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TABLE OF CONTENTS.

	PAGE
Arbitration—Award	1
Buddhist Law—Divorce...	1—28
——————Inheritance	1—18
——————Marriage	1— 8
Burden of Proof—Fraud	1
Civil Procedure	1—54
Contract	1—10
Execution of Decree	1— 2
Evidence	1—15
Land and Revenue Regulation	1— 8
Limitation	1—12
Master and Servant	1— 4
Muhammadan Law	1— 6
Registration	1— 4
Specific Relief	1— 5
Sub-Mortgage	1— 6
Tort-Defamation	1— 2
Tort	1—11

APPENDIX.

	PAGE
Circular Memorandum No. 1 of 1905	
—————————— No. 4 of 1906	
—————————— No. 6 of 1906	

TABLE OF CASES.

Cases.	Selected rulings.	PAGE
B		
Bet, Maung Kyan *v.* Maung Lu Dôk ...	Registration	1
Bye, Maung Tun *v.* Maung Yon ...	Civil Procedure	8
D		
Din, Mi Min and four others *v.* Mi Hle	Buddhist Law, Inheritance ...	11
Din, Nga Tha and one *v.* Nga Po Chan	Civil Procedure	42
Dun, Nga Kyaw *v.* Min Sin ...	Limitation	9
Dun, Maung Tha *v.* Maung Thin ...	Execution of Decree	1
Dun, Maung Tha *v.* Maung Su Ya ..	Contract	7
Dwe, Mi Min *v.* Ma Ma Kin Kyi Myin Mibya.	Land and Revenue Regulation ...	5
G		
Gale, Ma Ma *v.* Ma Me	Buddhist Law, Inheritance ...	5
Gyaw, Nga Tun *v.* Mi Po Me and one	Tort	5
Gyi, Mi Ma *v.* Nga Shwe Zin ...	Land and Revenue Regulation ...	1
Gyi, Nga Sa *v.* Nga Ye Ban and one ..	Civil Procedure	36
H		
Hlaing, Nga *v.* Nga Kyan Tha and three others.	Contract	3
Hmaung, Nga and seven others *v.* Nga Kyaw Ya and two others.	Civil Procedure	52
Hmon, Nga *v.* Nga Meik and one ...	Buddhist Law, Divorce ...	1
Hmwe, Nga Myat *v.* Nga Yi and one ...	Tort	9
K		
Kadu, Ma *v.* Ma Yon ...	Buddhist Law, Inheritance ...	7
Kin, Mi Ein *v.* Nga Le	Evidence	7
Ko, Maung San and ten others *v.* Ma Myo Ma and ten others.	Civil Procedure	24
Kumarappa Chetty *v.* Nga Pyi ...	———	18
Ku, Nga *v.* Nga Tha Hlaing ...	———	30
Kye, Nga *v.* Nga Po Min and five others	Sub-mortgage	1
L		
Lat, Mi Kin *v.* Nga Ba So ..	Buddhist Law, Divorce ...	3
Le, Ma and one *v.* Maung Hlaing and one.	Muhammadan Law ...	1
Le, Maung Chit *v.* Maung Pan Nyo and one.	Civil Procedure	41
Luddy, E. A. *v.* C. P. R. Arunachellam Chetty.	Contract	1
M		
Maung, Nga Chit *v.* Nga Po Kin and two others.	Civil Procedure	46
Min, Nga Tun *v.* Nga Lu Gyi and six others.	———	34
Mon, Ma *v.* Maung So	Buddhist Law, Marriage ...	1
Mya, Mi E, and five others *v.* Nga Pe ..	Civil Procedure	40
Myin, Mi *v.* Nga Twe and two others ...	Buddhist Law, Divorce ...	19

Cases.	Selected rulings.	
N		
Nandi, J. N. *v.* G. N. Dass ...	Civil Procedure ...	... 28
Nyo, Mi *v.* Mi Nyein Tha ...	Buddhist Law, Inheritance	... 15
P		
Palaneappa Chetty *v.* Sheodat Rai Bissesur Dass.	Limitation ...	... 1
Palaneappa Chetty *v.* Nga Po Saung ...	Civil Procedure ...	... 16
Palaneappa Chetty *v.* Maung Shwe Ge...	——— ...	... 4
Pe, Nga Lu *v.* Nga Shwe Yun ...	——— ...	... 50
R		
Raja Shwe Bakhsh Bogla and one *v.* Pirumall.	Master and Servant, Contract	... 1
S		
Saing Nga and one *v.* Nga Lu Aung and six others.	Evidence	... 13
Sein Maung *v.* Kin Thet Gyi ...	Buddhist Law, Marriage	... 5
T		
Taw, Mi *v.* Nga Ket	Tort	... 1
Thin, Nga Shwe *v.* Nga Nyun ...	Civil Procedure ...	... 26
Tu, Nga Shwe *v.* Nga Chit Son ...	Contract	... 9
U		
U, Mi Sa and four others *v.* Nga Pyan	Evidence	... 3
U Wathawa *v.* Nga Po	Specific Relief ...	... 8
Y		
Yan, Maung Kyaw and seven others *v.* Maung Po Win and one.	Buddhist Law, Inheritance	... 1
Yi, Ma Pan *v.* Maung Pan Aung ...	Tort-Defamation ...	... 2

INDEX.

A

PAGE.

ABUSE—Mere vulgar—defamation as distinguished from—is actionable without proof of special damage—*See* Tort, defamation ... 1

APPEAL—Arbitration without the intervention of the Court—*See* Civil Procedure 52

ARBITRATION—When a award has been made in—proceedings held without the intervention of a Court of Justice during the pendency of a suit or appeal, a party can bring a regular suit to enforce it under section 30, Specific Relief Act, even though the existence of the award was not brought to the notice of the Court before the suit or appeal was decided—*See* Specific Relief ... 3

———without the intervention of the Court—Appeal—*See* Civil Procedure 52

———AWARD—In a case where a Court has ordered an—to be filed under section 525, Civil Procedure Code,—*Held*—that an appeal impugning the—on grounds falling under section 521 does not lie—*See* Civil Procedure 40

Atet and *Lettetpwa* property—Division of—on divorce by mutual consent —*Nissao-Nissito*—*See* Buddhist Law—Divorce 19

AWARD—In a case where an—has been ordered to be filed in Court under section 526, Civil Procedure Code, the Court having disallowed an objection as to the validity of the submission, no appeal lies except on the grounds specified in section 522—*See* Civil Procedure 52

———When an—has been made in Arbitration proceedings held without the intervention of a Court of Justice, during the pendency of a suit or appeal, a party can bring a regular suit to enforce it under section 30, Specific Relief Act, even though the existence of the—was not brought to the notice of the Court before the suit or appeal was decided—*See* Specific Relief 3

Ayo—OR *Twinyo*—An—is an interest in State land, and consequently, in view of section 53 (2) (ii) of the Land and Revenue Regulation, the Civil Courts have no jurisdiction to entertain a suit to recover an—*See* Land and Revenue Regulation 5

B

BUDDHIST LAW—DIVORCE—A Burman Buddhist, husband or wife, 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 ... 3

———there is no distinction in—between the respective interests of a husband and wife in jointly acquired property, when the parties have been married before (*eindaunggyi*). and when the parties have not been married before 1

———*Held*,—on the authority of the Manugyè Book XII, section 3, that on divorce by mutual consent, (1) a wife is entitled to ½ of *atet* property where the relation of *Nissayo* and *Nissito* subsists with respect to that property, and she is the *Nissito*, (2) she is entitled to ½ of undivided ancestral property inherited by her husband during the marriage, (3) the profits of such *atet* and inherited property are *lettetpwa*, (4) the wife is entitled to a half share of such *lettetpwa* property, where it appears that it was acquired by the joint exertions of the parties 19

———INHERITANCE—In the case of collateral succession the general principle of the nearer relatives excluding the more remote takes full effect, and so long as there is a surviving brother he excludes the children of a previously deceased brother ...

PAGE

BUDDHIST LAW—INHERITANCE—The rule excluding the daughter of a divorced wife who has lived with her mother and has not maintained filial relations with her father, does not extend to the case where the daughter was born after the divorce, and the father left no other wife, child or grand-child—In such a case when the father lived with his sister—the daughter's share as against the sister is half 15

———The rule that mere absence of joint living is not sufficient to exclude from inheritance and that filial neglect must be proved, applies step-children 1

———When a husband and wife die within a short time of each other, leaving neither descendants nor ancestors, the relations of both may inherit the estate— 7

———*Nuns*—In the absence of any evidence of an ordination ceremony a nun (*Methila*), so-called, is a lay devotee, and a woman does not lose her rights to her property by becoming a nun—*Orasa*,—the eldest born son, means the eldest son and not necessarily the eldest child 11

———MARRIAGE—Restitution of Conjugal rights—ill-treatment and desertion a valid plea of justification under — ... 5

———A Burmese-Buddhist wife is entitled to sue her husband during marriage to recover, with interest, money raised on mortgage of her separate property and lent to her husband for his separate use 1

———*Zerbaddi* Muhammadans in Mandalay are not by custom having the force of law governed in respect of succession and inheritance by—they are governed in those matters by Muhammadan law—*See* Muhammadan law 1

BURDEN OF PROOF—in cases of wrongful dispossession in suits under section 9, Specific Relief Act, and suits on titled—meaning of possession—*See* Evidence 7

———In a suit under section 283, Civil Procedure Code, the—is not affected by the summary order under sections 280, 211 or 282—*See* Civil Procedure 16

———Fraud—when a claimant under section 278, Civil Procedure Code, or plaintiff in a suit under section 283, proves possession, section 110, Evidence Act, applies, and he is entitled to succeed unless the other party proves that he is not the owner or that he holds in trust for the judgment-debtor—*See* Civil Procedure 8

BURMAN BUDDHIST—A—husband or wife 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—*See* Buddhist Law—Divorce... 3

C

CIVIL COURTS—A right-of-way as an easement is an interest in land with in the meaning of section 53 (2), (ii), Land and Revenue Regulation, and the – are barred from entertaining a suit to establish such a right of way over State land—*See* Land and Revenue Regulation 1

CIVIL PROCEDURE—13 (II) (V).—In order to make section 13 applicable, it is not necessary that the matter of the subsequent suit should have been heard or have been fully decided by a Competent Court in the former suit when the case is one to which Explanation II applies 46

———15, 244.—A suit by a party to execution proceedings to have a Court sale set aside on the ground of fraud will lie when the decree has ceased to be capable of execution, and it is no longer open to the plaintiff to apply under section 244 to the Court

PAGE

executing the decree—where a Subdivisional Court having jurisdiction under section 10, Upper Burma Civil Courts Regulation, entertains, in contravention of section 15, Civil Procedure Code, a suit which he should have been instituted in a Township Court, this is a mere irregularity which does not vitiate the proceedings—Limitation, 11, 12, 91, 95, 178—Specific Relief—39 36

CIVIL PROCEDURE—25—A Superior Court cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it 28

———————42, 43.—Mesne profits, which can be claimed in a suit for immoveable property up to date of suit, but which were not so claimed, cannot be subsequently sued for in a subsequent suit because the case of action is the same 1

———————43, 211, 212, 244.—Mesne profits for the period prior to institution which can be claimed in a suit for immoveable property, must be profits which the person in wrongful possession actually received or might with ordinary diligence have received during that period 50

———————108.—A Court re-opening a suit without making any enquiry or giving the opposite party the opportunity of opposing the application, acts illegally or with material irregularity within the meaning of section 622, Civil Procedure Code ... 42

———————230.—ARTICLE 179, SCHEDULE II, LIMITATION Act.—Ordering execution of decree more than three years from date of last application of execution, an illegality within the meaning of section 622—*See* Civil Procedure— 26

———————230, 235, 245.—A Civil Court may send a decree simultaneously to two other Courts for execution, and issue process in execution itself without waiting for the reports of the other Courts—Execution may not be ordered on an application which does not comply with the provisions of section 235, Civil Procedure Code—*See* Execution of decree 1

———————273, 283.—When a claimant under section 278, or plaintiff in a suit under section 283, proves possession, section 110, Evidence Act, applies and he is entitled to succeed unless the other party proves that he is not the owner or that he holds in trust for the judgment-debtor—Burden of proof—fraud 8

———————280, 281, 282.—In a suit under section 283, Civil Procedure Code, the burden of proof is not affected by the summary order under—*See* Civil Procedure 16

———————283.—In a suit under—the burden of proof is not affected by the summary order under section 280, 281 or 282 ... 16

———————283.—A suit will lie to recover costs incurred in unsuccessfully objecting to attachment of property in execution of decree when the attachment was wrongful, and it is not necessary for the plaintiff to prove that the defendant acted maliciously or without probable cause in making the attachment or resisting the application to have the attachment removed 18

———————283.—A suit will lie to recover costs incurred in unsuccessfully objecting to attachment of property in execution of decree when it is shewn in a suit under—that the defendant had no colourable justification for attaching the property nor for defending the application for removal of attachment 4

———————295.—A suit under—is not a suit to set aside an order—and Article 13, Schedule II, of the Limitation Act, is inapplicable to such a suit—*See* Limitation ... 1

———————295.—An order as to priority of mortgages in execution of mortgage decrees for sale is an order in execution and an order under— 14

———————463.—If a person be admitted or found to be of unsound mind, although he has not been adjudged to be so under Act XXXV of 1858 or any other law for the time being in force, he

PAGE

should, if a plaintiff, be allowed to see through his next friend and the Court should appoint a guardian *ad litem* where he is the defendant 30

CIVIL PROCEDURE—521.—In a case where a Court has ordered an award to be filed under section 525, Civil Procedure Code—*Held*,—that an appeal impugning the award on grounds falling under—does not lie—*See* Civil Procedure 40

———————525.—In a case where a Court has ordered an award to be filed under—*Held*,—that an appeal impugning the award on grounds falling under section 521, Civil Procedure Code, does not lie 40

———————525, 526.—Arbitration without the intervention of the Court—Appeal—In a case where an award has been ordered to be filed in Court under section 526, the Court having disallowed an objection as to the validity of the submission, no appeal lies except on the grounds specified in section 522— ... 52

———————551.—In section 12 of the Limitation Act, the "time requisite for obtaining a copy" does not commence until the appellant does something to obtain the copy—Delay in signing a decree cannot be brought in to benefit a person who has not made any application to obtain a copy 24

———————574.—The judgment of the Appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge, and that he exercised his own discrimination in deciding them 34

———————622.—A Court re-opening a suit without making an enquiry or giving the opposite party the opportunity of opposing the application, acts illegally or with material irregularity within the meaning of—*See* Civil Procedure 42

———————622—Section 230 Civil Procedure Code, Article 179, Schedule II, Limitation Act—Ordering execution of decree more than three years from date of last application for execution an illegality within the meaning of— 26

COLLATERAL SUCCESSION—In the case of—the general principle of the nearer relatives excluding the more remote takes full effect and so long as there is a surviving brother he excludes the children of a previously deceased brother—*See* Buddhist Law—Inheritance ... 5

CONJUGAL RIGHTS—Restitution of—ill-treatment and desertion a valid plea of justification under Buddhist Law—*See* Buddhist Law—Marriage 5

CONTRACT—A lien over money lent may be created by deposit of a non-negotiable document which is evidence of the loan—Such a transaction is not necessarily contrary to Public policy ... 1

———————Where a party to a—is at liberty to rescind it under section 55, Contract Act, and does so, section 107 has no application—Meaning of section 107, Contract Act—*See* Contract ... 9

———————30.—In a suit to recover money which the plaintiff has deposited with a stake-holder the "paying over" which would bar the suit means paying over upon the event of the wager—wherein such a suit the plaintiff does not repudiate the wager but claims not only his original stakes, but the whole winnings, he can get nothing 3

———————53.—Money lent for the purpose of enabling the borrower to gamble is not recoverable by Civil Suit if the gambling contemplated by the parties when the money was lent is such as is prohibited by law, but if the gambling is not illegal, a suit for the recovery of the loan will lie 7

———————55, 107.—Where a party to a Contract is at liberty to rescind it under section 55, and does so, section 107 has no application—The meaning of section 107 is that "If defendant-respondent instead of rescinding the contract had chosen to re-sell at the plaintiff-appellant's risk, then, in order to be able to hold plaintiff-appellant liable for any loss on re-sale, he would have had to comply with section 107 by giving reasonable notice to the plaintiff-appellant" 9

PAGE.

CONTRACT—74.—Master and Servant.—In the absence of a binding contract by which the servant agrees to forfeit wages if he withdraws without giving notice, a monthly servant, who leaves without notice, is entitled to be paid down to the date when wages were last due but not for the period he has served since that date—*See* Master and Servant—Contract 1

COSTS—A suit will lie to recover—incurred in unsuccessfully objecting to attachment of property in execution of decree when the attachment was wrongful—*See* Civil Procedure 18

———A suit will lie to recover—incurred in unsuccessfully objecting to attachment of property in execution of decree when it is shown in a suit under section 283, Civil Procedure Code, that the defendant had no colourable justification for attaching the property nor for defending the application for removal of attachment—*See* Civil Procedure 4

D.

DAMAGE—If there be a right and if there be an infringement of that right, it is not necessary to show that there has been any subsequent injury, and if the Plaintiff's undoubted right has been invaded, he would be entitled to a remedy whether any—has accrued to him or not—also the principle ordinarily applied to actions of tort is that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special—he has laid, unless the special—is the gist of the action—*See* Tort 9

DECREE—A suit will lie to recover costs incurred in unsuccessfully objecting to attachment in execution of—when the attachment was wrongful—*See* Civil Procedure 18

———Delay in signing a—cannot be brought in to benefit a person who has not made any application to obtain a copy—*See* Civil Procedure 24

———Execution of—A Court may send a—simultaneously to two other Courts for execution and issue process in execution itself without waiting for the reports of the other Courts. *See* Execution of decree 1

———Ordering execution of—more than three years from date of last application for execution an illegality within the meaning of section 622, Civil Procedure Code—*See* Civil Procedure ... 26

DEFAMATION—As distinguished from mere vulgar abuse, is actionable without proof of special damage—*See* Tort 1

DIVORCE—The rule excluding the daughter of a divorced wife who has lived with her mother and has not maintained filial relations with her father does not extend to the case where the daughter was born after the—and the father left no other wife, child or grandchild—In such a case when the father lived with his sister the daughter's share as against the sister is half—*See* Buddhist Law—Inheritance 15

———Buddhist Law—Division of property—*atet*—*lettetpwa*—*Nissayo-Nissito*—*See* Buddhist Law—Divorce 19

———Buddhist Law—there is no distinction in Buddhist Law between the respective interests of a husband and wife in jointly acquired property, when the parties have been married before (*eindaunggyi*) and when they have not been married before—*See* Buddhist Law—Divorce 1

DOCUMENT—unregistered—affecting immoveable property—admissible to prove a personal obligation, when it contains distinct, *i.e.*, separate admission of liability or personal undertaking to pay and not otherwise—*See* Registration 2

PAGE

E

ESTOPPEL—Effect and value of entries of mortgages in Settlement Records—*See* Evidence 3

EVIDENCE—35, 91, 115 —Effect and value of entries of mortgages in Settlement Records—Estoppel 3

———58.—Non-registration—where a document is by reference included in the plaint or written statement and its terms and execution admitted on the record by the pleadings, it is not necessary to prove it or put it in evidence and its non-registration is immaterial—*See* Buddhist Law—Inheritance— 1

———92.—In a suit between mortgagees and mortgagors it is not open to some of the executants of the mortgage deed who signed as principal debtors and mortgagors, to adduce oral evidence to prove that they were only sureties 13

———110.—Meaning of possession—Burden of proof in cases of wrongful dispossession in suits under section 9, Specific Relief Act, and suits based on title 7

EXECUTION OF DECREE—A suit will lie to recover costs incurred in unsuccessfully objecting to attachment of property in—when it is shown in a suit under section 283, Civil Procedure Code, that the defendant had no colourable justification for attaching the property nor for defending the application for removal of attachment. *See* Civil Procedure 4

———sections 230, 235, Civil Procedure Code—A Civil Court may send a decree simultaneously to two other Courts for execution and issue process in execution itself without waiting for the reports of the other Courts—Execution may not be ordered on an application which does not comply with the provisions of section 235, Civil Procedure Code. Execution may be had simultaneously against the person and property of the judgment-debtor, unless there be special cause to the contrary 1

F

FRAUD—A suit by a party to execution proceedings to have a Court sale set aside on the ground of—will lie when the decree has ceased to be capable of execution, and it is no longer open to the plaintiff to apply under section 244, Civil Procedure Code, to the Court executing the decree—Upper Burma Civil Courts Regulation 10; Specific Relief 39; Limitation 11, 12, 91, 95, 178—*See* Civil Procedure 36

———Burden of proof—when section 110, Evidence Act, applies—*See* Civil Procedure ... ...

