of the sale was irregular.

The Court is not asked to determine the validity of the revenue sale or to set it aside.

What it is asked to do is to declare that the co-owners have not lost their rights in consequence of the sale, but that all that has been actually sold is the interest of the defaulting co-owner.

In other words that the purchaser is placed in the same position as a private purchaser.

In view of the authorities to which reference has been made I do not think there is any reason to doubt that a Civil Court has jurisdiction to make such a declaration, where a revenue sale has been obtained by fraud. The sale has the appearance of a sale for arrears of revenue but is, in its essence, a private alienation.

A co-owner of land cannot be allowed to use the machinery of the revenue sale law to defraud other co-owners, and if he does so the Civil Courts are competent to declare that the result of his conduct is not to place a fraudulent purchaser in a better position than a buyer at a private sale.

The appeal will be dismissed with costs.

Before Mr. Justice Pratt.

THE COLLECTOR OF RANGOON v. ABDUL RAHMAN
SIRCAR BY HIS AGENT ABDUL HAKIM.

Government Advocate—for Applicant.

Indian Stamp Act, 1899—Section 35—Deficient duty leviable under—
One anna stamp to be taken into calculation.

A bond chargeable with Rs. 2-8-0 stamp-duty was executed on paper bearing a one anna stamp.

Held,—that although the stamp was of the wrong kind, the document should not be considered to be unstamped but merely insufficiently stamped; and the one anna stamp should be taken into account in calculating the deficient stamp-duty.

Reference under section 50, Stamp Act, (1891) I.L.R., 15 Mad. 259; Reference under section 46, Stamp Act, (1884) I.L.R., 8 Mad., 87—dissented from.

This is an application under section 61 of the Indian Stamp Act by the Collector of Rangoon to record a declaration that a document stamped with a one anna stamp, which was in

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reality a bond was liable to a duty of Rs. 2-8-0 and a penalty of Rs. 25. The document was intended apparently to be a promissory note but was attested and not payable to bearer or order.

The Additional Judge of the Small Cause rightly held that the document was a bond and impounded it.

The Judge also correctly assessed the duty to which it was liable as Rs. 2-8-0.

Making allowance for the value of the adhesive one anna stamp already on the note the Judge proceeded to levy Rs. 2-7-0 as deficient duty and five times its value as a penalty under section 35.

Under that section as the deficiency multiplied by ten was above Rs. 5 the Judge was bound to levy a penalty of ten times the deficient duty.

The wording of the first proviso to section 35 is "any such instrument not being an instrument chargeable with a duty of one anna or half an anna only, or a bill of exchange or a promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, *in the case of an instrument insufficiently stamped*, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion."

The Judge, who levied the penalty, was obviously of opinion that credit must be given for the value of the one anna stamp improperly affixed and that the instrument must be treated as improperly stamped and not one as unstamped.

I am asked by the Government Advocate to hold on the authority of the Madras case reported at page 259 Vol. XV of the India Law Reports, Madras series, (1) to hold that in calculating the stamp duty the one anna stamp ought not to be taken into calculation.

That case follows the previous decision of the same Court in "Reference under the Stamp Act, section 46 (1), (2)." In the former case a promissory note (which as in this case was

(1) (1891) I.L.R., 15 Mad., 259.

(2) (1884) I.L.R., 8 Mad., 87.

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held to be a bond) was written on hundi paper with an impressed label of two annas affixed.

A full Bench of the High Court held that the stamp the document bore was not a stamp which was proper for such an instrument, and that the instrument should have been treated as unstamped.

No reason whatever was given for this decision and I do not feel bound to follow it in a reference under section 61 of the present act.

I confess I do not see why for revenue purposes a document should be considered to be wholly unstamped, when as a matter of fact it bears a stamp, merely because that stamp happens to be of the wrong kind.

The proviso to section 35 already quoted makes allowance for the value of the stamp in the case of insufficiently stamped documents.

So long as the Government has received the value for its stamp, it is to my mind immaterial for the purpose of calculating the stamp duty due under the proviso what is the nature of the stamp that has been used on the document.

From a common sense point of view a duty of one anna has been paid, and the total stamp duty leviable being Rs. 2-8-0, there is a deficiency of Rs. 2-7-0.

The law ought to be interpreted as simply as possible, and when a document is stamped though wrongly and inadequately it is to the ordinary person insufficiently stamped, but not unstamped.

The amount at issue is not large but in view of the wording of section 35 proviso (a) I am not prepared to record a declaration that the whole duty of Rs. 2-8-0 and penalty of ten times that amount must be levied, when the document bears a one anna stamp and there is no reason to suppose it was not stamped *bona fide* under the belief that it was a promissory note.

I declare that the document in question ought not to have been admitted in evidence without the payment of a penalty of Rs. 24-6-0.

A copy of this declaration together with the instrument impounded will be sent to the Collector under section 61 (3).

Before Sir Sydney Robinson, Kt., Chief Judge, and
Mr. Justice Macgregor.

(1) MAUNG PO NGWE; (2) MAUNG PAIK TWE v.
YACOOB ALLY.*

Ko Ko Gyi—for appellants (defendants).
Maung Pu—for respondent (plaintiff).

Special
Civil Second
Appeal No.
170 of 1920.

January
30th, 1922.

*Transfer of Property Act, sections 54 & 55—Agreement to sell—
Effect of failure to enforce rights.*

A mortgaged land to a Chetty as security for a loan and B executed the mortgage deed as surety. Subsequently B paid the Chetty Rs. 3,400 in part payment of the debt due on the mortgage and was given possession of part of the land with liberty to enjoy the rents and profits in lieu of interest on the Rs. 3,400. Later B paid off the balance of the debt, Rs. 2,600, and thereby acquired the rights of the Chetty against A under section 140 of the Indian Contract Act. Thereafter B brought a suit for Rs. 2,600 against A and the suit was compromised, a decree being given for Rs. 3,000 with costs and B surrendering the rights he had acquired under the Contract Act. B however remained in possession of the land as before, and it was agreed that if A did not repay the Rs. 3,400, B could call on him to convey the land outright to him. Soon after A conveyed the land to C who also obtained possession. B brought a suit under section 9 of the Specific Relief Act and obtained possession. C then sued for possession which was decreed. B appealed against this decision.

Held,—that there was no unqualified agreement to sell the land to B and that B had never sought to reduce into being the agreement that he should be entitled to claim that the land be sold to him if A did not or could not repay the Rs. 3,400; that there was no usufructuary mortgage; and that as B had taken no steps to legalise his position by registered deeds, C could not be deemed to have had notice of the charges on the land. As B had never taken steps to enforce his rights, he had acquired no legal title to the land, and was not entitled to retain possession as against C.

Po Maung v. Maung Kaing, (1913) 7 L.B.R., 262; *Lalchand Motiram v. Lakshman Sahadu*, (1904) I.L.R. 28 Bom., 466; *Kurri Veerareddi v. Kurri Bapireddi*, (1906) I.L.R. 29 Mad., 336; *Muthu Gounden v. Chellappa Gounden*, (1910) 8 I.C., 1089; *Bon Lon v. Po Lu*, (1916) 8 L.B.R., 553—referred to.

Robinson, C.J., and Macgregor, J.—Maung Po and his wife were the owners of two parcels of land which they mortgaged to a Chetty as security for the repayment of a loan. Appellant, Maung Po Ngwe, executed the mortgage-deed as surety. Subsequently he paid to the Chetty the sum of Rs. 3,400 in part payment of the amount due under the mortgage. By an agreement with Maung Po he was given

* *Special Civil Second Appeal from the decree of A. T. Rajan, Esq., I.C.S., Divisional Judge, Toungoo, setting aside that of Maung Maung, District Judge, Toungoo.*

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possession of one of the two parcels of land (the one which forms the subject-matter of the present suit), with liberty to enjoy the rents and profits thereof in lieu of the interest accruing due on the Rs. 3,400. Later he paid off Rs. 2,600, the balance that was then due under the mortgage to the Chetty, and he no doubt then acquired under section 140 of the Indian Contract Act all the rights which the Chetty had against Maung Po. Subsequently he brought a suit against Maung Po to recover the sum of Rs. 2,600, the amount of the second payment that he had made to the Chetty. He did not include in his claim the Rs. 3,400, and thus he is not now competent to bring a suit to recover that money. The suit he did bring was compromised, and a consent decree was passed in terms of the compromise. The terms were that there should be a decree for Rs. 3,000 with Rs. 150 for costs, and Maung Po Ngwe agreed that he would not be able to file any contribution suit against the defendants for the amount paid up by the plaintiff on behalf of the defendants to the M.S.M.M. firm at Toungoo due on the mortgage-deed executed by Ko Po and himself for the principal sum of Rs. 5,000, bearing interest at Rs. 1-10 per cent. per mensem, and which mortgage-deed was filed in the case by him. That is to say, he then deliberately abandoned all the rights which he had acquired under section 140 of the Indian Contract Act. The position then was that he had a decree for Rs. 3,000 and costs, and he was in possession of a parcel of land with liberty to enjoy the rents and profits in lieu of interest on Rs. 3,400 with the further agreement that, if Maung Po should not repay the Rs. 3,400, he could call upon him to convey the land outright to him. The compromise was made on the 11th December 1918, and on the 19th February 1919 Maung Po conveyed the land in suit to the respondent, Yacoob Ally, who also obtained possession of the land. Po Ngwe then brought a suit under section 9 of the Specific Relief Act and retook possession. Yacoob Ally now sues for possession. The suit was dismissed by the first Court but decreed by the learned Divisional Judge, and the present appeal is brought from that decision.

The first point urged is that Po Ngwe is still entitled to all the rights of the Chetty-mortgagee. In face of the compromise decree in which those rights were clearly and distinctly

given up we are unable to hold that he has any such rights as a mortgagee.

In the next place, it is urged that under the terms of the agreement made between him and Maung Po he is entitled to a charge on the property on the ground that there was an agreement to sell coupled with payment of the purchase price and delivery of possession. As to this, we are unable to hold that the facts justify the claim. The agreement merely was that he should take possession and enjoy the rents and profits in lieu of interest. If later Maung Po refused to pay or was unable to repay the Rs. 3,400, Po Ngwe would be entitled to demand that the land be sold to him. There was no unqualified agreement to sell the land, and Po Ngwe has never sought to reduce that agreement into being.

Reference has been made to the case of *Po Maung v. Maung Kaing* (1) in which the provisions of section 55 (6) (b) of the Transfer of Property Act were applied. With that decision we are unable to agree. In that case there was an actual sale which was invalid by reason of there being no registered conveyance. The money had been paid and possession had been given. Here, as we have pointed out, there was no such sale, and to treat the agreement that was entered into in the present case as a contract of sale and to hold that it gave a charge on the property would, in the words of the judgment of the learned Judges in *Lalchand Motiram v. Lakshman Sahadu* (2) which was referred to in the Burma case, be overriding the plain provisions of the Transfer of Property Act. See also *Kurri Veerareddi v. Kurri Bapireddi* (3) and *Muthu Gounden v. Chellappa Gounden* (4).

Section 55 lays down the rights and liabilities applying between the buyer and the seller of immoveable property. Section 54 of the Transfer of Property Act lays down that a contract for sale of immoveable property does not of itself create any interest in or charge on such property. In the present case, putting it at its highest, there could be no more than a contract for sale, and not an actual sale, that was invalid for want of formalities.

(1) (1913) 7 L.B.R., 262.

(2) (1904) I.L.R. 28 Bom., 466.

(3) (1906) I.L.R. 29 Mad., 336 F.B.

(4) (1910) 8, I.C., 1089.

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We are next asked to treat appellant's position as that of a usufructuary mortgagee in possession and to hold that on this ground he is entitled to a charge on the property. We do not think it can properly be said that he was a usufructuary mortgagee, seeing that he had deliberately abandoned his rights as a mortgagee. If the transaction could be treated as one that was intended to be a usufructuary mortgage, that could not be converted into a charge unless it could be valid as a mortgage. This view was taken in the case of *Bon Lon v. Po Lu* (5), where it was held, "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."

Lastly, it is urged that Yacooob Ally had notice or must be deemed to have had notice, of the possessory rights of Po Ngwe. This point was not however raised before, but even if it had been, as Po Ngwe had taken no steps to legalise his position by duly registered deeds, we cannot impute notice to Yacooob Ally. Had he made enquiries as to incumbrances on the land, he would have learnt that the chetty's mortgage had been satisfied and was no longer binding on the land in favour of any person. He would have been assured by his vendor that the land was unencumbered and he could not have referred to any registered documents as there were none. Po Ngwe was in possession under an oral agreement which, no doubt, gave him certain rights as against Maung Po. Those rights he never sought to enforce, and this being so, he has acquired no legal title to the land, and we are unable to hold that he is entitled to retain possession as against Yacooob Ally, the purchaser for value by a registered deed.

The appeal will therefore stand dismissed with costs in all Courts, the decree of the lower Appellate Court being confirmed.

*Before Sir Sydney Robinson, Kt., Chief Judge, and
Mr. Justice Macgregor.*

KING-EMPEROR v. SHWE HLA U.*

Mya Bu—Assistant Government Advocate,—for King-Emperor.
Jordan—for Respondent.

Murder—Normal sentence—in case of—

Death is the normal sentence for murder, and if the presiding judge does not pass sentence of death, he is bound to record his reasons for not doing so, that is, he must find that there are really extenuating circumstances and not merely an absence of aggravating circumstances.

Crown v. Tha Sin, (1902) 1 L.B.R., 216—followed.

Robinson, C.J., and Macgregor, J.—This is an application by the Crown to enhance the sentence of transportation for life passed upon Shwe Hla U for the murder of his uncle, to the extreme penalty.

The facts are simple and are hardly contested.

The accused had been working for his uncle, but left before the completion of the work. He had been paid 40 baskets of paddy, but some balance of wages was still due to him. On the day in question Kala Aung, a ten house-gaung, and an *ex-pong-yi* were going to deceased's hut to get a bamboo. They met the accused who went with them. The accused demanded the balance of his wages, and was told that they would be paid in a few days' time. According to the deceased's widow, the balance was fixed at 60 baskets of paddy, and in the accused's statement to the committing Magistrate he speaks of the balance of 60 baskets. Kala Aung says there was no quarrel between the two men at that time, and the widow of the deceased says that, when accused was told that the balance would be 60 baskets, he said it was too little. Her husband said it was not, and the accused replied, "Allright, give the balance 60 baskets now." He was told that it would be given in four or five days' time. There is no suggestion that there was any serious quarrel or, indeed, any quarrel at all between the two men. Kala Aung says that he and the *ex-pong-yi* left, leaving the accused behind them. The widow and the two other women eye-witnesses say that

* *Criminal Revision of the order passed by Maung Maung (7), Additional Sessions Judge, Arakan.*

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the accused followed Kala Aung. Shortly afterwards he returned, saying he left his pipe behind. In his statement in the Sessions Court accused admits that it was true that he went back to the hut to look for his pipe. According to the prosecution witnesses, after searching for his pipe all over the place, he went to a hut on the *talin* where the deceased was seated and, when he got behind him, he struck him a violent blow on the left side of the neck which caused instantaneous death.

The evidence shows that he is a left-handed man, and there is no reason to doubt that he is so. According to the medical evidence therefore, the blow would have been struck from behind, and according to the prosecution evidence, there was no assault or justification for the cowardly attack such as this beyond that he got disgusted for not getting more wages and not getting them at once.

The accused's statements are to the effect that, when he demanded the balance of his wages, deceased struck him with a stick and he fell down; that accused then picked up something, he did not know whether it was a stick or a *dā*, and warded off the blow with it. He says he got one blow, which fell on his back. In the Sessions Court he said that, when he went back to look for his pipe, deceased came out and beat him, saying "Have you come to pick a quarrel with me." He warded off the blow.

Accused calls two witnesses who are nephews of the deceased. One says that he stopped at a hut about 30 bamboos' length away from deceased's hut. While there, he heard some one abusing and looking round saw the deceased running to his hut. He did not see the accused at that time. When he got near the hut, he heard deceased's wife cry out "cutting, cutting," and then saw the accused run away. The cutting was inside a hut, but according to this witness, the cry he heard was raised when the deceased got near the hut. The other witness was seated about 40 bamboos' length from the deceased's hut. He heard deceased using abusive language and saw him go towards his hut. When he got near the hut, he heard people shouting out "cutting, cutting," and then saw the accused run away.

According to both these witnesses, therefore, they should have seen the cutting. We do not think any reliance can be placed on this evidence. The learned Additional Sessions Judge has apparently been influenced by the fact that they are nephews of the deceased, and he therefore holds that there is no reason to doubt their statements. This is a most inadequate reason. He further finds that the three women witnesses for the prosecution for obvious reasons tried their best to shield the deceased as much as possible. He argues that it is not likely that the accused would have assaulted his relation without provocation, and his final conclusion is that it may be safely presumed that there was some provocation. On that ground he considers the sentence of death should not be passed.

The Indian Penal Code allows one or other of two sentences for the offence of culpable homicide amounting to murder. Section 367 (5) of the Code of Criminal Procedure provides that if the accused is convicted of an offence punishable with death and the court sentences him to any punishment other than death, the Court shall, in its judgment, state the reason why sentence of death was not passed.

In *Crown v. Tha Sin* (1) a Full Bench of this Court held that "the extreme sentence is the normal sentence; the mitigated sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so." With this view we entirely concur. If the presiding Judge does not pass the sentence of death, he is bound to record the reasons why death sentence was not passed, that is to say, he must find, in the language of the judgment of the case just cited, that there are really extenuating circumstances and not merely an absence of aggravating circumstances.

In the present case it is clear that, whatever discussion there might have been as to what the balance of the wages was to be, there was no serious quarrel between the two men, and it is clear and is, indeed, admitted that the accused left and shortly afterwards returned on the plea of searching for

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his lost pipe. There is no proof and no reason to suppose that there was any quarrel between the two men at that time. The story of an assault and the warding off of a blow with the *da* that he had in his hand is wholly unconvincing. We must therefore hold that he came back on the plea of searching for his pipe, and that even if he had lost his pipe there, he suddenly and without any cause attacked the deceased from behind, striking him a blow on a vital part with a *dahma* with great force and causing instantaneous death, and was therefore guilty of murder. Thus it is hard to see what extenuating circumstances can be held to have existed. Even had he been disgusted at the amount of wages that it was proposed to give him, that could not justify the return and the cowardly assault which was made clearly with the intention to cause death.

The existence of some provocation is not enough to justify the passing of the mitigated sentence, and we are clearly of opinion that in this case the learned Additional Sessions Judge should have passed a capital sentence. However, the sentence he did pass was passed on the 1st of June 1921. Nine months have elapsed since that date, and under these circumstances we do not see our way to now enhancing the sentence.

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Before Mr. Justice Pratt and Mr. Justice Duckworth.

THE LEIBAOAK SYNDICATE v. FINLAY FLEMING
& CO.*

Keith with *Barnabas*—for appellants.

Lentaigne—for respondents.

Contract—Power to implement—Right of agent to lien or retainer on monies of principal in his hands for expenses.

A made forward contracts to supply B with wolfram. The wolfram received was sold through B's London Agent, C. When A failed to supply the full amount C carried out the contracts by supplying wolfram received from other sources and charged B for the cost. B retained the cost out of money in B's possession belonging to A. A brought a suit for this amount with interest.

Held,—that B was a factor as well as an agent and had authority to appoint C as sub-agent; that B and C had the right to implement the

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contracts; and that B was entitled to a lien or retainer on monies of A in his (B's) hands for all expenses properly incurred. Implementing of contracts is part of the general law.

Mahomed Nassoruddin v. S. Oppenheimer, 2 L.B.R., 186—referred to.

A. C. Chidambara Mudaliar v. N. Krishnasami Pillai, (1916) I.L.R. 39 Mad., 365 at pages 375 and 376; *Curwen v. Milburn*, (1889) L.R. 42 Ch. D., 424 at page 434; *Erie County Natural Gas and Fuel Company v. Samuel S. Carrol*, (1911) A.C., 105; *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited*, (1912) A.C., 673 at pages 684, 689 and 690; *Hammonds v. Barclay*, 2 East, 227—followed.

Pratt, J., and Duckworth, J.—The Appellant Syndicate sued the Respondents Messrs. Finlay Fleming & Co. before the Original Side of this Court to recover Rs. 6,465-13-9 being the balance of the price of certain wolfram, which the respondents had admittedly received and disposed of on their behalf. The amount in suit included interest.

The first contract made between the parties was duly carried out by the appellants. This was 15 tons of the mineral. The contracts with which we have to deal are two forward contracts, Exhibits F and G, for a total of 35 tons of wolfram ore, the first of which is really merged in the last, the price agreed upon being 52 shillings. It is admitted that some 14 tons were supplied leaving a deficiency of 21 tons and 1 hundredweight.

The wolfram received was sold through Messrs. Milne & Co., the London Agents of the respondents, who contracted to sell it in England in their own name. When the appellants failed to supply the full amount to the respondents, Messrs. Milne & Co. carried out the contracts by supplying wolfram received from other sources, and charged the respondents for the cost thereof. The latter contended that the amount sued for, less a sum of Rs. 285-1-9 (which they admitted was due, and paid into Court), represented the charges and expenses entailed by the fulfilment of the contracts, and claimed that they were entitled to retain the same out of the money in their possession belonging to the appellants. In fact they claimed a right of lien or retainer.

The appellants have waived a great deal of the grounds set out in the Memorandum of appeal i.e., all that part of the appeal which relates to their allegations in the original Court that the carrying out of the contracts had

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become impossible owing to the action of the Local Government, and that that action was largely due to the machinations of the respondents themselves.

The grounds upon which the appeal is based, for the learned Judge on the Original Side found in favour of respondents on every point, may be summarized as follows :—

1. That the respondents were not entitled in Law to appoint Sub-Agents for sale of the ore.

2. That the respondents had no authorization from the appellants to implement the contracts.

3. That without such direct authority Messrs. Milne & Co. were not justified in implementing the contract.

4. That in any case the respondents were not justified in repaying themselves from monies in hand belonging to the syndicate.

5. That the claim of the respondents ought to have been stamped as a set-off or counterclaim.

6. That the claim of the respondents was time-barred, *i.e.*, their claim for loss in implementing the contract, and for commission, etc.

7. That in any case inasmuch as the respondents' claim "sounds in damages," it was incapable of being made the subject of a set-off under the Civil Procedure Code.

It must here be stated that the appellants do not dispute the actual figures of the respondents, but only their right to retain the money in question.

I will deal with the first ground at once. In this is involved the question whether we are to consider the respondents merely as agents of the appellants, or also as their factors. The learned Judge on the Original Side held that they were factors, and, inasmuch as the respondents were entrusted by their principals with goods for sale, we are of opinion that there is little doubt that respondents were factors as well as agents. (Bowstead on Agency, page 4, Edition 5). We then would refer to section 190 of the the Contract Act. The respondents have no London Business House, and from the nature of the agency it is manifest that, in order that they might sell wolfram in time of War, they would have to appoint

a sub-agent in England. Apart from this, purchasers at that time would have been chary of entering into contracts with a Foreign Principal, because of the difficulty of suit and other matters. We hold that there was authority to appoint a sub-agent to sell the ore, and that it cannot be held that the respondents contracted to sell the ore personally.

Next as to ground 2, apart from what is stated in the Explanation to section 73 of the Contract Act, which clearly shows that the implementing of contracts is recognised by that Act, and that it is part of the Law in the case of an unfulfilled contract, it is manifest that, after the receipt of the letter Exhibit K, the appellants remained quiet for a long time, and that when they wrote to the respondents in the letter Exhibit R on the 17th of April they spoke of including the amount of respondents' claim in their suit against Turnbull & Co. We consider that this could have only referred to the present claim of the respondents, and that it is shown that the appellants did not construe the letter Exhibit DD dated in March as meaning that the respondents had dropped the matter. The appellants' letter Exhibit S dated in June refusing leave to implement and charge them came too late. The wolfram had then been sold. The evidence of Mr. Oakley shows that the appellants could not have procured the wolfram more cheaply themselves than did Messrs. Milne & Co. In fact it appears at once that the actions of that Firm were reasonable and to the advantage of the defaulting appellants.

In regard to ground No. 3, we consider that Messrs. Milne & Co. were quite justified in what they did. Wolfram ore in the early part of 1916 was of great national importance to Great Britain. Messrs. Milne & Co. were in duty bound to disclose, and procure sanction for, the contracts in question, and to carry them out with the utmost urgency. Moreover we think that the evidence shows that Messrs. Watson of Liverpool, who purchased this ore, must be taken to have been pressing Messrs. Milne & Co. for completion of the contract. In these circumstances, it is manifest that the only course for them to pursue was to implement the contract, which they were in Law entitled to do, provided that they acted reasonably and prudently, and in mitigation of damages.

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By their actions they saved the appellants 5 shillings, the price at Home being 60 shillings, whilst they bought at 55, or only three shillings more than the contract price, and at the cheapest price available at the time.

From this we pass to ground 4. Respondents actually held monies belonging to the appellants in their hands. We consider that, whether as agents or factors, they were entitled to retain money due to them therefrom by a right of lien or retainer, whether their lien be particular or general.

As to grounds 5 and 7, there was in our opinion no question of a set-off. It is probable that as a set-off the claim of respondents could not have been made in this suit, see the case of *Mahomed Nassoruddin v. S. Oppenheimer* (1) which was decided by a Full Bench of this Court in 1903 under section 111 of the then Civil Procedure Code. Under the present Law a claim of set-off must be stamped.

In regard to ground 6, the case being one of exercise of lien or retainer, no question of time limit arises at all.

As to the absence of time limit against the claims of respondents we would quote the case of *A.C. Chindambara Mudaliar v. N. Krishnasami Pillai* (2), and the case of *Curwan v. Milburn* (3).

We would further point out authority for the findings which we have come to in regard to implementing contracts. The first case is *Erie County Natural Gas and Fuel Company v. Samuel S. Carrol* (4), and we would refer specially to pages 116, 117 and 118 of that decision of their Lordships of the Privy Council. The next is the case of the *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London, Limited* (5).

As to the lien the case quoted by the learned Judge on the Original Side is to the point, viz., *Hammonds v. Barclay* (6). Further the passages quoted by Mr. Lentaigne for the respondents from Halsbury's Laws of England are useful in this connection, viz., Volume 19, page 8, section 9, page 7, section 8, and page 3, section 2. He also relied upon Volume 1, pages 196

(1) 2 L.B.R., 186. (2) (1916) I.L.R., 39 Mad., 355 at pages 375 and 376.

(3) (1889) L.R. 42 Ch. D., 424 at page. 434. (4) (1911) A.C., page 105.

(5) (1912) A.C., page 673 at pages 684, 689 and 690. (6) (2) East, 227.

to 198, sections 417, 419 and 420. Then there are sections 217, 221 and 222 of the Contract Act.

We consider that implementing of contracts is a part of the general law, and that in such a case as this the agent is entitled to a lien or retainer upon monies of the principal which are in his hands for all expenses properly incurred. It is clear that in this instance the expenses in question were properly incurred.

We think that the suit was rightly decided on the Original Side and accordingly dismiss the appeal with costs, confirming the decree of the learned Judge on the Original Side.

Before Mr. Justice Pratt and Mr. Justice Duckworth.

MAUNG TUN YIN v. (1) MA SEIN YIN; (2) MA HNIN OKE; (3) MA THEIN TIN; (4) MA E NYUN; (5) MA ON BWIN; (6) MAUNG PO SEIN.*

Lentaigne with *J. A. Maung Gyi*—for appellant.

May Oung with *Eusoof*—for 1st respondent.

Proceedings for grant of letters of administration—decision in such proceedings not a bar to subsequent suit for administration of estate—Res judicata.

The decision in proceedings for grant of letters of administration is not necessarily a bar to a subsequent suit for the administration of the estate. Regard must be had to the formality of the proceedings in the matter of the application for letters.

Ma Tok v. Ma Thi, 5 L.B.R. 78; *Maqbul Shah Ahmad v. Muhammad Azmat*, (1918) 53 Punjab Record, 167—followed.

Sheoparsan Singh v. Ramnandan Prasad Singh, (1916) I.L.R. 43, Cal., 694—referred to.

Kalyanchand Lalchand v. Sitabai, (1914) I.L.R. 38 Bom., 309—dissented from.

Pratt, J.—Plaintiff Maung Tun Yin sued for the administration of the estate of his deceased step-mother, Ma Nyein Me, claiming that he and the second and third defendants were the sole heirs of the deceased. The District Court found that the suit was *res judicata* by reason of the proceedings in suit No. 19 of 1919 of the same Court, wherein letters of administration to the estate of Ma Nyein Me were granted to Ma Sein Yin. In the proceedings under section 83 of the

* First Appeal against the judgment passed by D. O'Sullivan, Esqr., District Judge, Amherst.

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Probate and Administration Act the Court found after recording evidence that the present plaintiff-appellant had no right of inheritance to Ma Nyein Me's estate.

The only point for decision is therefore whether the plaintiff's right to inherit must be considered to be *res judicata* in view of the decision in suit No. 19 of 1919.

In *Ma Tok v. Ma Thi* (1) a bench of this Court pointed out that findings of fact arrived at in cases of application for letters of administration would not operate as *res judicata* in suits for administration or possession of property.

The learned District Judge apparently was of opinion that this finding was merely an *obiter dictum*, but a perusal of the judgment of this case makes it clear that the bench declined to go into a question of adoption in an appeal from an order granting letters of administration, on the ground that such a question could subsequently be fought over again in a regular suit.

The finding on the question of *res judicata* was therefore necessary for the decision of the appeal and cannot be brushed aside as an *obiter dictum*. It was arrived at after a consideration of the rulings on the subject and it was pointed out that no decisions to the contrary were cited.

In *Maqbul Shah Ahmad v. Muhammad Azmat* (2) decided in 1918 a Bench of the Punjab Chief Court taking the same view held that in a proceeding for grant of letters of administration the question before the Court is one of representation to the estate and not of distribution, and it was only for the purpose of determining the question of representation that the Court was called upon to decide whether the appellant would be entitled to the whole or any part of the estate of the deceased within the meaning of section 23 of the Probate and Administration Act, and that such a finding was not *res judicata* in a suit in which the question of title to the properties had to be determined. With this decision I am in entire agreement.

Sheoparsan Singh v. Ramnandan Prasad Singh (3) is quoted as an authority for the opposite view, but does not

(1) 5 L.B.R., 78.

(2) (1918) 53 Punjab Record, 167.

(3) (1916) I.L.R., 43 Cal., 694.

appear to be so in reality. In that case their Lordships of the Privy Council laid down that the application of the rule of *res judicata* by the Courts in India should be influenced by no technical considerations, but by matter of substance within the limits applied by law. This is sound common sense. The application of this principle would not seem to justify a finding that the question decided in the letters of administration proceeding in the present case was *res judicata* in the subsequent administration suit.

In the Calcutta case above cited the District Court granted probate of a will and the decision was affirmed by the High Court on appeal.

The appellants therefore sued for a declaration that they were next reversioners to the estate according to the Hindu Law in the case of an intestacy, and as such entitled to obtain revocation of probate.

The Judicial Committee *without deciding the question of res judicata* held that the suit was not maintainable.

The Bombay case of *Kalyanchand Lalchand v. Sitabai* (4), which is in favour of the District Court's view, was also a probate matter. A will had been held not proved and probate refused. In a suit brought by the widow of the deceased for recovery of the property from the executors, under the will a Full Bench held that the judgment in the probate proceeding operated as *res judicata* between the parties under section 83 of the Probate and Administration Act and section 11 of the Civil Procedure Code.

The ground for the finding was that as contentious probate proceedings must take the form of a suit, they constitute a suit within the meaning of section 11 of the Civil Procedure Code.

This is to my mind a dangerous doctrine. Section 83 of the Probate and Administration Act says that in any case where there is contention the proceeding shall take as nearly as possible the form of a suit according to the provisions of the Code of Civil Procedure in which the petitioner shall be the plaintiff, and the person, who may have appeared to oppose the grant, shall be the defendant.

(4) (1914) I.L.R. 38 Bom., 309.

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The section says the proceedings shall take the form of a suit, which seems to be merely a rule of procedure; it does not say the proceedings shall become or be deemed to be a suit.

In the District Court there were no less than four claimants or sets of claimants to letters in the present instance.

It is an arguable thesis that on the strict letter of the law the miscellaneous proceedings under the Probate and Administration Act should have been converted into four suits.

In a case of this description regard must be had to the formality of the proceedings in the matter of the applications for letters.

Although the matters at issue were apparently well understood, no issues were actually framed and no formal issues were drawn up.

It is admitted that plaintiff Tun Yin was a step-son of the deceased. The District Court found that he had forfeited his right to inherit by his unfilial conduct, although there was no allegation to this effect in the pleadings.