G

GAMBLE—Money lent for the purpose of enabling the borrower to—is not recoverable by Civil Suit, if the gambling contemplated by the parties when the money was lent is such as is prohibited by law, but if the gambling is not illegal a suit for the recovery of the loan will lie—*See* Contract 7

H

HUSBAND—A Burmese-Buddhist wife is entitled to sue her—during the marriage to recover, with interest, money raised on mortgage of her separate property and lent to her—for his separate use—*See* Buddhist Law—Marriage 1

PAGE

HUSBAND AND WIFE—There is no distinction in Buddhist Law between the respective interests of a—in jointly acquired property when the parties have been married before (*eindaunggyi*), and when they have not been married before—*See* Buddhist Law—Divorce ... 1

——————— when a—die within a short time of each other, leaving neither descendants nor ancestors, the relations of both may inherit the estate—*See* Buddhist Law—Inheritance ... 7

I

ILL-TREATMENT AND DESERTION BY PETITIONER—a valid plea of justification under Buddhist Law—Conjugal rights—restitution of—*See* Buddhist Law—Marriage ... ...

IMMOVEABLE PROPERTY—Mesne profits for the poriod prior to institution which can be claimed in a suit for—must be profits which the person in wrongful possession actually received, or might with ordinary deligence have received during that period—*See* Civil Procedure 50

INHERITANCE—the rule that mere absence of joint living is not sufficient to exclude from—and that filial neglect must be proved, applies to step-children—*See* Buddhist Law—Inheritance 1

——————— Buddhist Law—Daughter of divorced wife born after divorce living with mother—and did not maintain filial relations with father—father having left no other wife, child or grand-child—is entitled to inherit half against sister of father with whom father lived—*See* Buddhist Law—Inheritance 15

——————— Buddhist Law—When a husband and wife die within a short time of each other, leaving neither descendants nor ancestors, the relations of both may inherit the estate,—*See* Buddhist Law—Inheritance 7

J

JUDGMENT-DEBTOR—Execution may be had simultaneously against the person and property of the—unless there be special cause to the contrary. *See* Execution of Decree 1

L

LAND AND REVENUE REGULATION, 53 (2) (ii).—A right-of-way as an easement is an interest in land within the meaning of—and the Civil Courts are debarred from entertaining a suit to establish such a right over State land 1

——————————, 53 (2) (ii).—A *Twinyo* or *Ayo* is an interest in State land, and consequently in view of—the Civil Courts have no jurisdiction to entertain a suit to recover a *Twinyo* or *Ayo* 5

LAW APPLICABLE TO TORT—a suit will not lie where the damage complained of is too remote—*See* Tort 1

LIMITATION, 11, 12, 91, 95, 178—Either Article 91 or Article 95 is applicable to a suit to have a Court sale certificate set aside on the ground of fraud—*See* Civil Procedure 36

——————, 142, 144, 148.—Trespass on mortgagor's interest, by person who redeems in his own right—where the mortgagee was in possession and a third party, a trespasser, redeemed without the knowledge of the mortgagor and without notice to him—*Held*,—that the redemption extinguished the mortgage and the mortgagor could only sue for recovery of the interest from which he had been ousted, but that Article 144 applied, and it was for defendant, the

PAGE

trespasser, to show when his possession became adverse—*also*—that defendant's possession could not become adverse till he did something to affect the mortgagor with notice of his adverse claim— 9

LIMITATION, 11—179.—Civil Procedure 230.—Ordering execution of decree more than three years from date of last application for execution, an illegality within the meaning of section 622, Civil Procedure Code, *See* Civil Procedure 26

————, Schedule II—13.—Order in execution of mortgage decrees—section 295, Civil Procedure Code—suit to recover assets paid to persons and entitled to receive them 1

————, Schedule II - 164.—An attachment of property not belonging to the judgment-debtor is not execution of process for enforcing the judgment and does not bar an application under section 108, Civil Procedure Code—*See* Civil Procedure ... 42

————, 12.—The "time requisite for obtaining a copy" in does not commence until the appellant does something to obtain the copy—Delay in signing a decree cannot be brought in to benefit a person who has not made any application to obtain a copy—*See* Civil Procedure 24

LUNATICS ACT—XXXV of 1848.—If a person be admitted or found to be unsound mind although he has not been adjudged to be so under the—or any other law for the time being in force, he should, if a plaintiff, be allowed to sue through his next friend, and the Court should appoint a guardian *ad litem* where he is the defendant—*See* Civil Procedure 30

M

MALICIOUS' PROSECUTION.—Malice—reasonable and probable cause.—a conviction even when reversed on appeal is strong evidence in favour of there being reasonable and probable cause—*See* Tort ... 5

MASTER AND SERVANT—Contract—74.—In the absence of a binding contract by which the servant agrees to forfeit wages if he withdraws without giving notice, a monthly servant who leaves without notice is entitled to be paid down to the date when wages were last due but not for the period he has served since that date ... 1

MESNE-PROFITS—*Held*,—that for the period prior to institution which can be claimed in a suit for immoveable property must be profits which the person in wrongful possession actually received or might with ordinary diligence have received during that period—*See* Civil Procedure 50

————which can be claimed in a suit for immoveable property up to date of suit, but which were not so claimed, cannot be subsequently sued for in a subsequent suit because the cause of action is the same——*See* Civil Procedure 1

MORTGAGEE—If payment of the original mortgage debt is made to the original—without notice of the sub-mortgage, the sub-mortgage is extinguished and the sub-mortgagee cannot hold the property against the original mortgagor. If otherwise the sub-mortgagee can hold the property against the original mortgagor till the sub-mortgage is redeemed—*See* Sub-mortgage 1

————A—may sub-mortgage—there is privity between a mortgagor and his sub-mortgagee—*See* Sub-mortgage 1

MORTGAGES—Effect and value of entries of—in Settlement Records—Estoppel—*See* Evidence 3

MORTGAGEES AND MORTGAGORS—In a suit between—it is not open to some of the executants of the mortgage deed who signed as principal debtors and mortgagors to adduce oral evidence to prove that they were only sureties—*See* Evidence 13

MORTGAGOR—There is privity between a—and his sub-mortgagee—a mortgagee may sub-mortgage—*See* Sub-mortgage 1

PAGE

TORT—Law applicable to—a suit will not lie when the damage complained of is too remote 1

——— Malicious prosecution—malice—Reasonable and probable cause—a conviction even when reversed on appeal is strong evidence in favour of there being reasonable and probable cause ... 5

TRESPASS on mortgagor's interest by person who redeems in his own right—*See* Limitation— 9

Twinyo OR *Ayo*—A—is an interest in State land, and consequently in view of section 53 (2), (ii) of the Land and Revenue Regulation, the Civil Courts have no jurisdiction to entertain a suit to recover a—*See* Land and Revenue Regulation 5

U

UPPER BURMA CIVIL COURTS REGULATION, 10.—Where a Suddivisional Court having jurisdiction under—entertains, in contravention of section 15, Civil Procedure Code, a suit which should have been instituted in a Township Court, this is a mere irregularity which does not vitiate the proceedings—Limitation—Specific Relief—*See* Civil Procedure 36

W

WIFE—A Burmese-Buddhist—is entitled to sue her husband during marriage to recover, with interest, money raised on mortgage of her separate property and lent to her husband for his separate use —*See* Buddhist Law—Marriage 8

Z

Zerbadis—A custom having the force of law by which—in Mandalay are governed in respect of succession and inheritance by Buddhist Law does not exist. They are governed in those matters by Muhammadan Law—*See* Muhammadan Law 1

PAGE

MORTGAGOR'S INTEREST—Trespass on—by person who redeems in his own right *See* Limitation— 9

MUHAMMADAN LAW—A custom having the force of law by which *Zerbadis* in Mandalay are governed in respect of succession and inheritance by Buddhist Law does not exist—they are governed in those matters by— 1

N

Nissayo-Nissito—Property—Division of—on divorce by mutual consent—*atet* property—*Lettetpwa* property—*See* Buddhist Law—Divorce— 19

NON-NEGOTIABLE DOCUMENT—A lien over money lent may be created by deposit of a—which is evidence of the loan—Such a transaction is not necessarily contra y to public policy. *See* Contract ... 1

NUNS—In the absence of any evidence of an ordination ceremony a nun (*Mèthila*), so-called, is a lay devotee, and a woman does not lose her right to her property by becoming a nun—*See* Buddhist Law—Inheritance 11

O

ORASA—Eldest born son, means the eldest son and not necessarily the eldest child—*See* Buddhist Law—Inheritance 11

P

POSSESSION—Meaning of—Burden of proof in cases of wrongful dispossession in suits under section 9, Specific Relief Act, and suits based on title—*See* Evidence 7

PROPERTY—An attachment of—not belonging to the judgment-debtor is not execution of process for enforcing the judgment and does not bar an application under section 108, Civil Procedure Code—Limitation, II, 164—*See* Civil Procedure 42

——— Jointly acquired—there is no distinction in Buddhist Law between the respective interests of a husband and wife in—when the parties have been married before (*eindaunggyi*), and when they have not been married before—*See* Buddhist Law—Divorce ... 1

PROSECUTION—Malicious—malice—reasonable and probable cause—a conviction even when reversed on appeal is strong evidence in favour of there being reasonable and probable cause—*See* Tort ... 5

R

REGISTRATION—An unregistered document affecting immoveable property is admissible to prove a personal obligation where it contains a distinct, *i.e.*, separate admission of liability or personal undertaking to pay and not otherwise 1

RESTITUTION OF CONJUGAL RIGHTS—Ill-treatment and desertion a valid plea of justification under Buddhist Law—*See* Buddhist Law—Marriage 5

RIGHT-OF-WAY—As an easement is an interest in land within the meaning of rection 53 (2), (ii), Land and Revenue Regulation, the Civil Courts are barred from entertaining a suit to establish such a right-of-way over State land—*See* Land and Revenue Regulation 1

PAGE

S

SPECIFIC RELIEF, 9—Burden of proof in cases of wrongful dispossession in suits under—and suits on title—Meaning of possession—*See* Evidence 7

SPECIFIC RELIEF—30—When an award has been made in arbitration proceedings held without the intervention of a Court of justice, during the pendency of a suit or appeal, a party can bring a regular suit to enforce it under—even though the existence of the award was not brought to the notice of the Court before the suit or appeal was decided 3

——————39—In a suit under—it is immaterial which party is in possession—*See* Civil Procedure 36

STAKE-HOLDER—In a suit to recover money which the plaintiff has deposited with a—the "paying over" which would bar the suit, means the paying over upon the event of the wager,—where in such a suit the plaintiff does not repudiate the wager but claims not only his original stakes but the whole winnings, he can get nothing —*See* Contract 3

STATE LAND—A *Twinyo* or *Ayo* is an interest in—and consequently in view of section 53 (2), (ii) of the Land and Revenue Regulation, the Civil Courts have no jurisdiction to entertain a suit to recover a *Twinyo* or *Ayo*—*See* Land and Revenue Regulation ... 5

STEP-CHILDREN—The rule that mere absence of joint living is not sufficient to exclude from inheritance, and that filial neglect must be proved, applies to—*See* Buddhist Law—Inheritance ...

SUB-MORTGAGE—A mortgagee may sub-mortgage—There is privity between a mortgagor and his sub-mortgagee—If payment of the orginal mortgage debt is made to the original mortgagee, without notice of the sub-mortgage the sub-mortgage is extinguished, and sub-mortgagee cannot held the property against the original mortgagor. If otherwise, the sub-mortgagee can hold the property against the original mortgagor, till the sub-mortgage is redeemed 1

SUIT—Mesne profits which can be claimed in a—for immoveable property up to date of—but which were not so claimed, cannot be subsequently sued for in a subsequent—because the cause of action is the same—*See* Civil Procedure 1

SUMMARY ORDER—In a suit under section 283, Civil Procedure Code, the burden of proof is not affected by the—under sections 280, 281, or 282—*See* Civil Procedure 16

SUPERIOR COURT—A—cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it—*See* Civil Procedure 2

SURETIES—In a suit between mortgagees and mortgagors, it is not open to some of the executants of the mortgage deed who signed as principal debtors and mortgagors to adduce oral evidence to prove that they were only—*See* Evidence 13

T

TORT—Dafamation—defamation as distinguished from mere vulgar abuse is actionable without proof of special damage 1

——————*Held*,—that if there is a right and if there be an infringement of that right, it is not necessary to show that there has been any subsequent injury, and if the plaintiff's undoubted right has been invaded he would be entitled to a remedy whether any damage has accrued to him or not—*Also*—that the principle ordinarily applied to actions of tort is that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action 9

Arbitration—Award.

Civil Appeal No. 283 of 1904. December 11th, 1905.

Before G. W. Shaw, Esq.

(1) MI E MYA,
(2) MI THI NU,
(3) U SEIN DA,
(4) MI KYWE,
(5) NGA MYA,
(6) MI SAW NYUN,
} *v.* NGA PE.

Mr. *A. C. Mukerjee*—for appellants. | Mr. *Tha Gywe*—for respondent.

In a case where a Court has ordered an award to be filed under section 525, Civil Procedure Code.

Held—that an appeal impugning the award on grounds falling under section 521, Civil Procedure Code, does not lie.

See Civil Procedure, page 40.

MAUNG HMON
v.
MAUNG MEIK.

regard to the jointly acquired property they make no distinction between persons who have, and persons who have not been previously married. Similarly section 3 of Book XII of *Manukye*, a correct translation of which will be found at page 31 of Jardine's note II on Marriage, runs as follows :—

"If both the husband and wife have been married people before (*eindaunggyi*), and both have no fault and wish to divorce, let each party take the original property (*payin*) brought by him or her, and if there be any debts contracted let them bear them in the same manner. Let them also take equally the *hnitpason* or joint property animate and inanimate, and let them pay the *hnitpason* or joint debts."

There therefore appears to be ample ground for holding that there is no distinction in Buddhist Law as to the interest in jointly acquired property between the cases of a couple who have not been previously married and a couple who have not been previously married.

The appeal is dismissed with costs.

22

Buddhist Law—Divorce.

Before G. W. Shaw, Esq.

Civil Appeal No. 252 of 1904. October 23rd, 1905.

MI KIN LAT *v.* NGA BA SO.

Mr. *H. M. Lutter*—for appellant. | Mr. *F. N. Basu*—for respondent.

A Burman Buddhist husband or wife 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.

Authorities :—

Dr. Forchhammer's Jardine Prize Essay.
Maine's Ancient Law.
Jardine's Notes on Buddhist Law.
Institutes of Manu (Sacred Books of the East).
Moyle's Rulings and Notes on B. L.
Dhammapada ... ...
Questions of King Milinda ... } (Sacred Books of the East.)
Pundarika Suddharma ...
Buddhist Suttas ... ...
Kinwun Mingyi's Digest II.
Attathankepa.
Richardson's Manugye.
S. J. L. B., 391
Do. 607
Do. 610
U. B. R., 1897, 1901, II., 28.
I. L. B. R., 7.
Chan Toon's leading Cases II, 177.
Civil Appeal No. 299 of 1899 (unpublished).
U. B. R., 1902, 1903, II. B. L. Div., p. 6.
1. I. L. R., 2 Bom., 624.

PLAINTIFF-RESPONDENT sued for divorce. He did not allege any fault on the part of the Defendant-Appellant, but offered to pay all the debts, and to resign to the Defendant-Appellant the jointly acquired property. He attached to his plaint a list of the debts and a list of the joint property.

Defendant-Appellant in her written statement opposed the divorce on the ground that Plaintiff-Respondent had illtreated her and forced her to leave him, and to apply to a Magistrate for an order of maintenance. She also said that the debts where not expended on her behalf, but were incurred by Plaintiff-Respondent and his relations. She denied that Plaintiff-Respondent was entitled to a divorce by Buddhist Law. The Defendant-Appellant did not allege that the list of jointly acquired property was incomplete or incorrect, or that there were any joint debts not stated in Plaintiff-Respondent's list of debts. In these circumstances there was no necessity for the Lower Court to frame issues as to the amount of the joint debts or the quantity and value of the joint property. The sole question for decision was the question of law on which the lower Court disposed of the case.

MI KIN LAT v. NGA BA SO.

So in this appeal it is too late for the Defendant-Appellant to raise objection in regard to the jointly acquired property and the joint debts, and the decision must go on the question of law.

It is not disputed that Plaintiff-Respondent was ordered by a Magistrate to pay maintenance to Defendant-Appellant, from which it must be inferred that there was misconduct on his part.

The point for determination is therefore whether a husband, whatever his own conduct may have been, is entitled by Buddhist Law to obtain a decree for divorce against his faultless wife, on condition of surrendering to her the joint property and paying the joint debts. This is the question discussed in the learned notes on Buddhist Law by Mr. J. Jardine (as he was then) under the name of *ex-parte* divorce, or divorce at mere caprice.

Mr. Jardine regretted that in the generation that had elapsed since the publication of Richardson's translation of the *Manugye*, nothing had been done to elucidate the sources and the meaning of the rules of law contained in the *Dhammathats*, and that so few Judicial decisions existed.

It is strange to find that almost another generation has passed since Mr. Jardine's invitation to scholars to study the *Dhammathat's*, and that beyond Dr. Forchhammer's Prize Essay, the publication and translation of the *Kinwun Mingyi's Digest* at the instance of the late Mr. Burgess represents all that has been done during that time, while Judicial decisions have been even fewer than before. On the question now at issue, there is also a conflict of opinion between this Court and the High Court of Lower Burma, which makes it necessary for me now to examine these decisions and to endeavour to come to an independent conclusion.

I undertake the task with diffidence and reluctance, owing to the difficulty and complexity of the subject and especially because it involves criticism of the opinions of Judges who were my superiors in every way except perhaps in knowledge of Burmese.

I feel that I am hampered by want of the time needed for an adequate study of the *Dhammathats*, and of the juridical principles involved.

I also recognize that in the present state of knowledge in regard to the origin of the rules of Buddhist Law, any conclusions now arrival at cannot be entirely satisfactory.

In *Nga Ngwe* vs. *Mi Su Ma** (1886), the Special Court held that a divorce cannot be had at the mere will of either party, and that the only circumstances under which a divorce may be granted against the will of one of the parties are those summarized by Dr. Forchhammer in his explanation of the expression *Kanmasat* (ကံစေတ). On the first point the decision purports to be based on the *Manugye* Book V, sections 11, 16, 17 and 18, and Book XII, sections 42, 44 and 47, as well as the *Kanmasat* passage (in section 3 of Book XII). I shall refer to these passages again. On the second point the learned Judges apparently omitted by oversight to specify that the *Kanmasat* doctrine

* S. J. L. B. 391.

applied only where *there was no fault*. The Calcutta High Court in the case referred to below noticed this, and was further of opinion that the finding was on a point that was not before the Special Court for decision and was therefore extra-judicial The Special Court apparently gave much weight to the views expressed by Mr. Jardine and by Dr. Forchhammer.