The parties confined themselves almost entirely to proving their right to obtain letters as heirs and made practically no effort to rebut their opponents' case. Under the circumstances it would be unjust to declare that the parties are debarred from proving their right to inherit in a regular suit.

I would set aside the finding of the District Court on the preliminary issue and the decree dismissing the suit and remand the suit for disposal on its merits.

Costs of this appeal to be borne by the estate.

Duckworth, J.,—I concur.

*Before Sir Sydney Robinson, Kt., Chief Judge and
Mr. Justice Macgregor.*

MAUNG THWE v. (1) A. L. A. R. CHETTY FIRM;
(2) MA SHWE PON; (3) MAUNG OHN SHWE;
(4) MA PWA SEIN; (5) MA TIN; (6) MA THEIN;
(7) A. J. ROBERTSON.

*Civil
Miscellaneous
Applications
No. 65 of
1921.
February
20th, 1922.*

Das—for applicant.

Leach—for 1st respondent.

*Civil Procedure Code, section 110—Order XLV, rule 3.—Appeal
to Privy Council—Valuation for purpose of appeal.*

In deciding the amount or value of the subject matter of a suit for purposes of an appeal to the Privy Council, the Court has to consider the value at the time of the institution of the suit and the effect of the adverse decree on the applicant's interests.

A certificate cannot be granted solely on the ground that the decree or final order involves, directly or indirectly, some claim or question to or respecting property of the amount or value of Rs. 10,000 or upwards; in order to satisfy the conditions of section 110 it is necessary that the subject matter of the suit in the Court of first instance should be of like amount or value.

A certificate under Order XLV, rule 3 that a case is otherwise a fit one for appeal to His Majesty in Council can be granted only when the questions involved are not merely substantial but of great public or private importance.

Moti Chand v. Ganga Prasad Singh, (1901) I.L.R., 24 All., 174; *De Silva v. De Silva*, (1904) 6 Bom. L.R., 403; *Subramania Ayyar v. Sellammal*, (1915) I.L.R., 39 Mad., 843—followed.

Robinson, C.J., and Macgregor, J.—This is an application for leave to appeal to His Majesty in Council from a decree of this Court confirming the decree of the Court of First Instance.

The facts involved are as follows :—

Two persons, Maung Thwe and Tun Pe, each claimed to be the sole adopted son of a Burmese couple who died leaving a fairly large estate. Cross applications for letters of administration were filed and letters were granted to Tun Pe. Thereupon Maung Thwe brought a suit to have it declared that he was the sole adopted son and for possession of the estate. The first Court held that he was the sole adopted son. On appeal to this Court it was held that Tun Pe was the sole adopted son. An appeal was filed to His Majesty in Council when their Lordships held that both were adopted sons. In

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the meantime, subsequent to the decree of this Court declaring him to be the sole adopted son, and after notice had been served of the application for leave to appeal to His Majesty in Council, Tun Pe alienated the land in suit to Ma Shwe Pon for Rs. 6,000 by a registered deed. Subsequently Ma Shwe Pon mortgaged this land to A. L. A. R. Chetty. The present suit was brought by the Chetty to enforce his mortgage. The amount he claimed was under Rs. 10,000, as was also the amount decreed in his favour. Maung Thwe was made a party and contested the mortgage on the ground that the original sale by Tun Pe to Ma Shwe Pon was void and of no effect, as he was merely a co-heir and had no separate rights in this property that he could convey away. He pleaded that the principle of *lis pendens* applied to the alienation and that Ma Shwe Pon acquired no rights in the land which she could mortgage to the Chetty.

On appeal this Court at first accepted these arguments and set aside the decree of the Court below. An application for review was, however, admitted on the ground that the effect on the claim of the fact that Tun Pe was the administrator of the estate and must be deemed to have acted as such had not been considered, and the final decision was that the sale was good and that the doctrine of *lis pendens* would not apply in the circumstances of the case and this Court accordingly confirmed the decree of the Court below. From this decision Maung Thwe desires to appeal to His Majesty in Council.

He claims, in the first instance, that the subject-matter of the suit in the Court of First Instance and in dispute on appeal to His Majesty is over Rs. 10,000. It may be admitted that the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is over Rs. 10,000 if the interest accrued due up to the date of the decree of this Court be taken into consideration. But it is argued by the respondent that the amount or value of the subject-matter of the suit in the Court of First Instance is not Rs. 10,000.

As to this we have to consider the value at the time of the institution of the suit. The sale by Tun Pe to Ma Shwe Pon was for Rs. 6,000. When the property was brought to

sale in execution of the Chetty's mortgage-decree we are told it realized less than Rs. 10,000, and we can find no proof on the record to show that the land was worth Rs. 10,000 or upwards at the time of the institution of the suit.

The amount or value of the subject-matter of the suit to the Chetty was clearly the amount he claimed, together with, at most, interest that had accrued due up to the date of the decree.

In *Moti Chand v. Ganga Prasad Singh* (1) their Lordships held that the amount of the subject-matter of a suit in the Court of First Instance for the purpose of an appeal to His Majesty in Council is the amount for which a decree is recovered, including interest up to the date of the decree, and in the case of *DeSilva v. DeSilva* (2) Jenkins, C.J., held that for the purpose of considering whether the conditions as to value are satisfied "the decree is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal."

So far as Maung Thwe is concerned the effect on his interests of the adverse decree is that he is deprived of this parcel of land and that, as we have said, has not been shown to amount to Rs. 10,000. We must, therefore, hold that the conditions laid down in the first paragraph of section 110 are not satisfied.

It is next urged that even if that be so, petitioner is entitled to come under the second paragraph of section 110. It is urged that the decree involves, directly or indirectly, some claim or question to or respecting property of like amount or value. In the first place it is claimed that this provision is to be read alone and not subject in any way to the requirements of the first paragraph of the section. We are quite unable to accept this view. It is based apparently on the spacing and quasi-separation into a separate paragraph. We do not consider that it was intended to make it a separate provision. What the section requires is that the subject-matter in the Court of First Instance must be Rs. 10,000 or upwards, and in addition that the amount or value of the subject-matter on

(1) (1901) I. L. R. 24 All., 174. (2) (1904) 6 Bom. L.R., 408 at p. 406.

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appeal must be the same, or the decree must involve, directly, or indirectly, some claim or question to or respecting property of like amount or value. This latter provision is to be read as an alternative to the 2nd restriction in the earlier part of the section. To read it otherwise would render the provision as to the value of the subject-matter in the Court of First Instance a dead letter. It is not open to us so to interpret the section. We are bound so to interpret it that effect may be given to all its provisions if we can reasonably do so.

There is authority for this view in the case of *Subramania Ayyar v. Sellammal* (3). Speaking of this argument Wallis, C.J. said, "If this contention be accepted, a certificate must be granted in any case in which the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is not less than Rs. 10,000, whether or not the amount or value of the subject-matter of the suit in the Court of First Instance fell below Rs. 10,000, and this provision becomes wholly nugatory."

Mr. Justice Srinivasa Ayyangar said " * * * it is impossible to construe the second clause of section 110 of the Code of Civil Procedure so as to render the first perfectly useless * * * In my judgment the first clause applies to cases where the decree awards a particular sum, or property of a particular value or refuses that relief (*i.e.*) to cases where the object-matter in dispute is of a particular value. * * * If the operation of the decision is confined only to the particular object-matter, clause (2) does not apply, and unless the case satisfies the conditions in clause (1) there is no right of appeal. If the decision beyond awarding relief in respect of the particular object-matter of the suit affects rights in other properties, clause (2) would apply: also if the matter in dispute is one which is incapable of valuation as in the case of easements, clause (2) may apply."

It is argued that the decision in respect of this particular alienation by Tun Pe will decide other alienations made by him, one of which is pending in appeal before this Court. It is a case in which a mortgage was made by Tun Pe of

(3) (1915) I.L.R., 39 Mad., 843 at p., 845.

another portion of the estate. The decision of this case cannot be said to decide some other case relating to another portion of the estate. The parties will be different and this will in no way be binding on them. Moreover, the decision will be on a point of law and the correct decision on a point of law cannot be said to decide questions relating to other portions of the estate. Even if the decision on the point of law in this case holds good in some subsequent case, it will mean nothing more than that the right law has been applied but however this may be, as the value of the subject-matter of the suit in the Court of First Instance is not Rs. 10,000 this provision cannot be brought into play.

Lastly, it is urged that the case should be certified to be otherwise a fit one for appeal to His Majesty in Council. Where a case is otherwise unappealable, their Lordships of the Privy Council have laid down in *Moti Chand's* case that leave should not be granted unless there is some substantial question of law of general interest involved.

We are unable to hold that there is any such substantial question involved in the present case.

The powers of co-heirs in respect of alienation of joint and undivided property are well settled. The decision as to the doctrine of *lis pendens* cannot be described as of general interest and there is no substantial question of law to justify the grant of a certificate.

Had the case been one satisfying the restrictions as to value, as our decree confirmed that of the Court of First Instance, it would have been necessary to hold that the appeal involves some substantial question of law. It may be that for purposes of that provision the questions arising in this case might have been held to justify the grant of a certificate; but for the grant of a special certificate, the questions involved must be not merely substantial but must be of great public or private importance, and we are unable to hold that they are such in the present case.

For these reasons the application for leave to appeal must stand dismissed with costs. Advocates' fees five gold mohurs.

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Revision
No. 114B of
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February
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Before Mr. Justice Duckworth.

PO ME v. KING-EMPEROR.*

Indian Arms Act, 1878—Section 4—Definition of Arms—Dahs.

The true criterion is not whether a *dah* is an “*u-pyat*” but what was the intention of the maker as regards its purpose.

King Emperor v. Hamyit, (1910) 5 L.B.R., 207—referred to.

Read Reference by the learned Sessions Judge, Prome. The weapon referred to in *King Emperor v. Hamyit* (1) was held to be intended primarily for domestic and agricultural purposes. It was called a “*Dashe-u-pyat*” and was said to be of the usual type. Exhibit B is clearly intended to be used as a sword or *dahlwe*, and is sheathed as such. It also has a grip bound with cane to give the hand a secure hold. I consider it to be an arm as defined in the Arms Act.

Next I will deal with *dahs* Exhibits A and D. Exhibits A and D are “*dashe-u-pyat*” in the sense that the point (if any was ever there) has been cut off. But they are both of very great length, and Exhibit A has decorations and a “*thwe chaung*” which, apart from its length, tend to show that it was not intended primarily for domestic purposes. Exhibit B has no such decorations or “*thwe-chaung*” but its extreme length and handiness serve to show that it was intended primarily for a weapon of offence.

It is my opinion that these two *dahs*, of which the blades are 22 $\frac{3}{4}$ inches long, are arms, and that the true criterion is not whether any given *dah* is an “*u-pyat*” but what was the intention of the maker as regards its purpose.

As regards Exhibit C this is in my opinion the ordinary village *Dashe-u-pyat*. The blade is only 16 $\frac{1}{4}$ inches long and it is adapted more clearly to domestic and agricultural needs.

I would remark that Exhibits A and D appear to be the usual kind of *Dashe*, which is carried in Lower Burma by persons who commit dacoity. They are indiscriminately known “*Lingin*” *Dahs*, “*Hngetkyidaung*” *Dahs*, or “*Dashe-u-pyat*” and I have no doubt that they are intended to be

* Reference made under Section 438, Criminal Procedure Code, by J. P. Doyle, Esq., Sessions Judge, Prome, to set aside the sentence of fine (Rs. 20) passed on the accused by Maung Kin Maung, 2nd Additional Magistrate, Paungde.

(1) (1910) 5 L.B.R., 207.

weapons. I see no reason, therefore, to set aside the conviction in the case in question, in which Exhibit A was the exhibit. The proceedings may be returned.

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Before Sir Sydney Robinson, Kt., Chief Judge, and Mr. Justice Macgregor.

Civil 1st
 appeal
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THE CHETTY FIRM OF S.R.M.S. ARUNACHELLAM CHETTY v. (1) KO PO YAN; (2) KO KYAUNG TAIK; (3) THE LONDON RANGOON TRADING COMPANY, LIMITED; (4) THE BURMA RAILWAYS COMPANY, LIMITED.*

March 13th,
 1922.

N. M. Cowasjee—for appellants.

Young and Leach—for 3rd and 4th respondents.

Transfer of Property Act, 1882—Section 137—Contract Act, 1872—Section 178—Railway receipts—Negotiability of—Documents of title.

While Railway receipts are "documents of title" to goods within the meaning of section 178 of the Indian Contract Act, they are not of necessity documents which *ipso facto* transfer the ownership of goods; to do that they must be negotiable; they are not such in form and there is no proof that they are negotiable by the custom of the paddy trade in Rangoon.

Ramdas Vithaldas Durbar v. Amerchand and Company, (1916) I.L.R. 40 Bom., 630; Nacheappa Chetty v. Irrawaddy Flotilla Company, (1913) I.L.R. 41 Cal., 617,—referred to.

Robinson. C.J., and Macgregor, J.—The facts of this case are practically undisputed. The 2nd defendant, Kyaung Taik, had received from time to time large sums of money from the 3rd defendants, the London-Rangoon Trading Company, Limited, for the purpose of buying paddy for them. He was still owing them over Rs. 13,000 which he had to make good by the supply of paddy. They agreed to take paddy from him at the rate of Rs. 160 per 100 baskets. He went to Mandakay and there made arrangements with the 1st defendant, Po Yan, telling him that if he would buy paddy for him he would sell it to the London-Rangoon Trading Company, Limited, who were paying Rs. 160. Po Yan had no capital and he arranged with the plaintiffs, the Chetty firm, that they should finance his purchases, assigning to them the Railway receipts for all

* Appeal against the judgment of Maung Kin, J., on the Original Side.

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paddy dispatched as collateral security for hundis that were to be executed.

It is perfectly clear that the plaintiffs were fully aware of the arrangements come to. Po Yan bought paddy and consigned it to the London-Rangoon Trading Company, Limited, to be delivered at their Patheinyun Mill siding. For each dispatch a hundi was drawn by Po Yan on Kyaung Taik and the hundi was sent by the plaintiffs to their Rangoon branch for acceptance and collection, together with the Railway receipt relating to that consignment assigned by Po Yan, the consignor, to them. When each consignment was loaded in trucks and the Railway receipt issued, Po Yan, taking with him his vendors or their brokers, went to the Chetty who advanced the price and then took the hundis and the Railway receipts. The paddy was carried by the Railway Company, the 4th defendants, and delivered at the 3rd defendants' mill siding where it was immediately unloaded by Kyaung Taik's men. After the paddy had been inspected and passed, it was taken over by the 3rd defendants. Delivery was given by the Railway Company without production of the Railway receipt. This was in accordance with the standing arrangement between the Railway Company and the 3rd defendants, the Railway receipts being collected weekly and submitted together with the freight due.

It is not denied that the plaintiff Chetty gave no notice either to the 3rd defendants or to the Railway Company that the Railway receipts had been assigned to him for value specifically applied to the purchase of the paddy. All the paddy was delivered between the 20th and 23rd of November, 1918.

The plaintiff Chetty on learning that his Rangoon branch could not find Kyaung Taik, came down to Rangoon on the 25th, that is after delivery had been given and taken. Kyaung Taik then accepted the hundis but he did not meet them. Subsequently, as he could not obtain payment from either Po Yan or Kyaung Taik, the Chetty brought the present suit in which he claims a decree against the 1st and 2nd defendants for the amount due to him on the hundis: he asks for a declaration that he had a valid charge and lien for the amount so found due on the paddy covered by the Railway receipts, and further for a decree that the 4th defendants, or in the alternative the

3rd defendants, should hand over the paddy to him or pay its value to the extent of the amount found due from the 1st and 2nd defendants.

The 1st defendant confessed judgment. The 2nd defendant did not defend the suit though he appeared as a witness for the 3rd defendants. The 3rd defendant Company pleaded that they had a contract with the 2nd defendant to supply them 12,000 baskets of paddy at Rs. 160 per 100 baskets, and as the 2nd defendant owed them Rs. 13,500, it was agreed that the price of paddy delivered under this contract should be set off against the previous amount due. They admit receipt of the paddy; they allege that they paid for it by writing off Rs. 5,600 against the previous debt and paying Rs. 774-1-0 in cash; they allege they received the paddy from the 2nd defendant and that they had no knowledge that the paddy belonged to any other person, or that any third party had any interest whatever in the paddy or its value; they urge that it was the bounden duty of the plaintiff to have informed them immediately and plaintiffs' failure to do so absolves them from all liability.

The Railway Company deny that the plaintiff has any lien on the paddy; that they gave delivery in ignorance of the alleged claim and deny that plaintiff was entitled to any relief against them.

There can be no doubt on the evidence in this case and on the documents that were executed that Po Yan purchased the paddy for and on behalf of the 2nd defendant. He bought it under an arrangement by which it was agreed that the paddy should be consigned to the 3rd defendants at their mill siding. He purchased it with the knowledge and on the understanding that it should eventually be sold to the 3rd defendants. The plaintiff was also fully aware of these facts. He knew exactly when the paddy was dispatched, and he knew, or must be presumed to have known, that the paddy would not be kept lying about in waggons but that it would be unloaded without delay.

So far as the Railway Company was concerned he knew that if they delivered the paddy to the consignee they would be merely carrying out completely the contract that they had entered into with the consignor.

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The plaintiff must, therefore, have been aware that the 3rd defendants would take delivery of the paddy in due course without delay, that the paddy was consigned to them and that they would have no reason to suppose that there were any other claims against this paddy if he did not give them notice of the assignment of the Railway receipts to him. Knowing all this he appears to have taken the most leisurely action and made no attempt to give any such notice to either the Railway Company or the 3rd defendants. Under ordinary circumstances, therefore he could have no claim as against either the 3rd or the 4th defendants unless the Railway receipts were documents that were negotiable and transfer property in the goods by assignment merely. It is on this point that the appellant mainly bases his appeal.

The argument is that Railway receipts are documents of title to goods within the meaning of section 178 of the Indian Contract Act and that, therefore, a valid pledge of such documents might be made. Leaving aside the question whether the pawnee, in this instance, can be said to have acted with ordinary care in a manner that a careful man of business would act, the argument is based on the provisions of sections 4 and 137 of the Transfer of Property Act, but for the provisions of section 137 such a document would have required to be transferred by an assignment in writing, coupled with notice to the holder of goods.

Section 137 lays down that in respect of certain specific documents or instruments which are for the time being by law or custom negotiable, and also in respect to any, mercantile document of title to goods, those provisions should not apply.

To the section is appended an explanation which is a definition of the expression "Mercantile document of title to goods." It lays down that this expression includes, amongst other things, Railway receipts and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize either by endorsement or by delivery, the possessor of the document to transfer or receive goods, thereby represented. The section does not purport to go beyond providing that documents that fall within the scope of its terms shall not be

subject to the special requirements of Chapter 8 as regards transfers of actionable claims.

Now, it may be admitted that Railway receipts are "Mercantile documents of title to goods," but they are documents which are not by law negotiable, and in order that they should be given the attribute of negotiability, it must be established that by custom they are treated as negotiable in the particular trade and at the particular place where the claim to negotiability is advanced.

In paragraph 967 of Halsbury's "Laws of England," Volume 2, page 565, it is said: "There remain, however, always the same prime requirements with which an instrument must comply before it can be accorded negotiability. One of these requirements is the form of the instrument itself, the other custom of trade in regard to it"

Great reliance was placed on the decision of their Lordships of the Privy Council in the case of *Ramdas Vithaldas Durbar v. Amerchand and Company* (1). That was a case dealing with Railway receipts as used in connection with the cotton trade in Bombay. The case dealt with the right of stoppage *in transitu*. The High Court of Bombay in dealing with section 137 of the Transfer of Property Act had called attention to the significance of the division into two classes of Mercantile Documents of title mentioned in section 137; Bills-of-Lading stand apart in that "the purchaser who takes the Bill-of-Lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship in requiring him to attorn to his rights," and the learned author from whom the quotation is made goes on to say: "but when the goods are on land, there is no reason why the person who received a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill-of-lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore."

(1) (1916), I.L.R. 40 Bom., 630.

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They held that the enactment of section 137 put an end to the question, but on the case coming up on appeal before their Lordships of the Privy Council, they held that on the evidence that had been given in that case, the custom of merchants in the cotton trade at Bombay in respect of Railway receipts had been established and that that custom accorded negotiability to these documents; and their Lordships go on to say: "It is, therefore, unnecessary to consider whether, apart from evidence as to the ordinary course of business, the effect of sections 4 and 137 of the Transfer of Property Act No. 2 of 1900 would be conclusive on the point. It is clear that, even without the assistance of these sections, the receipts in question are 'documents showing title to goods' within sections 102 and 108 and 'documents of title to goods' within section 178 of the Indian Contract Act."

To my mind it is clear that their Lordships of the Privy Council did not regard the matter as so certain and clear as the Appellate Court in that case had considered; or otherwise they would have decided the case on that ground also. It is not necessary to go so far as to say that their judgment indicates grave doubt as to the result of section 137, but the authority does not help us to a decision in this case, for in the case before us no evidence has been led to show that by the ordinary course of business these documents have acquired the attribute of negotiability in Rangoon. They have in Bombay in the cotton trade, but it does not follow from that that they have in Rangoon in the paddy trade.

There are remarks, however, in their Lordships' judgment which are of great assistance. They say: "In the first place it is to be observed that 'title' in both expressions, (Instrument of title, document of title) can relate only to the right to receive delivery of the goods to which the instrument or document relates. It can have nothing to do with ownership. A bill of lading may in this sense be an instrument or document conferring title; but, if so, the same is true of all the other documents contained in the genus 'document of title.' The fact that a document confers title in this sense cannot, therefore, be used as the distinguishing mark of a particular species of the genus. The truth is that the only point in

which a bill of lading differs from other 'documents of title' is that its assignment, whether upon a resale or by way of pledge, operates as a constructive delivery of the goods to which it refers. The appellant's counsel was unable to mention, and their Lordships are not aware of any other document with this peculiarity. . . . "

A bill of lading transferred by endorsement and delivery transfers ownership of the goods; no other documents, though they may be "documents of title" to goods, can transfer, by mere assignment and delivery, the ownership of the goods though they may transfer the right to receive the goods.

In my view, therefore, section 137 merely deals with the manner in which the documents to which it relates can be transferred, but it does not affect the result of the transfer when made. In order that such a transfer should have, in the case of Railway receipts, the effect of transferring the ownership of the goods, it must be established that they are negotiable. They are not negotiable by law; they are not rendered negotiable by section 137 of the Transfer of Property Act, and there has been no attempt to prove in this case that they are negotiable by the custom of merchants in Rangoon.

There is, I think, authority for this view in the case of *Natcheappa Chetty v. Irrawaddy Flotilla Company* (2). Their Lordships of the Privy Council were dealing with a very similar claim to the present one. That was based on a Mate's Receipt, which is practically the equivalent, in the Irrawaddy Flotilla Company's business, of the Railway receipt in the Railway Company's business. Their Lordships said, after quoting section 137: "Their Lordships are of opinion that this document was not a negotiable document in the sense of this section of the Statute. It was not a document of title. There was no authority by law to give to an assignee by transfer of that document any right as against the shipowner except upon the usual form of an assignment as between the shipper and his assignee. That usual form must be accompanied by notice to the shipowner which charges him with the fact of the assignment, and makes him responsible to the assignee instead of the original shipper. There is great difficulty in cases of this

(2) (1913), I.L.R. 41 Cal., 670.

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kind, in avoiding being misled by terminology. Each of the categories attempted has failed. The document is not a bill of lading, not a Mate's receipt, and not a statutory negotiable instrument. The simple fact remains that this is a document which charges the respondents with receipt of certain goods from Chowdhry, under a bargain to convey them by ship to Rangoon for a stipulated freight and on certain conditions, and the duty arising from it was to deliver the goods to Chowdhry or to his nominee at Rangoon. In complete compliance with that duty the goods so placed in the possession of the shipowner for carriage were duly delivered.

"In these circumstances their Lordships see no reason to doubt that the judgment reached in the Court appealed from is correct. It is a simple ordinary receipt for goods. Why should these goods not be delivered to the person who is said to have handed them to the shipowner? Assuming the "Mate's Receipt", as it is called, to have been lost, was the owner of the goods, who then handed them to the shipowner, not to be entitled because the receipt had disappeared, to possession of his own goods from the carrier whose freight he was willing to pay?

"Their Lordships are of opinion that that simple statement of the point shows that there is no legal foundation for the position that this was a document of title, and that the goods passed upon the transfer of it."

Their Lordships then dealt with the result of the clauses in the conditions which are very similar to the clauses in the Railway receipts.

As regards the necessity for the production of the Mate's receipt before delivery can be given; "In the opinion of their Lordships the sentences now quoted from the circular of the respondent Company merely set forth a mode in which in conducting their own business, the respondent Company would protect themselves in the course of their trade. But they cannot be founded upon by other parties as forming any part of any obligation to them restrictive of their freedom, or methods of action in conducting their own affairs. As against customers they afford protection to the Irrawaddy Flotilla Company, and they give an intimation or warning that they shall not part with the goods unless Mate's receipts are given

up, or otherwise unless a guarantee be obtained. But this protection of themselves they could freely give up if satisfied of the identity and solvency of the owner or nominee of the owner who demanded the goods at the port of delivery. And it is wholly *jus tertii* for any person in the position of the appellants (who are money-lenders who had made certain trading advances to Chowdhry and make claims against him for the paddy) to plead that that clause of the shipowners' circular constitutes an obligation upon which they as outside parties are entitled to found."

Lastly, dealing with the case founded upon tort in respect of giving delivery without the production of the Mate's receipt, their Lordships say: "It is difficult to figure it; but the thing upon which tort was founded was some failure of duty. The failure of duty apparently was this: that the Irrawaddy Flotilla Company had suspicions raised in their minds or might have had suspicions raised in their minds, as to the expediency of parting with these goods unless on production of the Mate's receipt to Chowdhry, who himself handed them over to them, because some financiers like the appellants, might have claims upon them. . . ." They discard the argument.

It, therefore, seems to me that there is ample authority to support the opinion that I have expressed above, namely that these Railway receipts, while they are "documents of title" to goods within the meaning of section 178, are not also of necessity documents which *ipso facto* transfer the ownership of the goods; to do that they must be negotiable; they have not the attributes of negotiability in form and there is no proof that they have become negotiable by the custom of merchants.

As regards the Railway Company the appeal must fail, for the Railway Company entered into a contract and they have performed that contract in its entirety. The terms of their Railway receipts do not impose on them any duty not to give delivery unless and until the Railway receipt is produced. They have reserved to themselves in express terms the right to give delivery without the production of the Railway receipt and they exercised that right in the present case, and it must have been known to anyone who gave the matter a moment's thought not only that they would, but that they were bound to, exercise that right.

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The Railway Company had the arrangement with the 3rd defendants that is mentioned earlier in this judgment, and if they were to insist on the production of Railway receipts in every instance, the whole of the paddy trade of this Province would be dislocated. The shortage of waggons would be heavily accentuated, and there is every reason, therefore, why they should avail themselves of the right to dispense with the production of Railway receipts, which they have reserved.

As regards the 3rd defendants, the appeal also fails. They had agreed to accept from the 2nd defendant paddy at a certain rate; paddy arrives at their mill siding consigned to them; it is taken delivery of by the 2nd defendant's servants and unloaded; they examine the paddy and accept it and pay for it; they had had no notice from anyone of any dealing with the Railway receipts; they had no privity of contract with Po Yan; he was not their seller and no assignment by him could bind them, and certainly not without notice.

The sole ground, therefore, on which the appellant's claim could succeed as against defendants 3 and 4 would be that the Railway receipts were documents of such a character that property in the goods had passed to the plaintiff by the assignment of the Railway receipts. They are not negotiable instruments; they are not instruments which by transfer pass the ownership of the goods.

On every ground, therefore, in my opinion, the appeal fails as regards the 3rd and 4th defendants, and as regards the 3rd and 4th defendants it must be dismissed. We, therefore, confirm the decree of the Court below with costs throughout.

Before Mr. Justice Pratt and Mr. Justice Duckworth.

MAUNG TUN GYAW v. MAUNG PO THWE. *

Giles—for appellant.

Chari—for respondent.

*Evidence Act (I of 1872)—section 92—Meaning of words
“Between the parties.”*

Section 92 of the Evidence Act applies to all parties to a document whether the question in dispute is between the parties on the one side and the other or between the parties on the same side. Parties on one side to a deed cannot be allowed to show that that transaction, though purporting to be a sale, is a mortgage.

Mulchand v. Madho Ram, (1888) I.L.R. 10 All., 421; *Shamsh-Ul-Jahan Begam v. Ahmed Wali Khan*, (1903) I.L.R. 25 All., 337; *Maung Kyin v. Ma Shwe La*, (1918) I.L.R. 45 Cal., 320; 9 L.B.R., 114—referred to.

Pratt and Duckworth, JJ.—The appellant, Maung Tun Gyaw, as a widower, married Ma Kha, a widow, some 20 to 25 years ago. The plaintiff-respondent, Maung Po Thwe, claims to be the *kittima* adopted son of Ma Kha and her previous husband.

* * * * *

The history of the land is shown by the documentary evidence in the case. It was first of all mortgaged by Tun Gyaw and Ma Kha to U Po Khine and Ma Myit on the 22nd of March 1907. The paddy land in question was stated to measure 196'70 acres and three acres of Dhani garden were also included in the mortgage. Then on the 29th of June 1908, as they were unable to pay up the mortgage, Maung Tun Gyaw and Ma Kha transferred this land outright to U Po Khine and Ma Myit for Rs. 5,500. In addition to the amount due on the mortgage, they appear to have received some consideration in cash. (With reference to this transaction, it is part of the plaintiff's case that there was a collateral verbal agreement that the land should be re-conveyed at the same price.) Almost four years later, or on the 18th of May 1912, U Po Khine and Ma Myit re-conveyed the same land to Ma Kha alone for Rs. 5,500. On the 5th of August 1919, Tun Gyaw and Ma Kha executed what is called a second mortgage of 163'64 acres of this same land to Ko Po Wa and Ma Thein Me for Rs. 3,500 the first mortgage being referred to in the registered bond.

* First Appeal against the judgment passed by Maung Po Han, District Judge, Hanthawaddy.

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First
Appeal
No. 118
of 1921.
March
29th, 1922.

1922.
 MAUNG TUN
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 THWE.

On the 10th of June 1920, Ma Kha executed the deed under which Po Thwe claims in this suit. There are two other transactions which must be referred to. On the 11th of May 1912 or one week prior to the re-conveyance to Ma Kha by U Po Khine and Ma Myit, there was a sale of certain land which Tun Gyaw claims as his *payin* property and which has been found to have been his *payin* land. The vendors were Po Hlaing and Ma Hte (who were said to be the mortgagees), Tun Gyaw, Ma Kha, Ma The U and a minor, Maung Ba Sein and the purchasers were Ko Tha Zan and Ma Si. The price was Rs. 3,290 and the area sold was 35'57 acres. It is not contended that Maung Tun Gyaw did not receive this money. Then on the 18th of May 1912, or on the same day as the conveyance to Ma Kha by U Po Khine and Ma Myit, Ma Kha purports to have sold to Maung Po Sa and Ma Mya for a sum of Rs. 3,376, 36'55 acres out of the land which is the subject of this suit. We may add that at a later date it appears that she sold another 66 acres. The importance of these last mentioned transactions of the 11th of May and of the 18th of May by Tun Gyaw and Ma Kha is that it is probable that they provided the funds for the repurchase of the 196'70 acres from U Po Khine and Ma Myit.

Now there is no doubt that the transaction of the 29th of June 1908, whereby the land was transferred outright to U Po Khine and Ma Myit for Rs. 5,500 must be taken as an absolute sale. If so, the property ceased to be Ma Kha's *payin* property. Four years later it was re-conveyed by the vendees to one of the vendors. The fact that it was re-conveyed to only one of the vendors is not of great importance, because at that time it is an admitted fact that Maung Tun Gyaw was heavily involved in debt and was actually an inmate of the Civil Jail. It would be, therefore, not at all likely that the property would have been re-conveyed in the names of the two vendors.

It is important here to consider with what funds this repurchase could have been made. It is clear that Ma Kha by selling 36 and odd acres of the land did not realize more than Rs. 3,376. So far as we are able to see, it is not explained whence she obtained the balance to make up the sum of Rs. 5,500 unless, as on full consideration we think to be the

case, that balance was made up from the sale proceeds of Tun Gyaw's *payin* land dated the 11th of May. We cannot see our way to avoid holding that this money was included in the money necessary for this re-purchase. Taking this view, it is manifest that the property could no longer be treated as the *payin* property of Ma Kha, but must be considered to have become the *lettetpwa* property of Tun Gyaw and Ma Kha.

We think that the learned Judge of the District Court was in error in thinking that Tun Gyaw's money was not included. On this decision alone, it would be possible to decide this appeal, but there is another question which has been argued before us which, we consider, it is necessary to go into. Mr. Giles has argued that inasmuch as Maung Po Thwe claims on behalf of Ma Kha and as her representative in interest, he must be treated as though he were a party to the sale of the 29th of June 1908, and that, therefore, he cannot raise the question that that transaction was in effect a mortgage, and that the re-conveyance of the 18th of May 1912, was merely a redemption thereof. Mr. Chari on behalf of Maung Po Thwe has advanced the argument that, although Mr. Giles' contention might hold good if it was between the parties on the one side and the other in the sale of the 29th of June 1908, yet it cannot be held to be of any avail in the present instance, because here we are dealing with a question between the parties on one side *alone*, namely, Tun Gyaw, and Ma Kha as represented by Maung Po Thwe. He urges that section 92 of the Evidence Act has, therefore, no application, and he relies upon the case of *Mulchand v. Madho Ram* (1), which was followed in the case of *Shamsh-ul-Jahan Begam v. Ahmed Wali Khan* (2). It was there held that the words in section 92 of the Evidence Act "between the parties to any such instrument" refer to the persons who on the one side and on the other came together to make the contract or dispose of property and would not apply to questions raised between the parties on the one side only of the deed regarding their relations to each other under the contract.

We do not quarrel with this statement of the law, but in our opinion the Allahabad Court went too far if it intended to lay down that the parties on one side of a deed, as between

(1) (1888) I.L.R. 10 All., 421.

(2) (1903) I.L.R. 25 All., 337.

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themselves, were able to contradict, vary, add to or subtract from, its terms by means of parol evidence. We consider that the meaning of section 92 is clear, and that it has application to all parties to a document. Quite apart from section 92 of the Evidence Act, it would, of course, be possible for the parties on one side of a deed to show by parol evidence their mutual relations the one with the other. That they should be able to show with reference to any transaction to which they are the parties on one side, that such transaction, though purporting to be a sale, is a mortgage, we are unable to hold.

The decision of their Lordships of the Privy Council in the case of *Maung Kyin v. Ma Shwe La* (3), is binding, and following that ruling we are of opinion that Maung Po Thwe was precluded from showing that there was any collateral verbal agreement which would have rendered the transaction of the 29th of June, 1908, in effect, a mortgage. As a matter of fact, the only direct evidence on the point is that of Ma Kha who calls that transaction a "temporary sale." The rest of the evidence, that it was in effect a mortgage, is merely circumstantial, and we do not think that, where direct evidence is prohibited, circumstantial evidence could be permitted to prevail.

* * * * *

Before Mr. Justice Pratt and Mr. Justice Duckworth.

Civil
 Miscellaneous
 Appeal
 No. 220 of
 1921.

A. K. R. M. C. T. CHETTY FIRM BY ITS AGENT KRISHNAPA
 CHETTY v. MAUNG AUNG BWIN. *

April 6th,
 1922.

Chari—for appellants.

Maung Tin—for respondent.

Insolvency—Provincial Insolvency Act, 1920—Sections 9, 24 and 25—Right of creditor to prove debt.

When a creditor applies to have a debtor adjudicated insolvent and the alleged debtor denies the debt, the creditor must be allowed to prove the debt before the Insolvency Court, if he can, and cannot be required to prove it by means of a regular suit.

Pratt and Duckworth, JJ.—In this case a creditor Chetty applied to the District Court, in order to have a debtor adjudicated insolvent.

* Miscellaneous Appeal against the order passed by Maung Kyaw U, District Judge, Pegu.

(3) (1918) I.L.R. 45 Cal., 320 ; 9 L. B. R., 114.

For the purpose of this appeal, it will be enough to state that, when the debtor appeared, he denied that he owed any debts to the creditor.

The learned Judge of the District Court declined to permit the creditor to prove the alleged debts, requiring him to prove them by means of regular suits. He held rightly that in order to enable a creditor to file such an application, there must be a debt, which must be a liquidated sum payable either immediately or at some future time. This represents section 9 of Provincial Insolvency Act, 1920. The learned Judge however went on to hold that clause (b) of section 9 seems to show that a debt must be indisputably due, and remarked that he could find no section, which empowered an Insolvency Court to make an inquiry into a question of this nature.

Here he was clearly wrong.

Section 24 (1) (a) of the Act lays down that the Court shall require proof of, amongst other matters, the fact that the creditor is entitled to present the petition. This undoubtedly refers back to section 9. This latter section lays down the conditions which entitle a creditor to present a petition against a debtor. In these are included that there must be a debt due to the creditor aggregating not less than Rs. 500. Therefore it was incumbent on the petitioner to prove the debt.

The Act is based on the English Bankruptcy Act. Section 5 (5) of that Act provides expressly for an alternative reference of the creditor, in such circumstances as the present, to relief by regular suit. The omission of any similar provision from the Indian Act indicates that thereunder there is no similar alternative method of procedure, but that the creditor must be allowed under section 24 to prove the debt, when the debtor denies it. Further section 25 provides for dismissal of the petition on failure of the creditor to prove his right to present it, and this obviously involves the necessity of proving that right, in order to avoid dismissal.

The learned Judge of the District Court went astray by referring to the statements of objects and reasons given by the Legislature in enacting the Provincial Insolvency Act. The passage which he quoted relates, *not* to proceedings prior

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to adjudication, *but* to proceedings *in* the Insolvency, *i.e.*, after the adjudication of the insolvent. The order of the District Court, dated 10th November 1921, is set aside, and the case is remanded to that Court, with orders to proceed according to Law. The appellants' costs will be paid by respondent, with advocates' fees of three Gold Mohurs.

Civil
1st Appeal
No. 164 of
1920.
April 7th,
1922.

Before Sir Sydney Robinson, Kt., Chief Judge, and
Mr. Justice Macgregor.

1. KO TINE, 2. MA SA U, 3. U TUN GYAW, 4. MA MA GYI, 5. KO PO DAUNG, 6. MA DWA, 7. KO BA OH, 8. DAW SONE, 9. MAUNG SEIN, v. ISMAIL CASSIM MOORAD.*

Chari—for appellants.

Jeejeebhoy—for respondent.

Transfer of Property Act, section 60—Mortgage—Effect of Mortgagee purchasing part of the property mortgaged—Redemption.

A and B mortgaged certain land to C and subsequently sold part of it to D, E, etc. C sued A and B on certain promissory notes, obtained a decree and brought to sale and purchased a portion of the mortgaged land. A and B allowed some of the land to be sold for arrears of land revenue and thereby reduced the mortgage security. C then successfully sued D, E, etc., for a mortgage decree for the full amount against the remaining property.

Held,—on appeal, that C, the mortgagee, having purchased a portion of the mortgage security, ceased to have any right to claim that the security should not be split up, and the mortgagors or their assignees became liable for only so much of the mortgage debt as was proportionate to the portion of the mortgage security that they had purchased; and they were entitled to redeem the lands they purchased on payment of a proportionate amount of the mortgage security. In order to ascertain this amount the mortgagee must bring into account the full value of the property purchased by him.

Bhora Thakur Das v. The Collector of Aligarh, 14 C.W.N. 1634—distinguished.

Kallan Khan v. Mardan Khan, (1906) I.L.R. 28 All., 155; *Hamida Bibi v. Ahmed Husain*, (1909) I.L.R. 31 All., 385; *Narayan v. Ganpat*, (1897) I.L.R., 1 Bom., 619; *Chunna Lal v. Anandi Lal*, (1897) I.L.R. 19 All., 196—followed.

Robinson, C.J., and Macgregor, J.—The facts of this case may be briefly stated as follows:—

Defendants 1 and 2 executed and registered a mortgage on various parcels of land in favour of the plaintiff-respondent.

* First appeal against the judgment passed by Maung Po Han, District Judge, Hanthawaddy.

Subsequently the mortgagors sold various portions of the lands mortgaged to the other defendants in this case and they have erected buildings of various kinds on them. The plaintiff-respondent then brought a suit against defendants 1 and 2 based on certain promissory notes and obtained a decree. In execution of that decree he brought a portion of the mortgaged properties to sale and became himself the purchaser. Subsequently the mortgagors allowed certain of the mortgaged properties to be sold for arrears of land revenue and thereby reduced the mortgage security. The plaintiff-respondent then brought the present suit seeking a mortgage decree for the whole amount then due against the remaining properties excluding those that he had purchased himself and those that had been sold for arrears of revenue. The defendant-appellants raised various defences and, amongst others, the defence that any decree that the plaintiff-respondent may obtain should be limited so as to preserve their rights to redeem the lands purchased by them on payment of a proportionate share of the mortgage debt. The mortgage deed contained a provision as to interest. Interest was fixed at 2 per cent. per mensem and the money was to be repaid by the 10th of February 1907. The deed provided that on failure to so redeem interest at the increased rate of 3 per cent. per mensem for the sum so remaining unpaid should be payable. The defendants did not in their written statement contest the liability to pay this increased rate of interest. It was apparently assumed that the plaint correctly set forth the terms of the mortgage deed.

The learned District Judge has granted a mortgage-decree as prayed for, except in respect of certain defendants as to whose liabilities the claim was given up. Issues were drawn:—

(a) As to whether the plaintiff was estopped from asserting his right against all or any of the defendants who were *bonâ fide* purchasers.

(b) As to whether his suit was barred by limitation.

(c) As to whether, if there was no estoppel, the plaintiff was entitled to a mortgage-decree against the buildings as well as the lands, and lastly

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(d) As to whether any of the defendants would be entitled to redeem the lands purchased by them for a proportionate share of the mortgage debt.

As regards these issues, the trial Court stated that no evidence was led as to them, no argument was put forward and no law quoted in support of the defendants' claims. The judgment states that the learned District Judge cannot see how estoppel or limitation or right to redeem by payment of a proportionate amount of the debt arises.

In this appeal, which has been very ably argued by Mr. Charit he raises two points only:—

(i) That the defendants were entitled to redeem the lands purchased by them on payment of a proportionate share of the mortgage, and

(ii) That the increased rate of interest was a penalty and should not have been decreed.

As to the first point, he urges that in consequence of the plaintiff-respondent's purchase of certain of the mortgaged properties, the rights of the mortgagor and mortgagee in those properties were vested in one and the same person, viz., the mortgagee, and that, therefore, it must be held that the mortgage, which was originally indivisible, has become opened out. He relies on section 60 of the Transfer of Property Act and urges that, even though the section does not apply to the district where these lands are situate, the principle to be deduced therefrom should be applied as a rule of equity and good conscience.

For the respondent, it is urged that the whole of the burden of the mortgage could be and was transferred to the remaining properties, and reliance was placed on the decision of their Lordships of the Privy Council in the case of *Bhora Thakur, Das v. The Collector of Aligarh*, (1). In that case two properties were mortgaged and the mortgagee purchased one of them in execution of a decree obtained by him on a prior mortgage, and it was held that the other property continued liable for the entirety of the mortgage debt, and that a purchaser of the equity of redemption in such property could not be allowed to redeem it on payment of a proportionate share.

(1) 14 C.W.N., 1034.

of the debt. It appears to me that this is an authority dealing with an entirely different case. The mortgagee held two mortgages, and he was entitled to bring the mortgaged property to sale in execution of his mortgage-decree without affecting the liability of the property to satisfy the subsequent mortgage. This was an appeal from the decision of the High Court of Allahabad, which is reported in I.L.R., 28 Allahabad, page 593, and in the last page of the judgment of the High Court, the difference between the two positions is pointed out. It is there said: "Supposing A and B are mortgagors of certain property which they have jointly mortgaged to C. Now if C, the mortgagee himself, purchases the equity of redemption from A, it is clear that he cannot be permitted to throw on B's share the whole burden of his mortgage. In such a case B's share can only be saddled with the proportionate amount of the mortgage-debt. But if, as is the case here, C's purchase was at a sale in execution of a decree obtained on a prior mortgage, the case is different." I am, therefore, of opinion that the decision relied on is to be distinguished and does not apply to the facts of the present case.

In *Kallan Khan v. Mardan Khan* (2) it was held that where a mortgagee acquires a part of the mortgaged property, and thus a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, the indivisible character of the mortgage is broken up, and one of several mortgagors may in such a case redeem his own share only on payment of a proportionate part of the mortgage money. Again, in the case of *Hamida Bibi v. Ahmad Husain* (3), it was held that where the equity of redemption in respect of a part of the mortgaged property becomes vested in the mortgagee, whether by purchase or by inheritance or otherwise, there is a merger of rights and the integrity of the mortgage is broken up. And in *Narayan v. Ganpat* (4), it was held that the general rule is that a mortgagee has a right to insist that his security shall not be split up, but in the following cases there is no objection to do so and to rateably distribute the mortgage debt:—

(a) "When the mortgagee does not insist on keeping the security entire.

(2) (1906) I.L.R., 28 All., 155.

(3) (1909) I.L.R., 31 All., 335.

(4) (1897) I.L.R., 21 Bom., 619.

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(b) "When the original contract itself recites that the mortgagors join together in mortgaging their separate shares.

(c) "When the mortgagee has himself split up the security, e.g., when he buys a portion of the mortgaged estate. In this case he is estopped from seeking to throw the whole burden on that part of the property still mortgaged with him."

I will refer to one more authority. In *Chunna Lal v. Anandi Lal* (5), it was held that when a mortgagee holding a mortgage over two distinct properties brings one of them to sale in execution of a decree against the mortgagor not being a decree on his mortgage and purchases such property himself, the whole mortgage is not necessarily thereby extinguished; but, if the mortgagee subsequently seeks to bring the mortgaged property to sale in execution of a decree obtained on his mortgage, he will have to bring into account the full value of the portion of the mortgaged property purchased by him under his former decree.

There can, I think, be no question on the authorities, and under section 60 of the Transfer of Property Act, in cases to which that Act applies, that the law is so, and the mortgagee is entitled to claim that his security should not be split up but, if he becomes by his own act the purchaser of a portion of the mortgage-security, he has no longer any right to claim that the security should not be split up, and the mortgagors or assignees for mortgagors become liable for only so much of the mortgage debt as is proportionate to the portion of the mortgage-security that they have purchased. That this is so is merely equitable. Further, it is clear that the plaintiff's advisers realized the liability of the plaintiff to keep the lands purchased by him still subject to the mortgage and the right of the mortgagors and others to claim that this should be so. Accordingly, we find in the plaint that the amount paid for the properties which were brought to sale is said to have been credited towards the mortgage debt, partly for principal and partly for interest. The object clearly was to avoid having to account for the full value of the property. It is, I think, clear that in a case such as this, the purchasers from the mortgagors would be entitled to redeem the lands they

purchased on payment of a proportionate amount of the mortgage security.

It is urged that they cannot obtain the relief they seek in the present suit and that they must bring a separate suit against the mortgagee for this purpose. To compel them to bring a separate suit would clearly result in great delay, both in the present suit and before the rights of the various parties could be finally settled. I can see no reason, and I know of no rule of law, which would prevent the Court from passing a decree, limiting plaintiff's rights in consequence of certain findings of fact or of law.

Plaintiff seeks a mortgage decree and defendants desire and plead that, if he is to be granted a decree, that decree should be limited by setting out that he is not entitled to one indivisible decree against the whole of the properties, but only to a decree which would permit of each individual redeeming his own lands on payment of a proportionate share. I therefore think that there is no force in this objection and that it should not be allowed to prevail.

As to the second point: It is true that no defence was taken in the written statement as regards the interest; but seeing that the interest claimed was clearly one which might raise the question of its being a penalty and that the defending defendants were not parties to the document, the plaintiff ought clearly to have set out the terms of the deed as to interest. The matter depends on an interpretation of a clause in the deed. It is not a simple question of fact, and, that being so, I think it may be raised in first appeal.

It is perhaps not clear from the wording of the mortgage deed whether the increased rate of interest is to be payable from the date of the mortgage or only from the date of default; if the former, the provision is clearly a penalty and cannot be allowed; if the latter, it will fall within the provisions of the added explanation to section 74 of the Contract Act.

The interest originally fixed, namely 24 per cent. per annum was a very high rate of interest in the case of a mortgage with valuable properties as security; and to increase the rate of interest to 36 per cent. per annum has had the result

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of practically doubling the amount of interest that is now payable.

In my opinion, it is clear that, had the facts been brought to the notice of the Court, it would have been held that this stipulation for an increased rate of interest was a stipulation by way of penalty and that only 2 per cent. per mensem would have been decreed.

It is to be noted that plaintiff has waited for nearly 12 years in order to exact the uttermost farthing out of the increased rate of interest.

The appeal must, therefore, be accepted and the decree of the trial Court must be varied. There will be the usual mortgage decree for the principal sum due with interest at 2 per cent. per mensem up to the date of decree and for six months thereafter, with subsequent interest at 6 per cent. per annum, with costs.

The decree will set out that each of the defendant-appellants is entitled to redeem the lands purchased by him from the mortgagors on payment of a proportionate share of the mortgage debt and that that proportionate share shall be arrived at by including the property purchased by the mortgagee himself, which is to be taken at what is fixed as its value and not merely at the amount realized at the auction sale. The whole of the mortgaged properties having been valued, the amount due will be proportioned amongst the various properties and the amounts for which each defendant-appellant may redeem his lands shall be set out and a time fixed within which he must do so. This will necessitate an enquiry, and I would remand the case to the District Court for an enquiry to be made on these lines and the result of the enquiry, together with the opinion of the District Judge, will be returned to this Court when a final decree will be drawn up.

As to costs: No orders can be passed at present, but the matter will be decided on the return being made.

Before Sir Sydney Robinson, Kt., Chief Judge, and Mr. Justice
Macgregor.

P. R. P. L. CHETTY FIRM BY THEIR AGENT NACHIAPPA
CHETTY v. (1) G. LON POW; (2) MA KIN; (3) MA PON.*

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Appeal No.
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1921.
April 7th,
1922.

Judge—for appellants.

Dantra—for 1st and 2nd respondents.

*Code of Civil Procedure, section 47 and Order XXI, rule 2—
Adjustment of decree not certified through alleged fraud of decree-
holder—Execution Court not to enquire into uncertified adjustment
— Power to treat objection as application to certify.*

It is not open to the Court of execution to enquire into the fact of a payment or adjustment of a decree which has not been certified or recorded as provided in clause (1) of Rule 2 of Order XXI, Civil Procedure Code, even when the conduct of the decree-holder is alleged to have been fraudulent. Where an application for execution is opposed on the ground of payment or satisfaction or adjustment, the Court may treat this objection as an application to certify the alleged payment or adjustment, provided the objection be taken within the period of limitation allowed by law, viz., 90 days from the date of payment or adjustment, but section 18 of the Limitation Act cannot be used to extend the period of limitation.

Trimbak Ramkrishna Ranade v. Hari Laxman Ranade, (1910) I.L.R. 34 Bom., 575; *Hansa Godhaji Marwadi v. Bhawa Jogaji Marwadi*, (1916) I.L.R. 40 Bom., 333—dissented from.

Biroo Gorain v. Musst. Jaimurat Keor, 16-C.W.N., 923—followed.

Budrudeen v. Gulam Moideen, (1913) I.L.R. 36 Mad., 357; *Parma Ram v. Lehna Singh*, (1919) 54 P.R., 349—referred to.

Robinson, C.J., and Macgregor, J.—The appellant Chetty obtained two decrees against the present respondents in Civil Regular No. 91 of 1916 and Civil Regular No. 50 of 1918. On the 27th February 1920 a compromise was effected between the parties, and a petition was filed in Civil Regular No. 50, praying that full satisfaction of the decree might be recorded and certain other orders passed. It is not denied that both parties were present and both were represented by Counsel. The Deputy Registrar did not understand the prayer, and counsel asked for time to amend it, agreeing that prayer was defective. After an adjournment, Counsel appeared and amended the prayer, presumably after consultation with their clients. Ninety days from the 27th February expired on the 27th May 1920, and on the 1st June the decree-holder

* Miscellaneous Appeal against the order passed by Rutledge, J., on the Original Side.

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applied to execute the decree in Civil Regular No. 91. Notice of this application was admittedly received by the respondents some time prior to the 30th August of that year but it was not until the 23rd November 1920 that they filed an objection to the execution petition. It is said that the intervention of the long vacation accounted for this. The objection was that the decree had already been satisfied together with the decree passed in Civil Regular No. 50, and that the petitioner's application was fraudulent. They were called upon to file particulars of the alleged fraud, and on the 7th January 1921 they filed a long affidavit in which they set out that the compromise effected related to both the decrees; that the Chetty had brought them the petition written out and assured them that it contained the terms of their agreement in full and believing him they had signed the petition and gone to Court and saw it filed, and thus believed that satisfaction of both the decrees had been entered up. They only learnt that this was not so when the application for execution in Civil Regular No. 91 was served on them. The Deputy Registrar on this ordered an enquiry under section 47 into the alleged fraud. An appeal was filed from that order, and the learned Judge on the Original Side upheld the Registrar's order. This appeal is against that decision.

The questions that we have to decide therefore are as to whether the satisfaction of the decree in Civil Regular No. 91 never having been certified, the executing Court is bound not to recognize it, if this be so, whether the objection to the petition for execution may be treated as an application to the Court under Order XXI, rule 2 (2), and, if so, whether it is not barred by limitation.

As to the first point, respondents rely on the case of *Trimbak Ramkrishna Ranade v. Hari Laxman Ranade* (1) which was followed in *Hansa Godhaji Merwadi v. Bhawa Jogaji Marwadi* (2). In the latter case it was held that the Court should not in the exercise of its duty under section 244, Civil Procedure Code, allow a clear case of fraud to be covered and condoned by the provisions of Order XXI, rule 2. Three further cases were referred to. There was in this case

(1) (1910) I.L.R. 34 Bom., 575. (2) (1916) I.L.R. 40 Bom., 333.

a very clear indication of fraud on the part of the decree-holder. The contrary opinion has however been taken by the Calcutta and Madras High Courts in earlier cases which were not referred to.

In *Biroo Gorain v. Musst. Jaimurat Koer* (3) it was held that it is not open to the Court of execution to enquire into the fact of a payment or adjustment of a decree which has not been certified or recorded as provided in Clause 1 of Rule 2 of Order XXI even when the conduct of the decree-holder is alleged to have been fraudulent. The point for consideration is thus stated in the judgment, whether "although the adjustment has not been certified in the manner contemplated by Rule 2 of Order XXI of the Code of 1908, as the conduct of the decree-holder is fraudulent, it is open to the Court to investigate the allegations of fraud under section 47 of the Code of 1908." Reference is made to all the cases cited in the later Bombay case referred to above. It is pointed out that the Madras case was dissented from in a later decision of that Court, and that the Calcutta case when analysed did not support the proposition contended for. The learned Judges say, "The contention of the learned Vakil for the appellant in substance is that in cases where the conduct of the decree-holder is fraudulent, it is open to the Court, in fact it is incumbent on the Court to investigate the allegation of fraud under section 47 of the Code of 1908, notwithstanding the clear and specific provisions of Clause 3 of Rule 2 of Order XXI. This argument is obviously fallacious. A proceeding under Rule 2, Order XXI, is a proceeding under section 47 of the Code, inasmuch as it decides a question between the parties to the suit and relating to the execution, satisfaction or discharge of the decree made in the suit. If the contention advanced on behalf of the appellants were to prevail, in all cases where fraud is imputed to the decree-holder, the provisions of Clause 3 of Rule 2, Order XXI would become nugatory; in other words, the provisions of Rule 2 would be superseded by the wider provisions of section 47." The Court further decided the question of limitation that has been raised in the case before us, and they said, "We may further point

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out that even if it is established that the conduct of the decree-holders is fraudulent the judgment-debtor is not entitled to obtain an extension of the time within which an application is to be made to the Court under Clause 2 of Rule 2 of Order XXI. Section 18 of the Limitation Act which deals with the effect of fraud is clearly of no avail to the appellants," and after quoting that section, the judgment goes on, "It is not suggested on behalf of the appellants that they were kept by means of fraud from the knowledge of their right to make the application mentioned in Clause 2 of Rule 2 of Order XXI. Their grievance is that they have been kept by means of fraud from the exercise of their right to make this application; consequently, if we were to accede to the contention of the appellants, we should have to substitute for the phrase "from the knowledge of such right," the phrase "from the exercise of such right." But clearly the knowledge of a right and the exercise thereof are fundamentally distinct things. * * * But if the judgment-debtor, notwithstanding the express provisions of Clause 2, Rule 2, Order XXI, still enters into an adjustment with the decree-holder out of Court and omits to take the necessary precaution of making an application within the time allowed by law, he has no just ground of complaint when the decree-holder takes advantage of his omission to seek the protection of the law."

Again, in the case of *Budrudeen v. Gulam Moideen* (4) it was laid down that a payment or adjustment of a decree cannot be recognized by any Court executing the decree unless the same has been certified in the manner allowed by law. The clause is applicable where in answer to an application for execution an adjustment is set up by the judgment-debtor. Further, though a judgment-debtor's counter-petition may be treated as an application to certify, the same cannot be allowed in the absence of any fraud if it is made beyond 90 days of the adjustment. It is pointed out that the judgments relied on by the Bombay High Court quoted above had been dissented from and how some were to be distinguished.

Finally, in the case of *Parma Ram v. Lehna Singh* (5) the two Bombay cases cited above were differed from, and the

(4) (1913) I.L.R. 36 Mad., 357.

(5) (1919) 54 P.R., 349.

same view as is now taken in the Calcutta and Madras High Courts was adopted.

The balance of authority clearly therefore appears to be in favour of the view that the provisions of Clause 3 of Rule 2 of Order XXI are not to be rendered nugatory by the application of the general provisions of section 47 of the Code. With that view we entirely agree. The provision was enacted to prevent the Courts being flooded with false defences to applications for execution setting up a payment or adjustment in part or in whole which would be made merely to gain time. The decree-holder is bound to certify an adjustment, and the judgment-debtor is also given a right to apply to the Court to certify an adjustment. If the adjustment be not certified, it is entirely the fault of the judgment-debtor, and he does not deserve the consideration of the Court if he fails to take the very ordinary precaution of seeing that payment or adjustment made by him is certified to the Court. We can see no reason why this should not apply also in the case of an alleged fraud. It is perfectly true no doubt that the courts should not readily lend themselves to assist fraud in any shape or form, but the judgment-debtor upon whom such fraud may have been practised is not without remedy. He may sue for damages for the fraud committed and recover any payment made twice over or he may take action in the criminal courts. The Legislature must have considered the various arguments on either side and deliberately included this provision. It is not for a Court of Justice to refuse to observe the provision because hardship may result in consequence. The Court has merely to interpret and apply the law as laid down by the Legislature, and we should not be doing our duty if we acted otherwise. Even if an enquiry were held and the fraud was established, the provision of Clause 3 of Rule 2 of Order XXI would not be affected. But it is open to the Court to oppose a fraud so far as it can do so within the law, and where an application for execution is opposed on the ground of payment or satisfaction or adjustment, the Court may rightly treat the objection so taken as an application to the Court to certify the alleged payment or adjustment provided that the objection be taken within the period of limitation allowed by law.

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The fraud, if any, was committed in the present case on 27th February 1920; the appellant waited until 90 days from that date had expired, and a few days later the application to execute was filed. The objection which we are asked to treat as an application under Order XXI, Rule 2 (2) was not filed within 90 days; it was not in fact filed until the 23rd November 1920 but it was filed 83 days after the respondents became aware of the alleged fraud. It is however, claimed that they are entitled to the benefit of section 18 of the Limitation Act, and it is admitted that if they can rely on the provisions of that section, their application would be within time. Regarding the matter from that point of view, it is necessary to consider what allowance section 18 grants. It lays down that where any person having a right to make an application has by means of fraud been kept from the knowledge of such rights, the time limited for making the application shall be computed from the time when the fraud first became known to him. The respondents in the present case had the right of making an application to have the adjustment certified. It cannot be said, and it is not urged, that they were not aware of the right that they had, but it is argued that they were under the belief that the adjustment had been certified, and that the appellant by the fraudulent assurance to them that the petition contained all the terms of the agreement arrived at had concealed from them, or had caused them to be in ignorance of the right to move the court to correct the prayer of that petition. That appears to us to be an entirely different matter altogether. If we treat the objection to the petition for execution as an application, it is to be regarded as an application under Clause 2, Rule 2 of Order XXI, and section 18 only deals with the knowledge of their right to make such an application. Their argument really is that they were prevented from exercising the right of which they were fully aware by the fraud of the appellant. Section 18 does not deal with the exercise of the right, but with the knowledge of the right, and we agree with the learned Judges of the Calcutta High Court in *Biroo Gorain's* case which we have quoted above.

Respondents chose to rely, if their allegations were true, on what the appellant told them. They never adopted the

ordinary precaution of having the petition interpreted to them before signing it. They had counsel who appeared at the presentation of that petition on their behalf; they never attempted to find out from him what the petition contained. When the prayer of that petition was amended, they again never attempted to find out what the petition set forth though they were undoubtedly consulted as to the amendment of the prayer. They had ample opportunity of stultifying the fraud, if fraud there was, and they declined to avail themselves of it. But however that may be, we are compelled to the conclusion that the alleged fraud cannot now be enquired into under section 47 because of the special provisions of Order XXI, Rule 2 (3). We are further of opinion that they are not entitled to the benefit of section 18 of the Limitation Act, and that therefore even if their objection to the petition for execution were treated as an application under Order XXI, Rule 2 (2), it is barred by time.

We must therefore accept the appeal and reverse the order of the court below with costs throughout.

Before Sir Sydney Robinson, Kt., Chief Judge, and Mr. Justice Macgregor.

R.M.A.R.R.M. ARUNACHALLAM CHETTY v. V.E.R.M.N. SOMASONDARAM CHETTY.*

Lentaigne—for appellant.

Das—for respondent.

Indian Limitation Act, 1908—First Schedule, Article 85—"Mutual, open and current account."

A, as agent for two firms, B and C, kept an account of certain money transactions between B and C, each of whom at various times advanced money to the other. Interest was calculated on these loans and was debited and credited in the accounts kept by A. The credit balance was sometimes in favour of B and sometimes in favour of C. After a certain date the mutual accounts always showed an increasing credit in favour of B. The Court of first instance held that the account was one to which Article 85 of the Limitation Act applied and against this decision an appeal was filed.

Held—that each of the loans between B and C gave rise to a right of set off or claim against the borrower and these transactions gave rise to reciprocal demands from time to time. The accounts were never settled and the fact that A for his own convenience totalled up the

* First Appeal against the judgment passed by Rigg, J., on the Original Side.

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position and made entries of the result in each firm's books did not close the account. The account was therefore a mutual, open and current account. The fact that after a certain date C was always in debit did not affect the position, since the accounts were continued in the same form and payments by C after that date was shown as loans, not as payments in partial discharge of the debit balance against him. Article 85 therefore applied to the suit to recover the balance due on the account:

Ebrahim Ahmed Mehter v. S. Abdul Huq, 8 L.B.R., 149; *Ram Pershad v. Harbans Singh*, 6 Cal. L.J., 158; *Hirada Basappa v. Gadigi Muddappa*, 6 Mad. High Court Reports, 142; *Ganesh v. Gyani*, (1898) I.L.R. 22 Bom., 606; *Chittar Mal v. Bihari Lal*, (1910) I.L.R. 32 All., 11—referred to.

Robinson, C.J., and Macgregor, J.—The sole question for decision in this appeal is whether the case falls within the purview of Article 85 of the Limitation Act or not.

The 1st defendant formed a partnership with three members of the K. P. K. Firm, who are defendants 2, 3 and 4. Defendant 3 was sent to Rangoon as agent for this firm. He is a relative of the plaintiff who had also a firm in Rangoon. Plaintiff sought defendant's permission to defendant 3 acting as his agent in Rangoon as well as agent for the defendant. Defendant agreed to this and defendant 3 carried on the business of both firms. He submitted copies of his accounts to the defendant from time to time, but in 1913 he ceased doing so. This naturally aroused the suspicions of defendant 1, who thereupon withdrew the power of attorney he had granted him and dissolved the partnership. Plaintiff came to Rangoon to inspect his business. He found that the accounts showed that the defendant firm owed him a large sum of money and he induced defendant 3 to execute three promissory-notes in his favour covering this amount. Plaintiff brought three suits on these three promissory-notes. Defendants not having received any accounts did not know what their position was and denied owing plaintiff anything. They further pleaded that defendant 3's power of attorney having been cancelled, and the partnership dissolved to the knowledge of the plaintiff, the suits should be dismissed.