In *Mi Pa Du* vs. *Shwe Bauk** (1891), where the wife sued for divorce, on the ground of her husband beating her after promising amendment, the Judicial Commissioner of Lower Burma (Mr. Fulton) observed that the principle on which *Nga Ngwe* vs. *Mi Su Ma* was decided, *viz.*, that divorce otherwise than by consent of both parties is not to be given at the mere caprice of one party without proof of any of the grounds which the *Dhammathats* recognize as good grounds for divorce, had been lately affirmed by the Calcutta High Court in *Nga So Min* vs. *Mi Ta*,** and he held that

"Although these passages" (in the *Manugye* and *Attathankepa* relating to divorce by one party against the will of the other) "certainly seem to contemplate cases of divorce against the wishes of one party and without any fault committed by such party against the other, Chapter 3 of Book XII of *Manugye* shows that under such circumstances divorce is dependent on the fact of *Kanmasat*," and that "there must be proof either of some fault committed against theother of a sufficiently serious nature to justify divorce according to the *Dhammathats*, or of some evil deed (according to Dr. Forchhammer's explanation of *Kanmasat*) for which a separation of destinies can take place. Mere willingness to pay *kobo*.....will not constitute a ground for divorce. It might equally well be held that willingness to surrender the whole of the joint property constituted such a ground. But it seems to me that the rules for the partition of property and for the payment of *kobo* take effect after the parties have agreed to divorce each other, or the authorities have sanctioned a divorce, and do not show on what grounds divorces can be sanctioned.

He went on to argue from sections 407 and 408 of the *Attathankepa* which deal with slave wives that "assent does not necessarily involve a wish or desire for divorce," and that "the occurrence of passages providing for the ownership of joint property in case of divorce without fault or evil deed on either side is in no way inconsistent with the belief that such divorces can only be effected by consent." This was the view which Mr. Jardine was inclined to take. Mr. Fulton went on to say: "It is quite clear that a divorce cannot be granted on mere carprice." As authorities for this conclusion he cited "the texts quoted by the High Court" (of Calcutta) and (one sentence from) section 393 of the *Attathankepa*. The "texts quoted by the High Court" were apparently section 17 of Book V and section 43 of Book XII of the *Manugyè*, and passages stating that "five kinds of women may be abandoned or divorced."

The Calcutta case was that of *So Min* vs. *Mi Ta*, where the husband sued for divorce on the ground that the wife had deserted him for eight months and refused to resume cohabitation, and where the defence was that the plaintiff had treated her with cruelty. The learned Judges held on a consideration of the texts just cited that "a divorce cannot be had merely because one of the parties has no love

* S. J. L. B., 607.
** Do. 610.

MI KIN LAT v. NGA BA SO.

for the other, or does not comply with the desires of the other," and that desertion is not a good ground where the prescribed period has not elapsed. But they remarked that "there are no doubt texts in the several *Dhammathats* which show that a divorce can he had by mutual consent, and that one of the parties can separate from the other even if the latter does not consent, but in that case it is distinctly provided that the properties belonging to both and their liabilities should be divided."

The question of partition of property apparently did not arise in that case. There had been no partition, and apparently the plaintiff did not ask for partition or offer to surrender any part of the joint property. In the circumstances, the High Court refused to grant a divorce and deprive the wife of the status of wife without her consent.

The next case is that of *Mi Gyan* vs. *Su Wa* * (1897). There the parties had quarrelled, the husband assaulting the wife, and they had agreed before witnesses to live amicably together. Then the husband on a trivial occasion pulled his wife's hair, boxed her ears, struck her with his fist and kicked her and this more than once. He was criminally prosecuted and punished for the assault, and then the parties agreed to divorce and to refer the divorce and partition of property to arbitrators. But the arbitration falling through owing to her husband's failure to abide by his agreement, the wife instituted a suit for divorce simply, and without referring to partition.

Mr. Burgess after stating the rule contained in section 24 of Book V of the *Manugyè*, and asserting the right of the wife to a divorce at once if she insists on it,—at the cost of half the joint property—observed :—

"Throughout all the texts relating to the subject of divorce.....the principal object of the rules laid down appears to be to provide for the disposal of the property pertaining to husband and wife. The fundamental principle of the Buddhist Law of marriage seems to be freedom of forming connubial union and equal freedom of dissolving it, and one of its most salient and prominent characteristics is the near approach which it makes towards placing husband and wife on the same level .....and this striking feature is the partnership and community of property created by this equality. When the parties wed, the spouses virtually if not literally, say to each other, "with all my wordly goods I thee endow," and this joint ownership is jealously guarded both by written law and by popular sentiment. Consequently when husband and wife part there must be a separation not only of heart and hand but of goods as well, and unless there is such separation there can be no divorce. The tendency of the *Dhammathats* is naturally to discourage divorce, but they do not attempt to prevent it by absolute prohibition. Hasty reckless and unnecessary divorces are discountenanced by moral suasion and by pecuniary penalty."

"Time is to be given for the correction of faults and the amendment of conduct and the maintenance of the helpless is prescribed. If separation is insisted upon without strong or adequate reason, the party claiming it unduly is deprived of a part or it may be of the whole of the property which would fall to his or her share upon a divorce for perfectly just cause. But that there is any insuperable legal bar to divorce against the party desiring it, if that party is prepared to surrender all claim to the share of the property to which he would otherwise be entitled, is a proposition for which there is apparently no sufficient or satisfactory authority to be found in the Buddhist *Dhammathats*."

It was therefore held that there was "no cause of action for divorce without and as distinct from division of property," and the

* U. B. R. 1897-1901. II. 28.

plaintiff was allowed to withdraw her suit under section 373, Civil Procedure Code.

In *Tha Chi* vs. *Mi E Mya**, Birks, J. dissented from this decision holding that a suit would lie for divorce without a prayer for partition of property. From his reference to Mr. Jardine's notes he evidently followed Mr. Jardine's views, in coming to this conclusion.

In *Mi Nyein Hla* vs. *Nga Cheik*† (an unpublished decision of this Court), *Mi Gyan* vs. *Su Wa* was followed, and it was held that a suit for divorce on condition of abandoning all the property would lie. But it does not appear that the correctness of the statement of the Buddhist Law in Mi Gyan's case (as quoted above) was contested, or examined.

In *Shwe Lon* vs. *Mi Ngwe*‡ it was held (somewhat undecidedly) by Mr. Adamson, following *Mi Gyan* vs. *Su Wa*, that a suit would not lie for divorce without a prayer for partition. But another view was taken in *Nga Pye* vs. *Mi Me*,§ by the same Judge. It was there held that a suit would lie for divorce apart from partition. The complement of this decision was added in *Tha So* vs. *Ma Min Gaung*, ‖ where it was ruled that when a suit for divorce without partition has been brought, a subsequent suit for partition will lie. Although I am doubtful whether these last two cases correctly interpreted the ruling in *Mi Gyan* vs. *Su Wa*, it is unnecessary to go into that matter here. The point appears to be immaterial where there is a ground for divorce apart from the question of partition. So far as the present case is concerned they do not conflict with Mr. Burgess's decision.

In *Mi Gyan's* case Mr. Burgess remarked incidentally that where a party "withdraws from the matrimonial union upon submission to the penalty of forfeiture of claims to the substantial assets of the conjugal association" the intervention of a Court would not be necessary, where there was no resistance, and the assistance of the Court would only be likely to be required in the form of a declaration. On this point I agree with the decision in *Mi Nyein Hla's* case cited above that the intervention of a Court may be necessary to decide what property is to be abandoned, and also with that in *Nga Pye* vs. *Mi Me* that where the other party absolutely declines under any circumstances to allow a divorce, a suit is not superfluous.

The result is that the present suit will lie, and a decree for divorce may be granted in the circumstances of the present case, if the Buddhist Law of divorce is correctly stated in *Mi Gyan* vs. *Su Wa*, in the passage quoted above.

I have spent much time in re-reading Mr. Jardine's notes, and studying the *Dhammathats* with the help of Dr. Forchhammer's essay. It was necessary to refer to Mr. Jardine's notes not only on account of their intrinsic value, but because they obviously formed the basis for the Lower Burma decisions above cited. In note IV, Mr. Jardine summarized the objections which he saw in the way of the doctrine of what he called *exparte* divorce. I refrain from rehearsing them, on con-

* 1 L. B. R. 7.
† Civ. App. No. 239 of 1899 (unpublished).
‡ Chan Toon's L. C. II, 177.
§ U. B. R. 1902-03, II, B. L. Div., page 6.
‖ *Ibid*, page 12.

27

siderations of time and space. They will be referred to further on. What I conceive to be the most important point is whether Mr. Jardine was right in thinking that "the two things" (division and partition of property) "are to be discriminated with the utmost care" (Note II, section 12). It appears to me that if the *Dhammathats* consistently unite these two things, we cannot hope to understand the Buddhist law by discriminating them. We are bound to take them as they stand. Now is it true that the "Courts have looked in the wrong place" for the law about divorce (*i.e.*, have looked among rules relating to partition of property) "and raised inferences that are contradicted by positive rules, found elsewhere?" (Note I, section 10). I have no hesitation in stating that an examination of the *Dhammathats* does not support this assertion. In the *Kinwun Mingyi's Digest* we have some 30 *Dhammathats* to add to those which were available at the time Mr. Jardine wrote. Nowhere do we find rules relating to divorce separate from rules for partition on divorce. Everywhere the rule for partition to be applied to each case is stated whenever divorce in any given set of circumstances is dealt with. Numerous quotations could be given to prove this statement. I confine myself to quotations from the *Dhammathats* which Mr. Jardine had at his disposal.

In section 24 of Chapter V of the *Manugyè*, Divorce is expressly allowed on account of "brutish" conduct (ကွာပိုင်စေ) and is stated to be obtainable not only where there is infidelity or violence. Richardson's translation runs "It shall be considered as a separation by mutual consent, and let all the property common to both be divided equally between them and let them have the right to separate." The Burmese is သမဂ္ဂဒွိုင်ထိုက်သည့် ကိုခွဲဝေထူးထား၍အညီကွာစေ which I think means, "Let them separate (divorce) on equal terms, dividing the property in the same way as in the case of divorce by mutual consent."

In section 43 of Book XII, it is explained that in certain circumstances the husband may put the wife away and that this means abstaining from connubial intercourse and not *divorcing and taking all the property*, and it goes on to say that if he insists on divorce he must give her half the jointly acquired property, or in case of a second wife found not to be barren he is to "*divorce her giving her all the joint prpoerty.*" (နှစ်ပါးစုံရှာပေး၍ကွာစေ).

In section 46 of the same book, it is laid down that the wife may in certain circumstances abuse the husband without fault being imputed to her, and it goes on "If the husband sues for divorce let them be *divorced each taking an equal share* of the *hnapazon* (property) which they would be entitled to if they divorced by mutual consent. There is no law that because a woman is an abusive wife a husband is to *divorce and to take all the property*."

Again in section 47 we are told that a woman with the four kinds of pride is not to be put away. The husband is to correct her three times. If she continues in her pride after this correction "let him have the power to put her away (ပစ်ပိုင်စေ) even if she does not wish to divorce, let him *have the right to divorce her* (ကွာပိုင်စေ) and let their *hnapazon* be divided equally."

In the same section if a wife corrected for improper conduct wishes to divorce and the husband does not, each is to take the original property, and the wife is to have none of the *lettetpwa*, and is to pay all joint debts; and if the wife after correction promises to behave well and does so and the husband puts her away (ဖွဲ့ခွာတော်) each is to take the original property, the wife is to have all the property acquired during marriage and the husband is to pay all the joint debts, "because the wife having received correction conducts herself in the manner of a wife like a slave" (the best kind of wife).

So in the *Wagaru*, Divorce, sections 1 to 3, (translation in Jardine's notes) we have the moral rule immediately followed by a rule providing for separation (divorce) where one party is unwilling, and prescribing the method of division of property to be applied:—

"Oh great king listen well! Husband and wife must practise the *panca-vatthus* towards each other and live in peaceful union. If the *panca-vatthus* have been practised both by the husband and wife and yet one wishes to separate from the other, the party who wishes to separate through the guilt be not with him (or her), must leave the house with one suit of clothes and take upon him (or her) the increased debts (debts incurred during the matrimonial union). The increased (jointly acquired) property falls to the share of the party who does not wish to separate. If there are no increased debts and no increased property, the party who wishes to separate must pay the price of his (or her) body." [(*Ko-bo.*)

It is impossible to say of this rule that it relates solely to the division of property: and the same remark applies even more forcibly to section 10 where the rule is repeated and also to section 8.

I shall only add one quotation from the *Wunnana* (section 171):

"If a husband or wife in a state of anger says to the other 'I do not love you' such words shall not be sufficient to constitute a divorce. It is constituted only when they divorce and leave each other *after a division of the good and bad property*," etc.

No doubt from the European jurist's point of view the question of division of property arises only after divorce has been effected. But in Mr. Jardine's own words (Note I, section 15) "the more one studies the parts of the book which deal with these connections (with wives of different classes, concubines and slaves) and considers the general ease with which the status of marriage may be assumed, dissolved and contracted again, the more impressed one becomes with the difficulty of applying the analogies of the long-settled law of England to these connections."

It appears to me to be perfectly clear that the *Dhammathats* treat the division of property as part of the law of divorce, and even deal with divorce in some cases by rules about the division of property.

If this idea is once grasped, most of Mr. Jardine's objections are removed. He apparently came to the conclusions he did mainly because he deliberately "discriminated the two things with the utmost care." I venture to think that owing to this cause he misapprehended the law of the *Dhammathats* on the subject of divorce, and the learned Judges who followed him in the decisions above cited, by consequence arrived like him at the wrong conclusions.

I pass on to the next important point, the positive rules of the *Dhammathats* which provide for divorce in cases where one party is willing and the other is not.

MI KIN LAT *v.* NGA BA SO.

The much discussed passage in section 3 of the XIIth Book of the *Manugyè* where the expression *Kanmasat* (ထံမစိ) occurs is one. It is stated in Mr. Jardine's notes and the learned Judicial Commissioner in *Mi Pa Du's* case was apparently under the same impression that the rule as to what Mr. Jardine calls "*exparte* Divorce" or "divorce at mere caprice" is only to be found in this "one isolated passage difficult to interpret" (note 1, section 13). Strange to say this is very far from being the fact. The expression *Kanmasat* (ထံမစိ) it is true, occurs only in this one place. I shall deal with this fact presently. But the rule itself is to be found in several other passages of the *Manugyè* itself, in the *Wagaru*, an old and valuable *Dhammathat*, the basis, as Dr. Forchhammer tells us, of the *Wunnana*, and the *Thara Shwe Myin* on which Mr. Jardine so greatly relies, and in parallel passages in a considerable number of other *Dhammathats*.

To take the *Manugyè* there is the passage first quoted from it in section 255 of the Kinwun Mingyi's Digest. (I have not been able to find it in the copy of the *Manugyè* published with Richardson's translation). Then there is the parallel passage in the same section of Book XII dealing with persons married before. And there is the following passage from section 42 of the same book.

"A man may not yet (*i.e.*, all at once) (မစွန့်သင့်သေး—the သေး is omitted in Richardson's translation) put away a wife who is guilty of any or all of these improprieties. He has a right to chastise her with a bullock-driver's wand and split bamboo on the loins, etc. If after one, two or three chastisements she quietly lays aside her bad habits and lives correctly, it is not proper to separate from her (မကွာသင့်ချေ). If they do separate (should be 'If he does separate from her') it shall only be permitted on the husband giving her all she is entitled to [should be 'He shall have the right to separate (ကွာပိုင်စေသည်) after giving her all she is entitled to']."

This passage alone in my opinion clearly disproves Mr. Jardine's assertion that the rule as to *exparte* divorce does not in fact declare that there is a right to such a divorce and is merely a rule about partition of property. Then we have the passages from the 43rd 46th and 47th sections of the same Book, which I have already quoted above in another connection.

It is unnecessary to do more than refer to the *Wagaru* (the passages quoted and referred to above) and the other texts to the same effect contained in sections 255 (the rule for persons not married before) and 258 (the rule for persons married before) of the *Kinwun Mingyi's Digest*.

In section 303 we have the texts dealing with the case where the wife complains of ill-treatment (*Manugyè*, Book XII, section 3, and parallel passages). She is not to be granted a divorce at once. The husband is to be required to give security or enter into a bond for his good behaviour. But if the wife insists on divorce she is to get it—subject to a penalty. The extract from the *Yazathat* is fuller than the others and seems to me to explain in an unmistakable manner the principle of the rule. It runs:—

"If the wife declares that she cannot abide by the decision, and presses her suit for divorce, it shall be granted, even if the husband does not wish it and

although he may undertake to cherish and love her more than he used formerly. But since she does not by her persistence show much forbearance towards her husband, and is unable to pardon his first and only fault, the divorce shall be effected as if it were desired by both parties. The assets and liabilities shall be divided equally.

In face of texts like this it is impossible, as it seems to me, to find in passages like section 11 of the *Manugyè* and sections 155, 156 and 157 of the *Wunnana* any real contradiction of *ex parte* divorce subject to penalty. They merely state the moral rules found in all the *Dhammathats*. The fact that the *Wunnana* omits to add the rules for divorce at the will of one party goes for nothing. It may be that the author was a severe moralist who would have all men comply strictly with the ancient law whether derived from the Hindus or from the Buddhist canon. It may be merely that the omission was owing to the compendious character of the work or even to mistake. The great majority of the *Dhammathats*, while stating the same moral rules, go on to provide for divorces at the will of one party and other breaches of those moral rules, and this fact is not to be got over by the mere omission of similar prescriptions in the *Wunnana*. Again the texts, which prescribe that a woman who seeks to divorce her faultless husband against his will is to have her head shaved and to be sold cannot be taken as authorities against *exparte* divorce. We find most of then in section 255 of the Kinwun Mingyi's Digest. The *Manussika, Pyu Kaingza, Myingun, Kandaw, Vanna, Dhamma, Manuyin, Vicchedani, Sônda,* all contain this provision, *but they all affirm the right of the husband to divorce his wife against her will* with or without penalty. The explanation of the rule about shaving the woman's head, etc., I take to be this. Some of these *Dhammathats* are among the oldest. But in any case they appear to me to present an old-time rule existing before the equal position of women had been developed by the influence of Buddhism, and so far they must be taken to have been superseded by the more modern notions, which are given effect to in those *Dhammathats* like the *Manugyè, Wagaru, Manu Chittara* and others which deal in precisely the same manner with both sexes. Strange to say, the *Dhammathats* appear to be practically unanimous as regards persons married before (section 258, Kinwun Mingyi's Digest). None of them so much as mentions shaving of the head or selling in connection with such persons. This is no doubt to be explained by the fact that re-marriage is of purely Buddhist origin. It may be noted that in the present case the parties have both been married before.

With regard to the expression *Kanmasat* (ကံဆုတ်), the fact that it occurs in none of the other *Dhammathats* and only in the one passage of the *Manugyè* relating directly to divorces of persons not married before, where there is no fault on either side, and one party is unwilling, appears to me to be inconsistent while the interpretation but forward by the late Dr. Forchhammer. From an etymological and historico-philosophical point of view that interpretation may be correct enough. But if *Kanmasat* had had this force in the passage in question it is inconceivable that nothing corresponding to it should be found either

MI KIN LAT v. NGA BA SO.

in other passages of the *Maungyé* itself, or in the parallel passages in the other *Dhammathats*. Most of these contain no substitute for the phrase in question. But the Rescript (in section 255, Kinwun Mingyi's Digest) and the *Kungyalinga*, in section 258, Kinwun Mingyi's Digest) say "simply because there is no love between them," or "through want or love." It is easy to understand such an expression being omitted in other *Dhammathats*. But *Kanmasat*, according to Dr. Forchhammer, implies that the other party has committed an evil deed (SC, matricide, parricide, killing, stealing, shedding the blood of a *Rahan* or Buddha, heresy, adultery) which will involve his partner in retribution in future existences. If this had been what the Buddhist law-givers contemplated, it seems to me that it would have found a place in the other passages of the *Manugyè* and in the other *Dhammathats*. It would have been much too important a condition to be omitted. Another consideration is that the *Manugyé* as well as other *Dhammathats* expressly states that there is no fault (အပြစ်မရှိ). With all respect to Mr. Fulton's attempt to explain this, I doubt if it could be said of a party who had committed an evil deed rendering himself and his partner in the marriage contract liable to retribution in future existences that there was no fault in him. For these reasons I am of opinion that whatever its strict meaning may be, the expression *Kanmasat* must be understood as signifying something very much less than what Dr. Forchhammer's explanation requires in the passage of the *Manugyè* where it occurs. It is an elementary linguistic fact that words and expressions often acquired by use a much weaker significance than properly belongs to them. I think it is to be inferred from the surrounding circumstances that the same fate had befallen the expression *Kanmasat* before it came to be employed in section 3 of Book XII of the *Manugyè*. Having regard to the total omission of such an expression in other passages and in parallel texts, I think it may be altogether ignored. It follows that the view that a marriage can be dissolved *ex-parte* when there is no fault, only where the other party is alleged to have committed an evil deed (as explained above) is not sustainable.