I heard the cases on the Original Side myself and decided them in defendant's favour. An appeal against that decision was dismissed. During the pendency of the appeal plaintiff filed the present suit, claiming to recover the balance due on a mutual open and current account where there had been

reciprocal demands between the parties. The learned Judge on the Original Side held that the account was one to which Article 85 of the Limitation Act applied, and this appeal is against that decision.

It is necessary to consider what was the course of dealings between the parties. It is not denied that for several years at any rate plaintiff from time to time advanced moneys to the defendants and defendants from time to time advanced moneys to the plaintiff. Defendant 3 kept an account of these mutual loans. When plaintiff made a loan to defendant he credited plaintiff with that sum and debited defendant with a like amount in their respective books. On numerous occasions, generally at the end of each month, he would total up the position and show the amount at debit or credit in each firm's books. On at least three occasions he calculated interest on the loans made, calculating interest on the amounts lent by plaintiff and on the amounts lent by defendant, deducting one from the other, and adding the credit for interest to whichever party was entitled to it. In the earlier days of these dealings the credit rested sometimes with plaintiff and sometimes with defendant. The last occasion on which the credit rested with the defendant was in March, 1913. Subsequent to that date the balancing of the mutual accounts always showed an ever-increasing credit in favour of the plaintiff.

On these facts Mr. Lentaigne for the appellant argues that there was no mutual open and current account, because there were no payments made by plaintiff on defendant's account to third parties. He argues that there was no equitable right of set off which is the foundation on which the theory of mutual open and current accounts is based, and that there were no reciprocal demands between the parties. He further argues that even if the account could properly be considered to be a mutual open and current account, it ceased to be so after March, 1913, because from that time onwards the balance in favour of the plaintiff was always very large and any payments made by defendant would be merely payments in reduction of this balance and would give rise to no demand on the part of the defendant.

The Tamil year, it is agreed, ends in April. The present suit was filed in March, 1917, and the period of limitation

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under Article 85 would run from the close of the year in which the last item, admitted or proved, is entered in the account. The learned Judge in the Court below has calculated the three years from April, 1914, and, therefore, holds the suit to be within time. It is urged that on the second branch of his argument limitation should have been calculated from April, 1913, and that, therefore, the suit would be barred, even though Article 85 applied.

Great reliance has been placed on the ruling of this Court in the case of *Ebrahim Ahmed Mehter v. S. Abdul Huq* (1). The question there was whether the account was a mutual account. It was held that 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." It was found that the plaintiff was acting merely as agent of the defendant, and that the defendant throughout the dealings had done nothing for and on behalf of, or on account of, the plaintiff, and that, therefore, there was no mutual account. That authority has, it appears to us, no real bearing on the present case. He further relied on the case of *Ram Pershad v. Harbans Singh* (2). So far as the ground of mutuality is concerned, we agree entirely with both these decisions. In the latter case it was held that "mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits." Where one party only makes payments to, or for, or on account of, the other and that other only from time to time makes payments in repayment, it is perfectly clear that the accounts cannot be said to be mutual within the meaning of Article 85. Reference is made to the case of *Hirada Basappa v. Gadigi Muddappa* (3), where the learned Judge observed that "in order that accounts might be mutual, there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations." In this case also, as in many others, it is pointed out that "a shifting balance,

(1) 8 L.B.R., 149.

(2) 6 Cal. L.J., 158.

(3) 6 Mad. High Court Reports, 142.

sometimes in favour of one side, and sometimes in favour of the other, is a test of mutuality, but its absence is not conclusive proof against mutuality." With that expression of opinion we also agree.

The same view was taken in the case of *Ganesh v. Gyanu* (4) and in the case of *Chittar Mal v. Bihari Lal* (5). In the Calcutta case to which we have referred, it was lastly held that "the mere circumstance that on one solitary occasion there was a sum to the credit of the defendants in the books of the plaintiffs, does not make the account between the parties a mutual account in which there has been reciprocal demand between the parties."

The present case is one of mutual loans, and as an authority for such a case, we have the decision in *Ganesh v. Gyanu* (4) cited above. It is there pointed out: "The dealings between the parties in the present case were admittedly in the nature of mutual borrowings, and where the transactions are of that character, the test of a shifting balance, sometimes in favour of one party, and sometimes in favour of the other, though valuable as an index of the nature of the dealings, is not always decisive." It was held that in a case of mutual borrowings, interest being charged on such loans, the account was a mutual, open and current account creating independent obligations.

In the present suit, defendant 3, as the agent for both parties, lent money on behalf of one firm to himself as agent for the other firm. Each of these loans gave rise to a right of set off or claim against the borrower, and as both plaintiff and defendant were on occasions the lenders, these transactions gave rise to reciprocal demands from time to time. The accounts were never settled. The fact that defendant 3 for his own convenience totalled up the position and made entries of the result in each firm's books did not close the account. It was continuous and was, therefore, an open and current account, and having regard to the mutual loans, it was also a mutual account.

If we consider the case as it stood at the end of March, 1913, there can be no question that at that time either party could have said to the other: "I have a claim against you"

(4) (1898) I.L.R. 22 Bom., 606. (5) (1910) I.L.R. 32 All., 11.

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and could have demanded that the accounts be gone into and these mutual claims set off one against the other; that interest should be calculated not merely on the final balance found due after the set off was made, but on each loan as it was made.

It remains, therefore, to consider whether the position was altered after March 1913, because, after that date, defendant was always in debit. The accounts were continued in exactly the same form. There is nothing to show that any loans made by the defendant to the plaintiff subsequent to that date were made merely as payments in partial discharge of the debit balance against him. They continued to be made as loans, and defendant 3 in his evidence clearly so states. This being so, we are unable to see that there is any ground for saying that they were merely discharges and not loans as heretofore. This being so, the mutual dealings between the parties were continued in exactly the same way as they had been previously carried on. The fact that the balance no longer shifted is not in itself sufficient to justify us in holding that the account had ceased to be a mutual, open and current account.

We are, therefore, of opinion that the decision of the learned Judge on the Original Side was correct and that the appeal must be dismissed with costs throughout, the decision of the Court below being confirmed. We remand the case to the Lower Court in order that the Commissioner may now take the accounts in order to ascertain what sum is due by either party.

Before Mr. Justice Macgregor.

KING-EMPEROR v. NGA THET SHE.*

Criminal Procedure Code—Sections 215 and 423—Quashing of commitment—Revisional power of High Court.

Section 215 of the Criminal Procedure Code does not apply to a commitment ordered by a Sessions Judge under section 423, but the High Court can deal with the order of commitment in exercise of its powers of revision.

In the matter of Kalagava Bapiah, (1904) I.L.R. 27 Mad., 54; *Pirithi Chand Lal v. Sampatia*, 7 C.W.N., 327—followed.

This is a reference made by the Sessions Judge of Hanthawaddy to quash the commitment of Maung Thet She for trial before him on a charge under section 372, Indian Penal Code. The commitment was made by the Special Powers Magistrate of Insein, on the direction of the Sessions Judge's predecessor in his order in Maung Thet She's appeal (No. 46 of 1922) against his conviction under section 372 by the same Magistrate.

As the commitment was not made under any of the sections mentioned in section 215 of the Code of Criminal Procedure but was made by direction of the Sessions Judge acting, under section 423 of that Code, it appears to me that the question of quashing the commitment does not arise, but that the Sessions Judge's order for commitment can be dealt with by this Court in the exercise of its powers of revision: see e.g., *In the matter of Kalagava Bapiah* (1), and *Pirithi Chand Lal v. Sampatia* (2).

* * * * *

* Reference made under section 488, Criminal Procedure Code, by H. C. Moore, Esqr., I.C.S., Sessions Judge, Hanthawaddy, to quash the commitment of Maung Thet She for trial before him on a charge under section 372, Indian Penal Code.

(1) (1904) I.L.R. 27 Mad., 54.

(2) 7 C.W.N., 327.

*Criminal
Revision
No. 364B of
1922.
May 1922,
1922.*

Civil 1st
Appeal
No. 43 of
1921
April 6th,
1922.

Before Mr. Justice Maung Kin and Mr. Justice Macgregor.

(1) MA PWA OH, (2) MAUNG BA KYAW, (3) MA E KIN,
(4) MAUNG BA SEIN, (5) MAUNG BA TIN, (6) MA
SAIK KAUNG, (7) MA TIN TIN v. (1) MA LAY,
(2) MAUG PO KYIN, (3) MAUNG KIN.*

Ormiston with *May Oung*—for appellants.

Puget—for respondents.

Buddhist Law—Inheritance—Rights of relations of husband and wife who die within a short time of each other.

In a case in which a husband and wife died within two months and fourteen days of each other, it was held that the interval was not so short as to justify the application of the special rule that the relations of both should inherit. The decision in such a case does not depend on the question whether there was time for the survivor to obliterate the joint nature of the property.

Ma Gun Bon v. Maung Po Kyaw, (1897-1901) 2 U.B.R., *Buddhist Law: Inheritance*, p. 66; *Ma Kadu v. Ma Yon*, (1904-06) 2 U.B.R., *Buddhist Law: Inheritance*, p. 7—referred to.

Ma Myin v. Ma Toke, 10 L.B.R., 288—followed.

Maung Kin J.—Maung Po Mya and Ma So Tin, who were Burmese Buddhists, were married in 1905. After the marriage they lived for nine years with the wife's mother at Pegu till 1914. They then bought a house at Mazinchaung, a suburb of Pegu, and went and lived there. In January 1917, Maung Po Mya fell ill. In November 1917 as Ma So Tin had also fallen ill, the couple went to live again with the wife's mother. Her name is Ma Pwa O. They continued to live there till March 1918 when they went to live with Maung Ba Gyaw, a brother of the wife's. The husband did not get better, and was taken to Rangoon for treatment. The wife accompanied him. At Rangoon they lived at the house of Ma Lay, the husband's step-mother. After some time the wife returned to Maung Ba Gyaw's house at Pegu where she died on the 17th October 1918. The husband died at Rangoon on the 31st December 1918, two months and fourteen days after the wife's death.

Maung Po Mya's was a long, continued, and dragging out illness; Ma So Tin's was spasmodic and recurring. Some considerable property was left by them, and the present suit was brought by Ma So Tin's mother and her brothers against Maung Po Mya's step-mother and his half brothers and half

* First Appeal against the judgment passed by *Maung Kyaw U*, District Judge, Pegu.

sisters; also by the widow of a deceased brother of Maung Po Mya and her daughter by that husband.

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The first plaintiff claims to be the sole heir to the property left by Maung Po Mya and Ma So Tin; the other plaintiffs claim to be the sole heirs of Maung Po Mya and Ma So Tin in case the claim of Ma So Tin's mother fails.

The District Court held that Maung Po Mya and Ma So Tin died within a short interval of each other, that the plaintiffs were therefore entitled to share with the defendants, and that the plaintiffs' share would be one-half of the estate.

The defendants appeal to this Court, and the only point for consideration is whether the lower Court was right in holding that two months and fourteen days was a short interval within the meaning of Burmese Buddhist Law.

Extracts from *Dhammathats* bearing upon the point are quoted in section 308 of the Kinwun Mingyi's Digest, Volume I. I will take *Manukye* first, as it is one of the most important and respected *Dhammathats*.

The essential words are—
နှစ်ဦးသားသို့၍ သေခြင်းအရာရှိက်။ ရှေ့။
နှောင်း။အထင်မရှား။ထင်ရှားသော်လည်းထ။
နှစ်။မသိမ်းမခြား မိဖြစ်က။ နီးရာဝေထုကြစေ။

Richardson has translated these words as follows:—

If they both die about the same time, so that it is not clear who was the survivor, or if it be known, but the months or years not ascertained, let the relations of both inherit according to consanguinity.

This translation is not quite correct. I think the following is a correct translation containing no gloss whatsoever:—

In the matter of the two dying, (if) it is not certain which died first and which later, (or) though it is certain (but) month or year not having elapsed (intervened), let the next-of-kin (of both) divide (share).

Extracts from the following *Dhammathats* contain the same or practically the same words:—

Dhamma, Dayajja and Amwchon.

The extract from *Manu* is as follows:—

If a month does not intervene but they die one shortly after the other as if they died together, let the relations of both share equally.

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In my opinion what the *Dhammathats* mean is that, if the husband and wife die practically together so that it cannot be said which dies first, the relatives of both should share their property equally. But though it is ascertainable which dies first, the relations of both should be allowed to share equally in their property, if the interval between the two deaths is short. In using the expression “ထူးဝါး” or “နှစ်လခွဲ”, I do not think the *Dhammathat* writers meant one month or one year, or months or years; they only meant time of some duration. The *Dhammathats* are not enactments by the King or his *Hluttaw*, so that we cannot construe words like “ထူးဝါး” in the literal sense. I think the words really mean time, and they are used to indicate that the time must be of some duration. It seems clear to me that, if the words are taken in their literal sense, one would not know whether a month or a year is contemplated. The first rule is that, if it is not ascertainable who dies first, the relations of both should be allowed to come in for their inheritance, and it must have been thought just and equitable to extend it to the case where the interval of time between the two deaths was short. That being the case, we must be careful not to carry the extension too far so as to interfere with the ordinary rule of succession.

The reasons for the exceptional rule have been given by Mr. Burgess (J.C.) in *Ma Gun Bon v. Maung Po Kywe* (1) and by Mr. Irwin (J.C.) in *Ma Kadu v. Ma Yon* (2). The reason given by Mr. Burgess might or might not have been in the mind of the *Dhammathat* writers, but it is certainly plausible. The reason given by Mr. Irwin is not only plausible but, in my opinion, part of it must have been in the mind of the *Dhammathat* writers.

The *Dhammathat* writers must have recognized that the relations of a childless couple would expect to inherit from their relative, but that would, however, depend upon which dies first according to the ordinary rule of law popularly stated “ထီးသေလျှင်မိသားစုကရ၊ မိသေလျှင်ထီးကရ” “The wife takes when the husband dies; the husband takes when the wife dies.” And it would be hard to apply this rule of law to a

(1) (1897-1901) 2 U.B.R., *Buddhist Law : Inheritance*, p. 66.

(2) (1904-06) 2 U.B.R., *Buddhist Law : Inheritance*, p. 7.

case when the couple died one shortly after the other, because it was only an accident or the caprice of fate that it so happened that the relative of one side died before that of the other. The order of the deaths might very well have been different, so the authors extend the rule which applies to a couple dying so practically together as not to be ascertainable which was the survivor. But the interval must not be too long, because the rule is only an extension.

In my judgment the rule of law as stated above is clearly deducible from the *Dhammathats*. If it cannot be ascertained which of a couple died first, certain relatives of both will inherit their property, but the same should be the result where it is ascertainable which died first and the interval of time between the two deaths is short; certain relatives of both will inherit their property. But the difficult point for decision is what is a short interval.

As I said before, “*တန့်တန့်*” must be taken to be time of some duration, not necessarily month or year which the expression would mean if rendered literally into English. In *Ma Kadu's* case Mr. Irwin held two months and seven days to be a short interval within the meaning of the rule, but I agree with Sir Sydney Robinson, C.J., who in *Ma Myin v. Ma Toke* (3) says that it appears to have been assumed in *Ma Kadu's* case that that time would be a short interval, and in that case the learned Chief Judge held that any period over one month should not be regarded as a short interval. His authority for this is the indication given in the extract from *Manu* quoted above. He held that one month and twenty days was not a short interval, and that there were no special circumstances to hold that that was a short period. In my opinion two months and fourteen days is too long a period to constitute a short interval so as to make the exceptional rule apply.

Manu appears to be quite sensible, and it is the only *Dhammathat* which answers the question, what is a short interval. What it says is, “If they die one shortly after the other as if they died together but one month has not intervened, then, etc.” So that, this *Dhammathat* speaks of a short interval first and gives the period which it considers to be a short interval.

(3) 10 L.B.R., 288.

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The other *Dhammathats* only state vaguely,—“ If month or year has not intervened,” and it is impossible for any reader to say whether the authors meant one month or one year. And taking into consideration the fact that things move very quickly in these days and facilities for quick communication and travel are extensively provided, any period more than a month should not be considered to be a short interval within the meaning of the exceptional rule.

In my judgment it is immaterial whether as in this case the husband and wife were both ill and each died of his or her respective illness. The decision what is a short interval cannot depend upon such a fortuitous circumstance. Nor do I think that the decision depends upon the question whether there was time enough under the circumstances of a particular case for the survivor to do any act to obliterate the joint nature of the property. Mr. Burgess' reason for the exceptional rule does not commend itself to me, inasmuch as the *Dhammathats* do not seem to found the exceptional rule on such a reason. If there was any intention to do so, there was no difficulty in framing the rule by saying that if there had not been sufficient time to do an overt act by way of taking the joint property as the survivor's own before his or her death, let the relatives of both inherit it. As regards the reason I favour as indicated above I arrived at it as a result of my experience of my own country-men.

In the result, the plaintiff's suit is dismissed and the appeal allowed with costs throughout. By this decision it must not be taken that we have considered all the defendants to have the right of inheritance in the estate of Maung Po Mya including his inheritance from his wife, Ma So Tin.

The question who are the heirs to Maung Po Mya's estate has not been before us, and we do not decide it.

Macgregor, J.—I concur.

Before Mr. Justice Pratt.

P. KALI MUTU ASARI v. (1) MEERA HUSSEIN; (2)
ABDUL RAHMAN.*

Thein Maung—for appellant.

N. N. Sen—for 1st respondent.

Special Civil
2nd Appeal
No. 150 of
1921.

May 25th
1922.

Possession—Trespasser and real owner—Position of owner when trespass ends.

When a trespasser vacates land, possession vests again in the lawful owner, who is left in the same position in all respects as he was before the intrusion took place.

Agency Company v. Short, (1863) L.R. 13 Appeal Cases, 793 at p. 798—followed.

Plaintiff sued for possession of three fields part of a holding purchased by him from V.R.S.R.M. Chellappa Chetty on the 6th August 1919.

First defendant was sued alleging that he was in possession. Second defendant was made a party because 1st defendant pleaded that he was in actual possession as his (1st defendant's) tenant.

First defendant Meera Hussein pleaded that he was in possession under a lease from the revenue authorities.

Meera Hussein failed to prove that he was in possession under a lease and it was clearly established that he was not.

The trial Court held that as plaintiff failed to prove he or his predecessors in title had ever been in possession the burden of proving his title was upon him before defendant could be called upon to prove adverse possession.

On the evidence the Court found that plaintiff had clearly proved his title and that defendant had failed to prove twelve years' adverse possession. Plaintiff was accordingly granted a decree.

* * * * *

Defendant has failed to prove any title and there is no doubt he was a trespasser.

As suggested by the trial Court what seems to have happened is that the Chetty owner was in possession of a large holding. He did not carefully watch the boundaries and defendant was able to enter and work a small portion on the border without the real owner discovering the fact.

* Special second Appeal against the judgment passed by Maung Po Han, District Judge, Hanthawaddy, setting aside the decree passed by Maung Kyauk Taing, Township Judge of Kungyangon North.

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 HUSSEIN.

I would further point out that, even if Alla Peche had been in possession in 1907-08-09 which is not proved, on his vacating the land possession would vest again in the real owner.

The law is clearly stated by their Lordships of the Privy Council in *Agency Company v. Short* (1) "They (their Lordships) are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the *rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place.* There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose."

In view of the Land Records Map of 1908-09 and entries thereon there is no question of twelve years' adverse possession by defendant.

The finding and decree of the first Court were fully justified by the evidence.

* * * * *

The appeal will be allowed.

I set aside the finding and decree of the District Court and restore the decree of the Township Court with costs.

Before Mr. Justice Pratt,

KADER NATH SINGH v. W. C. GARRAD.*

N. N. Sen—for applicant.

Negotiable Instruments Act, 1881 — section 87 — "Material Alteration."

In a suit on a promissory note it was held that an alteration of the year of execution was a material alteration within the meaning of section 87 of the Negotiable Instruments Act,

The trial Court has held that the promissory note has been materially altered by converting the year of execution into

* Civil Revision of the judgment passed by Maung Kyaw Zan Hla, 1st Additional Judge of the Court of Small Causes, Rangoon.

(1) (1888) L.R. 13 Appeal Cases, 793 at p. 796.

Civil
 Revision
 No. 79 of
 1922.
 May 26th,
 1922.

1920 instead of 1921, the last figure a "1" being converted into a "0".

I am asked to hold that this is not a material alteration within the meaning of section 87 of the Negotiable Instruments Act.

The effect of the alteration of the date would be to make the executant liable for an additional year's interest if the altered date were accepted as the real date of execution.

I have no hesitation in holding that this amounts to a material alteration of the note.

The application is dismissed.

Before Mr. Justice Duckworth.

NGA BA SEIN v. KING-EMPEROR.*

Burma Habitual Offenders Restriction Act, 1919—Area of Restriction.

An order restricting a man to the four corners of his house at night is not a proper order under the provisions of the Act.

King-Emperor v. Nga Kala, 1 Bur. L. J., 36—referred to.

The accused Nga Ba Sein had an order of restriction passed against him under the Burma Habitual Offenders Restriction Act by which he had to report his presence to the headman every day before 6 p.m., was not permitted to leave his village-tract without the leave of the Police Station Officer at Kawa, and not depart from his house between the hours of 10 p.m. and 5 a.m. without making a report to the headman.

The case has been referred to this Court by the learned Sessions Judge, Toungoo, more especially with reference to the last portion of this Court's order, as reported in the case of *King-Emperor v. Nga Kala* (1). The Sessions Judge has rightly raised the point as to whether an order confining a man to the four corners of his own house at night is a proper order under the provisions of the Act. I am aware that this is a common form of order under the Act in the districts, and it is necessary that a definite ruling be pronounced in regard to it, especially in view of the last paragraph of the decision quoted.

* Reference made under section 438, Criminal Procedure Code, by J. M. Baguley, Esq., Sessions Judge of Toungoo, to amend the restriction order passed on the accused by Maung Ba Thin, B.A., Subdivisional Magistrate, Pegu.

(1) 1 Bur. L.J., 36.

1922.

KADER NATH
SINGH
v.
W. C.
GARRAD.

*Criminal
Revision
No. 362B of
1922.
June 10th,
1922.*

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NGA BA SEIN
KING
EMPEROR.

I have fully considered the point, and am of the opinion that it was never intended that a man should be confined to the four corners of his house at night in such cases as this, and that the narrowest limits of restriction should be the village of the man concerned, or the limits of the village to which he is restricted, as the case may be.

The Act itself does not define the limits of restriction further than laying down that a person may be restricted to any area prescribed in the order of restriction. This is in section 2. Section 10 would perhaps lead to an inference that the area must be the whole area of a village, inasmuch as it speaks of the person being able to earn his livelihood within the area of restriction. Further Rule 3 of the Police Department Notification No. 280, dated November 17th, 1919, published at page 918 of the *Burma Gazette* of November 22nd, 1919, seems to make it clear that the area shall ordinarily be the village-tract or Town where the person resides, or to which he is restricted by the order. It is going too far to restrict the person to his house within such an area. It is clear, however, that, in the case quoted from the *Burma Law Journal*, the point was never considered, either in this Court, or by the referring Sessions Judge, and the fact that in that case the man was restricted to his house at night was due to the causes suspected by the learned Sessions Judge, Toungoo, in his present order of reference. In other words it was due to oversight, and must be read as in the nature of an *obiter dictum*. The rest of that decision is correct; but that portion of it, by which the person in question was restricted to the four corners of his house at night is erroneous, and is overruled.

The first portion of the Magistrate's order is unobjectionable. With regard to the second part, it appears that the accused's village is four miles away from the police station. In order to obtain leave from the Police Station Officer, he would have to leave his village-tract, and thereby offend against the order. This is contrary to the spirit of Rule 5 of the Notification already referred to. Under Rule 6 his headman can grant him leave for three days, which would enable him to apply to the Police Station Officer, in case he required longer leave of absence.

There is another defect in the present proceedings. The Magistrate never, as provided by section 10 of the Act, satisfied himself that the accused was able to earn his livelihood within the area of restriction. I find that this error is almost universal, and shows that the Act is never carefully or intelligently read.

Accordingly the order is amended as follows:—"That the accused do report his presence every day before 6 p.m. to his headman, and that he do be restricted to his village-tract."

Before Mr. Justice Pratt.

MA THEIN MYA v. MAUNG TUN HLA.*

Maung Lat—for appellant.

Ba So—for respondent.

Buddhist Law—Divorce—Right of wife to divorce where cruelty is not proved.

Where a Burmese Buddhist husband has not treated his wife well, although his conduct does not constitute legal cruelty, the wife is entitled to a divorce on payment of the costs of the suit and foregoing all claim to the joint property of the marriage, even though the husband does not consent.

Mi Pa Du v. Maung Shwe Bauk, S.J.L.B., 607—dissented from.

Mi Kin Lat v. Nga Ba So, (1904-06) 2 U.B.R., Bud. Law, Divorce, p. 3—followed.

Po Han v. Ma Talok, 7 L.B.R., 79; *Mi Ah Pu Ma v. Mi Hnin Zi U*, 7 B.L.T., 83; *Maung Kyaw Yan v. Ma Nyo U*, 7 B.L.T., 16—referred to.

Plaintiff sued for a divorce from her husband on the ground of his ill-treatment of her.

The trial Court granted a divorce holding that defendant's conduct amounted to cruelty. On appeal the District Court held that cruelty was not proved and reversed the decree of the Township Court.

It was proved that the defendant reported to the thugyi that a gold chain was missing from his box of which plaintiff had a key, the insinuation being that she had taken the chain. Subsequently the defendant admitted that he had hidden the chain to compel plaintiff to accompany him to his parent's house.

His action was reprehensible but I agree with the learned District Judge that it cannot be construed as legal cruelty.

* Special 2nd Appeal against the judgment passed by P. W. Trutwein, Esq., District Judge, Tharrawaddy, reversing the decree passed by Maung Saing, Township Judge of Nattalin.

1922.
NGA BA SHIN
v.
KING-
EMPEROR.

Special Civil
2nd Appeal
No. 76 of
1921.

June 12th,
1922.

1922.
 MA THEIN
 MYA
 v.
 MAUNG TUN
 HLA.

It is, however, contended that even if defendant's conduct does not amount to cruelty plaintiff is still entitled to a bare or *ex-parte* divorce. In *Mi Pa Du v. Maung Shwe Bauk* (1) the Judicial Commissioner of Lower Burma held that before a Court can order a divorce against the wish of one party there must be proof either of some fault committed against the other of a sufficiently serious nature to justify divorce according to the Dhammathats or of some evil deed for which a separation of destinies can take place.

In *Mi Kin Lat v. Nga Ba So* (2) after an exhaustive discussion of the authorities Shaw, J., came to the conclusion that a Burmese Buddhist husband may sue and obtain a divorce on condition of surrendering all the joint property and paying the joint debts, and the costs of litigation, when the other party is without fault and does not consent.

Strong reasons are given for considering the decision in *Pa Du v. Shwe Bauk* (1) wrong and I consider that the learned Judicial Commissioner has established his thesis.

The ruling is discussed by Tha Gywe in his "Conflict of authority" and by May Oung in his Burmese Buddhist Law and approved by both.

The case is cited with approval in *Po Han v. Ma Talok* (3) though not on precisely the same point; but in the later case of *Mi Ah Pu Ma v. Mi Hnin Zi U* (4) the same judge appears to have recognised the right of a wife to insist on a divorce, when there has been no fault on her husband's part, on resigning all claim to the joint property.

It should be noted that in *Mi Kin Lat's* case authorities were available, which were not when the Lower Burma case of *Mi Pa Du v. Maung Shwe Bauk* was decided. In *Maung Kyaw Yan v. Ma Nyo U* (5), Parlett, J., quoted *Mi Pa Du's* case with approval, but apparently his attention was not called to the Upper Burma case of *Mi Kin Lat* or it is conceivable his conclusion would have been modified.

I am of opinion that plaintiff was entitled to a divorce on payment of the costs of the suit and foregoing all claim to the joint property of the marriage.

(1) S.J.L.B., 607. (2) (1904-06) 2 U.B.R., Bur. Law—Divorce, p. 3.
 (3) 7 L.B.R., 79. (4) 7 B.L.T., 83. (5) 7 B.L.T., 16.

As a matter of fact the joint property in the present instance appears to be a negligible quantity, but in view of the fact that defendant undoubtedly treated his wife badly, though his conduct did not amount to actual cruelty, I do not think any further penalty should be imposed as a condition of the divorce except payment of costs.

The decree of the District Court is set aside and plaintiff will be granted a decree for divorce.

Plaintiff will bear the costs in the trial Court. In view of the fact that defendant behaved badly to his wife I shall make no order as to the costs in this and the District Court.

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MA THEIN
MVA
v.
MAUNG TUN
H.L.A.

FULL BENCH.

Before Sir Sydney Robinson, Kt., Chief Judge, Mr. Justice Pratt
and Mr. Justice Macgregor.

Civil Refer-
ence No. 2
of 1922.

MAHOMED EBRAHIM MOOLLA v. S. R. JANDASS.*

June 19th,
1922.

Burjorjee with Doctor—for appellant.

Compagnac and Paget—for respondent.

Rangoon Rent Act, 1920—Section 18—Revisional jurisdiction of
Chief Court.

The First Judge of the Rangoon Small Cause Court, when disposing of a reference under section 18 of the Rangoon Rent Act, is a Court subordinate to the High Court within the meaning of section 115 of the Civil Procedure Code, and the Chief Court has jurisdiction to revise his proceedings.

Indian Engineering and Motor Co., Ltd. v. Gladstone Wyllie & Co., 26 C.W.N., 102; *Bata Krishna Pramanik v. A. K. Roy*, 26 C.W.N., 30; *Kali Dasi v. Kanai Lai De*, 26 C.W.N., 52; *H. D. Chatterjee v. L. B. Tribedi*, 26 C.W.N., 78; *Balaji Sakharam Gurav v. Merwanji Nowroji Antia*, (1897) I.L.R. 21 Bom., 279; *Vasudeva Aiyar v. The Negapatam Devasthanam Committee*, (1915) I.L.R. 38 Mad., 594; *Balkaran Kai v. Gobind Nath Tiwari*, (1819) I.L.R. 12 All., 129 at p. 156—referred to.

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

Civil Revision
No. 157 of
1921.

This is an application for revision of the order of the First Judge of the Court of Small Causes, Rangoon, on a reference under section 18 of the Rangoon Rent Act, 1920.

May 31st,
1922.

* Reference made in Civil Revision of the order passed by J. E. Godfrey, Esq., First Judge of the Court of Small Causes, Rangoon.

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 JANDASS.

It is admitted that the Judge was not acting in the exercise of his small cause jurisdiction and that no application for revision lies under section 25 of the Provincial Small Causes Act. It is contended, however, that this Court has a power of revision under section 115 of the Civil Procedure Code.

A preliminary objection has been taken to the application on the ground that the Court has no jurisdiction. Section 18 lays down that the decision of the First Judge of the Court of Small Causes shall be final, and I have little doubt that the intention of the Legislature was that the decisions should not be subject to revision by this Court.

It is argued that the First Judge of the Small Cause Court when acting on a reference under section 18 of the Rent Act is not a Court subordinate to the High Court. It is pointed out that the Act is a temporary measure providing a summary procedure for a special purpose and that the section might equally have provided for the appointment of some one to decide references, who was not a judge of a Court, and in that case the person hearing the reference would not necessarily be a Court at all.

In the *Indian Engineering and Motor Co., Ltd. v. Gladstone Wyllie & Co.* (1), the Calcutta High Court appears to have assumed that it had jurisdiction to revise the order of the Controller of Rents, Calcutta, under section 15 of the Calcutta Rents Act the provisions of which are similar to those of section 15 of the Burma Act, but the question of jurisdiction was not raised and it is suggested that the Calcutta High Court was acting under special powers conferred by its Charter and not under section 115 of the Civil Procedure Code. The provisions of section 6 of the Village Act are analogous to those of section 18 of the Rangoon Rent Act. Section 6 of the Village Act provides for investing headman with the powers of Civil Courts for petty suits and lays down that their decision shall, subject to revision by an authority appointed by the Local Government, be final.

It is obviously not intended to make the decision of headmen subject to revision by this Court or to constitute Courts subject to the High Court.

(1) 26 C.W.N., 102.

I am inclined to hold that this Court has no jurisdiction under section 115 to revise the decision of the First Judge of the Small Cause Court, but the point is one of considerable importance and should come before a Bench for decision.

I therefore refer to a Bench (Full or otherwise as the Chief Judge may determine) the question:—Is the First Judge of the Court of Small Causes, Rangoon, when disposing of a reference under section 18 of the Rangoon Rent Act, a Court subordinate to the High Court within the meaning of section 115 of the Civil Procedure Code?