The principle I deduce from the *Dhammathats* is this. The marriage tie should not be severed without good cause, but it is open to either party to insist on severing it subject to the payment of a penalty. Mr. Jardine thought that the penalty was prescribed in precisely the same way as penalties were prescribed for murder or theft, and that it is unreasonable to suppose that the Buddhist law-givers intended to "sanction an iniquity" by imposing a penality for it. Some of the texts no doubt lend support to this view. But I am of opinion that the only satisfactory way of reconciling them with those already referred to which plainly provide for *ex-parte* divorce, is to suppose that they represent the older legal or moral rule, which has been modified by the influence of Buddhism. I think it may fairly be argued that divorce by mutual consent is almost, if not, quite as much opposed to the rigid moral rule. So is the rule which provides for the dissolution of the marriage bond, by three (or one) years' desertion by the husband (or wife) without any communication or tender of maintenance. The

texts are to be found in section 312 of the Kinwun Mingyi's Digest. This rule, in my opinion, furnishes an important analogy, and sets in a clear light the attitude of the Buddhist law-givers towards divorce without adequate cause. Desertion is highly reprehensible, but having regard to the weakness of human nature, they provide for and allow it subject to restraining conditions. So divorce *ex-parte* without fault is morally wrong, but for the same reason they allow it subject to the payment of a penalty. I see no reason for finding in these provisions any approval or sanction of an iniquity. The view which the law-givers appear to have taken is probably expressed in the words of the *Dhammathat Kyaw* (section 256, Kinwun Mingyi's Digest)—

"Where husband and wife are not in mutual accord, or if they do not respect each other or care for each other's welfare.... *so that there is naturally no place in the house* they should divorce "(ဖွန့်ရုတ်၍) or in those of the *Rasi* (*Ib.* section 257). "If in consequence of disagreement either husband or wife (both of whom have previously been married) desires divorce, let each take what he or she brought to the marriage. The party desiring divorce, shall have no claim on the property acquired jointly and shall moreover be liable to liquidate all debts. If the husband and wife seriously find fault with and make recriminating remarks against each other, *it is hardly possible that they will be able to live peaceably and amicably together because they are conducting themselves with the view of going to law.* In such a case let them be divorced as by mutual consent (စိတ်တူကွာပြစေ) let each take the property brought to the marriage," etc.

This text by the way is a good instance of the way in which the *Dhammathats* combine the two things, divorce and partition of property Sir H. Maine's explanation of the penal law of ancient communities (Ancient Law, Chapter X,) does not appear to be inconsistent with this view of the penalty for divorce, since the Buddhist law of divorce is a development of the older law. The distinction between the abandonment for one or three years, dealt with in section 312 of the Kinwun Mingyi's Digest, and *ex-parte* divorce as described in sections 255 and 258 and other texts, appears to be that the former takes effect without resort to the Courts by mere lapse of time, while in the latter an adjudication by a constituted authority is contemplated. This view, I think, is supported by the language employed in the various texts. The first case is described as *Kinyathawtaya* (ကင်းရုတ်သဘော). "The law of (parties) becoming free (of each other)"—dissolution of the marriage bond. In the latter some word for divorce is used ဖွန့်ပစ် or ကွာ and an adjudication is implied. Take for example the Rescript in section 303 of the Kinwun Mingyi's Digest.

"The bond of union between husband and wife is very sacred and should not be lightly severed. If either seeks or both seek divorce strict enquiry shall be made as to who is in fault and the guilty party shall be admonished. If notwithstanding such admonition (the misbehaving party) does not amend or (the other party) insists on divorce (the Court) must adjudge (the offending party) to pay (the appropriate penalty), for misconduct the penalty of misconduct, for insisting on divorce the penalty of divorce."*

Another point on which I think Mr. Jardine misapprehended the meaning of the *Dhammathats* is in the references to "divorce as by mutual consent." He was partly misled no doubt by looseness of

* The printed translation of this text is naccurate.

MI KIN LAT v. NGA BA SO.

translation in Richardson's version of the *Manugyè*, but chiefly by his determination to discriminate between divorce and partition of property. From my study of the *Dhammathats* I have no doubt that in all these cases what is meant is nothing more than that the property to be divided in the manner prescribed for divorces by mutual consent. I think this is sufficiently clear from the extracts I have already given in connection with other points. It must of course be borne in mind always that the penalty is adjusted in each case according to circumstances, by means of different modes of partition. I can find no basis for the theory of fictional consent.

On the various points already touched upon, the texts given in section 272 of the Kinwun Mingyi's Digest appear to me to be very instructive. They contain the law of the subject on the divorce of a wife, when she has any of the six kinds of faults, the five kinds of impropriety, or the four kinds of pride, after chastisement, and I think furnish strong support to the propositions that divorce and partition of property go together, that references to divorce "as by mutual consent" signify merely the method of partition that *ex-parte* divorce is permissible on payment of a penalty and that a judicial decision is contemplated.

The sections of the *Attathankepa* which deal with divorce also deserve mention. They supply a very recent presentment of the law of the *Dhammathats* as understood and applied to modern conditions by a learned author of repute.

They are headed "The law of separation" (divorce) (ကွဲပြားခြင်း တရား). Section 391 deals with divorce by mutual consent of persons not married before, section 392 with divorce of the same class of people where only one party consents, section 393 with deivorce of the same class of people where one of the parties has been guilty of a matrimonial fault—and this section I may note expressly provides for divorce where the wife has been illtreated and a bond has been taken from her husband, but the wife insists on divorce—parallel to the extract from the *Yasathat* quoted above, and similar passages in other *Dhammathats*. It is difficult to conceive how Mr. Fulton could have extracted a solitary sentence from this section and relied on it as an authority opposed to and inconsistent with *ex-parte* divorce. Then section 394 gives the corresponding rules for persons married before, first in the case of mutual consent, then in that of divorce where only one party desires it, then in the case where one of the parties is guilty of a matrimonial offence. In the second case "the law of separation" (divorce) is stated to be this. The party wishing to separate is to take only his or her wearing apparel and *thinthi* property given by the King and to pay the joint debts and bear the law expenses, and the party not wishing to separate is to take all the jointly acquired property. If there is no jointly acquired property the party wishing to separate is *to pay compensation* according to the status of the other party. In the *Manugyè*, *Waru*, and other *Dhammathats* containing the same fully elaborated rules, in the last mentioned case, *Kobo* is to be paid.

It is in this way, by payment of *Kobo* or compensation, that the *Dhammathats* provide for the wife married and divorced before any

joint property has been acquired, and for the wife who is pregnant—cases in which Mr. Jardine thought the rule of *ex-parte* divorce (as he understood it) would work hardship—and in face of the texts expressly dealing with these cases this objection is clearly unsustainable. It is equally obvious that the whole of the joint property compensates the divorced wife for the loss of her chance of inheriting it on her husband's death, another injustice apprehended by Mr. Jardine. So where special rules for partition of property apply to divorce *ex-parte*, it cannot be said to nullify provisions relating to divorce, *e.g.*, for misconduct, which carry with them other rules of partition, and for a similar reason I am unable to see how it defeats the statutes punishing adultery and providing for the maintenance of wives. These statutes are no more affected by *ex-parte* divorce than by divorce by mutual consent. I do not think it is necessary to refer particularly to any of the other objections raised by Mr. Jardine. I think they have been answered by what has gone before. It may however be remarked that "the jural view of marriage" in regard to Burman Buddhists must be that of the Buddhist law. The case of *Sidlingapa* vs. *Sidava** cited by Mr. Jardine is itself authority for this proposition. The Institutes of *Manu* which in their present shape are of course not in any way the origin of the Burmese *Dhammathats* contain no rules for divorce, only allow the husband in certain circumstances to put away or supersede his wife and declare that "Let mutual fidelity continue until death" may be considered the summary of the highest law for husband and wife. (Sacred books of the East volume XXV, page 345). Starting with moral rules of this kind, the Burmese Buddhist law-givers developed their system of equality between the sexes, and of divorce by mutual consent without penalty, and in other circumstances under penalty. In their labours they do not appear to have derived any direct assistance from the Buddhist Religious canon. I can find nothing about marriage or divorce in the translated *Suttas*. On this point compare the remarks of Dr. Forchhammer on page xiv of the introductory note to the translation of the *Wunnana* in note III of Jardine's notes and those quoted as from Mr. Tagore in Mr. Jardine's VIIIth note. Even assuming that the Burmese Buddhist marriage is still something more than a contract, since it involves status, divorce at the will of one party, subject to a penalty, is no more inconsistent with it than any other kind of divorce. It may be remarked finally that "*ex-parte* divorce," "divorce at mere caprice" are not strictly speaking correct descriptions of the particular kind of divorce now in question. From what has been said above, it will be seen that they omit the essential element of the penalty and therefore give a false impression besides being incomplete.

I proceed to comment on the two Lower Burma Decisions first referred to above. Of the passages in the *Manugyè* relied on by the Special Court in *Nga Ngwe's* case, section 11, of Book V is merely the rule as to the seven kinds of wives classified according to conduct, of whom it is said four kinds ought not to be put away. This is of some antiquity, but cannot be held to contradict the law of divorce at the will

* I. L. R., 2 Bom. 624.

MI KIN LAT v. NGA BA SO.

of one party any more than any other part of the law of divorce. Section 16 declares that when the husband goes abroad to acquire knowledge, the wife should wait for so many years for his return. This is also an ancient rule. There is a similar rule in the Institutes of *Manu*. But it has nothing to do with divorce. It states the duty of a wife to her husband during a subsisting marriage. It is not affected by the fact that she may obtain a divorce from her husband without fault on his part by surrendering all the joint property and bearing the joint debts, any more than by the fact that the marriage may be dissolved in other ways. Section 17 contains the rules already referred to as to dissolution of marriage by mere abandonment for one or three years. Section 18 treats of cases where the husband or wife is a leper or mad or diseased, and the clause in it about the husband who is a drunkard, gambler, etc, seems also to refer to the same class of afflicted persons, *i.e.*, "it prescribes for the care of the helpless," and cannot be regarded as conflicting with the law laid down for divorce between persons not so afflicted. Again in Book XII, section 42 is that which states that wives are not all at once to be divorced for the 5 kinds of improprieties. It has been quoted above. Section 44 relates to the case where though husband and wife do not wish to divorce the friends of the woman may divorce them when she elopes with a lover from her parents' protection. It is difficult to see how this can be regarded as an authority against the particular kind of divorce in question. Section 47 relates to the women with the four kinds of pride. It has been partly quoted above. Among other things it provides for the case of the woman insisting on divorce after correction. It does anything but support the view taken in *Nga Ngwe's* case.

With regards to *Mi Pa Du's* case as we have seen already, the decision of the Calcutta High Court scarcely bears out the assertion that it affirms the principle in which *Nga Ngwe* vs. *Mi Su Ma* was decided. Mr. Fulton's application of the doctrine of *Kanmasat* (as interpreted by Dr. Forchhammer) to passages in others *Dhammathats* which do not contain it appears to me to be wholly unwarranted. I have already tried to show that a discrimination between divorce and partition of property is opposed to the view which the Burmese lawgivers took of the matter. Sections 407 and 408 of the *Attathankepa* are not in the published English translation. I have had them translated. They run as follows:—

"*Section 407.*—If after having eaten together out of the same dish, a husband wishes to divorce any of the 6 kinds of slave wife, *viz.*, 3 kinds of slave received in mortgage.

(*a*) Slave to serve all the life.
(*b*) Slave to serve until debt is paid.
(*c*) Slave given to serve on account of an unliquidated debt.
One kind of slave received by payment of debt which she owes others.
One kind of slave received on account of a debt.
One kind—*payin* slave, *i e.*, his own slave,

let the wife have all the good properties, forming *Hnapaeon*; if there be children let the parents each take those who will go with him or her.' As for the husband, let him have the price of the slave's body, the slave's *kanwin* (*athwin*) property and his own *payin* property.—Let the husband bear the debt incurred by both. If the wife wishes to divorce, she can do so only with the consent of the husband, and

by payment of the price of her body, If the husband does not consent, she is not free from the state of a slave, and cannot obtain a divorce."

"*Section 408.*—If a husband wishes to divorce, a *Thandaka* slave wife, let the wife pay the price of her body. If the wife wishes to divorce, she can do so only with the consent of the husband, and by payment of the price of her body. If the husband does not consent, she cannot pay the price of her body, and cannct be free from the condition of a slave, and cannot effect a divorce."

On the face of these texts, I am unable to find any ground for the inference drawn by Mr. Fulton that assent does not necessarily involve a wish or desire for divorce. On the contrary they appear to me to support fully my interpretation of the texts dealing directly with divorce at the will of one party. Thus the husband in these cases is at liberty to divorce his wife (against her will). As she has eaten out of the same dish she enjoys the right of a wife to the joint property and release from the joint debts, but being a slave she is to pay her *Kaôo* to the husband who is also to get her *athwin* (*kanwin*) property. On the other hand as she is a slave she is not to get a divorce from her husband against his will. "If he does not consent she is not free from the status of slave and cannct obtain a divorce."

Surely on a consideration of these rules it is made abundantly clear that those relating to the case of the ordinary free couple mean precisely what they say, *viz.*, that either party is entitled to obtain a divorce against the will of the other-subject to the penalty prescribed.

Book V, section 17, and Book XII, section 43, of the *Manugyè* and the passages about the five kinds of wives who may be divorced (Book V, section 11, *Manugyè* and paralled passages) have been referred to already.

In short, I am of opinion that Mr. Burgess in the passage quoted above from *Mi Gyan* vs. *Su Wa* correctly stated the Budhist law of divorce as found in the *Dhammathats*. He had Mr. Jardine's notes and the Lower Burma Decisions in *Nga Ngwe* vs. *Mi Su Ma* and *Mi Pa Du* vs. *Shwe Bauk* before him, and although he did not discuss the views expressed in those notes and decisions, I think it is clear that he duly considered the points that arose, and that his conclusions were as usual matured and well considered.

It follows from what has gone before that the Plaintiff-Respondent was entitled to a decree in the present case, and as there was admittedly joint property to the value of Rs. 95 this was all the Defendant-Appellant was entitled to and it was not a case where compensation could be ordered.

But the Defendant-Appellant was entitled to have her costs paid. This is expressly laid down in the *Dhammathats*, and the Plaintiff-Respondent in his plaint offered to pay the costs.

On this point the Defendant-Appellant must succeed. I modify the decree of the Lower Court by directing that the Plaintiff-Respondent is to pay the Defendant-Appellant's costs. He is also to pay the costs of this appeal.

37

Buddhist Law—Divorce.

Civil Appeal No. 326 of 1905. October 15th, 1906.

Before G. W. Shaw, Esq.

MI MYIN *vs.* { 1. NGA TWE. 2. NGA NYO. 3. MI O GYI.

Mr. *J. C. Chatterjee* for—Appellant. | Messrs. *S. Mukerjee and A. Agabeg*—for Respondents.

Held—on the authority of the Manugyè, Book XII, section 2, that on divorce by mutual consent :—

(1) A wife is entitled to one-third of *atet* property, where the relation of *nissayo* and *nissito* subsists with respect to that property, and she is the *nissito*.

(2) She is entitled to one-third of undivided ancestral property inherited by her husband during the marriage.

(3) The profits of such *atet* and inherited property are *lettetpwa*.

(4) The wife is entitled to a half share of such *lettetpwa* property, where it appears that was acquired by the joint exertions of the parties.

References :—

X., B. L. R. 49.
U. B. R. 1892-96, II, 121.
——— 1897-01, II, 39 (affirmed).
——— 1897-01, II, 146.
——— 192-03 B. L. Inheritance, page 1 (affirmed).
S. J. L. B. 110=1 L. C. 195.
1 Chan Toon's L. C. 74.

Plaintiff-Appellant Mi Myin sued for divorce and partition of property on the ground of cruelty. The District Court dismissed the suit. But on appeal my predecessor found that Plantiff was entitled to a divorce, with partition as in the case of divorce by mutual consent, and remanded the case for the determination of the remaining issues and final disposal. Those issues were as to what share, if any, of the property in Plaintiff's lists I, II and III she was entitled to ; whether that property was still in existence, and whether the 2nd and 3rd Defendants should be made parties.

To take the last point first, the Lower Court came to the conclusion that the 2nd and 3rd Defendants (Defendants Nga Nyo and Mi O Gyi) should not be made parties, and dismissed the suit against them with costs. This order followed naturally enough on the Lower Court's finding that Plaintiff was not entitled to share in the property in list III. But as 2nd and 3rd Defendants (Nga Nyo and Mi O Gyi) equally with 1st Defendant Nga Twe contend that that property which is admittedly undivided ancestral property of the three Defendants is not liable to partition on Plaintiff's divorce from first Defendant Nga Twe, it appears to me that they are interested parties, and hav been rightly joined in the proceedings in both Courts.

As to the *hnapazon* property it is admitted that Plaintiff-Appellant is entitled to half : The only disputed points are whether the produce of *atet* and inherited property (lists II and III) is *hnapazon* and liable to partition as such, and what property there is of this description for partition in the present case. The items in list I which are here in question are Nos. 18, 19, 20 and 24. The Lower Court held that the produce of *atet* and inherited property was not *hnapazon*, that Plaintiff was entitled to one-third of the produce of the *atet* property

MI MYIN v. NGA TWE.

and none of the produce of the inherited property, and also apparently that the items Nos. 18, 19, 20 and 24 of list I no longer existed.

I shall deal later on with the last mentioned point. The authority on the subject of the profits of *atet* and inherited property being *lettetpwa* is contained in section 3 of Book XII of the *Manugyè*, in which also is to be found the law on the other points in issue in the present case. The particular passage now in question is reproduced in section 264 of the Kinwun Mingyi's Digest, Volume II. I refer to it, and the translations of it further on. As regards the point I am now dealing with there is no ambiguity about it. It declares in plain and unmistakeable language that the profits accruing from *pyin* property and property inherited from parents during marriage are *lettetpwa* and are to be divided as such.

There is no text to the contrary except the Kungyalinga, which has never been considered, as far as I know, to be of equal authority with the *Manugyè*.

The rule is mentioned by Chan Toon (Principles, 2nd edition, page 44) as given in Spark's Code and approved by Sir J. Jardine (Mr. Jardine as he was then) in *Shwe Ngon* vs. *Mi Min Dwe*,* and Mr. Jardine quoted it in the first of his notes on Buddhist Law at page 3. The authority is the text of the *Manugyè* already mentioned.

The principle appears to be that, as Sandford, J., said in the case quoted by Mr. Jardine, the husband and wife live together and manage their concerns together, and even where the profits arise from the husband's separate property, the wife would be in charge or she would be managing the domestic affairs of the husband and administering to his domestic comfort and giving him leisure to attend to his out-of-door business, etc.

In short the profits arising from separate property would be obtained by the joint exertions of the married couple.

Mr. Jardine in the note cited gave reasons for thinking that even where the wife did not actually share in the acquisition, there is "no authority in the *Dhammathats* for holding that anything disqualifies a wife from any benefit pertaining to her status unless fault is proved."

This proposition may or may not be well founded, but no good reason has been shown for refusing to follow the *Manugyè* on the point in question. It is not explained how the Lower Court came to overlook the rule.

As regards the *atet* or *payin* property in the present case, I am of opinion that the profits are *lettetpwa* which should be equally divided between Plaintiff and her husband Defendant Nga Twe, on divorce. The case of the inherited property is not so clear.

For reasons given further on I hold it to be itself *lettetpwa*, and the profits of it are clearly *lettetpwa* also, on the authority of the text cited above. But, as will be seen presently, the method of division prescribed in the *Manugyè* for the inherited property is two-thirds and one-third, because it is considered that in respect of it the parties occupy the position of *nissayo* and *nissito*.

* S. J. L. B. 110=1 L. C. 195.

The question is what method of partition should be applied to the profits. If the husband's share had actually come into his possession by partition there would be no doubt. It would be in the position of *atet* property. Husband and wife would be dealing with it together, or their joint labours would be such as to justify the profits being regarded as acquired equally by both. But here the inherited property had not been divided, and the question is whether the relation of *nissayo* and *nissito* should be held to subsist with respect to the profits as well as to the property itself. The meaning of *nissayo* and *nissito* will be explained further on.

The evidence consists only of the statements of Plaintiff herself and of Defendents Nga Twe and Nga Nyo. Nga Nyo, who is the chief co-heir, states that the authorized Defendant Nga Twe to lease the land and collected the produce, that Plaintiff and Defendant Nga Twe were living together at the time, and that the paddy was divided equally between the co-heirs from 1258 to 1263, while the produce for latter years has not been divided yet. Defendant Nga Twe says that he alone leased the land and he and his clerk looked after the paddy; that Plaintiff took no part in the leasing of the land or the collection of the paddy, though she received and weighed sessamum (the produce of what land is not stated). Plaintiff says that she and Defendant Nga Twe used to lease the land and receive the produce, and jointly sold the produce and took charge of the money. Comparing these statements I have no doubt which party to believe. As they were living together on ordinary terms, the probability is that Plaintiff took the share which a Burmese wife ordinarily takes in her husband's business. It is most unlikely that she had nothing to do with the letting of the land or the receipt of produce. Besides, she presumably attended to the domestic affairs and gave her husband leisure for his out-door business. On the principles before referred to, I am, therefore, of opinion that, as regards the profits of the inherited property, the Plaintiff was equally concerned with her husband in their acquisition, or, in other words, that the relation of *nissayo nissito* did not exist, and therefore the partition should be made equally.

It follows from the foregoing that items Nos. 18, 19, 20 and 24 of list I were rightly included by Plaintiff in that list.

The next question is as to the Plaintiff's right to share in the *payin* or *atet* property.

The Lower Court's decision was not appealed against. But the Defendants filed cross-objections shortly before the date fixed for hearing.

Is it objected on behalf of Plaintiff that the time allowed by section 561, Civil Procedure Code, was exceeded, and that the cross-objections, therefore, should not be considered.

On this point I am clearly of opinion that it would be inequitable not to admit the cross-objections. The notices served on Defendants contained an endorsement setting forth that cross-objections might be presented not later than seven days before the date fixed for hearing. The amendment of section 561, Civil Procedure Code, had long before

MI MYIN v. NGA TWE.

superseded that rule. But the defendants must be allowed consideration in the circumstances.

I therefore proceed to discuss the question on the merits.

The Dhammathats are at first sight at variance, and the *Manugyè* (Book XII, section 3, and section 254, Kinwun Mingyi's Digest, Volume II), apears to be alone, or almost alone, in partitioning *payin* property on divorce.

The language of the original texts is obscure, and what adds to the difficulty of interpreting them is that the published translations are inaccurate. Mr. Adamson (now Sir H. Adamson) in *Kin Kin Gyi* v. *Nga Kan Gyi** was evidently misled by the published tarnslation of the Digest into thinking that the Kinwun Mingyi had substituted a gloss of his own for the original text of the *Manugyè*. That text, however, as a reference to the Burmese shows, was reproduced without alteration in section 254 of the Digest. As given there it is parctically word for word the same as the Burmese in Richardson's edition of the *Manugyè*. It was the translation that introduced a new meaning into the passage.

What appears to me to have escaped notice is that in that passage the *Manugyè* reproduces the rule found in the Wunnana and other Dhammathats as to the *neikthaya* and *neikthita* (supporter and dependent) using the Burmese equivalent for those words, and at the same time gives it an iterpretation which has never been put on the versions to be found in other Dhammathats.

Richardson's translation is inadequate, since it does not show that the relation of supporter and dependent is referred to. The same may be said of the translation in Jardine's notes (note II, 1, page 244), and of the published translation of the first *Manugyè* passage given in section 264 of the Kinwun Mingyi's Digest, Volume I (a continuation of that given in section 254). The published translation of the *Manugyè* passage in section 254 is a gloss. The Burmese will not bear the meaning given to it. *Neikthaya* and *neikthita* appear to be, respectively, corruptions of the Pâli *nissayo*, "that on which anything depends," and *nissito*, "dependent on" (Childers) *cf.* the Wunnana in the last-named section of the Digest, were *nissayo* is rendered နိဿယဖြစ်သူ, "the *neikthaya*." The true Burmese equivalent is အခြံ-*ahmi*, and it is so used in the corresponding passage of the Wagaru, which is also bilingual. In the passage of the *Manugyè* now under consideration, အခြံပြုရှင် *ahmi-pyu shin* is used for *nissayo*, and အခြံမရှိသူ or မပြုသူ *ahmi-ma-shi-thu* or *ma-pyu-thu* for *nissito*. What it says is this:—"Of property obtained through (*lit*, "by dependence on") the husband or through (*lit*. "by dependence on") the wife, let the party through (*lit*. "by dependence on") whom it was obtained (*sc*. the *nissayo*) take two-thirds and the party through (*lit*. "by dependence") whom it was not obtained (*sc*. the *nissito*) one-third. As for property obtained through (*lit*. "by dependence on" both, if their original interests are equal, let them divide it equally between them." The language here is peculiar and difficult (နှစ်ဦးသားအခြံဥစ္စာရင်းအပါတူသွင်) But I think it is clear that there is no reference to "principal," both from the

* U. B. R., 1902-03, Bud. Law. Div., p. 1.

42

Mi Myin v. Nga Twe.

·context and also from a comparison with the passage further on about property inherited after marriage where similar phraseology is used (ထင်ကရသောဥစ္စာရပ်သည်အရင်းအမြှီမညီရှုလေသည်). It then directs that debts are to be treated in the same way. Then it goes on to enumerate and define the different kinds of property obtained through (*lit.* "by dependence on") the husband or the wife, *viz.*, *payin* property brought by the husband or the wife, *where the other had no such property*, property obtained by one's own skill or industry, and property given by the king.

The importance of the passage lies in this, that it interprets the rule as to *nissayo* and *nissito* as applying to particular property. Thus *payin* of the husband or wife, when the other has no such property, is said to have been obtained through (*lit.* "by dependence on") the person who brought it, in other words the relation of *nissayo* and *nissito* is considered to exist with reference to that property, and it is to be divided two-thirds and one-third accordingly. So if both parties had *payin*, the relation of *nissayo* and *nissito* will not be considered to exist with reference to that property, their "original interests will be equal" and they will divide it equally, which is the same thing as each taking his or her *payin*. Contrariwise, where the relation of *nissayo* and *nissito* exists, the rule as to each taking his or her *payin* will not apply. Compare the passage further on which I have already referred to, in which it is declared that property inherited by the husband after marriage is considered to have been obtained originally through (*lit.* "by dependence on") the husband, and is therefore to be divided two-thirds and one third (although it is *lettetpwa*).

Interpreted in this way the rule of *nissayo* and *nissito*, which before was obscure, becomes at once intelligible. Of the Dhammathats quoted in section 254 of the Digest, the Wagaru the Rasi, * the Wunnana, the Panam, the Warulinga and the Cittara all give the rule, but all leave it obscure.

They are all briefer and less definite than the *Manugyè*; even the Wunnana, which is fuller, leaves it in doubt what property is referred to. The Pali Wunnana, the Rasi and the Panam do not provide for the case where "the original interests" of the parties "are equal."

But, making allowance for their comparative incompleteness, none of these texts is clearly opposed to the *Manugyè* as above interpreted.

The Wunnana, in that part of it which is an addition to the Pâli original, defines *neikthaya* and *neikthita*, but that definition, in my opinion, is not inconsistent with the *Manugyè*.

Similar remarks may be made of the extract from the Manusara Shwe Myin given (in translation) at page 31 of Jardine's note, II, I, already cited.

In short the *Manugyè* appears to me to be merely clearer and more precise than the other Dhammathats.

For this reason, and also because the Manugyè is a Dhammathat of the highest authority, I am of opinion that it deserves to be followed on this point.

* The Rasi uses the expression ဧကျီကျွေးမှီသောသူ for *nissayo* and ကျွေးမှုမှီသောသူ for *nissito*.

43

MI MYIN v. NAG TWE.

It is necessary to note that the published translation of the extracts, in section 254 of the Kinwun Mingyi's Digest, Volume II, from the Wunnana, the Panam, and the Kungyalinga is open to objection, since the words "jointly acquired" are not to be found in the original and are a gloss of the translator, who ought at least to have put them in brackets as he did in the 2nd extract from the Warulinga.

The foregoing interpretation of the rule for partition of *atet* or *payin* property on a divorce, as by mutual consent, of parties not married before, is, I think, directly supported by section 391 of the Attathankepa. The published translation of that work also fails to give effect to the particular phraseology employed in the original, which runs thus:—"Of the three kinds of property, *viz.*, *payin* property, property given by the King, and property acquired by (one's own) skill, the *neikthaya* is to take two-thirds and the *neikthita* one-third. When *neikthaya* and *neikthaya* are alike, the said three kinds of property shall be divided equally."

I think it is also supported by the texts quoted in section 257 of the Digest, Volume II, which give the rule applicable to persons who have been married before, *e.g.*, especially the extract from the Dhamma.

The rule of *nissayo* and *nissito* seems to be equally applicable to persons who have been married before. Compare the passage already referred to twice as a property inherited after marriage, also section 394 of the Attathankepa. The fact that the ordinary rule of partition in the case of persons previously married is that each takes his or her *payin* is probably based on the assumption that such persons, ordinarily both, bring *payin* to the second marriage. But it is not necessary to go into that.

In the present case, it is not disputed that the rule applicable to the parties is that prescribed for persons not married before. See *Mi E Nyun* v. *Tok Pyu*.*

For these reasons, I am of opinion that there is no ground for dissenting from the decision in *Mi E Nyun* v. *Tok Pyu* by which the lower Court was guided as to the Plaintiff's right to a share of the *atet* property.

I have gone into the question because it has been contended that the last mentioned decision is no longer of binding authority on this point, since Sir H. White himself, in *Mi San Shwe* v. *Vulliappa Chetty and others*,** doubted its correctness. What he said was: "This rests on one test of the *Manugyè* Dhammathat. But the weight of authority in section 254 of the Digest seems to incline to the position that in such a case each party takes his or her own *payin*." I have given reasons for my opinion that *Manugyè* deserves to be followed and that the other texts are not really opposed to it. *Mi San Shwe's* case was not one of divorce. The question was as to the right of a husband to dispose of his *payin* during the subsistence of the marriage. It was held that it was not shown that a husband has no power to alienate his *payin*. That question is not affected by the rule of law which prescribes how *payin* is to be dealt with (when it still exists) at partition on divorce.

*U. B. R., 1897-01, II 39. | **X, B. L. R., 49.

It is admitted that Plaintiff-Appellant had no *payin*. The position of the parties in the present case was therefore clearly that of *nissayo* and *nissito* with respect to the *payin* property, and Plaintiff Mi Myin is entitled to one-third of Defendant Nga Twe's *payin* as found by the Lower Court.

On the point of Plaintiff's right to one-third of the property inherited by her husband during the marriage, the Plaintiff relies on *Kin Kin Gyi's* case above cited, in which it was directly decited that on a divorce as by mutual consent between parties not previously married, the wife is entitled to one-third of property inherited by the husband during coverture, and *vice versâ*. It is somewhat remarkable that the Lower Court appears to have overlooked that decision.

The learned Advocate for Defendants-Respondents relies on the last extract from the *Manugye* given in section 264 of the Kinwun Mingyi's Digest, Volume II. It is very difficult passage. The translations by Richardson and the author of the published translation of the Digest are clearly wrong. The question is whether the translation given in Jardine's notes at page 31 of note II, 1, under the distinctive letter J is correct. It has the support of section 395 of the Attathankepa, which looks like a paraphrase of it.

The objection to this version is that it involves a flat contradiction of the paragraph which immediately precedes it, in which property inherited during marriage is expressly declared to be *lettetpwa*. I have referred to it above in other connections.

The Digest itself is at fault in omitting altogether from section 264 the last mentioned passage. It is given in section 257. It lays down in plain and unmistakeable language that "*hnapazon lettetpwa*" is of two kinds. First property or debts inherited by one other from parents during the marriage, and second property obtained and debts incurred in the common business of both, and that the former is to be considered as obtained "by dependence on" the person who inherited it and is therefore to be divided two-thirds and one-third.

It is hardly conceivable that the compilers of the Dhammathat would have immediately gone on to contradict this plain pronouncement.

I venture to put forward another version of the disputed passage, which has the merit of not involving the compilers of the Dhammathat in a ridiculous contradiction. It is this:—

"Property obtained by gift from the King, *payin* at the time of marriage, property inherited by either from parents during marriage having been (*se.* as before explained) placed (*i.e.*, classified and dealt with) according to its origin (ဆရုံးဆဝင်း) profits accruing from such property should be regarded as *lettetpwa*. Let (the parties) divide between them in accordance with what has been said before".

We have seen that what was said before was that gifts from the King and *payin* were liable to division into two-thirds and one-third where the relations of *nissayo* and *nissito* existed (with respect to them), and that property inherited during marriage was *lettetpwa*—liable to division in a similar manner, because the relation of *nissayo* and *nissito* existed in respect to it. It was also said of other *lettetpwa* that it should be divided equally.

45

MI MYIN v. NGA TWE

Thus the passages in question is consistent and intelligible, which on any other interpretation it is not. I think the translation now offered is also a legitimate construction of the Burmese.

There is therefore, in my opinion, nothing in the passage in question to support the Defendant's case

The Manu in the same section (264 of the Digest) agrees with the *Manugyè* in classifying property inherited during marriage as *lettetpwa*.

There are no texts to the contrary, but section 395 of the Attathankepa, which, if the explanation given above is correct, must be based on a misconception.

The next objection taken is that the property inherited by first Defendant not having been divided, Plaintiff had no vested interest in it and cannot claim a partition. The learned Advocate has not been able to cite any authorities in support of this contention. He has been driven to follow the Lower Court in adducing rules relating to *pre-emption*, which have no relevancy whatever.

The cases of *Mi Lan* v. *Shwe Daing* * and *Nga Wa'k and others* v. *Nga Nyein* ** have declared the right of a wife to suceeed to her husband's estate, including undivided ancestral property: in the latter indeed, it is expressly stated that a wife so succeeding may enforce partition. In the present case we have an instance of a wife admittedly succeeding to her deceased husband's interest in the undivided ancestral property in question. This is the Defendant, Mi O Gyi. Her deceased husband's brother, the Defendant' Nga Nyo, married her, it is true. But her right to succeed her husband has not been disputed.

This being so, a wife cannot be considered as an outsider who, for that reason, is debarred from claiming a partition. And in case of a divorce as by mutual consent, where the law declares that the wife is entitled to share in the ancestral property inherited by her husband during marriage, there is no more reason why the property should not be divided in order that she may get her share, than there would be if her husband had died and shc had succeeded to his interest.

The objection was raised and disposed of in the Lower Burma case of *Mi Ngwe Bwin* v. *Lun Maung* † As explained there the inheritance vested in Defendant, Nga Twe, when his mother died, and what he acquired by right of inheritance was fully acquired then.

He was in possession and enjoyment because he and his co-heirs being in joint possession of the whole, he was receiving the income according to his share of the inhritance.

A partition would only have given him a right to separate possession of his share in the property.

It was quite clear from the evidence of Defendants themselves (summarized above) that they did receive shares of the income from property in the shape of paddy.

An attempt was apparently made to prove that there was a custom among the Salin Thugaungs of holding property undivided, but it failed miserably. All that the evidence came to was that some Thugaung

* U. B. R., 1892-96, II, 121. ** U. B. R., 1897-10, II, 146.
† 1, L. C. 74

families kept their inheritance undivided as long as possible, *i.e.*, till circumstances necessitated partition.

Here the circumstances require partition, and Defendant Nga Twe cannot deprive Plaintiff of her legal right by saying that he does not consent to partition.

Thus no good ground has been shown for dissenting from the decision in *Kin Kin Gyi's* case, and the fact that the property has not yet been partitioned is immaterial.

It remains to determine what the property to be divided consists of.

* * * * * *

The decree of the Lower Appellate Court is modified. There will be a decree for divorce with partition as follows:—

Of the property in list I, as above settled, Plaintiff is to receive a half of the moveables or their value, Rs. 5, 052-6-0, also 2,630 baskets of paddy, or Rs. 2,367 on account of 1,266 and half of the immoveables.

Of the property in list II, as modified above, she is to receive one-third, *viz.*, one-third of the moveables or their value, Rs. 733-4-8, and one-third of the immoveables.

Of the property in list III, she is to receive one-ninth of the moveables or their value, Rs. 753-0-8, and one-ninth of the immoveable property.

Costs in proportion.

The cross-objections are dismissed

The Lower Court was wrong in giving Plaintiff a decree for money instead of for a share of the immoveable property.

I attach what I offer as a correct translation of the relevant parts of section 3, Book XII of the *Manugyè*, referred to in this judgment.

Manugyè, Book XII, Section 3.

* * * * * *

If a husband and wife, bath noble, wish to separate by mutual consent, let the husband take the clothes and ornaments of his rank and the wife the clothes and ornaments of her rank, and let the rest of the property, animate and inanimate, be divided in this manner; of property obtained through (*lit.* "by dependence on" အခိုကြ၍) the husband or through (*lit.* "by dependence on" အခိုကြ၍) the wife, let the party through whom it was obtained (အခိုကြရင်=*nissayo*=supporter) take two-thirds and the party through whom it was not obtained (အခိုမရိသူ or ဖြိသူ= *nissito*=the dependent) one-third; as for property obtained through both (*lit.*, "by dependence on" both နှစ်ဦးသားအခို), if their original interests are equal (ဥစ္စာခုငါးအပါထူထျင်), let them divide it equally between them. * * * *

If husband and wife divorce, let them pay equal shares of any joint debts. * * * * * *

Property obtained through (*lit.* "by dependence on" အခိုကြ၍) the husband is of three kinds, *viz.*, first, *payin* property, animate and inanimate; second, property obtained by his or her own skill or industry; third, property given by the King. Of these three kinds, property

47

MI MYIN v. NA TWE.

obtained through (*lit.* by dependence on ဆဒ္ဒိပြု၍) the husband is, first, property obtained from parents at the time of marriage by the husband, where the wife has no such property, second property obtained by the skill or industry of the husband during the marriage; third property obtained by the husband as a gift from the King and the property obtained through (*lit.* " by dependence on " ဆဒ္ဒိပြု၍) the wife is, first property obtained from parents by the wife, where the husband has no such property ; second, property obtained by the wife by skill or industry ; third, property obtained by the wife only as a gift from the King. If there were debts at the time of marriage (ထင်ဖြစ်ခဲ့ဖြစ်က),

* * * * * *

let them pay them in the same manner. This is the law for persons not married before separating by mutual consent.

If both have been married before and they wish to separate by mutual consent, without matrimonial fault (နှစ်ပါးစုံအဖြစ် *hnapazon* fault) on either side, let each take the property he or she brought to the marriage (ပါရင်း *payin*) and pay the debts he or she brought to the marriage (ထင်ဖြစ်ရင်း) and let them divide equally the joint (နှစ်ပါးစုံ *hnapazon*) property, animate and inanimate, and pay the joint (နှစ်ပါးစုံ *hnapazon*) debts in the same manner. Joint property acquired during the marriage (နှစ်ပါးစုံထက်ထက်ပွါး *hnapazon lettetpwa*) is of two kinds. first property or debts inherited by one or the other from parents during the marriage; second, property obtained or debts incurred in the common business of both. Of these two kinds property or debts obtained by the husband from parents are said to have been obtained originally through (*lit.* " by dependence on " ဆရင်းဆဒ္ဒိ) the husband ; therefore let him take two-thirds of the property and pay two-thirds of the debts. If the husband has none, but only the wife has, let the division be made in like manner (*sc.* the wife taking two-thirds the husband one-third).