The opinion of the Full Bench was as follows:—

Robinson, C.J.—The matter referred for decision of the Full Bench is stated as follows:—

Is the First Judge of the Court of Small Causes of Rangoon, when disposing of a reference under section 18 of Rangoon Rent Act, a Court subordinate to the High Court within the meaning of section 115 of the Civil Procedure Code?

Section 18 of the Rent Act enacts that “the decision of the First Judge of the Court of Small Causes of Rangoon or of the Judge of such other Court as aforesaid shall be final,” and in order that there should be no doubt as to the scope of the reference, we decided with the consent of counsel that it should further include the question whether, his decision being by the Act made final, this Court had any jurisdiction.

The Rangoon Rent Act provides for a reference from the decision of the Controller fixing the standard rent for any premises to the First Judge of the Court of Small Causes of Rangoon, or to the Judge of such other Court as the Local Government may, by rule, direct.

The question to be decided is as stated in the order of reference. It is not argued that this matter is not a case within the meaning of section 115, and if therefore the First Judge of the Small Cause Court acting in the matter of a reference is a Court, he would clearly be a Court subordinate to this Court.

A similar point has lately been more than once decided by the Calcutta High Court with reference to the Calcutta Rent Act. In the case of *Bata Krishna Pramanik v. A. K. Roy* (2) it was held that the President of the Calcutta Improvement

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Tribunal, who under that Act occupies a similar position to the First Judge of the Small Cause Court under our Act, is a civil Court. It was held that the President acting under section 18 exercised a civil jurisdiction, and the decision was based on the fact that section 24 of the Calcutta Act, which corresponds to section 23 of our Act, required him to follow as nearly as may be the procedure laid down in the Code of Civil Procedure for the regular trial of suits. A further reason was that by Rule 24 of the rules made under the Act the President was to have all the powers possessed by a civil Court for the trial of suits. The Calcutta High Court has further held that an application in revision lies against the Rent Controller's decision in *Kaui Dasi v. Kanai Lal De* (3). The same was held in a later case of *H. D. Chatterjee v. L. B. Tribedi* (4), and the jurisdiction of the High Court is assumed to exist without question in the case of *Indian Engineering and Motor Co., Ltd. v. Gladstone Wyllie & Co.* (1).

We have, however, been referred to the case of *Balaji Sakharam Gurav v. Merwanji Nowroji Antia* (5). This was an application in revision with reference to section 23 of the Bombay District Municipal Act Amendment Act (11 of 1884). Section 23 provides that if the validity of any election of a Municipal Commissioner is brought in question, certain persons may within a limited time apply to the District Judge of the district within which the election was held and that the District Judge may, after such enquiry as he deems necessary, pass an order confirming or amending the declared result of the election, or for setting the election aside. It provides further that for the purposes of this enquiry the District Judge may exercise any of the powers of a Civil Court, and that his decision should be conclusive. The Court held that the District Judge acting under this section is not a Court within the meaning of that word in section 622 of the Civil Procedure Code. The reasons for the decision are not given, but a previous decision of the Court which we have not been able to obtain is referred to. Apparently the basis of the decision is that the District Judge is therein merely a *persona designata*.

(1) 26 C.W.N., 102. (3) 26 C.W.N., 52. (4) 26 C.W.N., 78.

(5) (1897) I.L.R., 21 Bom., 279.

appointed for a special purpose. This decision was referred to and explained in the case of *Vasudeva Aiyar v. The Negapatam Devasthanam Committee* (6), and the learned Chief Justice says, "It seems to me that under the Act in question the District Judge is a *persona designata* for a specific purpose and not an officer exercising judicial functions under the Act." The Madras case was one under the Religious Endowments Act under which, when a vacancy in a Committee has not been filled up, the civil Court, which is defined to be the principal Court of original civil jurisdiction in the district in which the mosque or religious establishment is situate, is given power either to fill the vacancy or to direct the remaining members of the committee to do so, and they held that the District Judge was exercising judicial functions under the Act and not merely exercising his discretion as a *persona designata*. That case went on appeal to their Lordships of the Privy Council who held after considering the provisions of the Act that the District Judge was clearly to exercise judicial functions, and that he exercised his powers as a Court of law and not merely as a *persona designata* whose determinations are not yet treated as judgments of a legal tribunal.

It is necessary, therefore, to consider what the provisions of the Burma Rent Act with reference to the powers and duties of the Controller and the First Judge of the Small Cause Court are.

The Controller's duty is to fix the standard rent which is declared ordinarily to be the rent at which the premises were let on the 1st April 1918 ; he is given further powers in certain cases of fixing the standard rent at such amount as, having regard to the provisions of the Act and the circumstances of the case, he may deem just. He may, for instance, fix the rent higher than that which was payable on the 1st April 1918 when, in his opinion, that rent was unduly low. He is given authority by written order to require any person to furnish him with particulars as to the rent that had been previously payable. He may require him to produce his accounts and rent receipts, etc., for inspection. He is given power to summon and enforce the attendance of witnesses and compel the production of documents by the same means and so far as may be in the same

(6) (1915) I.L.R. 38 Mad., 594.

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manner as is provided in the case of a Court by the Code of Civil Procedure, 1908. He has to decide on a civil dispute as to proprietary rights between the landlord and the tenant, and it is to my mind clear that in so doing he is given, although not in express language as the President is given in Calcutta by Rule 24 of the rules made under that Act, all the powers that a civil Court could possess. In my opinion, therefore, so far as the Controller is concerned, it must be held that he is acting judicially in the exercise of a civil jurisdiction and that he must therefore be held to be a civil Court, and in the absence of anything in the Act to the contrary he must therefore be held to be a Court subordinate to this Court.

As regards the First Judge of the Court of Small Causes, he also acts as a judicial tribunal to revise the order of the Controller. In disposing of references he is directed by section 23 to follow as nearly as may be the procedure laid down in the Civil Procedure Code for the regular trial of suits. It is open to him to take further evidence and to call for further documents to enable him to deal fully with the matter. It is true that the power is conferred on the First Judge of the Court of Small Causes and not upon any Judge of that Court, and that the power is not conferred, as it is in the Calcutta Act in the case of premises situate outside Calcutta, on the principal civil Court of original jurisdiction in the district. But that alone is not sufficient to show that he is merely a *persona designata* appointed for a special purpose, or to show that he is acting merely in a ministerial or administrative capacity. He will decide questions of civil rights in the same manner as a Court exercising civil jurisdiction would do, and in my opinion he must be regarded as a civil Court and as a Court subordinate to this Court. Section 18, no doubt, provides that his decision shall be final, but there is nothing to show that this expression is used in any other meaning than in its ordinary legal meaning, *viz.*, that his order shall not be appealable. In the case of *Balkaran Rai v. Gobind Nath Tiwari* (7) it is said, "Where the Legislature has used the term 'final' for other purposes and without intending that the decision, decree or order to which it is applied shall not be appealable, it has been careful to express its intention,

(7) (1890) I.L.R. 12 All., 129 at p. 156.

of which Explanation IV in section 13 of the Code of Civil Procedure is an example." The matter is fully considered in that authority.

If either the Controller or the First Judge of the Court of Small Causes declines to exercise the jurisdiction vested in him it would seem that the parties would be without any remedy unless these officers are held to be Courts, and it is clear that the Legislature never contemplated such a result. I would, therefore, answer the reference in the affirmative, and hold that this Court has jurisdiction to entertain an application for revision.

The costs of this reference will be costs in the cause—Advocates' fees, 5 gold mohurs.

Macgregor, J.—I concur.

Pratt, J.—When I made this reference the authorities which have been cited before us were not brought to my notice or I should have hesitated to express the opinion that the First Judge of the Small Cause Court, when disposing of a reference under section 18 of the Rangoon Rent Act was not a Court subordinate to the High Court within the meaning of section 115 of the Code of Civil Procedure.

I have now had the advantage of reading the judgment of the learned Chief Judge and on further consideration I am of opinion that his view that the First Judge of the Small Cause Court must be held to be a civil Court in this connection is correct.

The intention of the Legislature was apparently to provide for an appeal from the decision of the Rent Controller to a civil Court.

It must be taken that the object in specifying the First Judge of the Court was to secure that the reference would be disposed of by the senior judge of the Court and not merely to designate the First Judge as an individual for a specific purpose.

I concur in answering the reference in the affirmative.

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Civil Revision
Nos. 157 and
158 of 1921.
July 10th,
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Before Mr. Justice Duckworth.

MOHAMED EBRAHIM MOOLLA v. S. R. JANDASS
AND OOSMAN ABDUL GUNNY.*

Burjorjee—for applicant (defendant).

Campagnac and Paget—for respondents (plaintiffs).

Rangoon Rent Act, 1920—Power of Rent Controller to set aside ex-parte orders and to review his own orders—Powers of First Judge of the Small Cause Court in dealing with orders under section 18.

The Rent Controller fixed the standard rent of a building at Rs. 120. The order was passed *ex-parte*. The next day the Rent Controller at the request of the landlord set aside his order and issued notices to both sides for evidence to be taken. This was done without notice being issued to the tenants of the application to set aside the order. Finally the Rent Controller fixed the rent at Rs. 150. Reference was made to the First Judge of the Small Cause Court who held that the proceedings after the date of the Rent Controller's first order were without jurisdiction and void.

Held,—On revision, that the Rent Controller, acting as a civil Court, had inherent power to set aside an *ex-parte* order or to review his own order, but in this case as he failed to give notice to the other side, his action in setting aside his first order and his proceedings thereafter were without jurisdiction and void. It was not necessary for the tenants to impugn his action at once; they could do so when they made a reference under section 18. The First Judge of the Small Cause Court could deal with each and every legitimate objection to the last order and not merely with its merits.

Tyeb Beg Mahomed v. Allibhai Mangalji, (1908) I.L.R. 31 Bom., 45; *Sankumani v. Ikoran*, (1889) I.L.R. 13 Mad., 211; *Minakshi v. Subramanya*, (1887) I.L.R. 11 Mad., 26—referred to.

In this judgment I am dealing with this Civil Revision Case No. 157 and also No. 158. They have been heard together, and one judgment, it is admitted, can decide them both.

In some proceedings before the Rent Controller, the respondent tenants, and other tenants of the same premises, applied to have the standard rent of the premises fixed by the Controller. The petitioner Mohamed Ebrahim Moolla is the landlord. The proceedings show that the Controller, after issuing notices, and receiving objections from the respondent to the claims of the tenants, proceeded to pass orders on the 17th November 1920, fixing the standard rent at Rs. 120, as demanded by the tenants. A copy of this order was actually

* Civil Revision of the order passed by J. E. Godfrey, Esq., First Judge of the Court of Small Causes, Rangoon.

sent to the landlord on the same date, and notice was issued to the tenants to take delivery of the certificate in question. This order was passed in the absence of both sides. Then on the 18th November the advocate, who appeared for the landlord, had an interview with the Rent Controller in his chambers, and informed him that he had not understood that the landlord had to produce evidence, and asked him to set aside the order which had been passed *ex-parte*, and to issue notice to both sides for evidence to be taken. To this request, the Rent Controller acceded at once, and orders were passed on the diary to that effect. On the next day, the 19th November, the advocate filed an application in writing, complaining of the *ex-parte* orders, and praying that the proceedings might be reopened. This was apparently an effort to regularize the proceedings, but the fact remains that no notice of the verbal or written application was ever issued to the tenants. However notices were issued for the production of evidence, and the cases proceeded, the Rent Controller fixing a standard rent of Rs. 150 by an order or decision dated the 1st of February 1921. This was, of course, to the advantage of the landlord, and against the interests of the tenants. Against this decision the present petitioner and the petitioner in Revision Case No. 158 caused references to be made to the first Judge of the Court of Small Causes of Rangoon, under section 18 of the Rangoon Rent Act of 1920. Their first ground of attack was that the order of the Controller revising his previous order was *ultra vires*. Upon this ground alone the learned Judge of the Small Cause Court decided both the references, holding that the proceedings of the Rent Controller after the 17th of November 1920 were without jurisdiction, and void, and that his decision of February the 1st, therefore, went by the board, the order of the 17th November 1920 holding good till set aside in a legal manner.

The landlord has now, in each case, moved this Court on revision under section 115 of the Code of Civil Procedure. As a matter of fact the petitions were filed as coming under section 25 of the Provincial Small Cause Court Act.

My learned brother Pratt, J., made a reference to a Full Bench as to whether the first Judge of the Small Cause Court in such proceedings sat as a Court subordinate to the High

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Court within the meaning of section 115 of the Civil Procedure Code. It was admitted that section 25 of the Provincial Small Cause Court Act had no application, inasmuch as the Judge was not sitting in the exercise of his small cause jurisdiction. The Full Bench decided, firstly, that the Rent Controller, under the Act, was a Civil Court subordinate to the High Court, and, secondly, that the First Judge of the Small Cause Court dealing with a reference under section 18 of the Act, was a Court subordinate to the High Court, and that the High Court had jurisdiction to entertain an application for revision from his decisions made under section 18 of the Act.

The matter has since proceeded to a hearing.

It is clear now that the Rent Controller, if he acts as a civil Court, would have inherent power to set aside an *ex-parte* order in a legal manner under the Code of Civil Procedure. This is not disputed by Mr. Paget, and though it is not admitted by Mr. Campagnac, I think that it follows as a necessary corollary of the Full Bench decision. The Controller would also have the power to review his order on proper cause shown. Of this there is probably no doubt either. But to urge that he can set aside a decision made by him, fixing a standard rent, without notice to the other side is, to my mind, preposterous, and cannot be accepted. In *Tyeb Beg Mahomed v. Allibhai Mangalji* (1), it was held that a judge of a Small Cause Court had inherent but not direct power to set aside an *ex-parte* decree, though of course, in a legal manner. Any Court exercising civil judicial duties would, I think, have such powers.

It appears to me that, inasmuch as the Rent Controller never issued notice to the tenants on the matter of the verbal application of the 18th November 1920, his action in setting aside his previous decision, and all his proceedings thereafter, were void and without jurisdiction altogether. Order 9, Rule 14, and Order 47, Rule 4, of the Civil Procedure Code, make it imperative that notice should issue before an *ex-parte* decree is set aside, or a review is granted, and in my opinion, though no direct authority on the question has been placed before me, and though a laborious search on my own part has revealed

(1) (1908) I.L.R. 31 Bom., 45.

none, the issue of such notice is not a mere matter of procedure, or a question of regularity, but goes to the very root of the matter. In *Sankumani v. Ikoran* (2), it was decided that the want of notice could be waived by the party who did not receive it, by submitting to the jurisdiction of the Court, but there the issue of notice in question was one under section 25 of the Code of Civil Procedure of that date, *i.e.* in connection with the transfer of a suit, and it was aptly pointed out that the Judge in any case had power to make a transfer of his own motion. *That case is therefore not parallel. This last case referred to the Privy Council case of *Minakshi v. Subramanya* (3), but the facts of that case are not parallel to those of the present case, and afford no assistance whatever.

Taking the view which I do, it was not necessary for the tenants to impugn the action of the Rent Controller at once, but they were quite entitled to do this, when and if they made a reference to the First Judge of the Small Cause Court. It is conceivable that the second order might have been again in their favour. It is not correct to argue that the First Judge of the Small Cause Court could only deal with the merits of the order of the 1st of February 1921, and that he could not in a reference under section 18 touch the order setting aside the decision of the 17th November. In dealing with the decision of the 1st of February, he could, of course, deal with each and every legitimate objection thereto, and the chief objection made was that the decision of the 17th November was not legally set aside, with the result that the later order was *ultra vires* of the Rent Controller. It is also of no avail to argue that the tenants should have made a reference in regard to the setting aside of the original order. This would have been precluded by the terms of section 18 itself, for it makes a reference possible only in regard to a decision fixing a standard rent. It is true that they might have moved this Court on Revision under section 115, Civil Procedure Code, but at the time it was not known that the orders of the Rent Controller were subject to such revision by the High Court, and, at the worst, the suggested procedure was merely optional to them.

Both the applications are dismissed with costs, Advocate's fees 5 gold mohurs (for the two cases).

(2) (1889) I.L.R. 13 Mad., 211. (3) (1887) I.L.R. 11 Mad., 26.

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*Criminal
Reference
No. 17 of
1922.*

*June 26th,
1922.*

Before Sir Sydney Robinson, Kt., Chief Judge, Mr. Justice Maung Kin and Mr. Justice Macgregor.

NGA CHAN THA v. KING-EMPEROR.*

Criminal Procedure Code—Section 351—Jurisdiction of Magistrate not empowered under section 190 (1) (c).

In the course of a theft case sent up by the Police, the Magistrate made one of the witnesses an accused and tried the case *de novo*. The Magistrate was not empowered to take cognizance of a case under section 190 (1) (c), Criminal Procedure Code, and did not under section 191 inform the accused that he was entitled to have the case tried by another Court.

The following question was referred to a Full Bench :—

“Whether on the facts of the case section 190 (1) (c) or section 351, or any other provision of the Criminal Procedure Code, applied.”

Held,—per C.J. and Macgregor, J.—That the Magistrate had full jurisdiction to act as he did, that section 351 applied to the case, and that the Magistrate, so far as section 190 applied, if it applied at all, was acting under section 190 (1) (b).

Per Maung Kin, J.—That on the facts of the case section 190 (1) (b) applied.

Khudiram Mookerjee v. The Queen-Empress, 1 C.W.N., 105; *Queen-Empress v. Hirashanker*, Ratanlal's Unreported Cases, 951; *Raghab Acharjee v. Empress*, 3 C.W.N., CCLXXIX (Law Notes)—referred to.

Jagat Chandra Mozumdar v. Queen-Empress, (1899) I.L.R. 26 Cal., 786; *Charu Chandra Das v. Narendra Krishna Chakravarti*, 4 C.W.N., XLV (Law Notes); 4 C.W.N., 367; *Emperor v. Sakha*, 3 I.C., 568; *Deedar Buksh v. Syampada Das Malakar*, (1914) I.L.R. 41 Cal., 1013—followed.

*Criminal
Revision
No. 165B of
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*April 7th,
1922.*

The following reference was made by Mr. Justice Maung Kin to a Full Bench under section 11 of the Lower Burma Courts Act :—

This is an application for revision by Chan Tha.

The police sent up Po Ne and another for trial under section 379 of the Indian Penal Code. The Magistrate took cognizance and tried the case. After some of the witnesses for the prosecution had been examined, Chan Tha, who was one of the witnesses cited by the police, appears to have been

* Reference made in Criminal Revision of the order passed by E. D. Duckworth, Esq., I.C.S., Sessions Judge of Tharrawaddy, confirming the original order of sentence of two years' rigorous imprisonment passed on the accused by Maung Po Ka, Special Power Magistrate, Tharrawaddy.

placed in the witness-box and to have been questioned by the Magistrate, though Chan Tha's replies have not been recorded; but we find the Magistrate recording in the case diary that Chan Tha tried to exculpate the other accused and that, according to the evidence which had been recorded, he was one of the principal persons who arranged the payment of the money and the return of the stolen cattle. The result was that Chan Tha was made a co-accused and the case was tried *de novo*. In the end both Po Nè and Chan Tha were convicted. On appeal to the Sessions Court the convictions were confirmed; but as regards Chan Tha, the learned Sessions Judge considered the point whether the trial was illegal.

It appears the Magistrate was not empowered to take cognizance of a case under section 190 (1), clause (c), Criminal Procedure Code. It also appears that he did not, under section 191, inform Chan Tha that he was entitled to have the case tried by another Court. The learned Sessions Judge, however, held that the Magistrate had taken action against Chan Tha under section 351 of the Criminal Procedure Code, and that the trial was in order.

According to two cases, namely, *Khudiram Mookerjee v. The Queen-Empress* (1) and *Queen-Empress v. Hirashanker* (2) where a witness is turned into an accused, the Magistrate takes cognizance of the case against him under section 190 (1), clause (c), of the Criminal Procedure Code. The former is a Calcutta case and was decided by O'Kinealy and Jenkins, JJ., and the latter is a Bombay case and was decided by Parsons and Ranade, JJ.

Against these two cases, we have the cases of *Jagat Chandra Mozumdar v. Queen-Empress* (3) and *Charu Chandra Das v. Narendra Krishna Chakravarti* (4). In the former case there was a complaint charging three persons with various offences. On the filing of the complaint, the Magistrate examined the complainant and some witnesses produced by him and then issued processes against the persons complained

(1) 1 C.W.N., 105. (2) Ratanlal's Unreported Cases, 951.

(3) (1899) I.L.R. 26 Cal., 786.

(4) 4 C.W.N., XLV (Law Notes), 4 C.W.N., 367.

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against and another person. Ghosh and Wilkins, JJ., held that the Magistrate took cognizance upon the complaint. In the latter case, a report was made to the police against four persons, as having outraged the modesty of a woman. The police enquired into the case, and as the complainant identified a certain person as one of those concerned, that person was sent up for trial. At the trial, it appeared from the evidence of one of the witnesses that two other persons were concerned in the offence. The Magistrate then issued processes against these two others, and they were tried along with the accused sent up by the Police. One of the two, the subsequently added accused, was convicted. An appeal to the Sessions Judge was unsuccessful. The matter came before the High Court before Prinsep and Hill, JJ. It was contended that the Magistrate had acted without jurisdiction in proceeding under clause (c) of section 190 of the Criminal Procedure Code as he was not especially empowered to take cognizance of the case under the said clause of the said section. It was also contended that the Magistrate did not take cognizance of the offence upon a complaint or upon Police report, inasmuch as no complaint was lodged against the petitioner and the police did not send him up for trial. It was held that as there had been a complaint that some person or persons committed an offence the Magistrate had cognizance of the offence upon a complaint under section 190 (1), clause (a).

In my judgment, these two cases are entirely different to the case before me, inasmuch as there was no Police report or complaint against Chan Tha, nor was there any Police report or complaint to the effect that there were more than two persons concerned in the case. I would hold that, if section 190 applies to this case, the Magistrate took cognizance of the case against Chan Tha under clause (c) of that section and that, as he had not been especially empowered to take cognizance of the case under that clause, his proceedings must be held to be void; and even if he had been so empowered the same result would follow, because he did not, under section 191, inform the accused that he could have his case tried by another Magistrate, if he so wished.

This brings me to the contention by the learned Sessions Judge that the Magistrate did not take action under section 190 at all but under section 351. In support of this contention, the case decided by Sir Bepin Krishna Bose, Additional Judge of Nagpur, Judicial Commissioner's Court—*Emperor v. Sakhia* (5)—may be cited; but in my opinion, the conclusions arrived at by the learned Judge are not correct. He holds that section 351 is self-contained and complete in itself and independent of section 190 and consequently of section 191. He holds that where a Magistrate acts under section 351 against any person upon the evidence taken before him to be concerned in the offence under investigation, he cannot be properly regarded as taking cognizance of the case upon information received, or upon his own knowledge or suspicion within the meaning of clause (c) of sub-section (1) of section 190, so as to enable the accused to object to that Magistrate proceeding further with the case. He says, "Now, section 190 finds place in a sub-chapter dealing with 'Conditions requisite for Initiation of Proceedings,' whereas section 351 is located in a chapter, which is headed 'General Provisions as to Inquiries and Trials.' While the former refers to the *initiation* of proceedings, the latter deals with a matter arising during the course of a proceeding *already initiated*. Looking to the fundamental difference in the character of the subject-matters of these two sections appearing in two distinct parts of the Code, it does not appear that the Legislature intended that the one should be dependent on the other to this extent that no proceeding can be started against any person under section 351 except in compliance with the conditions set forth in section 190. On the contrary, it would seem that section 351 deals with a state of things not covered by section 190. When an inquiry or trial has already commenced in one or other of the methods provided for by section 190, the power of the presiding Magistrate is no longer fettered by its provisions. He may, independently of them, take action against a person filling the character described in section 351, 'as though he had been arrested or summoned.' These words seem, in my judgment, to indicate that the person proceeded against is to be regarded in the same light, and is to be subject

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to the same disabilities as though he had already been arrested or summoned in pursuance of a proceeding initiated under section 190. The conditions for initiation of a proceeding as set forth in this section are in his case to be dispensed with. The case is to be regarded as having passed the stage contemplated therein."

Section 351 is as follows :—

- (1) "Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of enquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned."
- (2) "When the detention takes place in the course of an inquiry under Chapter XVIII, or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard."

This section is placed in the chapter headed "General Provisions as to Inquiries and Trials," and it applies to all Criminal Courts. For instance, it applies to a Court of Sessions. It also applies to investigations preliminary to commitment for a subsequent trial. In the case of the Court of Sessions, any person attending the Court may be made a co-accused with another under-trial. In the case of a Magistrate holding a preliminary enquiry with a view to commitment to the Court of Sessions, he can make any person attending his Court a co-accused with another against whom the enquiry is being made. These two cases do not come within the purview of section 190:

The question arises : what will be the meaning of section 351 in cases in which section 190 applies ?

Now under section 190, certain Magistrates are empowered to take cognizance of an offence upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such offence has been committed and where action is taken under section 191 the Magistrate

is bound to inform the person proceeded against that he may, if he wishes, ask to be tried by another Magistrate. If the trying Magistrate has no power to take cognizance in that way, or, having such power, fails to inform the accused as required by section 191, his proceedings are void under section 330 of the Code.

If, under the circumstances of a particular case, it can be held that the action taken by the Magistrate was under section 190 (1), clause (c), and his proceedings are void for non-compliance with section 191, or because he had no power to take cognizance under that clause, the question arises as to whether section 351 will help make his proceedings valid. In my judgment that section will not. All that it says is that he may detain a person attending his Court for purpose of enquiry into or trial of any offence of which he can take cognizance and which from the evidence may appear to have been committed, and he may proceed against such person as though he had been arrested or summoned. But the section does not answer the question how the Magistrate should take cognizance of the offence against that person. For an answer to that question we must go to section 190 (1), clause (c), and section 191. In other words, section 351 must be read as a general provision applying to all Criminal Courts, with sections 190 and 191 as provisos thereto with reference to the various classes of Magistrates. I am unable to agree with Sir B. K. Bose that section 351 is self-contained and independent of sections 190 and 191. In coming to that conclusion, I am of opinion, the learned Judge overlooked the fact that section 351 is designed to apply to all Criminal Courts and is, therefore, placed in the chapter headed "General Provisions as to Inquiries and Trials." If the learned Judge's view is correct, section 351 will certainly be in conflict with section 190 (1), clause (c). Apparently, he recognized the possibility of this argument, inasmuch as he argued for the conclusion that section 190 applies to the initiation of proceedings and that section 351 applies to proceedings which have already been initiated. I am unable to discern in the language of either section, or both taken together, any indication of that view. My view is that section 351 is a general provision

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applying to all Criminal Courts and must be held to apply to them subject to any special provision made with reference to any particular classes of Criminal Courts.

For the above reason, I am inclined to hold that the proceedings of the Magistrate as regards Chan Tha were taken under clause (c) of section 190 (1) and that as the Magistrate has not been specially empowered to take cognizance of cases under that clause, his proceedings were void and that the same result would have followed, even if he had been so empowered, because there was no compliance with section 191. But as the point is of some difficulty and of great importance, I would refer to a Bench, Full or otherwise, as the learned Chief Judge may direct, the following question :—

Whether on the facts of this case, section 190 (1) (c), or section 351, or any other provision of the Criminal Procedure Code applies ?

The opinion of the Full Bench was as follows :—

Robinson, C.J.,—The Magistrate in this case acted on a Police report, Po Ne and another person being sent up for trial under section 379 of the Indian Penal Code in a cattle theft case. After some evidence had been led for the prosecution, the Magistrate ordered the prosecution of Chan Tha, the petitioner, jointly with the other accused. The trial was commenced *de novo* and Chan Tha was convicted. His appeal was rejected by the Sessions Judge, who considered whether the Magistrate had jurisdiction to try him. An application in revision was filed in this Court by Po Ne and rejected by Mr. Justice Pratt. Another application for revision has now been filed by Chan Tha and the question of jurisdiction has been referred by my brother Maung Kin, to a Full Bench.

The question referred is thus stated :—

Whether on the facts of this case, section 190 (1) (c), or section 351, or any other provision of the Criminal Procedure Code, applies ?

The question involved really amounts to this : As to whether the provisions of section 351 of the Code are governed by the provisions of sections 190 and 191 of the

Code. Section 190 deals with the conditions requisite for the initiation of proceedings, and the section provides that a Magistrate may take cognizance of any offence:—

- (a) Upon receiving a complaint of facts which constitute such offence;
- (b) Upon a police-report of such facts;
- (c) Upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.

It is to be noted that the section provides that cognizance may be taken of *any offence* and that no reference is made to the offender. Indeed, the identity of the offender is in no way involved, for a complaint may be presented with a view to action being taken against some person or persons unknown. When, therefore, proceedings are initiated on a complaint, or on a police report, the Magistrate can legally take cognizance of the offence and the requirements of section 190 of the Code are complete.

In the present case, the trial was commenced and action was taken against Chan Tha. The addition of a new accused does not, in my opinion, necessitate fresh proceedings in initiation. The evidence, it is true, must be recorded *de novo*, but that is merely in order that the witnesses, whose evidence has already been recorded, may be used against the new accused. The Magistrate having taken cognizance of the offence, it is right and proper that he should bring to justice all those persons, whether originally mentioned or not, who the evidence shows were guilty of that offence. It has been held that in such cases, the Magistrate should be regarded as taking cognizance under the same clause of section 190 as he did against the original accused; and if it were necessary to apply section 190 at all, I would hold that that is the correct view to take for the reasons that I have given above. But, in my opinion, section 351 applies to such cases, and is intended to apply to them. The offence being one and the same, and the Magistrate, having cognizance of that offence, acting under section 190 (b), has full seizin of the offence. He takes action on the evidence given for the prosecution to establish the offence, and there is apparently no need, therefore, to refer back to section 190 at all. However this may be, if there is

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such necessity, there is ample authority to support the view that in this case the Magistrate was acting under section 190 (b). I am unable to agree that there is no indication in the language of section 351 to support the view that section 190 applies to the initiation of proceedings and that section 351 applies to proceedings that have already been initiated. The section distinctly refers to cases in which a trial has already been begun, and the section, as now drafted, refers to enquiries and also trials. With the exception of one case, there is no reported case that I can find that takes a different view. That one case, which is also the earliest, is that of *Khudiram Mookerjee v. The Empress* (1). It was under the old Code of Criminal Procedure and before section 351 had been amended. In that case, however, there is a bare statement of the opinion of the Court. No reasons for the decision are given, and it is, therefore, impossible to ascertain or consider the grounds on which the decision was arrived at. In the case of *Raghab Acharjee v. Empress* (6), we have only a note of the case, which has not apparently been reported in full. The case is different to the present one, in that the Magistrate took action against the petitioner on the evidence that was led for the defence of the original accused and not on the evidence which was given for the prosecution. The case was decided on other grounds, but it was held that a Magistrate is competent at the trial of one person to proceed against any other who may appear, upon the evidence taken, to be concerned in that offence, and that in doing so he cannot be properly regarded as acting within the terms of section 190, clause (c). It was further held that this rule should not be applied to a case where the trial of the 2nd accused is not on the same evidence on which the 1st accused was tried but on other evidence adduced on behalf of the defence of the 1st accused.

On the facts of the present case, therefore, this authority differs from that of the previous one quoted. In *Jagat Chandra Mozumdar v. Queen-Empress* (3), the Magistrate took cognizance of the case upon a complaint against three persons. After examining the complainant and some witnesses on his behalf, the Magistrate took action against another person,

(1) 1 C.W.N., 105.

(3) (1899) I.L.R., 26 Cal., 786.

(6) 3 C.W.N., CCLXXIX (Law Notes).

and it was held that he took cognizance of the offence as against this other person under clause (a) and not under clause (c) of section 190; that is to say, it was held that the proceedings having been initiated on a complaint, the proceedings against the additional accused must be held to be initiated on the same complaint. In *Charu Chandra Das v. Narendra Krishna Chakravarti* (4) the same view was held. A complaint was made to a head constable of the Railway Police at Hooghly that four Babus had outraged the modesty of the complainant's wife. The police held an enquiry and the complainant identified one Bhut Nath Mukerjee who was sent up for trial. At the trial, it appeared upon the evidence of one of the witnesses that the petitioner was also concerned in the offence, and the Magistrate instituted proceedings against him. It was urged that the Magistrate had acted without jurisdiction in proceeding under clause (c) of section 190 of the Code of Criminal Procedure, as he was not especially empowered by the Local Government to take cognizance of the case under the said clause and that he had not taken cognizance upon complaint or upon a police report, inasmuch as no complaint was lodged against the petitioner. It was held that he had taken cognizance of an offence and, having cognizance of the offence, it was his duty to proceed to deal with the evidence brought before him and to see that justice was done in regard to any person who might be proved by the evidence to be concerned in that offence.