* * * * * *

Property obtained by gift from the King (*payin*) at the time of marriage, property inherited by either from parents during marriage, having been (*sc.* as before explained) placed (*i.e.*, classified and dealt with) according to is origin (ဆရင်းဆတိုင်း) profits accruing from such property should be regarded as *lettetpwa*. Let (the parties) divide between them in accordance with what has been said before.

(*Note.*—The Burmese text of the last passage in the Digest varies slightly from that in Richardson, ထိုင်း for ဆတိုင်း is a purely verbal alteration. But the other changes make for intelligibility and support the above version.)

48

Buddhist—Law Inheritance.

Civil Second Appeal No.60-32 of 1904. August 22nd.

Before G. W. Shaw, Esq.

MAUNG KYAW YAN.
MA MEIN MA GYI.
MA THET TU.
MA E ME.
MAUNG THET PON.
U BYA.
MA E MYEIN.
MAUNG SHEIN.
} *vs.* { MAUNG PO WIN.
MA SAN ME.

Mr. H. V. Hirjee—Advocate, for appellants.

Mr. A. C. Mukerjee—Advocate, for respondents.

The rule that mere absence of joint living is not sufficient to exclude from inheritance and that filial neglect must be proved applies to step-children.

References:—

2, U. B. R., 1897-01, page 193.
——— ——— ———page 379, followed.
——— ——— ———page 66.

There are cross-appeals in this case. I deal with them together. Plaintiffs were the children of Mi Min Gyein by to former husbands of whom the first was divorced and the second died. Eleven or twelve years before suit Mi Min Gyein married as her third husband Lu Gaung. At this time plaintiff Po Win was thirteen or fourteen years old, and plaintiff Mi San Me five or six years old (or perhaps a little more). Both continued to live with their mother and Lu Gaung as part of the third family, Mi San Me till the death of Mi Min Gyein on the 10th. *Nadaw Lazan* 1263 B. E., Po Win till his marriage in 1259 only. Five or six days after Mi Min Gyein's death Lu Gaung left plaintiff Mi San Me and went to live with his elder brother Kyaw Yan (defendant) in whose house he died on the 8th, *Pyatho Lazok* 1264. He left his property in possession of defendants. There were no children of the marriage between Lu Gaung and Mi Min Gyein. Plaintiff sued as being entitled in the absence of children to the whole of the *letttletpwa* and a share of the ancestral property. It is contended on behalf of defendants that plaintiffs having ceased to live and work with their step-father as above noted, were not entitled to inherit anything. But this point was not raised in the Lower Courts, and is not even among the ground of appeal. It was held in *Mi Taik and others* vs. *Mi Nyun and others** that mere absence of joint living is not sufficient to exclude a child or grandchild from inheritance and that filial neglect must be proved. The same rule applies to step-children. It was therefore the business of the defendants at the first hearing to allege filial neglect, if they wished to raise this question, so that the other party could have notice of it, and an issue could be framed upon

* 2, U. B R.—1897-01, page 193.

MAUNG KYAW YAN. *vs.* MAUNG PO WIN.

it. All they did was to assert in their written statement, that plaintiffs were antagonists of Lu Gaung in law suit. But they produced no evidence to prove this. In these circumstances I hold that defendants have failed in show that plaintiffs are not entitled to inherit by reason of absence of joint living. Defendants opposed the plaintiff's claim on the ground of an agreement made on the 9th. *Tabaung Lasok* 1263 B. E. (*i.e.*, a little over three months after Mi Min Gyeins' death) between Lu Gaung and the plaintiffs whereby Lu Gaung on his side renounced his claims to property forming the inheritance of Mi Min Gavein(မခင်းကြီးထွင်အမွေပစ္စည်း) and plaintiffs on theirs renounced their claims property forming the inheritance of Lu Gaung (ထူးကောင်းထွင်အမွေပစ္စည်း (အမွေရင်ဝစည်း) in considertion of receiving a house, compound and hut and three plots of land called Legyidaw, the same being property acquired during Mi Min Gyeins' time and whereby finally Lu Gaung assigned the last mentioned property to plaintiff. Defendants alleged that by this agreement plaintiffs were debarred from claiming anything. Plaintiffs, on the other hand, contended that they were only bound by the agreement during Lu Gaung's lifetime. In the Lower Appellate Court they further contended that if the agreement was binding it did not apply to the *lettetpwa* property. Finally in second appeal they raised a further objection that the document on which the agreement was recorded was liable to registration and not being registered could not be proved, and excluded secondary evidence of its contents.

To take the last point first the document after reciting the terms of the agreement goes on to say that Lu Gaung "gives" (or asigns) "the house, compound," etc., "by signing" (လက်ဒှတ်ရေးထိုးချပေးထိုက်သည်). It is therefore in my opinion on this ground alone a conveyance of immoveable property and was liable to registration.

But this is immaterial. The terms of the agreement and its execution were admitted on the record by the pleadings. By reference the document was included in the plaint and the written statement. The terms of the agreement were not in dispute. The only question was whether they debarred the plaintiff from claiming the inheritance. It follows that it was not necessary to prove the document or put it in evidence (section 58, Evidence Act). The case of *Nga Ket* vs. *Nga So* * is conclusive on the point. It may be noted that the remarks of the learned Judge in *Burjorjee Cursetjee's* case therein cited are closely applicable to the facts of the present case.

In regard to the effect of the agreement, I am of opinion that the Lower Appellate Court has taken the correct view so far as regards the description of property covered by it. From the terms used quoted above I think there can be no doubt that the property to which the plaintiffs renounced their claims was the ancestral property of Lu Gaung. Lu Gaung was entitled to a share in certain undivided ancestral property to which plaintiff might have put forward a claim and on the other hand Mi Min Gyein had inherited certain property in

* 2, U. B. R., 1897-01, page 379

which Lu Gaung would have been entitled to share. They agreed that neither would put forward any such claim.

On the other hand, no agreement was come to with respect to the bulk of the *lettetpwa* property which remained with Lu Gaung and plaintiffs as step-children are in the absence of any children the sole heirs to this property (*Mi Gun Bon* vs. *Po Gywe and another*).*

The question is whether the agreement in respect of the ancestral property still held good after Lu Gaung's death so as to deprive plaintiffs of their right to inherit from him the share which they would otherwise have been entitled to. For the following reasons I am of opinion that it would not be equitable to hold plaintiffs bound by the agreement after Lu Gaung's death. So long as Lu Gaung lived the agreement was fair and gave an advantage to both sides. But on Lu Gaung's death his family had no legal right to share in Ma Min Gyein's ancestral property while plaintiffs were admittedly entitled to a half share of Lu Gaung's. In its nature the agreement was one applicable only to Lu Gaung's lifetime. It would be unreasonable to hold that it placed pfaintiffs in a worse position than they would have occupied if for example, they had sold so much land to Lu Gaung. The fact that the *lettlepwa* property was not dealt with by the agreement seems to show that it was not the intention of the parties to make final settlement of plaintiff's claims.

It follows from what has been said that the decree of the Lower Appellate Court must be modified. The plaintiffs in addition to the *lettetpwa* property will get half the ancestral property of Lu Gaung. The appeal of defendants is dismissed. Costs follow.

In regard to the plaintiff's objection to the Lower Appellate Court's award of Rs. 200 to defendants on account of funeral expenses, as this is not among the grounds of appeal, I do not see how I can deal with it in these proceedings.

* 2, U. B. R., 1897-01, page 66.

51

Buddhist Law Inheritance.

Civil Second Appeal No. 220 of 1904. February 6th, 1905.

Before A. M. B. Irwin, Esq., C.S.I.

MA MA GALE v. MA ME.

Mr. *A. C. Mukerjee*—for Appellant. | Mr. *C. G. S. Pillay*—for Respondent.

In the case of collateral succession the general principle of the nearer relatives, excluding the more remote, takes full effect, and so long as there is a surviving brother he excludes the children of a previously deceased brother.

References:—

U. B. R., 1897-1901, 172 (distinguished).

1. L. B. R., 104, Chan Toon's leading cases, II, 124 (followed).

Civil Second Appeal No. 11 of 1903 (not reported).

The point in issue is simple. Ma Paw had two younger sisters, *viz.*, Ma Thwe (deceased) mother of Appellant Ma Ma Gale, and the Respondent Ma Me; Ma Thwe died before Ma Paw, Ma Ma Gale claims a share of Ma Paw's estate, and Ma Me says Ma Ma Gale is not entitled to any share because her mother predeceased Ma Paw.

The Appellant cited *Maung Tun Aung* v. *Maung Yan Pyo* * to show that a sister does not exclude a niece. In that case grandsons of uncles were admitted to share with sons and daughters of uncles, but the main point was whether relatives of the deceased's mother were entitled to shares as well as relatives of the deceased's father. The question whether nearer relatives exclude more distant ones was not raised at all.

In *Maung Hmaw* v. *Ma On Bwin* † a distinction was drawn between inheritance by direct descendants and inheritance by collaterals. All descendants share, though grandchildren generally take less than their parent would have taken, if he had survived his parents. But in the case of collateral succession it was held that the general principle of the nearer, excluding the more remote, takes full effect, and that so long as there is a surviving brother he excludes the children of a previously deceased brother. This decision of a bench of the Lower Burma Chief Court was followed by my learned predecessor Mr. Adamson in *Ma Nan Yit* v. *Ma Ngwe Su*,‡ and I know of no good reason for dissenting from it. I have searched the Kinwun Mingyi's Digest, and can find in it no definite pronouncement about brothers and sisters excluding or not excluding nephews and nieces. Sections 308 and 309 lay down clearly the general rule that failing descendants and ancestors the estate goes to the six relatives, namely, paternal and maternal uncles and aunts. No mention is made of children of deceased uncles and aunts.

The appeal is therefore dismissed with costs.

* U. B.R., 1897-1901, 172.

† 1. L. B. R., 104, Chan Toon's Leading Cases, II, 124.

‡ Second Appeal No. 11 of 1903, unreported.

Buddhist Law—Inheritance.

Civil Appeal No. 265 of 1904. April 25th, 1905.

Before A. M. B. Irwin, Esq., C.S.I.

MA KADU *v.* MA YON.

Mr. *H. N. Hirjee*—for Appellant. | Mr. *K. K. Roy*—for Respondent.

When a husband and wife die within a short time of each other, leaving neither descendants nor ancestors, the relations of both may inherit the estate.

References:—

U. B. R., 1892—1896, 136.
U. B. R., 1897—1901, 66.
U. B. R., 1897—1901, 146.
Kinwun Mingyi's Digest—308, 309.
Chan Toon's Principles, 149.
Manu Kye Dhammathat, Vol 10, section 56.
Attasan-Khepa Vannana, section 237.

Maung Kyu and Ma Thaik were husband and wife. Maung Kyu died on 4th *Waning Thadingyut* 1265, leaving no children. Ma Thaik inherited all his property as his widow. Two months and seven days after Maung Kyu's death Ma Thaik died, leaving surviving her no descendants, no ancestors, no brothers or sisters. The property remained in the custody of Maung Kyu's sister Ma Yon, the respondent, who had lived for some years with her brother and sister-in-law.

Ma Kadu applied for letters of administration to Ma Thaik's estate, alleging that she was Ma Thaik's aunt. She was opposed by Ma Yon, and the application was dismissed. Ma Kadu appeals.

It appears in evidence that Ma Kadu is first cousin of Ma Thaik's mother. Ma Yon says Ma Kadu is too distantly related to inherit Ma Thaik's estate, while Ma Kadu says that Ma Thaik's sister-in-law cannot inherit at all because there are blood-relations of Ma Thaik surviving her.

The District Court decided the case without any express reference to the law governing it. Some irrelevant considerations were introduced into the pleadings, and the issues were not properly framed. Under section 23 of the Probate and Administration Act, letters should be granted to some person entitled to the whole or part of the deceased's estate. The only point raised in appeal is that Ma Yon is not entitled to any part of Ma Thaik's estate because she is not, and Ma Kadu is, a blood relation of Ma Thaik. The appellant relies on the decision of this court in *Maung Waik* v. *Maung Nyein*,* while respondent relies mainly on section 308 of the Kinwun Mingyi's Digest.

Section 308 relates to the case of a husband and wife dying within a short time of each other, section 309 to the case of one surviving the

* 2 U. B. R., 1897-01, 146.

MA KADU v. MA YON.

other for a considerable period. I do not think *Maung Waik* v. *Maung Nyein* is applicable to the present case; at any rate it is not a decisive authority, for the learned Judge expressly left section 308 out of consideration because a considerable period (three or four years) had elapsed between the deaths of the husband and the wife.

I can find no decisions directly bearing on the point now in issue. It depends on the construction of section 308 of the Digest. Appellant says that dying within a short time of each other is an expression meant to cover only cases in which it is uncertain which died first, and this view seems to be favoured by Chan Toon at page 149 of the Principles, but the matter is very briefly treated there, and the construction of the words is not discussed at all. At page 136 of the Upper Burma Rulings for 1892-1896 there is a judgment copied from the records of the *Hlutdaw*, in which the expressions "short interval" and "long interval" are plainly taken in their ordinary sense, and there is no trace of the theory that the right of the relatives of both husband and wife to succeed is limited to cases in which it is not known which died first. Mr. Burgess noted this Kaukchet of the *Hlutdaw* in *Ma Gun Bon* v. *Maung Po Kywe* * where he says (at page 71).

"The apparent reason of this distinction seems to be that when husband and wife die within a short interval of each other, their joint interest in the estate is regarded as predominant, whereas when one lives long after the other, the presumption arises that the joint interest has completely merged in the sole interest of the survivor, and there is no doubt a certain amount of plausibility about such a distinction."

Section 56 of the 10th book of *Manu Kye* is translated thus, "If they both die about the same time, so that it is not clear which was the survivor, or if it be known, but the months or years not ascertained, let the relations of both inherit," etc. The meaning of the words "but the years or months not ascertained" is not very clear, but at any rate this passage expressly extends the "short interval" to some cases other than those in which it is not known whether the husband or the wife died first.

Section 237 of the *Attasan-Kheppa Vannana* reads as if the ordinary rule were that the relatives of both husband and wife should take shares. The section concludes thus, "If one dies after the other let the relatives of the survivor take the joint property." This is somewhat puzzling, as it is obviously a very rare occurrence for husband and wife to die at the same moment. It seems reasonable to suppose that the concluding sentence refers to one dying a considerable time after the other.

These are all the authorities that I have been able to find. In my opinion it would be straining the words of section 308 unduly to accept the construction which appellant seeks to place on them. The balance of authority is plainly in favour of the construction which Mr. Burgess considered plausible. It might be stated thus in other words.

*2 U. B. R., 1897—1 01, 66.

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

Whether this be the correct reason or not, I think much respect should be paid to an interpretation of the dammathats by the *Hlutdaw*. I find that Ma Yon is entitled to at any rate a share in Ma Thaik's estate because Ma Thaik survived her husband only two months and seven days. It is unnecessary to consider whether she has sister-in law excludes Ma Thaik's first cousin once removed altogether. Ma Yon is in possession of the estate and had lived for several years with Ma Thaik. She is clearly a fit person to administer, and the District Court was justified in dismissing Ma Kadu's application in favour of Ma Yon.

The appeal is dismissed with costs.

57

Civil Appeal No. 126 of 1905. November 27th.

Buddhist Law—Inheritance.

Before G. W. Shaw, Esq.

MI MIN DIN
MI TAT
NGA ON GAING
MI AT
MI MIN GALE
v. MI HLE.

Mr. A. C. Mukerjee—for Appellants.
Mr. S. Mukerjee—for Respondent.

Nuns.

Held—In the absence of any evidence of an ordination ceremony that a nun (*Mèthila*) so-called is a lay devotee, and that a woman does not lose her rights to her property by becoming a nun.

Orasa.

Held—That eldest born son means the eldest son and not necessarily the eldest child.

References:—

Chan Toon's Leading cases, II, 235.
——— 233.
——— 210.
U. B. R., 1897—1901, II, 54.
——— 66.
2, L. B. R., 292.

Plaintiff-Respondent sued for one-seventh of the estate of her grandparents, Shwe Waing and Mi Kala, as the only child of Yan Naing, their eldest son, and entitled to his full share. Defendant-Appellant Mi Min Din is the daughter of Mi Tein, an elder daughter of Shwe Waing and Mi Kala, who predeceased her parents. The other Defendant-Appellants are uncles and aunts of the Plaintiff-Respondent. Plaintiff-respondent's father Yan Daing died from 13 to 17 years before suit, Shwe Waing between 30 and 40 years before suit, Mi Kala in 1265 B.E.

Defendants-Appellants (with the exception of Yan Gyaw) contested the Plaintiff-Respondent's claim on the grounds (1) that on Shwe Waing's death Mi Kalama became a nun, thus dying a civil death, so that the suit was barred under either Article 123 or Article 144, Schedule II, Limitation Act, (2) that Plaintiff-Respondent lived separately from Mi Kalama, (3) that if entitled to share, she was only entitled to one-fourth of the share her father would have got if he had lived, since her father, though the eldest son, was not the eldest child. Both the Lower Courts found in Plaintiff-Respondent's favour for the whole one-seventh share.

No issue was framed on the second of the above three points, but it does not appear that the Defendants-Appellants moved the Subdivisional Court to frame an issue on it, and in their appeal to the district

MI MIN DIN v. MI HLE.

Court they did not raise any objection on this point. It must therefore be taken that the Defendants-Appellants abandoned it. There was also nothing to show that there was a severance of filial relations. In these circumstances the fourth ground of the present second appeal must be dismissed.

The third ground is also unsustainable. It is that the death of two of Shwe Waing and Mi Kala's children (before Mi Kala) did not operate to increase the share of the Plaintiff-Respondent, but only of her uncles and aunts, so that it is not a question of a one-seventh or one-fourth of a one-seventh share, but of a one-ninth or one-fourth of a one-ninth share. This objection was not raised in either of the Lower Courts and it is too late to raise it now.

The questions that remain for decision are (1) whether owing to Mi Kala becoming a nun 30 odd years before suit, the share of Plaintiff-Respondent's father became deliverable then, and consequently whether the suit is barred, and (2) whether Plaintiff-Respondent's father though not the eldest child was as the eldest son the *orasa* son and Plaintiff-Respondent therefore entitled to his whole share or only to one-fourth of it.

The first question so far as regards a man becoming a monk is dealt with in *Mi Pwe* v. *Myat Tha** and this is practically the only authority that has been cited. Two other cases have indeed been referred to *U Wiseinda* v. *Mi Gale*† and *Nga Mya* v. *Mi The Hmon*.‡ But the former deals with property inherited by a monk after his ordination, and there is nothing in the latter to show that the property there in question was not of the same character. As the property now in suit admittedly belonged to Mi Kala on her husband's death before she became a nun these two decisions could have no application.

In *Mi Pwe's* case the conclusion come to was that "ordination operates in the same way as death or divorce when there is no fault on the part of the wife," that is to say, that when a man becomes a monk he renounces all the property he had and consequently it was held tha the monk retained no interest in the property in suit after becoming a Buddhist monk.

But I am unable to find that a nun in the present day occupies an analogous position to that of a monk. The Buddhist Scriptures recognize nuns under the name of Bhikkhunis (*cf.* Kula Vagga,kh. X-Sacred Books of the East, XX) and so do the *Dhammathats* under the name of Rahanma or Rahanmeinma (ရဟန်မ or ရဟန်မိန်းမ). These are true *nuns* corresponding to the Bhikkhus, Rahans or *pongyis*. But the so-called nuns of the present-day *Mèthila* (မထိလာ) *Mèthila yin* (မထိလာရှင်) do not appear to be Bhikkhunis or Rahanmas, but merely religious lay women, or lay devotees, corresponding to the *Pothudaws* (ပိုးဆွဲတော်) or "religious laymen" (Stevenson). As I understand, they undergo no ceremony of ordination. They was no proof that Mi Kala underwent any such ceremony. In these circumstances the legation that by becoming a nun (or *Mèthila*) Mi Kala renounced

* U. B. R., 1897—01, II. 54.
† Chan Tool's Leading cases, II, 235.
‡ *Ib*——— ——— ——— ——— 233.

her property and died a civil death must be held to be without foundation. This conclusion is supported by the evidence in the case. As the Lower Courts have found the Defendants-Appellants themselves did not consider Mi Kala to have ceased to be the owner of her property till she died. Those of them who gave evidence spoke of managing her property for her, and one of them expressly said that the house continued to belong to her till she died. I therefore see no reason to dissent from the finding of the Lower Courts on this point.

With regard to the share of the child of an *orasa* son the rule is stated and the authorities for it cited in *Mi Gun Bon* v. *Po Kywe and another** on page 74 of the Upper Burma Rulings for 1897—1901, Volume II. "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 *awratha* heir. But the share of the children of a deceased brother or sister other than the *awratha* is reduced to a quarter of a brother's or sister's share."

I have referred to these texts and have also perused the *Kinwun Mingyi's* Digest and my conclusion is that this rule is not restricted to one *orasa* in a family, *i.e.*, to the eldest child (whether son or daughter). The question what is an *orasa* son was examined in *Tun Myaing* v. *Ba Tun.*† It was there found that the eldest born son is the *orasa* 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, then his next youngest brother, subject to the same conditions, succeeds to his possession as *orasa*. But it does not appear to have been decided what is to be understood by "the eldest born son." The point is very obscure. The eldest son (or eldest capable son) whether eldest child or not, clearly has special privileges. Similarly the eldest daughter, whether the eldest child or not, has special privileges, and as in the case of the *orasa* son, her position depends on her fitness to perform the duties and responsibilities pertaining to it. *Cf.* the *Pakasani* in section 155 of the *Kinwun Mingyi's* Digest. "Among daughters the one who is best known to the public and respected by the members of the family shall be deemed the eldest among them, also among sons the most distinguished shall be deemed the *orasa*." In *Mi Saw Ngwe and others* v. *Mi Thein Yin*‡ referred to in *Tun Myaing's* case, it was held that there cannot be two *orasa* children (*i.e.*, an *orasa* son and an *orasa* daughter) in the same family. This decision was apparently based on section 212 of the *Attathankepa*. The published English translation of that work seems to imply that there is either an *orasas* on 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

* U. B. R., 1897—1901, I, 66. † 2, L. B. R., 292.
‡ 2, C ian Toon's leading cases, 210.

61

MI MIN DIN
v.
MI HLE.

special position and privileges of the eldest (or *orasa*) son and of the eldest daughter, as co-existing. *Cf.* sections 153 to 161 of the *Kin-wun Mingyi's* Digest.

There is nothing in sections 162 and 163 of that work which deal respectively with the case of the eldest (or *orasa*) son and the eldest daughter dying before the parents—the texts directly in point in the present case—to show that they are mutually exclusive.

I am therefore of opinion that the Plaintiff-Respondent's father was the *orasa* son, and that the Lower Courts were right in awarding him the full share of one-seventh and not one-fourth of that share.

The appeal is dismissed with costs.

Buddhist Law—Inheritance.

Civil Second Appeal No. 290 of 1905. September 28th, 1906.

Before G. W. Shaw, Esq.

MI NYO *vs.* MI NYEIN THA.

Mr. C. G. S. Pillay—for Appellant.

Held,—that the rule excluding the daughter of a divorced wife who has lived with her mother, and has not maintained filial relations with her father, does not extend to the case where the daughter was born after the divorce, and the father left no other wife, child or grandchild.

Held also,—that in such a case when the father lived with his sister, the daughter's share as against the sister is half.

References :—

U. B. R, 1892-1896, II, 22, 159.
——— 1897—1901, II, 116, 135, 193, 66.
L. B. P. J., 469.
S. J. L. B., 184.
Chan Toon's L. C., II, 220.
Civ. 2nd. App. No. 157 of 1904.

Plaintiff-Appellant sued for two-thirds of 10·37 acres of land and two buffaloes, property worth in all Rs. 270. The plaint alleges that this was the undivided joint property of Plaintiff-Appellant's deceased father Nga Aga and of Defendant-Respondent his sister, and that Plaintiff-Appellant was entitled, her father having died, to get his share. The facts recounted in the plaint do not explain how that share came to be put down at two-thirds. The authorities on which it purports to rely have no applicability whatever to the present case, and the citation of them is not creditable to the intelligence of the author of the plaint.

Defendant-Respondent in her written statement denied that 1·78 acres of the land and the two buffaloes were joint property, and alleged that there had been two partitions, at one of which she received two plots of land (*viz.*, Legaukkyi 1·46 acres, and Sindawbwe 1·22 acres) and at the other, shares were given to the surviving husband and child of a deceased sister of Defendant-Respondent. She also alleged that Plaintiff-Appellant's mother was divorced before Plaintiff-Appellant was born, and that Plaintiff-Appellant had nothing to do with the property in question, she (Defendant-Respondent) being the sole heir as having tended Plaintiff-Appellant's father in health and sickness, and buried his remains.

The Subdivisional Court very strangely omitted to frame an issue on the legal point, but the Advocates were heard on it and authorities referred to. The Judge found the authorities not directly applicable, and on the ground of equity gave a half to each party, *i.e.*, he gave Defendant-Respondent her own half and Plaintiff-Appellant the whole of her father's share.

It is not clear whether Plaintiff-Appellant and the Court after her did not overlook the fact that Defendant-Respondent was entitled to half in her own right.

The issues and evidence were taken up with the contest about the property. The Judge came to no definite finding on the issues, but by implication held the whole of the property specified in the plaint to be liable to pratition.

63

MI NYO
v.
MI NYEIN THA.

In appeal to the District Court, Defendant-Respondent contended that the property had been proved to belong to her and only a small part of it to be Plaintiff-Appellant's father's, and therefore Plaintiff-Appellant should have been awarded a one-sixth share.

The District Court, after remanding the case on issues relating to Plaintiff-Appellant's right to inherit, decided that Plaintiff-Appellant was not entitled to inherit at all; and dismissed her suit, relying on the decisions in *Nga Hmat* v. *Mi Po Zon*,* *Mi Sein Nyo* v. *Mi Kywe*,† *Mi Pon* v. *Po Chan*‡ *and Nga Pe* v. *Mi Myitta*.§

The District Court did not go into the questions of fact at all.

The only point to be dealt with in this second appeal is therefore the point of law, whether a daughter by a divorced wife, born after the divorce and living all her life with her mother and scarcely visiting her father at all, in short not maintaining the relations ordinarily subsisting between a parent and a child entitled to inherit, has a right to share in her father's property, as against her father's sister.

The case resembles in some respects an unpublished case decided not long since, *Mi Ka* v. *Nga To and others*,‖ where the question was whether the daughter of a divorced couple who lived with her mother and maintained no relation with her father and her step-mother, could succeed to the inheritance left by the step-mother in preference to strangers with whom the step-mother lived before she died and by whom she was buried. After a consideration of the Rulings above cited and others, it was held that the claim should be admitted in the absence of other heirs.

The following quotations may be made from the Judgment:—

"The ordinary rule has been stated in *Mi Pon and others* v. *Po Chan and others*,¶ where previous decisions were examined and discussed, *viz.*, that "daughters of a divorced wife who live with their mother and do not maintain filial relations with their father, but live entirely separate from him are not entitled to a share in his estate, when there has been a division of property at the time of the divorce." This was admitted to be an extension to all descriptions of property of the rule laid down in *Mi Thaik's case*** which had dealt only with property jointly acquired by the father and the second wife after the divorce.

In Po Chan's case (as well as in other cases) the claim was made against the widow or against children by the later marriage; but the same learned Judge in *Nga Pe and another* v. *Mi Myitta*,†† observed. "It is difficult to see how a different rule could be applied when the adverse claimants are other relatives. The principle of the decision and of the Ruling followed is that the separate child has no right of inheritance. That being so, it is of no consequence against whom the contest may be." He went on to hold that the Rulings cited did not apply to a child of tender years who had no opportunity of exercising a reasonable choice. A similar exception has been allowed in other cases. And it has been held (in cases where no divorce had occurred) that mere separate living will not exclude a child, natural or adopted from inheriting, and that there must be an intentional severance of the family tie, or proved neglect to exclude, and in

* L. B. P. J., 469.
† U. B. R., 1882—1896, II, 159.
‡ ——— 1897—1901, II, 116.
§ 2, L. C., 220.

‖ Civ. 2nd App., No. 157 of 1904.
¶ U. B. R., 1897—1901, II, 116.
** S. J. L. B., 184.
†† Chan Toon's L. C., II, 22.

64

the case of an adopted son living separately, the burden of proof has been laid upon the son. See *Shwe Thwe* v. *Mi Saing and another*,* and *Mi Taik and another* v. *Mi Nyun and another*.†

But what makes this case different from all those that have gone before it, is that here there are no other relatives. And the ground on which this appeal is based is that Plaintiff-Appellant is entitled to inherit because there are no other heirs, just as an illegitimate child may inherit where there are no legitimate children. The case of *Mi Sein Hla* v. *Sein Hnan* ‖ has been referred to by way of analogy. In that case a step-son, illegitimate, was held to be entitled to inherit to the exclusion of collateral heirs, in the absence of legitimate children. In *Mi Gun Bon's case*,‡ in which the right of step-children to inherit on an equal footing with natural children in preference to collaterals was affirmed, Mr. Burgess remarks § that it is provided in the *Dhammathats* that though certain classes of children are excluded from the inheritance, still they are allowed to inherit when the children who would be preferred to them do not exist."

Among the texts cited were those contained in sections 297 and 299 of Volume I of the Kinwun Mingyi's Digest. The learned Advocate for Plaintiff-Appellant in the present case has also referred to section 300.

Practically the whole of Chapter XVII (sections 296 to 313) is in point.

Sections 297, 298 and 299 indeed appear to deal precisely with the situation now under consideration.

The gist of these sections is to the following effect:—

Where the husband divorces his wife, after she has conceived, and dies without other wife, child, or grandchild, the child by the divorced wife is to succeed to his estate. If the father lives alone the child succeeds to the whole estate. If the father lives with his co-heirs the child succeeds to half, and the co-heirs to the other half. Section 236 of the Attathankepa states the same rule in a compendious form. This is a plain rule. I can see no reason for disregarding it. The Manugyè is among the *Dhammathats* which contain it. It is in accordance with the principle referred to in *Nga Aing and another* v. *Mi Kin*,** of the desire to have an heir in descent, which in other cases leads to the illegitimate child, and the *apatittha* son related by blood and living apart being declared entitled to inherit where there are no other descendants.

It is only where there are no descendants of any kind that the inheritance ascends, or goes to collaterals.

The Rulings above referred to, in which it is declared that the daughter of a divorced wife who lives with the mother and does not maintain filial relations with the father is not entitled to a share of his estate when there has been a division of property at the time of divorce, were cases where the rival claimants were the widow or children by a later marriage of the deceased.

The opinion expressed in *Nga Pe and another* v. *Mi Myitta* was not necessary for the decision of that case, and appears to me to overlook cases like the present and the texts which admit to inheritance in the absence of other descendants, children who would otherwise have

* U. B. R., 1897—1901, II, 135.
† ——— II, 193.
‡ ——— II, 66.
‖ 2, L. B. R., 54
§ Referring to Manugyè, page 318.
** U. B. R., 1892—1896, II, 22.

65

MI NYO
v.
MI NYEIN THA.

no right. I do not think any notice need be taken of the Defendant-Respondent's admission in her petition of appeal to the District Court of Plaintiff-Appellant's right to a one-sixth share. This figure seems to have been derived from the Dayajja in section 300 of Volume I of the Kinwun Mingyi's Digest, a text dealing with the son born of a casual union.

I hold the Plaintiff-Appellant to be entitled to half of her father's estate, Defendant-Respondent taking the other half.

The case is remanded to the Lower Appellate Court for a decision on the other points in the case, *viz.*, as to the property comprising the estate. The case will be resubmitted with the Lower Appellate Court's findings before the 26th September next.

I invite the Lower Appellate Court's attention to the necessity of keeping clearly in mind that the property specified in the plaint is there alleged to be the joint property of Plaintiff-Appellant's father and of Defendant-Respondent.

27th July 1906.

The Lower Court has found that all the property in suit was the joint property of Nga Aga and Defendant-Respondent, except the field of 1·78 acres which belonged to Nga Mya and Mi U, and was mortgaged to Nga Aga and Defendant-Respondent for Rs. 50. As far as the parties to the present case are concerned, this means that this land is liable to partition between them just the same as the rest of the property. The Lower Appellate Court's findings are therefore practically the same as those of the First Court and neither side has taken any objection to them.

The decree of the Lower Appellate Court is set aside and there will be a decree in favour of the Plaintiff-Appellant for one-fourth of the land in suit and for one-fourth of the value of the buffaloes (which I put at Rs. 70, the only evidence on the point being that Rs. 70 is the value of them) or Rs. 17-8-0. Costs in proportion.

28th September 1906.

Buddhist Law, Marriage.

Before A. M. B. Irwin, Esq.

MA MON *v.* MAUNG SO.

Civil Second appeal No. 239 of 1903, January 25th, 1904.

Mr. H. N. Hirjee—for Appellant | *Mr. C. G. S. Pillay*—for Respondent.

Held,—that a Burmese Buddhist wife is entitled to sue her husband during marriage to recover with interest, money raised on mortgage of her separate property and lent to her husband for his separate use.

References :—

Manukye VI, § 43.
Upper Burma Rulings 1902—Buddhist Law, Marriage, p. 1.
2, Upper Burma Rulings, 1892—96, p. 159.

The parties married when both were *ein-daunggyi*. Plaintiff-Appellant raised money on a mortgage of a house which was her separate property, and some of this money she gave to her husband, respondent, to buy paddy for her. He bought paddy, and sold it at a profit. Appellant's case was that she allowed her husband to use the sale proceeds for his own purposes but he refused to repay it, so she instituted this suit for the amount she had allowed him to use, and interest.

In his written statement respondent alleged vaguely that according to *dhammathats* and rulings she was barred from suing. He also denied that he had anything to do with the money raised on mortgage of plaintiff's house, but when examined he expressly admitted that the money he spent on buying paddy was plaintiff's own money and in fact the contrary allegation in the written statement was untenable, for in another part of it he alleged that he had paid to plaintiff the whole of the sale-proceeds, or in other words had paid to her both the amount he had received to buy paddy, and the profit on the transaction. This is clearly his substantial defence.

The Court of first instance first framed as issue whether a wife can sue for the restoration of her own private property without obtaining a divorce, and decided it in the affirmative without giving any reasons. The case was then tried on the merits, and plaintiff obtained a decree for Rs. 2,856, with interest and costs.

The Divisional Court on appeal held that the present suit is not justified by precedent or custom, not consonant with equity or good conscience, and therefore not maintainable. The correctness of that decision is questioned in the present appeal, and is the principal point for consideration.

The learned Divisional Judge discussed the question at length and examined several rulings and passages in the *dhammathats*. The substance of his reasoning may, I think, be summarized as follows :—

MA MON v. MAUNG SO.

The District Court probably relied on the ruling in *Maung Ba* v. *Ma Ok** but that merely decides that a wife may sue her husband in certain circumstances and does not decide that she may sue whenever the property is *payin*. The analogy of partnership was then considered, and an opinion expressed that the partnership business of a Buddhist married pair seems to include all their transactions. The dictum in *Manukye*, Book VI, section 43, that a wife may sue her husband for anything of her separate property lent without her knowledge was rejected as irrelevant because no concealment was alleged in the present case. Then it is remarked that the general tenor of the texts is that a wife has not the right to the sole employment of her *payin* property, it is not necessary for accounts to be kept of the profits and losses on its employment, and that in the employment of her *payin* she must defer to the wishes of her husband. The substantial grounds on which the right of suit was disallowed are to be found I think in the following passages :—

"If we have to follow each sum of money to its source, we become involved in great difficulties. Take, for instance, this case. The house was *payin* but the rent of it would be *lettetpwa*. The wife mortgaged the house and brought paddy with the money. If the paddy had been sold, the mortgage paid off, the interest paid up and the transaction closed, we should then know what the profit was, and could class it as *letťotpwa*. But the mortgage was allowed to run on. If the wife is allowed to sue for the money and for interest on it, it is arguable that the husband should be allowed to set off the lost rent or a share of it. Then the Court would find itself involved in a maze of accounts, from which, during the subsistence of the marriage, there could be no exit."

And

"Let it be granted for the sake of argument that the *payin* of each party to a marriage should be preserved. It still seems to me inequitable that either party should be at liberty to sue the other in respect of a single transaction. He or she who seeks equity must do equity. If it be conceded that dissolution of the marriage need not be sought, yet at least a settlement of accounts up to date should be solicitr ed, the plaintiff should state the *payin* brought by each, the *Kanwin* if any, the profits on the *payin* of each party and on the *Kanwin*, the expenditure thereof, the disposal of the respective capitals of *payin* and the balance due, or plaintiff should ask for accounts to be taken."

These last remarks seems to me to have no application to the present case, nor can I find in the pleadings any basis for the apprehension expressed in the previous passage that the Court would find itself involved in a maze of accounts. The correct way to regard the suit seems to me to be this. Plaintiff sued on a contract pure and simple. Defendant accepted it as such. He admitted that the money was plaintiff's, and his defence was that he repaid it in full, with all the profits. His claim, at the end of the written statement, that in case of a divorce he would be entitled to half the profits, does not materially vary his defence for he claimed that the payment of Rs. 1,800 to plaintiff was a final settlement of the matter, evidenced by a stamped document attested by witnesses. This being so, the real issue of law seems to be, whether the status of the parties in relation to each other, arising from the marriage tie, precludes them from entering into such

*Upper Burma Rulings, 1902—Buddhist Law, Marriage, p. 1.

a contract as in alleged by plaintiff and admitted by defendant. The consideration or object of the agreement cannot be said to be unlawful within the meaning of section 23 of the Contract Act. The parties have not been shown to be disqualified from contracting by the law to which they are subject. The issue in *Maung Ba* v. *Ma Ôk* was not exactly one relating to competency to contract but to the right of suing on a contract during marriage, yet the principle underlying the ruling in that case is applicable in the present case. The case of *Ma Sein Nyo* v. *Ma Kywe** cited by the learned Divisional Judge, affords at page 104, in the paragraph relating to the fourth issue, support to the view that the husband's acquiescence can override status in respect of property claimed by the wife. Thus I think no reason has been shown why the parties would not enter into a contract in respect of money raised on mortgage of the wife's separate property, nor why such a contract should not be enforced, and damages awarded for the breach of it. The issues are simple, and there are no complications in the case.

* * * * *

Decree reversed.

* 2, U. B. R., 1892-96, p. 159.

Buddhist Law—Marriage.

Before G. W. Shaw, Esq.

Civil Appeal No. 306 of 1903. October 10th, 1904.

MAUNG SEIN *v.* KIN THET GYI.

Mr. C. G. S. Pillay—for Appellant. | *Mr. H. N. Hirjee*—for Respondent.

Restitution of Conjugal Rights.

Held,—Ill-treatment and desertion by petitioner a valid plea of justification under Buddhist Law.

References:—

I. L. R., 10, Bom., page 301.
————28, Cal., page 751.
L. B. P. J., page 654.
L. B. R., 1900-02, page 351.
Brown and Powles' Law of Divorce, page 164, A. B. C. D.
Rattigan's Law of Divorce (India), page 178.
2, U. B. R., 1897-01, page 488.

Plaintiff-Appellant sued for restitution of conjugal rights. The facts appear to be clear enough. The parties were married with the consent of their parents, and for some eight months afterwards lived in the same house with the Defendant-Respondent's parents, who maintained them. Plaintiff-Appellant had got Rs. 2,000 from his parents for the marriage of which he made over Rs. 1,280 in cash to his wife. He says he spent the rest on furniture and clothes. According to Defendant-Respondent, the furniture and clothes should have been in addition to the Rs. 2,000. Plaintiff-Appellant also gave his wife a gold chain worth Rs. 180. Some three weeks after the marriage he asked for the return of the Rs. 1,280 in order to invest it in trade. On another excuse he also asked for the return of the gold chain. He borrowed small sums from his wife's parents amounting to Rs. 275. When his wife at their instance asked him to repay this money, and asked for an account of the joint property, he got angry and threw a broom and a slipper at her and finally left the house, saying he would divorce her. For a year and seven months he did not go near her, did not write to her, did not send and ask her to go to him. Then he sent elders with a message which Defendant-Respondent's step-mother refused to receive on the ground that Plaintiff-Appellant ought to have come himself or sent his parents. Then he sent notice of the present suit and another message after the suit had been instituted.