The next case—*Emperor v. Sakhia* (5) deals fully with section 190 and section 351. It was held that the Magistrate taking action, as he did in the present case, cannot be regarded as taking cognizance upon information received or upon his own knowledge or suspicion, within the meaning of clause (c) of section 190. It was held that section 351 is self-contained, complete in itself and independent of section 190.

Lastly, there is the case of *Dedar Buksh v. Syamapada Das Malakar* (7), where most of the previous authorities that I have referred to are considered. In this case a complaint was made by the husband of a girl against four persons under sections 342 and 363 of the Penal Code. The Magistrate

(4) 4 C.W.N., XLV (Law Notes), 4 C.W.N., 367.

(5) 3 I.C., 568.

(7) (1914) I.L.R. 41 Cal., 1013.

1922,
 NGA CHAN
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 EMPEROR.

directed the complainant to prove his case, and two days later he presented a petition for withdrawal of the complaint and its dismissal as untrue, but the Magistrate proceeded and examined the girl and some prosecution witnesses and he found that, though there was no satisfactory evidence against the original accused, there was sufficient evidence against other persons, and, treating the girl as the real complainant, issued processes against them for offences under sections 342, 352, and 363 of the Penal Code. It was held that he took cognizance against these new accused not named in the complaint under clause (a) and not clause (c) of section 190 of the Code. *Raghab's* case is distinguished.

The authorities, therefore, are strongly in favour of the view that a Magistrate so acting must be held to have acted under the same clause of section 190 as that under which the proceedings were initiated.

There is also authority for the view that section 351 is independent of the provisions of section 190.

For the reasons given above, I would hold that the Magistrate had full jurisdiction to act, that section 351 applies to the case, and that the Magistrate, so far as section 190 applies, if it applies at all, was acting under section 190 (b).

Maung Kin, J.—I have had the advantage of reading the judgment of the learned Chief Judge and have taken time to consider the point.

In my opinion it is right to hold that section 190, which relates to the conditions requisite for the initiation of proceedings, provides that Magistrates may take cognizance of any offence upon information derived in one of the three ways mentioned in (a), (b) and (c) of sub-section (i) of section 190, and that it is not necessary that any particular person should have been accused before cognizance is taken of the offence by a Magistrate.

I think as regards section 190 (i) (c) the information, or the knowledge, or suspicion referred to therein, has reference to the initiation of proceedings in regard to the offence alleged to have been committed, and not to a later stage of the case.

The Magistrate's action in the present case refers to a stage later than that when cognizance was taken of the offence. Therefore, section 190 (i) (c) does not apply. And

there is abundant authority for holding that a Magistrate can proceed against anybody who may afterwards be shown to have been, or suspected of having been, concerned in the commission of the offence of which he has taken cognizance. In view of the ruling in *Dedar Buksh v. Syamapada Das Malakar* (7) it cannot now be held that there is any distinction between the case before us and the cases of *Jagat Chandra Mozumdar v. Queen-Esquss* (3) and *Charu Chandra Das v. Narandra Krishna Chakravarti* (4) on the ground that there was no complaint or police report against Chan Tha.

The Magistrate took cognizance of the offence in question and enquired as to who committed it or was concerned in the commission of it. That was the question the police by their report asked him to try. For this reason it must be held that the Magistrate took cognizance of the case against Chan Tha upon a Police report under clause (b).

With great respect to the learned Judges, their ruling in *Khudiram Mookerjee v. The Empress* (1) cannot be followed, because, in my opinion, the point was over-looked that all the three cases which enable a Magistrate to take cognizance of the case relate to the initiation of the proceedings and not to a later stage in the proceedings.

In the view I have taken of the meaning of section 190, it is unnecessary to express any opinion as to the meaning of section 351.

My answer to the question referred is that on the facts of the case section 190, (1) (b), applies.

Macgregor, J.—I concur in the answer of the learned Chief Judge.

(1) 1 C.W.N., 105.

(3) (1899) I.L.R. 26 Cal., 786.

(4) 4 C.W.N., 367; 4 C.W.N., XLV (Law Notes).

(7) (1914), I.L.R. 41 Cal., 1013.

1932.
 NGA CHAN
 THA
 v.
 KING-
 EMPRESS.

Civil Miscal-
laneous
Applications
No. 18 of
1922.
JUNE 26th,
1922.

Before Sir Sydney Robinson, Kt., Chief Judge, and
Mr. Justice Macgregor.

S. N. SEN (RECEIVER) TO THE ESTATE OF HAJEE TAYUB
(DECEASED) v. 1. ABDUL AZIZ TAR MAHOMED ;
2. KARIM TAR MAHOMED ; 3. TAR MAHOMED
HAJEE-OSMAN.

Das—for applicant.

Burjorjee—for respondents.

Appeal to Privy Council—Civil Procedure Code, section 110—Meaning of words "affirms the decision."

The word "decision" in section 110, Civil Procedure Code, means the decision of the suit by the Court, and for the purpose of granting a certificate under Rule 3 of Order XLY it is immaterial that the appellate Court does not affirm the finding of the lower Court on all the facts on which the latter's judgment was based.

Tassaduq Rasul Khan v. Kashi Ram, (1903), I.L.R. 25 All., 109—followed.

Nagendrabala Dasi v. Dinanath Mahish, 26 C.W.N., 651;—referred to

Robinson, C.J., and Macgregor, J.—This is an application for leave to appeal to His Majesty in Council.

That the subject-matter of the suit satisfies the requirements of section 110 of the Code of Civil Procedure as regards value is not disputed.

The question that we have to decide is, whether the decree of this Court on appeal affirmed the decision of the Court immediately below. If it did, the petitioners will have to establish that the appeal involves some substantial question of law.

The suit was brought, praying for an account of the estate of the late Hajee Tayub, and for possession of the same, or, in the alternative, for such share thereof as plaintiffs are entitled to with mesne profits.

The plaintiffs set up that the business that had been carried on by Hajee Tayub was his own separate business, and that the immoveable properties acquired had been paid for out of the profits of this business. The defendants claimed, on the other hand, that the business had originally been a joint family business and had remained so till the end.

The learned District Judge passed a decree, holding that the business was the joint business of Hajee Tayub and another brother of his, Hajee Sulaiman, and that Hajee Tayub's heirs were entitled to a half share of the properties in suit. It is to be noted that this decision was not in accordance with the allegations of either the plaintiffs or the defendants.

An appeal was filed in this Court by the plaintiffs in respect of the half share that had not been awarded to them by the District Court. Our decision was as follows :—"The real question at issue is whether this was a joint family business, or whether it was a partnership between Sulaiman and Tayub, and in my opinion the former is the correct decision." We reversed the decision of the learned District Judge in so far as it held that the business was a partnership between Sulaiman and Tayub, but we confirmed the decree so far as it awards a half share in the properties. The question is whether, under these circumstances, our decree affirmed the decision of the Court below.

In *Tassaduq Rasul Khan v. Kashi Ram* (1) their Lordships of the Privy Council held that the word "decision" means the decision of the suit by the Court, and further that it was not correct to say that it was necessary that the appellate Court should also affirm the grounds of fact upon which the judgment was based. The decision of the District Court was that the plaintiffs were entitled to a half share in the properties, and the decision of this Court was the same. The decision was therefore affirmed, and for the purposes of a certificate, we must hold that it is immaterial that we came to a different conclusion on the question of fact as to what the business was.

We have been referred to the case of *Nagendrabala Dasi v. Dinanath Mahish* (2). The facts of that case were somewhat peculiar, and the decision of their Lordships of the Privy Council to which I have referred was not apparently before the learned Judges who passed that decision.

Next, as to whether there exists in this case some substantial question of law, it is urged that the onus of proving that it was not a joint family business had been wrongly placed on the petitioners. It does not appear that the onus was so placed, and the decision did not turn on the question of onus, but was a decision based on a consideration of all the evidence tendered by both sides. We, therefore, hold that no substantial question of law was involved, and that the petitioners are not therefore entitled to a certificate.

The application is dismissed with costs, Advocate's fees 3 gold mohurs.

(1) (1903) I.L.R. 28 All., 109.

(2) 26 C.W.N., 651.

1922.

S. N. SEN
v.
ABDUL
AZIZ TAR
MAHOMED.

*Criminal
Revision
No. 267B of
1922.
June 26th,
1922.*

Before Mr. Justice Duckworth.

- (1) PAN BU, (2) THU DAW, (3) PO AUNG, (4) AUNG DAING, (5) PO YEIN, (6) ON GAING, (7) U BAW, (8) HLA DIN, (9) TUN SEIN, (10) BA THIN, (11) AUNG BON, (12) PO HAN, (13) TUN MAUNG, (14) ON NYUN, (15) PO ON, (16) PO THAUNG, (17) SAN PE, (18) SHWE HMAW, (19) THU DAW GYI, (20) SHWE PHWE, (21) AUNG DUN, (22) PO LIN, (23) LE BYAW, (24) PO HLAING, (25) PAUK SEIN, (26) PO HAN, (27) BA E, (28) BA THIN, (29) THA GYAW, (30) U GYAW, (31) PO THA HAN, (32) SEIN DAING, (33) PO HLA GALE, (34) MAUNG HMYA, (35) ON NYUN, (36) MA SHAN, (37) PO KYAW, (38) MAUNG TWE, (39) PO HLAU *v.* KING-EMPEROR.*

Ba Dun and San Shwe—for applicants.

Assistant Government Advocate—for respondent.

Burma Village Act, 1907—section 12—Settlement operations—Requisition of Villagers for reaping—Onus of proving reasonable excuse.

A Headman may legally requisition, without payment, the labour of villagers to assist in settlement operations, such as soil classification, holding-marking and crop reaping.

Before the onus of proving reasonable excuse is placed on the villagers under section 12 of the Burma Village Act, the prosecution must prove that they were present or were informed of the requisition in time.

The 39 applicants were convicted by the Township Magistrate, Dedayè, under section 12 of the Burma Village Act for refusing to comply with a requisition of the Headman to assist him in his public duties. They were each fined a sum of Rs. 15 only, or, in default, were sentenced to undergo seven (7) days' rigorous imprisonment.

A Settlement Party is at work in Pyapôn District. In the village tract in question eight (8) plots of paddy land were marked out for crop reaping and measuring, for the purposes of Revenue assessment. The crops on five of these plots had been reaped and measured. This case concerns the remaining three plots. The Headman ordered the villagers to turn out on the day in question, and to reap and measure the crops. The applicants are shown to have refused to go, unless they

* Criminal Revision of the order passed by Maung Ba Thaw, Township Magistrate, Dedayè.

were paid to do so. For this, they have been punished as stated. They have applied to this Court on revision, through their counsel Maung Ba Dun, on the grounds that the requisition was not for the performance of any public duty imposed upon villagers under the Burma Village Act, and that, even if it was, the applicants admittedly reaped the said three plots a week after their refusal. It was further contended that there was no proof that applicants Le Byaw, Po Han, Ba E, Po Tha Han, Po Kyaw, and Po Htaw were present, or ever received the Headman's order, and that, therefore, the Magistrate was in error in placing the burden of proof on these six applicants under section 12 of the Act. Finally it was argued that the Township Magistrate, as an executive officer, was biased, and that he should have held that Thu Daw's statement that "if only the Deputy Commissioner's order explicitly stated that the reaping must be done with the villagers, they would undertake the work," was a complete answer to the Headman's requisition and a reasonable excuse.

I will take the last point first. It was, of course, no excuse or answer, even if Thu Daw said it. The Headman had an order from the Deputy Commissioner to reap the plots, to carry out the work, and adopt the usual procedure. The requisition was well within his rights. It is well known that, in settlement operations, Headmen have to assist the Settlement Officials, by turning out villagers for such duties as soil classification, holding-marking, and crop reaping, and for him to order them to do so is an old established rule, under which they have to turn out, and receive no pay for their efforts. Crop reaping by a large crowd of villagers in a few plots is very light labour. In this case the Headman states that it would only have involved some three sheaves of paddy per man. The order, or requisition in question, though not defined in the Act, was usual and quite legal, and, as the Headman was responsible, it was clearly a requisition to assist him in his public duty. Of that I have no doubt at all. I have been an Assistant Settlement Officer, and I speak of that, which I know. Even if the villagers considered that they should, in these expensive modern days, be paid for such work, it was their duty to comply with the order and represent matters afterwards. This is,

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PAN BU
v.
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EMPELOR.

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v.
KING-
EMPEROR.

incidentally, sufficient answer to ground No. (1) referred to above. As regards the point that the applicants actually reaped the plots a week after their refusal, this was not until the Headman had taken the matter to Court, and, in reaping, as every farmer knows, time is often of the greatest importance.

The whole trouble was due to the actions of the applicants Pan Bu and Thu Daw, leaders of the local Y.M.B.A., which I am surprised to find wasting its energies in an attempt to obstruct local administration by their Headman. As regards the six applicants referred to above, there is no proof either that they were present, or that they were informed of the requisition in time. Even under section 12 of the Act, the prosecution has to prove this, and cannot cast the onus of proving absence on the accused. The words used in section 12 are clearly not intended to apply to anything of this kind, but to cases where a man sets up just cause for not having obeyed a requisition, which he has received. That is, of course, a very different matter.

As regards the thirty-three other applicants, the convictions were undoubtedly correct, but in the case of each man, (with the exception of the two leaders Thu Daw and Pan Bu), the sentence was in the circumstances unnecessarily severe.

The six applicants, who are not proved to have been present, are entitled to an acquittal.

The applications of Nga Thu Daw and Nga Pan Bu are dismissed. The convictions of the other applicants (excepting Le Byaw, Po Han, Ba E, Po Tha Han, Po Kyaw and Po Htaw) are confirmed, but the fines are reduced in each case to one of Rs. 5 each, or, in default, three days' rigorous imprisonment.

The excess fines paid will be refunded to them.

The applicants Le Byaw, Po Han, Ba E, Po Tha Han, Po Kyaw and Po Htaw are acquitted, their convictions and sentences being set aside. The fines paid by them will be refunded.

Before Mr. Justice Pratt.

MA SAW v. MAUNG SHWE GAN AND MA BAN.*

Chari—for appellant (plaintiff).

Vertannes—for respondents (defendants).

Possession—Suit on possessory title not debarred by section 9 of the Specific Relief Act.

A suit for recovery of possession of state land based on a possessory title acquired by occupation and clearing will lie as against a trespasser independently of section 9 of the Specific Relief Act.

In re Maung Naw v. Ma Shwe Hmut, (1915) 8 L.B.R., 227; *Gobind Prasad v. Mohan Lal*, (1901) I.L.R. 24 All., 157; *Narayana Row v. Dharmachar*, (1902) I.L.R. 26 Mad., 514; *Ismail Ariff v. Mahomed Ghous*, (1893) I.L.R. 20 Cal., 834; *Ali v. Pachubibi*, (1903) 5 Bom. L.R. 264;—followed.

Nisa Chand Gaita v. Kanchiram Bagani, (1899) I.L.R. 26 Cal., 579—dissented from.

Plaintiff sued to recover possession of certain lands alleging that they were the joint property of herself and her deceased husband Lamba.

Defendants' case was that the land had been made over to them absolutely by Lamba. The Divisional Court on appeal pointed out that Lamba's right of occupancy constituted an interest in the land and could only be transferred by a registered deed.

On the ground, however, that the plaintiff and her husband had no title to the land, because land-holder's rights had not been acquired, the learned Divisional Judge held that the suit was not maintainable and that plaintiff's only remedy would have been a suit under section 9 of the Specific Relief Act within six months of dispossession.

It seems to me that in saying neither plaintiff nor her husband had any title to the land, the Divisional Judge has inadvertently begged the whole question and contradicted his previous dictum as to the reasons for holding that there had been no valid transfer.

He has admitted that Lamba had a right of occupancy and therefore an interest in the land.

* *Special 2nd Appeal from the judgment of W. Carr, Esq., I.C.S., Divisional Judge, Hanthawaddy, setting aside the judgment of Maung Ba Kyaw, Subdivisional Judge of Twante.*

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256 of 1921
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SHWE GAN.

It cannot therefore be said that he had no title. A possessory title acquired by occupying and clearing waste state land is good as against trespassers, if not against Government.

The Courts in Burma have consistently recognised such possessory titles.

In "*In re Maung Naw v. Ma Shwe Hmut*" (1) a Full Bench of this Court accepted the principle laid down in *Gobind Prasad v. Mohan Lal* (2) that a person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or will or by execution sale, just in the same way as it could be dealt with, if the title were unimpeachable.

In the present suit the true owner is the Government and actually recognises in its Directions under the Land Acquisition Act that squatter's rights may have a market value and that under certain circumstances occupiers of land who have not obtained landholder's rights, may be entitled to compensation for compulsory acquisition by the real owner, the state.

Section 9 of the Specific Relief Act provides a special procedure whereby a person, who has been dispossessed otherwise than in due course of law may by suit within six months of dispossession recover possession, without relying on title, even against a person, who has a good title. It distinctly lays down that nothing in its wording shall bar any person from suing to establish his title to such property and to recover possession thereof.

The present suit is based on a superior possessory title obtained by clearing and occupying state waste land and is to my mind clearly not debarred by section 9.

It is not a simple suit for possession based solely on unlawful possession within six months, but is a class of suit contemplated by section 9 as not barred by failure to sue for possession under the provisions of that section.

I do not consider it necessary to refer in detail to the numerous cases cited in argument and discussed by the lower Appellate Court, but I am fortified in my conclusion by the

(1) (1915) 8 L.B.R., 227.

(2) (1901) I.L.R. 24 All., 157.

Madras case of *Narayana Row v. Dharmachar* (3) which points out that possession is under the Indian, as under the English Law, good title against all but the true owner: I agree with the reasons there given for not following the Calcutta case of *Nisa Chand Gaita v. Kanchiram Bagani* (4), in which the contrary view was taken and which appears open to grave exception. The principle enunciated in the earlier Calcutta case of *Ismail Ariff v. Mahomed Ghous* (5) that lawful possession of land is sufficient evidence of right as owner against a person, who has no title, is to my mind correct.

In the Bombay case of *Ali v. Pachubibi* (6) a similar view was taken and the difference between a suit based on a possessory title and a suit under section 9 of the Specific Relief Act was well set out. "Proof of previous possession is, without more, evidence of the plaintiff's title to recover from the defendants who are proved to be wrong-doers.

There is a difference between such a suit (*i.e.* a suit based on possessory title) and a suit under section 9 of the Specific Relief Act. In the former the Court awards the claim only when it finds that the plaintiff had peaceful possession before dispossession and that the defendant had no title and is a wrong-doer, the plaintiff's previous possession being in law sufficient proof of his title: in the latter, the Court can only go into the question of dispossession within six months before the suit and cannot inquire into the defendant's title."

I have no doubt that the Divisional Court's finding that the suit would not lie is wrong in law. I accordingly set it aside and remand the appeal for hearing on its merits.

Appellant will be allowed the costs of this appeal. The usual certificate for refund of Court-fee will issue.

(3) (1902) I.L.R. 26 Mad., 514.

(5) (1899) I.L.R. 20 Cal., 834.

(4) (1899) I.L.R. 26 Cal., 579.

(6) (1903) 5 Bom. L.R., 264.

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MA SAW
v.
MAUNG
SHWE GAU

Civil
Revision
No. 137 of
1921.
July 16th,
1922.

Before Mr. Justice Duckworth.

KARUPIAH NAIDU ALIAS GOVINDASWAMY v. R. M. S. MUTHUSWAMI.*

Tambe—for applicant.

N. N. Sen—for respondent.

Criminal Procedure Code, section 195—Sanction to prosecute—Jurisdiction to grant or revoke sanction—Costs not to be awarded.

A applied to a Township Court for sanction to prosecute B under section 205, Indian Penal Code, for false personation of a witness in a Civil case, and sanction was granted. On B's application the sanction was revoked by the District Court. A then moved the Divisional Court which cancelled the revocation order and restored the sanction. B then moved the Chief Court on revision under section 115, Civil Procedure Code.

Held,—that the Divisional Court acted without jurisdiction; and that once the District Court had acted under section 195 (6) of the Criminal Procedure Code, the only Court with jurisdiction to revise the District Court's orders was the High Court.

Held, further,—that costs should not be allowed when Courts are dealing with cases under section 195, Criminal Procedure Code.

Muthuswami Mudali v. Veeni Chetti, (1907) I.L.R. 30 Mad., 382; *Ram Dēni v. Nand Lal Rai*, (1907) I.L.R. 30 All., 109; *Emperor v. Serh Mal*, (1908) I.L.R. 30 All., 243; *Nga Tha Win v. Nga San*, (1910-13) I U.B.R., 166 at p. 169—followed.

The respondent applied in the Township Court of Bogale for sanction to prosecute the applicant under section 205, Indian Penal Code, for false personation of a witness in Civil Miscellaneous Case No. 5 of 1920. The application was made under section 195, Criminal Procedure Code. Sanction was granted with costs. Applicant then applied to the District Court for revocation of that sanction. The said sanction was revoked with costs in Civil Miscellaneous Case No. 59 of 1920. The present respondent then moved the Divisional Court in Civil Miscellaneous Appeal No. 28 of 1921, and the learned Judge of that Court cancelled the revocation order, and restored the sanction with costs in all Courts. Against this last order, the applicant now moves this Court on Revision under section 115, Civil Procedure Code.

In the first place the matter was being dealt with by Civil Courts. Naturally the order of the Township Court could be

* *Civil Revision of the order passed by H. C. Moore, Esq., Divisional Judge, Myaungmya, setting aside the order of Maung Kyaw, District Judge, Pyapōn, and restoring the order of Maung Po Lon, Township Judge, Bogale.*

considered by the District Court, but once the latter Court had passed an order under section 195, Criminal Procedure Code, Clause 6, the only remedy of the party aggrieved was to move the High Court, probably on Revision, and the Divisional Court had no right to deal with the case. This latter Court has in Civil matters no right to revise, or hear appeals from, decisions of Township Courts, even when they have been on appeal before the District Court. That this is so will be clear from a perusal of the cases of *Nuthuswami Mudali v. Veeni Chetti* (1), *Rām Deni v. Nand Lal Rai* (2) and *Emperor v. Serh Mal* (3). These cases anyhow serve to indicate, beyond any doubt that, in a case like the present, once the District Court had acted under section 195 (6), Criminal Procedure Code, the only Court with jurisdiction, would be the High Court. If the original proceedings are held in the Subdivisional or District Court, then it would seem that the Divisional Court has jurisdiction but only when it is the Court intended by section 195 (7), Criminal Procedure Code.

The Divisional Court, therefore, in this case acted without jurisdiction and its orders were void *ab initio*.

Further, the orders granting costs were erroneous. Though Civil Courts were acting, the inquiry was for the purpose of section 195, Criminal Procedure Code, and costs should not have been allowed. The case of *Nga Tha Win v. Nga San* (4) shows this very clearly. The matter is also dealt with at page 516, Edition X, Sohoni's Criminal Procedure Code. It is unnecessary to deal with other points raised. The application is allowed, and the order of the Divisional Court granting the sanction is set aside. I make no order as to costs.

(1) (1907) I.L.R. 30 Mad., 382.

(2) (1907) I.L.R. 30 All., 109.

(3) (1908) I.L.R. 30 All., 243.

(4) (1910-13) 1 U.B.R., 166 at p. 169.

1922.

KARUPPIAH
NAIDU
vs.
R. M. S.
MUTHU-
SWAMI.

Civil
Revision
No. 218 of
1921.
July 13th,
1922.

Before Mr. Justice Duckworth.

MESSRS. SINGER SEWING MACHINE COMPANY v.
MAUNG TIN.*

Clifton—for applicant.

*Security money—Forfeiture of—Contract Act, 1872, section 74—
Not applicable to forfeiture of deposits.*

Neither section 74 of the Contract Act, nor the principles of law laid down in decisions dealing with promises to pay specified sums in case of breach of contract, apply to cases of forfeiture of deposits for breach of stipulations. Where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable in amount.

Manian Patter v. The Madras Railway Company, (1905) I.L.R. 26 Mad., 118; *Wallis v. Smith*, (1882) L.R. 21 Ch.D., 243 at p. 268; *Cooper v. The London, Brighton and South Coast Railway Company*, (1879) L.R. 4 Ex.D., 88—followed.

The respondent sued the applicant Company to recover his security money, deposited with them in terms of his service agreement, *viz.* a sum of Rs. 82-8. The lower Court, sitting as a Small Cause Court, found the total sum to be Rs. 84-2, disallowed a sum of Rs. 35, and gave a decree for Rs. 49-2, though the Company claimed that they had rightly forfeited this balance to themselves.

The case has been heard *ex-parte* in this Court. It only concerns, as stated, the small sum of Rs. 49-2, but the matter is important as it affects the contractual relationship of the applicant Company with their employees. The respondent Maung Tin was an employee of the Company, entrusted with sewing machines for sale, under an agreement. According to the rules of the Company he had deposited some of the security money, which he had to deposit, with the Company. As a matter of fact he had deposited a nett sum of Rs. 82-8. Before he left the Company's service, there was a shortage of Rs. 226 and the Company had to expend Rs. 30 in travelling expenses, for checking and verifying the respondent's accounts. Respondent's surety, his father, paid up the deficit, and respondent agreed that a sum of Rs. 30 for the travelling expenses should be debited to his deposit with the Company.

* *Civil Revision of the order passed by Maung Po Man, Township Judge, Kyauktan.*

The Company admitted that, with interest, his deposit account totalled Rs. 84-2, out of which a sum of Rs. 5 was deducted for his Fidelity Bond, as well as the said sum of Rs. 30. They claim to forfeit the balance Rs. 49-2 as pactional damages under respondent's service agreement, Exhibit 2. This was their reply to his suit. It is quite obvious that respondent was rightly debited with the Rs. 35 deduction. He clearly agreed to the deduction of Rs. 30, though this was contested by him, and I fully indorse the lower Court's finding on this matter. In this application the sole question is whether the lower Court was right in disallowing the Company from forfeiting to themselves the balance of Rs. 49-2 in terms of clause (b) of the second condition on the back of the service agreement, Exhibit 2. The relevant portion of this runs:—

"Provided that, in case of any failure on the part of the employed affecting his honesty or fidelity, then the sums deposited, and other moneys in the hands of the Company, belonging to the employed, or the balance of such sums, and other moneys, are to be forfeited to the Company as ^{liquidated} pactional damages, notwithstanding that other security may be held by the Company."

Now this is quite clear. It is part and parcel of respondent's service agreement. It is not in the nature of a penalty, and the forfeiture was quite lawful and within the Company's rights. It is laid down in the case of *Manian Patter v. The Madras Railway Company by its agent and manager* (1), a case which approved the well known English cases of *Wallis v. Smith* (2) and *Cooper v. The London Brighton and South Coast Railway Company* (3), that neither section 74 of the Contract Act, nor the principles of law laid down in decisions dealing with promises to pay specified sums in the case of breach of contract, apply to cases of forfeiture of deposits for breach of stipulations, even when some of them are but trifling, while others are not. In such cases the rule is that where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable in amount.

(1) (1905) I.L.R. 29 Mad., 118.

(2) (1882) L.R. 21 Ch. D., 243 at p. 258.

(3) (1879) L.R. 4 Ex. D., 88.

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Respondent had undoubtedly been unfaithful and dishonest, and had broken his agreement. The Company was legally entitled to damages for loss of service and dishonest employment, apart from out of pocket expenses.

The lower Court was wrong in disallowing this amount, solely because the Company had been repaid their out of pocket expenses. This is a good ground for Revision under section 25 of the Provincial Small Cause Courts Act.

I allow the application, reverse the lower Court's judgment giving respondent a decree for Rs. 49-2 against the Company, and dismiss the respondent's suit with costs in full in the lower Court, and in this Court on the uncontested scale.

Criminal
Reference No.
32 of 1922.

July 21st,
1922.

Before Sir Sydney Robinson, Kt., Chief Judge, and Mr. Justice Macgregor.

NGA SHAN v. KING-EMPEROR.*

Indian Penal Code—sections 215 and 420—Application of—in cattle pyanpe cases.

When an offence may be one of two or more offences as defined in the Indian Penal Code, the Court should as a rule convict of and punish for the most serious offence that is established, provided that the accused has been charged with and has had an opportunity of meeting the charge of that offence. Although section 215 was enacted to provide for a particular class of offence, there is no provision of law which forbids a conviction under section 420 for an offence of that class, if the necessary facts which constitute an offence under section 420 are proved.

Deputy Legal Remembrancer v. Ijjatullah Kazi, (1906) 10 C.W.N., 1005—referred to.

Criminal
Appeal No.
434 of 1922.
June 26th,
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The following reference was made by Mr. Justice Duckworth to a Bench under section 11 of the Lower Burma Courts Act, 1900:—

The facts of this case are very clear, and there are no reasons for holding, as stated by the appellant, that the prosecution case against him was a mere fabrication, due to a plot between complainant and his Chinese brother-in-law, Htan Na. In fact, the appeal was only admitted for consideration of the question whether the appellant, Nga Shan, was rightly convicted under section 420, Indian Penal Code, under which use could be made of his three previous convictions under section

* Reference made in criminal appeal against the judgment of Maung Aung Gyi, Special Power Magistrate, Thaton.

380. Indian Penal Code, in order to impose upon him a heavy sentence, or whether, on the facts before the Court, he should merely have been convicted under section 215, Indian Penal Code, under which his sentence could not extend to more than two years' rigorous imprisonment.

As matters stand, appellant has been convicted under section 420, Indian Penal Code, for cheating, and inducing the delivery of money, to wit, a sum of Rs. 14, and has been sentenced to five years' rigorous imprisonment including three months' solitary confinement. He was accused of inducing the complainant to pay him Rs. 14 as a ransom for the return of his two bullocks, which had undoubtedly been stolen, and, thereafter, in spite of several successive promises to return the said animal at Thindawgyi Kyaukkon, of failing upon each occasion to restore them. As a matter of fact, the said cattle have never been returned.

According to my view, the questions to be considered in order to determine the matter, are :—

- (i) Does the record indicate that the appellant ever had the animals in his possession or control?
- (ii) If so, does it show, or lead to the inference, that he had from the first, no intention of restoring them to the owner, after receipt of the ransom money? (Cheating).
- (iii) Is it indicated that he may have at first intended to return the bullocks, and subsequently changed his mind, or otherwise been prevented from doing so? (No cheating).
- (iv) Or, is it to be inferred that he never had control of the animals, and all along intended to swindle the owner out of his money? (Cheating.)

Normally, where the facts show an offence under section 215, Indian Penal Code, it would be a Court's duty to convict under that section but I can see no reason, where the facts proved, or to be inferred, indicate the commission of a more serious offence (which may include an offence under section 215, Indian Penal Code), why a Court should be precluded from convicting an offender under the appropriate section, provided, of course, that he has been duly charged with it. It seems to

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me that section 235, Criminal Procedure Code, expressly provides for such a case.

☉ The matter was decided by my learned brother Pratt, J., in the unpublished case of *Nga Kyaw Zan v. King-Emperor* (1), where he came to the conclusion that, in cases where section 215, Indian Penal Code, fitted the crime, section 215, and not section 420, Indian Penal Code, should be utilized. However, it does not appear to me that the matter was thoroughly thrashed out in that instance, and I am aware that there are differences of opinion about the correctness of that decision.

I have already stated what my own view is, and what questions have to be decided in each separate case, for, in my opinion, the decision depends entirely on what are the proved facts in each instance, it being impossible to lay down any hard-and-fast rule.

What are the facts proved and to be inferred in the present case?

Complainant apparently met appellant casually, when searching for his bullocks and told him of his loss, and asked him to attempt to procure information about them. The appellant told complainant that he would try to get news, and requested the complainant to meet him that evening. This was on the day following the actual theft of the animals.

At the meeting that night, in the kwin, appellant informed the complainant that he had received news of the lost cattle. On complainant mentioning a ransom, appellant said that he would go and consult another person, and warned the complainant to meet him next morning. The meeting took place in complainant's durian garden, and appellant told complainant that the ransom would be Rs. 30. On complainant suggesting that this was perhaps too much, it was arranged that they should meet again at complainant's brother-in-law, Htan Na's house, that night at Tangale. At that meeting, the appellant accepted a sum of Rs. 14 as a ransom for the return of the cattle, and indicated the spot already referred to as the place where the bullocks would be released. On at least four occasions he failed to keep this promise, and the case was then sent up to Court.

(1) Criminal Appeal No. 673 of 1912.

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I think it may be taken, from these allegations, that the appellant, who knew complainant well, never had possession of, or control over, the cattle, and merely seized upon the complainant's complaisance, in order to defraud him of what money he could. The cattle were worth at least Rs. 120, and it is probable that a man, who had them securely in his control, would not have been contented with a paltry sum of Rs. 14 as a ransom.

If this be so, it seems to me that the offence could fall under section 420, Indian Penal Code.

If the appellant had possession, or control, of the animals while he might have been convicted under section 379 or section 411, Indian Penal Code, he could not well have been convicted under section 420, Indian Penal Code, unless it was shown, or was clearly to be inferred, that he never intended to restore them on payment of a ransom; for, if he intended to return the bullocks at the time when the ransom was paid, but subsequently changed his mind, or was otherwise prevented from returning them, the offence of cheating would not have been complete. The case of the *Deputy Legal Remembrancer v. Ijjatullah Kazi* (2) might be referred to with reference to the last statement of Law made by me.

In the present instance, my opinion is that an offence under section 420, Indian Penal Code, has been proved, and that the conviction was correct. In view, however, of the fact that Pratt, J., has come to a different decision in the case already referred to, which I am aware has since been followed in several Lower Burma districts, I consider that the matter is of sufficient importance to be referred to a Bench, or a Full Bench, of this Court, as the learned Chief Judge may decide.

The question referred will be:—When an accused person has taken a ransom for the restoration of stolen property, and fails to return that property to the person, who has paid him the ransom, can he be convicted under section 420, Indian Penal Code, or must the conviction be confined to one under section 215, Indian Penal Code?

The opinion of the Bench was as follows:—

Robinson, C.J.—The question referred for the decision of

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this Bench is stated as follows :—“When an accused person has taken a ransom for the restoration of stolen property, and fails to return that property to the person who has paid him the ransom, can he be convicted under section 420, Indian Penal Code, or must the conviction be confined to one under section 215, Indian Penal Code?”

The reference presumes that the facts established by the evidence would constitute the offence of cheating though they would also establish an offence under section 215, Indian Penal Code. In other words, the question is whether, the Legislature having enacted an offence to meet a particular form of crime it is open to the Courts to convict of a more serious crime when the facts proved constitute that more serious offence.

This reference has been made because of an unpublished ruling of a Judge of this Court holding the view that it is not open to the Court to convict of the more serious offence. No reasons for that decision were given and no authority was cited so that we do not know on what ground that *dictum* was laid down.

The Indian Penal Code defines many offences, some of the same character as others but differing in degree, others of an entirely different character. The general rule which in our opinion should guide the Courts is to convict of and punish for the most serious offence that is established provided of course that the accused has been charged with and has had an opportunity of meeting the charge of that offence.

Section 215, Indian Penal Code, was no doubt enacted to provide for a particular class of offence. Without it there might be cases in which as the facts constitute no other offence the guilty person would get off scot free. But we can find no ground for holding that the Legislature meant to confine the Court to that offence when the facts proved amount to another and more serious offence. If a man is guilty of the offence of rape and it is established that he was in committing that offence also guilty of murder it could surely never be held that because the Legislature had provided for the particular offence of rape he could not be convicted of murder.

We must therefore answer the reference by saying that he can be convicted of cheating.

Macgregor, J.—I concur in the answer to the reference proposed by the learned Chief Judge. The offences under sections 215 and 420 have the common ingredient that a person has been induced to part with money or money's worth. The addition to this of certain facts will result in an offence under section 215, against public justice. The addition to it of certain facts of a different kind will result in an offence under section 420, against property. Where the ingredients of an offence under section 420 are proved, I can find no provision of law forbidding a conviction under it merely because of the presence of other facts which, if looked at to the exclusion of some of the ingredients of the offence under section 420, disclose an offence under section 215.

Before Mr. Justice Duckworth.

JAISHANKAR v. JIVANRAM SANTHAL.*

Surty—for applicant (defendant).

R. M. Sen—for respondent (plaintiff).

Rangoon Rent Act, 1920—Section 13—Recovery of overpayments by deduction from rent—Period of limitation.

A tenant may deduct overpayments of rent from rent payable by him to his landlord only within six months after the last overpayment made by him.

It is admitted that the last overpayment of rent was made by defendant-applicant in March 1921.

This suit was filed on 24th January 1922. By this suit respondent sued to recover a sum of Rs. 157 as balance of rent due by the applicant for rooms 3 and 4 in No. 5, 29th Street, Rangoon, for the months of March, April and May 1921.

The applicant did not dispute that the rent was due, but by his stamped written statement he sought to set off, under section 13 of the Rent Act, rents overpaid by him, before the Rent Controller had fixed a Standard Rent for the premises, such Standard Rent being at a lower rate than he had been paying. In all, he claimed that there was a balance in his favour amounting to Rs. 145, for which he prayed for a decree with costs. The learned Judge of the Small Cause Court decreed respondent's suit, holding that, under section 13 of the

* Civil Revision of the order passed by J. E. Godfrey, Esq., First Judge, Small Cause Court, Rangoon.

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Rent Act, the claim to set off was time-barred, that section containing a special limitation of six months from the date of payment of rent sought to be recovered.

In this Court it is argued that the lower Court misread, and misunderstood, the concluding portion of section 13 (1), Burma Act II of 1920; that it should have held that the applicant defendant was entitled to deduct the amount of rent paid in excess of the Standard Rent; and that the applicant's claim to deduct the same from the rent outstanding was not time-barred. It is also urged that the applicant had, even prior to suit, exercised this right to deduct, in that he had not paid the rent in question in the suit. Other matters in the application were not argued, and may be taken to have been dropped.

First of all, it must be decided what the concluding portion of section 13 (1) of the Act means. Once that is decided, the decision of the case is easy. After reading sections 13 and 14 of the Act, my opinion is that the whole intention of sections 13 and 14 was to give various easy methods of recovering rents overpaid within a period of six months from the date of payment. However the actual words, upon which Mr. Surty for applicant-defendant relies, are:—

“Where any sum has “been paid on account of rent being a sum which is by reason of the provisions of this Act irrecoverable” “such sum” “may, without prejudice to any other method of recovery, be deducted by such Tenant from any rent payable within six months by him, to such Landlord.”

Mr. Surty contends that this means that, if the tenant has up to six months' rent in his hands, he may deduct therefrom, at any time, such rent as he had overpaid before the rent was lowered by standardization. In other words, he can hold the rent as a pledge. He sets up that this was really what his client did, though he merely pleaded a right to deduct, when the written statement was filed.

On the other hand, Mr. Sen argues that the words mean that this deduction must be made within six months of the date of payment of the rents in question—in this case within six months of March 1921. This was, of course, the view taken by the learned Judge below.

From the position of the words "within six months" I am inclined to think that the correct view is not that taken by Mr. Surty, but that taken by Mr. Sen, and the learned Judge of the Small Cause Court. I think that what is meant is that the tenant may deduct his overpayments from rent payable by him to the landlord within six months after the last overpayment made by him. This is in accord with the tenour of the rest of section 13, section 14 and the new section 14 (a).

Taking this view, I think that there is no doubt that the claim to set off was time-barred.

It is ridiculous to argue that the deduction had been made before suit, or that applicant had exercised an option to deduct it previous to the filing of the written statement. The wording of that document is against such an idea.

No ground upon which exemption from limitation could be claimed was shown in this written statement demanding a set off, as required by Order 7, Rule 6, Civil Procedure Code. Nothing can be inferred in applicant's favour merely because he defaulted in his rent. In fact, it is shown that he actually applied to a Magistrate under section 14 and this tells heavily against any such plea. In my opinion, the case was correctly decided in the Small Cause Court, and I dismiss the application with costs.

Before Mr. Justice Maung Kin.

MAUNG MYO v. MAUNG KHA. *

Shaw—for appellant (defendant).

N. N. Sen—for respondent (plaintiff).

Satisfaction of decree—Failure to certify—Right of judgment debtor to sue for damages for breach of promise to certify—Jurisdiction of Small Cause Court.

When a decree-holder promises to certify satisfaction of a decree but fails to do so, a suit will lie against him for damages for breach of the promise to certify, and such a suit is cognizable by a Small Cause Court.

Shadi v. Ganga Sahai, (1881) I.L.R. 3 All., 588; *Periatambi Udayan v. Vellaya Goundan*, (1897) I.L.R. 21 Mad., 409; *Iswar Chandra Dutt v. Haris Chandra Dutt*, (1898) I.L.R. 25 Cal., 718; *Gendo v. Nihal Sunwar*, (1908) I.L.R. 30 All., 464; *Azizan v. Matuk Lall Sahu*, (1893) I.L.R. 21 Cal., 437; *Viraraghava Reddi v. Subbalka*, (1881) I.L.R. Mad., 397; *Mallamma v. Venkappa*, (1884) I.L.R. 8 Mad., 277; *In the*

Second Appeal against the judgment passed by H. Po Saw, Esq., Additional Judge, Henzada, setting aside that of Maung Ba Thwin, Township Judge, Ingabu.

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matter of Medai Kaliani Anni, (1907) I.L.R. 30 Mad., 545; *Poromanand Khasnabish v. Khepoo Paramanick*, (1884) I.L.R. 10 Cal., 354; *Patankar v. Devji*, (1882) I.L.R. 6 Bom., 147; *Haji Abdul Rahiman v. Khoja Khaki Aruih*, (1886) I.L.R. 11 Bom., 6; *Deno Bundhu Nundy v. Hari Mati Dasse*, (1903) I.L.R. 31 Cal., 480; *Moru Narsu Gujer v. Hasan valad Fattékhan Jummal*, (1918) I.L.R. 43 Bom., 240; *Jaikaran Bharti v. Raghunath Singh*, (1898) I.L.R. 20 All., 254; *Ishan Chunder Bando-padhya v. Indro Narain Gossami*, (1883) I.L.R. 9 Cal., 788; *Pat Dasi v. Sharup Chand Mala*, (1887) I.L.R. 14 Cal., 376; *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I.L.R. 19 Cal., 683—referred to.

The defendant obtained a decree against the plaintiff for Rs. 150 and costs. Subsequently the plaintiff paid Rs. 100 in full satisfaction of the decree, as agreed upon between the parties. The defendant's son, who undoubtedly was the agent of his father in this behalf, agreed to certify satisfaction to the Court; but, as a fact, it was not certified. The defendant then executed the decree by attaching certain property. The plaintiff objected, and applied to be allowed to prove satisfaction, but was not allowed to do so, as his application was held to be time-barred.

The plaintiff now files the present suit for damages, alleging that the defendant has committed a breach of his promise to certify satisfaction to the Court. The words of his plaint on this point are:—"Plaintiff has a right to sue to be indemnified for the loss caused to him by the defendant's unfair conduct in not certifying execution in terms of the contract of compromise." He assessed his damages as being the difference between the Rs. 100 he had paid and the amount he paid in the subsequent execution proceedings.

The question is whether such a suit lies.

Under Order XXI, Rule 2 (1), where a decree has been satisfied the decree-holder shall certify the payment to the Court, whose duty it is to execute the decree, and the Court shall record the same accordingly. Under sub-section 3 of the same rule a payment, which has not been certified or recorded, shall not be recognized by any Court executing the decree. So that, the payment, alleged to have been made, not having been certified under Order XXI, Rule 2, sub-sections 1 and 2, the Court executing the decree cannot recognize it.

The question then is—Can any other Court recognize it? In answering this question, sub-section 3 of sub-rule 2 must be read with section 47 of the Code.

I think the law is clear that any Court other than the Court executing the decree can recognize the payment, provided, in doing so, the Court does not disobey the provisions of section 47. And recognition of such a payment by the Court other than the Court executing the decree must necessarily be in a suit.

So far as I can ascertain there are four classes of cases, namely (1) where the judgment-debtor sues for the money he has paid out of Court on the ground of failure of consideration; (2) where the judgment-debtor sues for damages for a breach of an express or implied promise of the decree-holder to certify the payment; (3) where the judgment-debtor, after having paid up the decree out of Court, asks for a declaration that it has been satisfied, and for an injunction to restrain the decree-holder from executing the decree and (4) where the judgment-debtor asks for the sale to be set aside.

As regards the first case there are authorities for saying that the suit is maintainable. See *Shadi v. Ganga Sahai* (1); *Periatambi Udayan v. Vellaya Goundan* (2); *Iswar Chandra Dutt v. Haris Chandra Dutt* (3); and *Gendo v. Nihal Kunwar* (4).

In *Iswar Chandra Dutt's* case *Azizan v. Matuk Lall Sahu* (5) was distinguished. In that case the suit was for a declaration that the defendant had no right to execute the decree, and for an injunction to restrain him from executing it. The contention was that the suit was barred by section 244 of the Civil Procedure Code of 1882. It was held by a majority of the Judges, who composed the Bench, that section 244 was not limited by section 258, and that the suit was not maintainable; and that where a decree was satisfied by an agreement out of Court, and such satisfaction was not certified to the Court, a subsequent suit on the agreement was not maintainable if the object was to restrain the decree-holder from executing his decree in contravention of the agreement. The facts of that case were held to be very different, Ghose, J., observing:—"The object of the present suit is not to restrain the decree-holder from executing his decree in contravention

(1) (1881) I.L.R. 3 All., 538.

(2) (1897) I.L.R. 21 Mad., 409.

(3) (1898) I.L.R. 25 Cal., 718.

(4) (1908) I.L.R. 30 All., 464.

(5) (1893) I.L.R. 21 Cal., 437.

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of the agreement entered into between the parties as evidenced by the two documents to which we have already referred; but rather the suit is with the object of recovering property under that agreement. The defendants-decreeholders have already in execution of the decree been put in possession of the properties covered thereby, and what the plaintiffs now say is in effect this; subsequent to the decree you received from us certain consideration for which you conveyed the property covered by the decree; we were not at liberty to oppose the execution of decree and so you were put in possession of the property in execution; but we are notwithstanding entitled to recover the same from you upon the conveyance executed by you. We think that this action is quite maintainable."

As regards the second class to which the present case belongs, the following are the authorities.—*Viraraghava Reddi v. Subbakka* (6); *Mallamma v. Venkappa* (7); *In the matter of Medai Kaliani Anni* (8); and *Poromanand Khasnabish v. Khepo Paramanick* (9).

In *Viraraghava Reddi's* case Kindersley, J., observed :— "In the class of cases now under consideration the debtor is precluded by positive enactment from proving in the course of execution his payment made out of Court. What, then, is his remedy? Where the creditor on receiving the money has promised to certify the payment to the Court, and has failed to do so, I think that a suit would lie on the promise. It is not clear from the case stated whether there was such a promise in the present case. Where there has been no promise, the question appears to me more difficult. It is difficult to bring the case within the English action for money had and received upon a consideration which has failed; because, though the debtor probably may rely upon the creditor certifying the payment, the consideration for the payment is the decree." Turner, C. J., (*Mutuswamy Iyer, J.*, concurring) observed :— "The suit now pending is not brought to recover money levied under a decree, nor is it a suit to recover money paid and accepted in satisfaction of a debt due. It is a suit to recover damages for the breach of the implied promise to certify the payment to the

(6) (1881) I.L.R. 5 Mad., 397 (F.B.) (7) (1884) I.L.R. 8 Mad., 277 (F.B.).
(8) (1907) I.L.R. 30 Mad., 545. (9) (1884) I.L.R. 10 Cal., 354.

Court and thereby make it effectual in execution. . . . For the wrong which the plaintiff has suffered, he cannot be debarred his remedy by action, unless it is taken away expressly or by necessary implication."

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In the present case there was a promise to certify the payment to the Court, and the suit is for damages for an alleged breach thereof. Therefore, the remarks of Kindersley, J., and Turner, C.J., apply.

In *Madai Kaliani's* case Subramani Iyer, J., observed:—
"The ground on which the Full Bench decision in 5 Mad., 397, rests is that the law casts on a decree-holder receiving payment out of Court the duty of certifying such payment in satisfaction of the decree, and that if he fails to do so, there is a breach of that duty. This, to my mind, necessarily implies that a cause of action accrues when the judgment-debtor fails to fulfil his duty in the matter."

All the cases above cited on the second class of cases are under the 1882 Code.

In *Promanand Khasnabish's* case the case of *Patankar v. Devji* (10) was dissented from. In this Bombay case the learned Judges, Melvill and Pinhey, held that a suit for the recovery of money paid to a judgment-creditor out of Court and not certified appeared to be barred by section 244 (c) of Act X of 1877, and by the last paragraph of section 258 as amended by Act XII of 1879. *Huji Abdul Rahiman v. Khoja Khaki Aruth* (11), a Full Bench case of the Bombay High Court, is to the same effect as *Patankar's* case. *Patankar's* case was decided on the 24th January 1882 before the 1882 Code came into force; and the latter case was decided in 1886. To understand the reasons of the decisions in these two cases, it is necessary to examine the past history of the Code of Civil Procedure. This is correctly stated by Mulla in his Civil Procedure Code: * "The Codes of 1859 (s. 206) and 1867 (s. 258) provided that a payment or adjustment made out of Court should not be recognized by any Court executing the decree, unless it had been certified to that Court. The Code of 1877 was amended in the year 1879, and the amendment provided

(10) (1882) I.L.R. 6 Bom., 147.

(11) (1886) I.L.R. 11 Bom., 6.

* Page 543 of Mulla's C.P. Code, 7th Edn.

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that an uncertified payment or adjustment should not be recognized by *any* Court; and the same provision occurred in the Code of 1882. In the year 1888 the section was again altered by providing that an uncertified payment or adjustment should not be recognized by *any Court executing the decree*; and this is the form in which the rule now stands" in the present Code. *Patankar's* case was decided under the amendment of the Code of 1877. The later Full Bench case of Bombay was decided under the Code of 1882 before the amendment in 1888. The reasons for the decisions in these two cases are the same, and it is necessary to quote only what Sargent, C.J., said on the point. The learned Chief Justice said:—"The question in this case turns upon the consideration to be placed on the concluding clause of section 258 of the Civil Procedure Code (Act XIV of 1882) which after providing that—'where any money payable under decree is paid out of Court, or the decree is otherwise adjusted, in whole or in part, to the satisfaction of the decree-holder, the decree-holder shall certify such payment or the adjustment to the Court whose duty it is to execute the decree'—directs that 'no such payment or adjustment shall be recognized by *any Court*, unless it has been certified as aforesaid.' It has been contended for the appellant that by 'any Court' it must be meant any Court concerned with the question of the execution of the decree. Such would appear to have been the opinion of a Division Bench of the Allahabad Court consisting of Dudhoit and Mahmood, JJ., in *Ramghulam v. Janki Rai*, I.L.R. 7 All., 124 at p. 128, and which was adopted by the Calcutta High Court in *Jhabar Mahmood v. Madan Sonahan*, I.L.R. 11 Cal., 671. In the former case Mr. Justice Mahmood says:—"The section occurs in a Code regulating Civil Procedure and a chapter which relates to execution of decrees, and the only object it can have in view is to remove the inconvenience which would otherwise arise in connection with the execution of decrees in cases in which adjustment out of Court is pleaded. It cannot affect Courts which are not concerned with the question of execution of decrees, but with a separate suit in which the cause of action alleged is the breach of a valid contract by which the decree-holder has bound himself not to execute the decree.' I am unable to agree in this view

of the section." The learned Chief Justice, after discussing the matter further, said :—" The irresistible conclusion is that the substitution of "any Court" for 'such' Court was made advisedly by the Legislature with the intention of extending the prohibition to every Civil Court against recognizing an uncertified adjustment for the purpose for which it was intended, namely, as operating in satisfaction of a decree."

It seems clear that the Bombay cases do not now apply, because by the amendment in 1888 the Legislature has substituted "the Court executing the decree" for "any Court."

As regards the third class of cases, *Azizan v. Matuk Lall Sahu* (5); *Deno Bundhu Nundy v. Hari Mati Dasse* (12), and *Moru Narsu Gujar v. Hasan valad Fattekhhan Jummal* (13) are cases in which it was held that a suit for a declaration that the decree has been satisfied, and a suit for that and an injunction to restrain the execution proceedings, do not lie.

In *Deno Bundhu Nundy's* case an attempt was made for an amendment of the plaint into one for damages for a breach of contract. The learned Judges disallowed the proposed amendment, as it had been refused by the Court below, and as it was too late to ask for it in the High Court. Further, they said that there was no allegation of any damage in the plaint, and that they had felt some difficulty in ascertaining what the amendment really asked for was. They further said that it was by no means apparent that the plaintiff had as yet sustained any damages, and that to allow the plaintiff to amend would virtually amount to allowing him to make a new case, and they refused the application for amendment. It is to be noted that the learned Judges did not appear to hold the view that a suit for damages for a breach of contract would not lie.

As regards the fourth class of cases, Blair and Aikman, JJ. in *Jaiharan Bharti v. Ranghunath Singh* (14) held that such suits will not lie. The Calcutta cases of *Ishan Chnnder Bandopadhyaya v. Indro Narain Gossami* (15) and *Pat Dasi v. Sharup Chand Mala* (16) in which the contrary view was held, were pointed out to have been overruled by the decision of the

(5) (1893) I.L.R. 21 Cal., 437.

(12) (1903) I.L.R. 31 Cal., 480.

(13) (1918) I.L.R. 43 Bom., 240.

(14) (1898) I.L.R. 20 All., 254.

(15) (1883) I.L.R. 9 Cal., 788.

(16) (1887) I.L.R. 14 Cal., 376.

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v.
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Privy Council in *Prasunno Kumar Sanal v. Kali Das Sanyal* (17). It is not necessary for me to go into this question.

From the above examination of the authorities, it seems clear to me that the suit in the present case does lie, and is not barred by Order II, Rule 3, or by section 47 of the Code of Civil Procedure.

The next question for consideration is whether the suit lies in the Small Cause Court.

It has been contended that this is a suit which comes within the Article 35 (j) of the Second Schedule to the Provincial Small Cause Courts Act, the suit being one for the illegal or improper execution of any distress or legal process. I think it is sufficient to quote from Mr. Shafi's discussion on the test for determining the jurisdiction of the Small Cause Court in his Provincial Small Cause Courts Act. The learned author says:—"In order to determine whether a Court of Small Causes has jurisdiction to try a particular suit, we must look to the real nature of the claim." (I.L.R. 30 Mad., 101, and I.L.R. 28 All., 293.)

The suit as disclosed by the plaint in the case is one which is clearly cognizable by a Court of Small Causes. It is not based on the illegal or improper execution of the decree. If it was, it would have been altogether barred by section 47 of the Code, or, in the words of Turner, C.J., the suit is not one brought to recover money levied under a decree. It is merely a suit to recover damages for the breach of an express or implied promise to certify the payment to the Court.

For the above reasons, I would hold that the suit is not barred by any provisions of law, and that it is cognizable by the Court of Small Causes.

This appeal does not lie and is, therefore, dismissed with costs.

Before Mr. Justice Maung Kin.

MAUNG AUNG BAN v. MAUNG AUNG PO.*

Ko Ko Gyi—for applicant (plaintiff).

Naidu—for respondent (defendant).

Civil
Revision No.
79 of 1911
2
July 31st
1922.

Limitation Act, 1908—Article 97—Suit for recovery of money on failure to perform contract.

A owed B money and in satisfaction of the debt made over outright his share in the land in suit. B let the land to A as tenant. Later he asked A to give him a registered conveyance and A refused. B then sued for the money, alleging that A had failed to perform his part of the contract.

Held,—that although there was no actual payment but only a debt acknowledged by A to be due, Article 97 of the Limitation Act applied and a suit for the recovery of the money was not barred till three years after the date of the failure to perform the contract.

Bassu Kuar v. Dhum Singh, (1888) I.L.R. 11 All., 47 at p. 57—followed.

This is an application for the revision of the decree of the District Court of Henzada which dismissed the applicant's suit. It was one for the recovery of Rs. 430 on failure of consideration.

The plaintiff's case, as appears from his plaint, is shortly as follows:—

In Tabaung 1277 B.E. the defendant owed him Rs. 430, and, in satisfaction of the debt, made over outright his share in the land in suit. After having got possession, the plaintiff let out the land to the defendant at 60 baskets of paddy per year. The defendant is still in possession. The plaintiff has now discovered that the outright transfer should have been effected by a registered instrument, and has therefore asked the defendant to give him a registered conveyance, which the defendant has refused to do. Instead of suing for a decree for specific performance of the contract of sale, he sues for the Rs. 430, alleging that the defendant has failed to perform his part of the contract.

The defendant denies having transferred the land to the plaintiff, or that the plaintiff got possession of it at any time. He says, in Kason 1276 B.E. he borrowed Rs. 250 from the

* Civil Revision of the order passed by H. Po Saw, Esq., Additional Judge, Henzada, setting aside the decree passed by Maung Sein Win, Township Judge of Myanaung.

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plaintiff, and promised to repay the loan by making over 60 baskets of paddy a year. Up to 1281 B.E. he has for six years regularly given the plaintiff 60 baskets of paddy. The debt has, therefore, been discharged.

The trial Court found that the plaintiff's allegations were all true, and that the defendant could not prove his allegations as to the loan of Rs. 250, and the discharge thereof, and passed a decree as prayed.

The defendant appealed to the District Court. His first ground of appeal was that the suit was not maintainable. The Court found that by reason of the Transfer of Property Act and the Registration Act, both the alleged sale and lease were wholly void, and that, therefore, the suit was barred by limitation, and for this reason dismissed the plaintiff's suit.

I cannot understand the learned Additional District Judge's view. The fact that the alleged sale and lease were not made by a registered deed does not appear to me to affect the plaintiff's suit as framed. The learned Judge recognized the fact that the plaintiff could have sued for a decree for specific performance by asking for a registered deed of sale; but he appears to have forgotten that where a person is entitled to ask for a decree for specific performance, he is also entitled to ask for the return of his money. Therefore, if there was a payment under the agreement, which is sought to be specifically performed, the person, who has done his part of the contract, would be entitled to ask for a decree for specific performance, or for the return of the money. A little difficulty, however, arises in this case, because the allegation was that there was no payment, but only an admission on the part of the defendant that he owed the plaintiff Rs. 430.

It has been contended that Article 97 of the Limitation Act applies, and that the suit was not time-barred, as the defendant broke his part of the contract only a year before the suit. The opposite view, which looks fair on the face of it, is that the Article applies only where money was actually received by the defendant at the time the contract was entered into and that it is for the plaintiff in the present suit to sue for the recovery of the debt, in which case it is common ground that the suit would be barred by limitation. The point is, however, concluded by authority in *Bassu Kuar v. Dhum*

Singh (1) where the facts are similar to those in the present; their Lordships of the Privy Council observed:—"An action for money paid upon an existing consideration which afterwards fails is not barred till three years after date of the failure. A debt retained in part payment of the purchase money is in effect, and as between vendor and purchaser, a payment of that part." Relying on these observations I would hold that the suit was not time-barred.

The judgment and decree of the lower Appellate Court are set aside, and it is directed the appeal before it be readmitted under its original number and the case decided on its merits.

The costs of this appeal will be costs in the cause.

Before Mr. Justice Duckworth.

MAUNG PO YE v. (1) YE CHEIN HONG AND (2) MA MAI THIN.*

Doctor—for applicant (defendant).

R. M. Sen—for respondent (plaintiff).

Promissory Note—Form of—Effect of omissions.

Where the amount of a loan was shown in figures at the top of the promissory note, but had not been entered in the space provided for it in the body of the note, it was held that as the meaning of the document was clear the omission did not invalidate it.

M.N.R.L. Firmv. Kirwan Gyan, 5 Bur. L.T., 162—referred to.

The sole questions for decision in this Revisional application are:—

- (1) Whether the document in suit is a Promissory Note?
- (2) If not, what is the result?
- (3) Is the point raised too late?

The respondent-plaintiffs sued the petitioner in the Township Court on the document, as being an On Demand Pronote, and obtained a decree. This decree was confirmed on appeal to the District Court. It does not appear that the question as to whether the said document was a pronote or not was ever raised in the Township Court, and the question was not dealt with by the lower Appellate Court, though I am told by

* Revision of the order passed by Maung Ba U, District Judge, Bassein, confirming the judgment passed by Maung Pe, Township Judge, Ngaputaw.

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AUNG BAN
v.
MAUNG
AUNG PO.

Civil
Revision No.
14 of 1922.
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1922.

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YB
YB CHEIN
HONG.

Mr. Doctor that the matter was referred to in argument. It was certainly not one of the grounds of appeal.

The document in question which is on a printed form, and is in Burmese, may be translated as follows:—

Gwee Chein Hong and Ma Me Thin.

Number	No.	Money	Rs. 225/
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On Demand

2nd April 1920 A.D.

15th Lazan of Hnaung Tagu 1281 B.E.

U Po Ye of Gwechaung Village, who signs on this On Demand pronote below, says:—

I, U Po Ye, the undersigned, do hereby promise to pay the loan (blank) due for payment On Demand at any time to the two creditors Gwee Chein Hong and Ma Me Thin themselves, or to order, in full, and by one payment, together with interest at the rate of Rs. 3 per cent. per mensem. Having thus promised, I accordingly sign hereunder and borrow the loan.

Stamp

U Po Ye

Mr. Doctor argues that, as the amount of the loan Rs. 225 is not entered in the blank space in the body of the note, the said document is not a promissory note, and he relies on section 20 of the Negotiable Instruments Act, and on the case of *M.N.P.L. Firm v. Kirwan Gyan* (1).

Now section 20 deals with Instruments executed in blank, or Inchoate Instruments. The decision quoted dealt with a case where it does not appear that the Payee's name was entered anywhere on the document. In my opinion, neither section 20, nor the decision relied on, have any application to the present case. Here we have the amount Rs. 225 specifically mentioned in figures at the right-hand top corner of the document in a space provided therefor, and the meaning of the document is quite clear. It is not as though the amount of the said "Loan" (ငွေငွေ) was not mentioned anywhere on the face of the paper. On page 35, Edition 2 of Bhashyam

(1) 5 Bur. L.T., 162.

and Adiga's Negotiable Instruments Act, we read: "If the amount can be ascertained from the face of the paper, the form of expression is immaterial." In regard to cheques on page 52 it is stated: "The sum should be distinctly expressed in the instrument both in words and figures, but either will do." Here I am satisfied that the document in question is a promissory note, and that the other two questions raised do not require determination. I dismiss the application with costs.

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MAUNG PO
YE
v.
YE CHHIN
HONG.

Before Mr. Justice Maung Kin.

MAUNG PO YIN v. MAUNG SHWE KIN.*

Chari—for appellant (defendant).

Bose—for respondent (plaintiff).

Special Civil
Second
Appeal
No. 93 of
1922.
August 8th,
1922.

Sale of land—Resale—Contract of—Time essence of the contract

Where land is sold with the right of repurchase to be exercised within a fixed period of time, or on a date fixed, time is of the essence of the contract and the seller has no power to exercise his option after the expiry of the period fixed. The doctrine that time may not be of the essence of the contract, which arises on the construction of contracts of sale of immovable property, is not applicable to contracts of resale of property conveyed.

Jamshed Khodaram Irani v. Burjorji Dhunjibhai, (1916) 30 Mad. L.J., 188—referred to.

Samarapuri Chettiar v. A. Sudarsanachariar, (1919) I.L.R. 42 Mad., 802—followed.

By a registered deed the plaintiff transferred the land in suit to the defendant with the right of repurchase on the expiry of three years from the date of the deed.

The plaintiff, treating the instrument as one of mortgage, sued for redemption of the property.

In the trial Court the question whether the transaction was one of mortgage or sale with the option of repurchase was gone into, and it was held that it was not a mortgage but a sale with the option of repurchase. The Court proceeded to hold that, as the time fixed for the exercise of the option had passed when the suit was filed, the plaintiff could no longer exercise it.

* Special Civil Second Appeal against the judgment passed by J. B. Marshall, Esq., Divisional Judge, Arakan, setting aside that of A. E. Gilliat, Esq., District Judge, Sandoway.

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 SHWE
 KIN.

On appeal to the Divisional Court, it was held that, upon a fair construction of the document, time was not of the essence of the contract, that the plaintiff was entitled to exercise the right to repurchase within a reasonable time after the date fixed, and that, as the plaintiff offered to repurchase the property only twenty-two days after the date fixed, the offer had been made within a reasonable time. The plaint which contained no prayer for a decree for specific performance of the contract of repurchase, was allowed to be amended, and a decree for specific performance was granted.

In holding that time was not of the essence of the contract, the Divisional Court placed reliance upon *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* (1). In that case their Lordships of the Privy Council held that in the case of contracts for the sale of land, time is presumed in equity not to be of the essence of the contract and specific performance will be enforced notwithstanding the failure to keep the dates assigned by the contract if justice can be done and there is nothing in the express stipulations, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal rights of the parties, and that in enacting section 55 of the Indian Contract Act the Indian Legislature only embodied this doctrine of equity.

I understand that it was pointed out to the learned Judge that the Privy Council case lays down a general rule in ordinary cases of sales of immoveable property, and that this general rule does not apply to the case of a right of repurchase or of an obligation to resell on the date fixed.

The case of *Samarapuri Chettiar v. A. Sudarsanachariar* (2) was cited to the Judge; but he appears to have considered that case to be contrary to the Privy Council case, inasmuch as he said in his judgment that the Privy Council case was not referred to.

The learned Judges of the Madras High Court held that "the lower Appellate Court was in error in applying the doctrine that time may not be of the essence of the contract which arises on the construction of contracts of sale to contracts for resale of property conveyed." They stated that

(1) (1916) 30 Mad. L.J., 186 (2) (1919) I.L.R. 42 Mad., 802.

the true doctrine is given in Fisher on Mortgages, chapter 1, paragraph 18, as being that, if the transaction is not a mortgage, the right to repurchase being an option must be exercised according to the strict terms of the power. They were of opinion that there was no reason why a different rule should prevail in India.

The law on the subject is stated to the same effect in Volume 21 of Halsbury's Laws of England on the subject of Mortgage at page 72. It is as follows:—"If, however, the intended arrangement is not a lending and borrowing transaction but an absolute sale, accompanied by a contemporaneous agreement for repurchase or a stipulation that the conveyance should be void upon payment of a certain sum at a fixed time, this does not entitle the vendor to such a right to redeem as is incidental to a mortgage, but creates a mere right of repurchase to be exercised in accordance with the terms of the power. The question always is—was the original transaction a *bonâ fide* sale with a contract for repurchase, or was it a mortgage under the form of a sale? In the former case the condition for repurchase is construed strictly against the vendor, and where there is a time limited for the purpose it must be precisely observed."

It seems clear to me that the case of the exercise of an option of repurchase on a certain fixed date is different to the ordinary case of an agreement to sell immoveable property by a certain fixed date. In the latter case the doctrine of equity is that time may not be of the essence of the contract; but in the former case time will always be of the essence of the contract. The reason for the difference is stated by Fisher as being that in the case of an option of repurchase there is no mutuality. In other words, the purchaser has no means of compelling the repayment of the consideration money, and the power of repurchase is only a privilege.

Under these circumstances, it must be held that the plaintiff-respondent had no power to exercise his option when twenty-two days after the date fixed he offered to repurchase the property. His suit must, therefore, be dismissed, and this appeal is allowed with costs.

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MAUNG PO
YIN
vs.
MAUNG
SHWE
KIN.

Civil
Miscellaneous
Appeal
No. 95 of
1922.
August 8th,
1922.

Before Mr. Justice Maung Kin.

A. SUBRAMONIAN IYER v. ABDUL RAHMAN.*

Das—for appellant.

Barnabas—for respondent.

Civil Procedure Code—Order XXXVIII, Rules 1 and 2—Security for appearance—Responsibility of surety.

In execution proceedings the judgment-debtor's surety brought him before the Court, but the judgment-debtor produced a protection order from the Insolvency Court. Later the judgment-debtor's insolvency application was dismissed and the decree-holder put in a fresh application for execution against the surety. The lower Court held that the surety had done all that he was bound to do.

Held,—on appeal, that the surety was bound to produce the judgment-debtor at any time when called upon till the decree was satisfied or the judgment-debtor proceeded against in the execution proceedings.

The appellant brought a suit against one R. V. Bhat for the recovery of money alleged to be due on a promissory note. The defendant was arrested before judgment and, when brought before the Court, undertook to furnish security. The usual bond was executed by him and his surety, Abdul Rahman, the respondent before me. A decree was passed against the defendant after contest. The plaintiff then applied for execution against the surety who, consequently, produced the defendant before the Court. As there was some talk of a settlement, it was ordered that the case be taken after the luncheon interval. The plaintiff did not then appear, and his application was dismissed. But in the morning the defendant had produced a protection order from the Insolvency Court; so, in any case, whether the plaintiff appeared after the interval or not, the defendant could not have been committed to jail. Subsequently the defendant's insolvency application was dismissed and the plaintiff put in a fresh application for execution against the surety. On this application the Court held that the surety had done all that he was bound to do.

The question I have to decide is whether the decision was correct. Order 38, Rule 1, of the Civil Procedure Code gives the grounds on which the Court is authorized to issue a warrant to arrest the defendant before judgment and bring

*Miscellaneous Appeal against the order passed by Maung Tha Tun Aung, Second Additional Judge, Small Cause Court, Rangoon.

him before the Court to show cause why he should not furnish security for his appearance. Rule 2 provides: "Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed in the suit" "Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit."

The security is, therefore, for the defendant's appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit. In this case, as a decree had been passed, the defendant would be bound to appear when called upon between the date of the decree and the satisfaction thereof. This is the period during which the plaintiff first made his application against the surety who produced the defendant in consequence. But it is clear that, by the defendant's appearance, there could have been no satisfaction of the decree, or punishment of him for not satisfying the decree, because he appeared under a protection order from the Insolvency Court. In my opinion such an appearance is not such as is contemplated under Order 38, Rule 2, of the Code. That being the case, the subsequent application which has been dismissed should have been granted.

Now supposing the losing party in a suit appeals and obtains an *ad interim* order for stay of execution and the other side, ignorant of this, has him arrested in execution of the decree and he produces the order for stay, he must then be released, and, if the Appellate Court does not reverse the decree on appeal, a fresh application for execution can be made.

There is no doubt that in the case before me, the defendant undertook to appear before the Court for certain purposes, and the surety undertook to produce him for those purposes. Therefore, so long as the defendant was bound to appear under the bond, the surety was bound to produce him. But if,

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RAHMAN.

when he was produced, he could have been called upon to pay up the decree, or, in default, to suffer the punishment provided for by the Code, the matter might have rested on a different footing.

The bond which has been cancelled is restored; the order of the lower Court is set aside; and that Court is directed to proceed with the application and call upon the surety to produce the judgment-debtor, and do all other things it is its duty to do, consequent upon the compliance or non-compliance with the order as the case may be. The respondent will pay the appellant the costs of this appeal; Advocate's fee, two gold mohurs.

Civil
Miscellaneous
Application
No. 23 of
1922.
August 15th,
1922.

Before Sir Sydney Robinson, Kt., Chief Judge, and
Mr. Justice Duckworth.

- (1) V.E.R.M.V.E. RAMANATHAN CHETTY; (2) V.E.R.M. A.R. RAMANATHAN CHETTY; (3) V.E.R.M.N. RAMANATHAN CHETTY; AND (4) V.E.R.M.V. RAMANATHAN CHETTY v. (1) V.E.R.M.N.R. RAMANATHAN CHETTY *alias* SOMASUNDRAM CHETTY; AND (2) V.E.R.M.P. RAMANATHAN CHETTY.

Burjorjee—for applicants.

Das and Chari—for respondents.

Civil Procedure Code—sections 22 and 23—Transfer of Suit—Definition of "Subordinate Court," Original Side of a High Court.

Section 22 of the Civil Procedure Code applies to all Courts in which a suit may be brought, and therefore to the Original Side of a High Court. The factor which determines the power to transfer a suit is whether appeal lie to the Court in which the application is made. As appeals lie from the Original Side to the Appellate Side the former must be taken to be "subordinate" to the latter for the purposes of section 23 and the Appellate Side has jurisdiction to transfer a suit from the Original Side of a High Court.

Robinson, C.J., and Duckworth, J.—Mr. Das raises a preliminary objection to the hearing of this application for transfer. He urges that the suit having been filed in the Original Side of this Court there is no Court to which that Court is "subordinate" and therefore no Court to which such an application can be made or which would have power to pass an order of transfer. This involves a decision as to what

is the meaning to be assigned to the expression "subordinate" in sub-clause 3 of section 23 of the Code of Civil Procedure.

Section 22 deals with the power to transfer cases and it deals with all Courts in which suits may be instituted. There is nothing in this section to suggest that it was not intended to and does not apply to the Original Side of a High Court. Presumably it does so apply but we are asked to hold that as there exists no Court which can exercise the power of transfer it must be held that section 22 does not apply to the Original Side of a High Court. It may be that on a certain reading of section 23 (3) that sub-clause would not govern this case, but inasmuch as we can find no ground for limiting the purview of section 22 or for assuming that it was intended that suits instituted on the Original Side of a High Court should never be transferable under any circumstances we must consider what is the meaning to be assigned to sub-clause 3, and if it is possible to assign a meaning that would allow transfer without any straining of the language used we should assign that meaning. What then is the feature which determines the Court to which an application for transfer should be made? In sub-sections (1) and (2) of section 23 we find the application is to be made to the Appellate Court, that is, the Court to which ordinarily appeals will lie from the Court in which the suit, or one of them, has been filed. Where the Appellate Courts are different then it has to be made to the High Court and lastly where the High Courts are different then to the High Court within the local limits of whose jurisdiction the Court in which the suit brought is situate. There is nothing to show that in the case of a suit brought in the Original Side of a High Court any different rule is to be applied.

But it has been urged that the Judge sitting on the Original Side is a Judge of the High Court, that the Appellate Side is not a different Court and that the Judge on the Original Side is in no way subordinate to the Judges sitting on the Appellate Side. That is quite true. It is pointed out that this Court has held that the Appellate Side cannot interfere in Revision with a decision of the Original Side because it is not a subordinate Court. That again is perfectly true. But we are now dealing with the question of transfer and we find that the

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R. RAMA-
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R. RAMA-
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deciding factor is whether appeals lie from the Court in which the suit is brought. For administrative purposes the Original Side is not subordinate to the Appellate Side but for the purposes of appeals it is subordinate using that expression in its ordinary sense and without any reference to technical subordination in the sense of its being a Court of a lower grade. In ordinary parlance we find it impossible to hold that a Court whose decrees and orders are liable to be reversed on appeal is not subordinate to the Court which has the jurisdiction to reverse its decisions.

Finding then that section 22 deals with all Courts in which a suit may be brought; finding that the determining factor is whether appeals lie to the Court in which the application is made; finding that we can properly interpret "subordinate" for the purposes of transfer as referring merely to subordination in the sense that appeals lie even though the Court may not be a subordinate Court for administrative purposes; we are of opinion that the present application lies and that we have jurisdiction to deal with it if a suitable case is made out for ordering a transfer.

* * * * *

Before Mr. Justice Maung Kin.

D. M. ATTIYA v. KING-EMPEROR.*

Auzam—for applicant.

Criminal
Revision
No. 505B of
1922.
September 5th,
1922.

Indian Penal Code—Section 225B.—Escape from lawful custody.

The applicant was arrested on a civil warrant but a number of men assaulted the process-server with the result that the applicant was released. He made no resistance himself, but he disappeared and was not seen till he surrendered next morning.

Held,—that the applicant had taken advantage of the rescue to get out of the way of the process-server and had therefore been rightly convicted of escaping from lawful custody.

Queen-Empress v. Muppan, (1895) I.L.R. 18 Mad., 401; *The Public Prosecutor v. Ramaswami Konan*, (1908) I.L.R. 31 Mad., 271; *The Public Prosecutor v. Sennimalai Goundan*, (1918) 25 Mad. L.T., 290; *In re Public Prosecutor*, (1910) 7 Indian Cases, 392—referred to.

I accept the findings of the learned Magistrate. They are as follows :—

A warrant was issued for the arrest of the applicant. The process-server, after showing the warrant, seized him by the arm, when a number of men interfered by assaulting the peon with the result that the applicant was released. There is nothing to show, or to suggest, that the applicant struggled or made any resistance himself. A large crowd collected, and the applicant was not seen again until he surrendered himself on the following morning. In spite of the evidence of the process-server, it cannot safely be held that the applicant ran away.

The question for consideration is whether the applicant escaped from the custody of the process-server. He has been convicted of that offence under section 225B, Indian Penal Code.

The essential facts found are that the applicant was in the lawful custody of the process-server when he got released, and that thereafter he was not seen again until he surrendered himself.

It has been argued that it was due to no fault of his that he was released, and that he had no intention to escape from the custody of the process-server, because he surrendered himself

* *Revision of the order of C. Gaunt, Esq., Western Subdivisional Magistrate, Rangoon, directing the applicant to pay a fine of Rs. 20 or to suffer six days' rigorous imprisonment.*

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on the following morning. In my judgment it is immaterial whether he surrendered himself or not as alleged. It is clear that he was rescued by a number of his friends from the lawful custody of the process-server, and that he took advantage of this and disappeared, and thus got out of the way of the process-server. I think it must be held that the applicant escaped within the meaning of the section under which he was convicted.

In *Queen-Empress v. Muppan* (1) the respondent was convicted under section 224, Indian Penal Code, for escaping from the lawful custody of a Police Constable. Having been legally arrested, he was subsequently left unguarded, and escaped. He was then rearrested and tried and convicted under that section. The law was stated in the following terms:—

“A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law, he commits the offence of ‘escape.’ It has been long established that even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody, the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law (I Russ., 5th edition, p. 567; Roscoe, 11th edition, p. 453; and Bishop’s Criminal Law, 7th edition, section 1404).”

In *The Public Prosecutor v. Ramaswami Konar* (2) a case where a prisoner escaped after he was arrested owing to the neglect or consent of the person who had him in custody, the learned Judges approved of the law stated in *Muppan’s* case, and they observed that the fact that the person who had the custody of the accused went to sleep did not, in any way, put an end to the custody, or affect the accused’s duty to submit to the judgment of the law.

These two cases were followed by a Bench of the Madras High Court in *The Public Prosecutor v. Sennimalai Goundar* (3), and they pointed out that the ground of distinction made by Krishnaswami Iyer, J., in *re The Public Prosecutor* (4) was:

(1) (1895) I.L.R. 18 Mad., 401. (2) (1908) I.L.R. 31 Mad., 271.
(3) (1918) 25 Mad. L.T., 290. (4) (1910) 7 Indian Cases, 392.

not sound. In the latter case the learned Judge refused to follow those two cases, on the ground that they had no application to a case of arrest in execution of a civil process. They also observed that under the terms of the warrant before them the process-server was only authorised to release the judgment-debtor on actual receipt of the decretal amount.

I agree with the learned Judges. Whether the warrant is issued by a Magistrate or other officer empowered to do so, or by a Judge of a Civil Court, the requisition is the same, *viz.*, that the person named in the warrant is to appear before an authority empowered to enquire into a case made against him.

The case before me is stronger than any of the cases above cited. The applicant took advantage of his release from custody and disappeared. The applicant was rightly convicted and his application is dismissed.

Before Mr. Justice Maung Kin.

MAUNG BA THAW v. (1) MA HNIT, (2) MAUNG MYIT
(3) MAUNG ZIN, (4) MAUNG PYIN, (5) MA MA GYI,
(6) MAUNG LE GYI, (7) MAUNG GALE, (8) MA KIN,
(9) MAUNG LAT, (10) MA THIN.*

Halker—for appellant (plaintiff).

Lambert (senior)—for respondents (defendants).

Civil Procedure Code—Section 11—Explanation IV—Res judicata.

Appellant claimed title to certain land as having been given to him by his father who at the time of the suit was dead but lost the suit on the ground that the gift was not valid. He then brought a suit for a certain share in the same land as *orasa* son of his deceased father and mother. The lower Courts held that the second suit was *res judicata*.

Held,—on appeal, that the appellant might in the former suit have put in the claim, that he made in the second, as an alternative. If he had done so there would have been no confusion, and all questions relating to his title would have been completely and finally determined. The second suit was therefore *res judicata*.

Rameswar Pershad v. Rajkumari Ruttan, (1892) I.L.R. 20 Cal., 79; *Goddappa v. Tirkappa*, (1900) I.L.R. 25 Bom., 189—followed.

Masilamania Pillai v. Thiruvengadam Pillai, (1908) I.L.R. 31 Mad., 385; *Sadaya Pillai v. Chinni*, (1879) I.L.R. 2 Mad., 352;

* *Second Appeal from the decree of E. D. Duckworth, Esq., I.C.S., Additional Divisional Judge, Prome, confirming the decree of Maung Shin, Subdivisional Judge of Thayetmyo.*

1922
D. M.
ATTIYA
v.
KING-
EMPEROR.

Civil and
Appeal No. 36
of 1922,
September 14,
1922.

1922.
 MAUNG BA
 THAW
 v.
 MA HNIT.

Thyilan Kandi Ummadha v. Cheria Kunhamed, (1881) I.L.R., 4 Mad., 308; *Denobundhoo Chowdhry v. Kristomoner*, (1876) I.L.R. 2 Cal., 152; *Bheeka Lall v. Bhuggoo Lall*, (1877) I.L.R. 3 Cal., 23; *Brojo Lall Roy v. Khettur Nath Mitter*, (1869) 12 W.R., 55; *Dudsar Biber v. Shakir Burkundas*, (1871) 15 W.R., 168,—referred to.

The point for determination is whether the present suit is *res judicata* by reason of a former suit.

Both the suits were instituted in the same Court and between the same parties, and the subject-matter is the same. In the former suit the plaintiff claimed title to three pieces of paddy land as having been given to him by his father who, at the time of that suit, was dead. It was held that the gift was not valid. In the present suit he sues as the *orasa* son of his deceased father and his mother, Ma Hnit, claiming a half share in the same three pieces of land.

Both the lower Courts have held that the present suit is *res judicata*.

If Explanation IV to section 11 of the Code of Civil Procedure applies to the case, the suit must be held to be *res judicata*.

The specific question to be determined is whether in the former suit the plaintiff in the present case should, in the alternative, have made the claim he now makes.

Rameswar Pershad v. Rajkumari Ruttan (1) is a Privy Council case. Jenkins, C.J., referred to it in *Guddappa v. Tirkappa* (2) and said: "What is apparent, however, from the judgment is, that their Lordships considered that the case should be determined on the words of the section themselves; no authority is even cited. In reference to those words it is said 'That it *might* have been made a ground of attack is clear. That it *ought* to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word *ought* would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur, and it appears to their Lordships that the matter *ought* to have been made a ground of attack in the former suit, and, therefore, that it should be 'deemed to have

(1) (1892) I.L.R. 20 Cal., 79.

(2) (1900) I.L.R. 25 Bom., 189.

been a matter directly and substantially in issue' in the former suit, and is *res-judicata*." The learned Chief Justice proceeded to state:—"The test, therefore, proposed whereby to determine whether it ought to have been matter of attack is this: are the matters so dissimilar that their union might lead to confusion"?

The facts of the Bombay case are that the first suit was for the recovery of certain land, on the allegation that the plaintiffs were the surviving members of the joint family to which the former owner belonged. That suit was dismissed. Then the same plaintiffs brought a suit to recover the same land, alleging that, on the death of the widow of the former owner, they became entitled as reversioners. It was held that the latter suit was *res-judicata*. Both the causes of action existed at the time of the first suit. It was pointed out that in the first suit the plaintiffs could have alleged, in the alternative, their title as heirs, and that they ought to have so alleged it, because it was forbidden by no rule of pleading, and, on the contrary, it was necessary for the complete and final disposal of all questions as to the plaintiff's title, and also because no confusion could have arisen by introducing the plea in the former suit.

In the case before me it is conceded that the plaintiff might have, in the former suit, put in the claim, that he now makes, as an alternative claim. If he did so, there would have been no confusion, and all questions relating to his title in the property would have been completely and finally determined. For this reason, he ought to have made the claim in the present suit as a ground of attack in the former suit. For this reason, the present suit must be held to be *res-judicata*.

The case of *Masilamania Pillai v. Thiruvengadam Pillai* (3) is similar to the present case, and Wallis and Miller, J.J., (White, C.J., dissenting) held that the subsequent suit was barred by Explanation II to section 13 of the Code of 1882. A careful perusal of the learned Chief Justice's judgment shows that the question whether a matter ought to have been made a ground of attack within the meaning of the provisions in question would depend on the facts of each case.

(3) (1908) I.L.R. 31 Mad., 385.

1922
 MAUNG SA
 THAW
 v.
 MA HNIIT.

It has been argued that the cause of action in the present suit is not the same as that in the former suit, and that therefore Explanation IV to section 11 does not apply. But this is a case in which the plaintiff claims title to certain property, and, in proving his title to that property, he ought to have put forward all means of attack in his armoury; and it is to be pointed out that the rule, as enacted by section 11 of the present Civil Procedure Code, omits all references to the cause of action. Under the Civil Procedure Code of 1859 there was a conflict of opinion as to matters of the kind in question in this case. Section 2 of that Code says:—"The civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." It is to be noticed that these provisions do not contain any provisions like those of Explanation IV to section 11 of the present Code. Under the Code of 1859 the Madras High Court consistently held in several cases that a plaintiff was not bound to bring forward all his titles at once. See *Sadaya Pillai v. Chinni* (4) and *Thyila Kandi Ummadha v. Cheria Kunhamed* (5) which expressly dissented from the decisions of the Calcutta High Court in *Denobundhoo Chowdhry v. Kristomoner* (6) and *Bheeka Lall v. Bhuggoo Lall* (7). In *Brojo Lall Roy v. Khettur Nath Mitter* (8) it was held that the dismissal of a suit for certain land on the basis of a gift would bar a suit for the same land on the ground of heirship as "a litigant cannot be allowed to keep back one of his titles and then to bring a fresh suit on the ground that he had still a right in reserve. He is bound to disclose all the titles at once." It was also pointed out that the Subordinate Judge appears to have confounded the plaintiff's title and his cause of action together, and to have considered that, because the plaintiff's title by inheritance was not decided by the former judgment it was open to trial now, and that a plaintiff's cause of action is a very different thing from his title; the one being something done contrary to a

(4) (1879) I.L.R. 2 Mad., 352.

(5) (1881) I.L.R. 4 Mad., 398.

(6) (1876) I.L.R. 2 Cal., 152.

(7) (1877) I.L.R. 3 Cal., 23.

(8) (1869) 12 W.R., 55.

person's interest which obliges him to seek the aid of the Court, the other the proof that that some thing affords him a valid ground for relief.

In *Duqsar Bibee v. Shakir Burkundas* (9) the decision was the same on facts similar to those of the last case cited above. Mitter, J., said :—" It is perfectly clear that the title on which the plaintiff has brought the present suit was in existence at the time when the former suit was brought, and she was bound to bring the latter suit on all the titles that were then in existence. She did not choose to do so, and it follows therefore that the decision in the former case, so far as it relates to the ownership of the *Jote*, must operate against her as an estoppel in this case." These two cases were under the Code of 1859.

In the Code of 1877 a provision exactly the same as Explanation IV under consideration was inserted, besides other Explanations. It has been retained in the Code of 1882, which has now been superseded by the present Code. It seems clear to me that the insertion of the Explanation in the Code of 1877 was with the object of putting an end to the conflict.

The decision in the Privy Council case above cited is binding on all the Courts in the Indian Empire, and cases which were decided by the High Courts in India before that decision are not of any assistance at all.

For the above reasons, the appeal is dismissed with costs.

(9) (1871) 15 W.R., 168.

1882
MAUNG BA
TRAW
2.
MA HNI

Civil
2nd Appeal
No. 246 of
1921.
July 4th,
1922.

Before Mr. Justice Maung Kin.

C. CHAING
KYWAN, v.

- | | | |
|---|--------------------|---|
| { | (1) MA OO, | } |
| | (2) MA PHOO MA, | |
| | (3) MA HTOON ZAN, | |
| | (4) MAUNG SAN WIN, | |
| | (5) MA SAW | |
| | (6) MA AYE BYU, | |
| | (7) MA AYE THA, | |
| | (8) MAUNG PO HNIN, | |

LEGAL REPRESENTATIVES OF MAUNG SAN IN, DECEASED.*

Vertannes—for appellant (plaintiff).

Maung Lat—for respondents (defendants).

Sale of land and agreement for repurchase—Nature of transaction—Mortgage by conditional sale.

Certain land was conveyed by a registered deed of sale and on the same day the purchaser executed an agreement to let the sellers repurchase the land at the same price within three years. This agreement was not registered.

Held,—that on the facts the intention of the parties was that the transaction should be a usufructuary mortgage and that the agreement should therefore have been registered. As this was not done, a suit for the specific performance of the mortgage would not lie.

Bhagwan Sahai v. Bhagwan Din, (1890) I.L.R. 12 All., 387; *Kinram Mondol v. Nitye Chand Sirdar*, (1907) 11 C.W.N., 400; *Balkishen Das v. Legge*, (1899) I.L.R., 22 All., 149—referred to.

This appeal arises out of a suit for specific performance of an agreement in writing to sell the land in suit to plaintiff's assignor. The agreement is Ex. A.

Maung San Min and Ma Lun were the original owners of the land in suit. On the 10th March 1920 they conveyed the land to Maung San In by a registered deed of sale for consideration stated therein, *viz.*, Rs. 500. That deed is marked Ex. B. On the same day San In by the agreement, Ex. A, agreed to let Maung San Min and Ma Lun have the land back if, within three years, they paid Rs. 500.

The plaintiff is the assignee of the rights under these two documents.

San In admitted Ex. B, but denied Ex. A.

Both the lower Courts held that the document, Ex. A, created a mortgage of the land, and therefore required regis-

* Civil second appeal against the judgment of W. Carr, Esq., I.C.S., Divisional Judge, Hanthawaddy, confirming the decree passed by Maung Ba Kyaw, K.S.M., *Barrister-at-Law*, Subdivisional Judge, Twante.

tration. The document not being registered, the suit was dismissed.

The plaintiff appeals to this Court, and contends that Ex. B read with Ex. A shows that Ex. A gave San Min and Ma Lun a right to repurchase the land, and that in that view of the matter Ex. A did not require registration.

On behalf of the respondents it is contended that Ex. A made the whole transaction a mortgage by conditional sale but not a sale with a right of repurchase, and that, even if Ex. A only gave San Min and Ma Lun a right to repurchase the land, it would still require registration, inasmuch as it must be held that it created an interest in immoveable property.

Ex. B is an ordinary conveyance, showing an outright sale.

The material portions of Ex. A are as follows:—

“Under registered deed a piece of paddy land has been conveyed with outright possession by Maung San Min and Ma Lun to Maung San In for Rs. 500.” There are terms the parties wished to include in the said deed, but which they left out. They are as follows:—“That the creditor shall receive and enjoy the profits, rent and crops, and shall pay the land revenue in full satisfaction annually; that the creditor shall transfer with outright possession, if the owners of the lands redeem them for the principal sum of Rs. 500 within three years; and that if the owners of the lands could not redeem the same at the expiration of three years, they shall have no further right to possession and enjoyment, and forfeit the same to the creditors.”

Plaintiff's Counsel placed reliance on *Bhagwan Sahai v. Bhagwan Din* (1). This is a Privy Council case. There were two documents. The first was an outright conveyance, and under that the property passed into the possession of the vendors. In the second document the following passage occurs:—“However, I have as a matter of favour, mercy, kindness and indulgence executed the deed, and do hereby stipulate that, if all these vendors will within a period of ten years from the date of this deed pay in a lump sum and without interest the whole amount specified above, I shall accept the same and cancel this valid sale. During the aforesaid term I shall remain in posses-

(1) (1890) I.L.R., 12 All., 387.

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sion; collect the rent and enjoy the profits and be liable for loss; the vendors shall have no concern whatever. I shall not claim interest from the vendors, nor will they demand profits from me after the expiry of the term. In case the whole of the principal is not paid according to the terms of this document, the vendors shall not be able to cancel the sale by payment of the principal." The Allahabad High Court held that, on a proper construction of the two documents read together, the relationship of the mortgagor and mortgagee existed between the vendors and the vendee. On appeal Their Lordships of the Privy Council held that it was clear that this case was not one of mortgagor and mortgagee, but one of an absolute sale with a right of repurchase within a period of ten years. For the contention that it was a case of mortgagor and mortgagee, reliance was placed upon the presence of the term "principal" in the second document.

In *Kinuram Mondol v. Nitye Chand Sirdar* (2) there were two contemporaneous documents, one of which purported to be a deed of sale, and the other provided that on the vendor repaying the purchase money mentioned in the deed of sale with costs within a fixed period, the vendee would return the land, and, in case he did not do so, the vendor would deposit the money in Court and take possession. It was held that the two documents together did not constitute a mortgage. In that case the Privy Council case already cited, and another Privy Council case *Balkishen Das v. Legge* (3) were referred to, and it was contended that, by reason of the second Privy Council case, the authority of the first had become somewhat weaker. But the learned Judges distinguished the two cases by saying that in the later case there were terms clearly showing that the intention of the parties was a mortgage, and not an out-and-out sale with a right of repurchase. The learned Judges observed that such indications were lacking in the case before them, and that on the contrary they were in the opposite direction. In particular they said:—"The money was paid by the grantee, and it was a proper value of the property at the time. The purchaser was let into immediate possession; he received the rents. There is no provision as to the pay-

(1907) 11 C.W.N., 400.

(3) (1899) I.L.R., 22 All., 149.

ment of any interest, and the purchaser was to pay the expenses of preparing the deeds. These features indicate that the intention of the parties was that the transaction should be an out-and-out sale with a right of repurchase within seven years." Although they said that it was not necessary to decide it finally as there was no "certain date" of payment within the meaning of the definition of a mortgage by conditional sale, they express their opinion that it is an essential element of a mortgage by conditional sale.

In the first Privy Council case cited the only term used as indicating a loan was the word "principal," and in the second document in that case this word came last. In itself it was not sufficient to indicate that the intention of the parties was to create a mortgage and it was stated that the length of time allowed for taking the land back militated against the intention being to effect a mortgage.

In the Calcutta case there was not a single term used indicating a loan in the second document. In *Balkishen Das v. Legge* (3) there were terms in the second document indicating the redemption to be for principal and interest.

In the case before me the terms "creditor," "principal" and "redemption" are used. The term "interest" is not used. The reason for that is obvious. The land had gone into the possession of the vendee under Ex. B, and it is stated in Ex. A that he was to enjoy the profits until the redemption is made within three years. Therefore, it was not necessary to mention any interest for it might well have been that the parties intended that the interest should come out of the profits of the land. The only thing that is lacking in Ex. A is the statement that, though Ex. B purports to be a deed of sale, it was intended really as a mortgage. If there was that statement, there would of course be no difficulty in construing these two documents. In my opinion sufficient has been said in Ex. A to indicate that the intention of the parties was that the transaction evidenced by Ex. B was not really what it purported to be, but a mortgage.

The case before me is clearly distinguishable on the facts from the Privy Council case first cited. In the view I have

(3) (1899) I.L.R. 22 All., 149.

1922.
O. CHAING
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taken of the point involved, Ex. A must be held to require registration, and the lower Courts were, therefore, right in dismissing the suit.

This appeal is dismissed with costs.

Civil Misc.
Appeal No.
48 of 1922.
November
16th, 1922.

Before Mr. Justice Pratt and Mr. Justice Heald.

MA GYI v. { (1) MA KHIN SAW,
(2) MAUNG MAUNG,
(3) MA THAN, } MINORS BY THEIR
GUARDIAN
MAUNG BA
TUN.*

Halker—for appellant.

Chari—for respondent.

Buddhist Law: Inheritance—Succession of half-brothers and sisters in preference to grand-parents.

A died while still a minor and letters of administration were granted to her step-mother on behalf of A's minor half-brother and half-sister. A's maternal grand-mother appealed against this order and argued that because A had lived with her for some years and because she was A's own grand-mother, she ought to exclude A's half-brother and half-sister.

Held,—that the principle that inheritance should not ascend applies in favour of half-brothers and half-sisters of a deceased person as against a maternal grand-mother in a case where there are no full brothers or sisters of the deceased and no representatives of full brothers or sisters.

Held further,—that the fact that the grand-child had previously lived with the grand-mother was not sufficient to warrant a departure from that principle.

Taung Mro v. Aung Nyun, 12 B.L.T., 163; *Ma Hnin Bwin v. U Shwe Gon*, 8 L.B.R., 1; *Le Maung v. Ma Kwe*, 10, L.B.R., 107; *Kyaw Sein v. Ma Min Yin*, 4 U.B.R., 20—referred to.

Pratt and Heald, JJ.—Appellant's daughter, Ma Hta Sein, married Eng Wa and by him had a daughter Ah Nyun. After Ma Hta Sein's death Eng Wa married Ma Khin Saw by whom he had two children Maung Maung and Ma Than. Eng Wa died and his estate was divided between Ah Nyun and Ma Khin Saw and her children. Then Ah Nyun died, while still a minor, and appellant on the one side and Ma Khin Saw on behalf of her children on the other side claimed letters of administration. The lower Court held that Ma Khin Saw's children were Ah Nyun's sole heirs and excluded appellant, and accordingly granted letters to Ma Khin Saw on behalf of her children.

* Miscellaneous appeal against the order passed by Maung Po Han, B.A., Barrister-at-Law, Judge, Hanthawaddy District.