According to Defendant-Respondent the Plaintiff-Appellant had all along behaved in an unsatisfactory manner. He would absent himself for lengthy periods. He said he was trading, but resented any enquiries by his wife as to the nature of the business. Nobody saw any signs of business.

71

MAUNG SEIN v. KIN THET GYI.

He was suffering from sores which it is suggested were syphilitic.

Plaintiff-Appellant's case is that his wife's parents quarrelled with him and drove him out of the house. But this is not proved.

I think there can be no doubt that the learned Additional Judge is right in the conclusions which he came to on the evidence, *viz.*, that Plaintiff-Appellant left the house without any sufficient cause after ill-treating Defendant-Respondent, and that since then he has failed to exhibit any sign of affection for her. The Additional Judge holds on these facts that Plaintiff-Appellant is not entitled to sue for restitution of conjugal rights. He thinks Defendant-Respondent's apprehensions of ill-treatment are not unreasonable.

The following authorities have been cited on one side or the other:—

Dadaji Bhikaji vs. *Rukma Bai.**
Tekait Mon Mohini Jamadai vs. *Basanta Kumar Singh.*†
Bazaralli vs. *Appuzunbee.*‡
Afazulla Chowdry vs *Sakina Bi.*§
Browne and Powles' Law of Divorce, page 164, A. B. C. D.
Rattigan's Law of Divorce (India), page 178.

The first two cases dealt with Hindus, and the second two with Muhammadans and the only very relevant point to be found in them is the assertion of the fact that cases of restitution of conjugal rights are to be governed by the personal law of the parties. It was held that a suit for restitution would lie under Hindu law and under Muhammadan law.

And in *Rukma Bai's* case it was held that the Court "cannot recognize any plea of justification other than a marital offence."

The works on Divorce deal with the English law or with the English law as applied to India by the Indian Divorce Act, which does not affect Hindus, Muhammadans or Buddhists.

In *Browne and Powles'* book at page 151, it is said "the only ground" for a suit for restitution of conjugal rights is "that one of the married persons has withdrawn from living with the other without lawful cause."

In Blackstone's Commentaries (quoted in *Rukma Bai's* case), the ground for a suit of the kind is stated to exit "whenever the husband or the wife is guilty of the injury of substraction or lives separate from the other without any sufficient reason."

The case from the English Courts embodied in the above mentioned works almost without exception appear to be cases in which the Respondent has withdrawn from the conjugal home. In this respect they differ from the present case where as we have seen it was the Plaintiff who withdrew, and without sufficient reason.

* I. L. R. 10, Bom., page 301.
† ——— 28, Cal., page 751.
‡ L. B. P. J., page 654.
§ L. B. R., 1900-02, page 351.

72

An important fact is that under the more recent decisions, conduct which may not amount to legal cruelty entitling to judicial separation, may be a bar to a suit for restitution.

And although the explanation of this ruling is to be found in the special provisions of the Matrimonial Causes Act, 1884, Rattigan says (page 179). "At the same time it does not seem to be in accordance with the principles of ordinary justice to compel a Respondent whose conduct in withdrawing from the petitioner's society the Court admits to be only natural and reasonable to resume a cohabitation which is likely to be fraught with the greatest misery to a perfectly innocent party.....Possibly therefore the Courts of this country will hold that it is a condition precedent to the grant of relief that the petitioner's own conduct shall have been not only free from the commission of any distinct matrimonial offence, but also of such character that the Respondent was in no wise reasonably justified in withdrawing from the society of the other," etc.

The argument seems to be even more to the point where it is the petitioner who withdrew from the other's society without sufficient cause, and the Respondent is merely refusing to leave her parent's house where they lived together and follow him elsewhere, in the absence of any exhibition of affection on his part, and in the apprehension of further ill-treatment.

On the basis of the English law as above stated my conclusion is that the petitioner would have established sufficient ground for a decree in the present case.

We have however to decide this case by Buddhist Law.

It has never so far as I am aware been denied that a suit for restitution of conjugal rights is maintainable among Burman Buddhists (*cf. Nga Kyaik* v. *Ma Gyi**). It may be inferred from the provisions of the *Dhammathats* which lay down the duties of husbands and wives to each other that living together is an ordinary incident of marriage and that it is a wife's duty to live with her husband wherever he may be (*cf.* Kinwun Mingyi's Digest, Volume 2, sections 208, 209, 210, 211 and 212 *seqq*). But the same rules require on the part of the husband kindness and consideration towards his wife not to mention his primary duty of maintaining her.

And where he has left her saying "I do not love you," and does not send her any means of maintenance for three years, the marriage is dissolved and she may marry again (section 312 *cf.* also section 395). The rules contained in section 303 may also be compared. These refer to the case where the wife accuses her husband of cruelty. She is to call witnesses and if they state merely that they heard the quarrel but did not see her beaten, the case is not to be thrown out if she still has marks of injury on her person. The wife is not to get a

* 2, U. B. R., 1897-01, page 488.

735

MAUNG SEIN v. KIN THET GYI.

divorce the first time, the husband ss to be permitted to resume cohabitation on the express understanding (or on giving security) that he will not ill-treat her in future. "If the wife declares that she cannot resume cohabitation, the divorce shall be granted even if he objects to it."

I am of opinion that this furnishes ample authority for holding that in the circumstances of the present case Plaintiff-Appellant is not entitled to a decree for restitution of conjugal rights and that he must first of all give some guarantee that he will not ill-treat his wife in future. This is practically what the Lower Court has held and far from being a "sentimental" solution of the imbroglio, and "not law" as the learned Advocate for Plaintiff-Appellant has asserted, the Lower Court's judgment appears to be strictly in accordance with the principles of the *Dhammathats*.

The appeal is dismissed with costs.

Burden of proof—fraud.

Civil Second Appeal No. 100 of 1904, October 3rd.

Before G. W. Shaw, Esq.

MAUNG TUN BYE *v.* MAUNG YON.

Mr. C. G. S. Pillay—for Appellant | *Mr. Tha Gywe*—for Respondent.

Held,—*That where a claimant under section 278 or Plaintiff in a suit under section 283 proves possession, section 110, Evidence Act applies and he is entitled to succeed unless the other party proves that he is not the owner or that he holds in trust for the judgment-debtor.*

See Civil Procedure, page 8.

Civil Procedure—42-43.

Civil Second Appeal No. 281 of 1913. March 18th, 1904.

Before A. M. B. Irwin, Esq.

MAUNG CHIT LE *v.* MAUNG PAN NYO, MAUNG SAW PWA.

Mr. J. C. Chatterjee—for Appellant. | *Mr. C. G. S. Pillay*—for Respondents.

Held,—that mesne profits which can be claimed in a suit for immoveable property up to date of suit, but which were not so claimed, cannot be subsequently sued for in a subsequent suit, because the cause of action is the same.

References:—

I. L. R. 17, All., p. 583 (1895).
———3, —— p. 660 (1881).
———8, Cal., p. 593 (1882).
———12, Cal., p. 482 (1885).
———19, Cal., p. 615 (1891).
———11, Mad., p. 151 (1887).
I. L. B. R., p. 13 (1899).

This is a suit for mesne profits, and the first question which arises is whether the suit is barred by section 42 or section 43, Civil Procedure Code.

On 30th October 1900 respondents sued appellant for possession of a *ya*, which they alleged that appellant had unlawfully entered on in that same year 1262. They eventually obtained a decree for possession. The present suit was instituted on 30th January 1903, for the value of the crop which appellant reaped on the above mentioned *ya* in the yeaf 1262 (1900) and he said to have sold. It is alleged in the plaint that the crop had been raised by plaintiffs. Defendant replied that the crop was not raised by plaintiffs but by himself, and that the suit was barred by sections 42 and 43. The other parts of the defence need not be noticed at present. Defendant in his evidence said that when the present suit was instituted the plants were as high as the waist or knee or a man's height. This statement is not challenged by the other side, and may be accepted as true.

The learned Advocate for Plaintiff-Respondent said that when the suit was instituted the crop was part and parcel of the land, and it was the act of severing the crop from the land that prevented him from obtaining possession of the land with the crop on it in the former suit, the value of the crop did not become mesne profits until the crop was severed from the land. This is a very ingenious argument, but I not think it can be said that plaintiffs could not have joined a claim for mesne profits with the claim for possession made in the former suit, as they had been kept out of possession until the crop was without specifying the amount is clear from section 211, Civil Procedure Code. I find then tha. the present claim could have been joined in the former suit.

77

MAUNG CHIT LE v. MAUNG PAN NYO.

That being so, the question whether the present suit for mesne profits is barred by sections 42 and 43 is one of considerable difficulty, for the High Courts of India are not agreed on it. The ruling of the Privy Council in *Madan Mohan Lal* v. *Lala Sheoshankar Sahai** was cited by appellant, but it is quite clear that it does not decide the point now in issue In the year 1285 the plaintiff sued for mesne profits for 1283, and what the Privy Council decided was that a subsequent suit for the mesne profits for 1284 and 1285 was barred by section 43.

Respondent cited a ruling published in the Madras Law Journal, 1901, page 332, which is also beside the point, as it refers to mesne profits accruing after the institution of the first suit.

The rulings which appear to be relevant to the present case are, in Chronological order *Lalji Mal* v. *Halasi* † *Venkoba* v. *Subbanna*,‡ *Lalessor Babin* v. *Janki Bibi*, § *Mewa Kuar* v. *Banarsi Prasad* ‖ *and Oktama* v. *Ma Bwa.* ¶ In the first, two Judges of the Allahabad High Court held that mesne profits which can be claimed in a suit for immoveable property up to date of suit, but which were not so claimed, cannot be subsequently sued for in a subsequent suit. In the next case two Judges of the Madras High Court decided the same question in the same way, but they said that this view was in accordance with the decision of the Judicial committee in *Madan Mohan Lal* v. *Lal Shoe Shankar Sahai.* I have already shown that the question decided in that case was a different one. In the next case, these two rulings of Allahabad and Madras were dissented from by two Judges of the Calcutta High Court, who based their opinion partly on what seem to me to be more or less *obiter dicta* in two earlier cases of the same Court. One was a Full Bench ruling on a question of Courts fee stamps in a suit for possession and mesne profits, the other a decision in a question of *res judicata* where the Court had not applied section 211 in the first suit. Besides referring to these two decisions the learned Judges expressed an opinion that the cause of action and the nature of the suit are in each case (possession and mesne profits), altogether different, and there is no doubt that this has been the rule in Bengal since 15th June 1849, as appears from the Full Bench ruling mentioned above ** but when the learned Judges quoted the words of Garth, C.J. from that case, they might perhaps have quoted with advantage a little more of them, as follows:—

"The Court which decides the question of possession has generally all the materials before it to decide at the same time the question of mesne profits, and it would be entailing both upon the Court and the parties unnecessary expense and trouble to try the claim in two different suits.

This seems to express exactly the foundation of section 42, Civil Procedure Code.

In the next case, *Mewa Kuar* v. *Banarsi Prasad* the High Court of Allahadad considered and dissented from the Calcutta ruling. The learned Judges' criticisms of wording of sections 43 and 44 and their

* I. L. R. 19, Cal., p. 482 (1885).
† I. L. R. 3, All., p. 660 (1881).
‡ „ 11, Mad., p. 151 (1887).
§ I. L. R. 19, Cal., p. 615 (1891).
‖ I. L. R. 17, All., p. 583 (1895).
¶ I. L. B. R., p. 13 (1899).
** I. R. 8, Cal., p. 593 (1882).

reasons for holding that claims for possession and for mesne profits are based on one and the same cause of action seem to me to be lucid and forcible, and difficult to refute.

Lastly in *Oktama* v. *Ma Bwa* Mr. Justice Birks followed the Calcutta ruling without comment and without consideriug the decisions of the other High Courts.

In Bengal, before 15th June 1840, a plaintiff was bound to sue for possession and mesne profits in one suit; on that date the Sader Court made a rule permitting him to bring a separate suit for the mesne profits. The High Court of Calcutta has interpreted the Codes of 1859, 1877 and 1882 as continuing this rule. Their reasoning does not commend itself to my mind. The decisions of the Allahabad and Madras Courts seem to me to be more in accordance with the words of the Code. They certainly give effect to section 42, and they give the only possible interpretation of the third clause of section 43 if both suits are based on the same cause of action. I have no doubt that the cause of action is one and the same, namely the wrongful taking possession of plaintiff's land and excluding plaintiff from the use of it.

I therefore set aside the decree of the District Court and dismiss the suit with costs in all Courts.

Civil Procedure—283.

Before A. M. B. Irwin, Esq.

PALNEAPPA CHETTY *v.* MAUNG SHWE GE.

Civil Second Appeal No. 230 of 1903. January 20th, 1904.

Mr. H. N. Hirjee—for Appellant. | *Mr. J. Chatterjee*—for Respondent.

Held,—that a suit will lie to recover costs incurred in unsuccesfully objecting to attachment of property in execution of a decree, when it is shown in a suit under section 283, Civil Procedure Code, that the defendent had no colourable justification for attaching the property nor for defending the application for removal of attachment.

References:—

3, Mad., H. C, R. page 341.
6, Mad H. C. R., page 192.
8, Bom., H. C. R. (A. C.) page 29.
I. L R. 1. Bom., page 467.
———2, Bom,. page 360.
———8, All., page 45 2.
———9, All., page 474.
Pollocks' Law of Torts, 6th edition, page 310.

Appellant attached certain land in execution of a decree. Respondent applied to have the attachment removed but was unsuccessful, and was ordered to pay appellant's costs, Rs. 42-8. His own costs were taxed at Rs. 22-8. He then instituted this suit under section 283, Civil Procedure Code, to recover the land, and Rs. 65, the sum of the costs which he had to pay and the costs which he would have recovered if he had been successful in the application for removal of attachment.

The Court of first instance gave a decree for the land, and recorded "As regards costs Rs. 65, I can find no rulings whether plaintiff is entitled to get back or not." This sentence is repeated word for word in the decree, and neither judgment nor decree contains any definite order on the subject of these costs. The decree is very badly drawn. It was treated as a decree dismissing the claim for costs. On appeal this claim was allowed by the District Court, the learned Judge remarking "As this expenditure was caused to the Plaintiff-Appellant by Defendant-Respondent wrongfully attaching his land, he is justified in suing to recover it."

The ground of the present appeal is that no suit will lie to recover the costs incurred in prosecuting the application for removal of attachment. The only authority cited by appellant is the anonymous case reported at page 341 of the Madras High Court Reports, Volume III. In that case no costs were awarded in the summary proceeding, and no suit was instituted under section 283, but the party who succeeded in the summary proceeding sued to recover the costs which might have been awarded to him in it. It was held that such a suit was not maintainable because the question of costs was within the discretion of the Judge who decided the claim to the attached property. This

8 /

PALNEAPPA CHETTY v. MAUNG SHW GE.

clearly does not govern the present case, where the order for cost in the summary proceeding was in accordance with the substantive decision in that proceeding, and it is only because that decision has been held to be wrong that the present claim is made.

Three Judges of the same High Court, in the case of *Chengulva Raya Mudali* v. *Thangatchi Ammal* * held that a suit is maintainable for costs incurred in a proceeding in which the Court was not empowered to award costs.

A bench of the Bombay High Court decided the case of *Pranshankar Shivshankar* v. *Govindhal Parbhudas*† which was exactly similar to the present case except that the plaintiff claimed only the costs he had been compelled to pay in the summary proceeding to defendant, not the costs he had himself incurred, and he claimed these costs in a separate suit after succeeding in the suit under section 283, Civil Procedure Code. The decision was given in a single sentence, "a suit will not lie to recover costs awarded by a Civil Court, though it may lie for costs which could not be so awarded." The reference in these last words is to the Madras case which I have just cited, and it is curious, as another bench of the same (Bombay) Court had previously held, contrary to the opinion of the Madras Court, that when an Act makes no provision for the award of costs it should be inferred that the Legislature did not intend that costs should be recoverable (*Jalam Punja* v. *Khoda Javra*). ‡

The case of *Kabir Valad Ramjan* v. *Mahadu Valad Shivaji* § was similar to the anonymous Madras case first cited, in that the original Court could have, but did not, award costs, and it was the successful party who sued for them and only I mention it because it formed part of the ground of the decision of Mahmood, J. *Mahram Das* v. *Ajudhia*.‖ The plaintiff in this case sued (*inter alia*) for damages on account of costs incurred in unsuccessful proceedings in a Revenue Court. The learned Judge considered the three Bombay cases and one Madras case above cited and his opinion is summed up in these words: "Where a Court has jurisdiction and orders costs, that order is final and binding. But where the former Court is not entitled to order costs, and costs are incurred, they may in my opinion be made the subject of consideration as to damages in a subsequent suit." This decision was followed by a bench of the same Court in the case of *Kadir Baksh* v. *Salig Ram* ¶ which is exactly similar to the present case except that it seems the plaintiff claimed only the costs awarded against him to defendant in the summary proceeding.

I have not been able to find any ruling of the High Court of Calcutta or of the Courts of Lower Burma or of this Court, bearing on the point now in issue.

*6, Mad., H. C. R., p. 192 (1871).
†I. L. R., 1, Bom., p. 467 (1876).
‡8, Bom., H. C. R., A. C., p. 29 (1871).
§ L. R., 2, Bom., p. 360 (1877).
‖I. L. R., 8, All., p. 452 (1886).
¶ I. L. R., 9, All., p. 474 (1887).

82

The result then is that benches of the Bombay and Allahabad Courts have held that a suit such as the present one is not maintainable, while the Madras High and one Judge of the Allahabad Court held that where the Court is not empowered to award costs a subsequent suit for such costs will lie, and the Bombay bench referred to this ruling without dissent, and without noticing that another bench had previously expressed a contrary opinion.

To my mind the principle that where a Court has jurisdiction and orders costs, that order is final and binding, cannot govern a case in which the substantive order, to which the order for costs was subsidiary, is found to be erroneous. When such an order is set aside in appeal or revision, the order for costs usually shares the same fate as a matter of course, but when there is no appeal, and the summary order is found to be wrong by a procedure which provides, not for setting it aside but for superseding it then I think there are much stronger reasons for allowing a suit to recover the costs paid under the erroneous order than there are for allowing a suit to recover costs incurred in a proceeding in which the Court was not empowered to award costs. In this case respondent had obtained possession of the land with a good title about ten years before the institution of the appellant's suit against the mortgagor. He incurred costs in resisting the wrongful attachment, and was compelled to pay appellant's costs of maintaining the wrongful attachment. The latter ought to be refunded to him because the order to pay them was founded on a manifestly wrong finding which might almost be called perverse. The former stand on a somewhat different footing, and if a suit lies to recover them it must be founded, I think, on the wrongful action of appellant in attaching the property. Is such an act an abuse of process of law, and is such abuse an actionable wrong? Some light is thrown on this question by Pollock's Law of Torts (6th edition) page 310, and footnote (*g*). The institution of Civil proceedings without reasonable and probable case is not generally an actionable wrong, but whether the real reason for this rule be that an order for costs is sufficient compensation, or that to allow such suits would prolong litigation *ad infinitum*, neither reason is of any force in the present case.

It is not in my opinion expedient that a person who attaches property without taking care to ascertain that it is the property of his debtor should escape from liability to pay any expenses thus caused to the real owner. I am thus compelled to dissent from four learned Judges of the High Courts of Bombay and Allahabad. I do so with great reluctance. To disallow the respondent's claim would not, in my opinion, be consistent with justice, equity and good conscience.

I will not go so far as to say that when the plaintiff succeeds in a suit under section 283 he would in every case be entitled to recover his costs in the summary proceeding. It is not necessary to decide that point now. In the present case the appellant had no colourable justification for attaching the land nor for defending the application for

PALNEAPPA CHETTY v. MAUNG SHWE GE.

removal of attachment. He called no witnesses, and contented himself with a bare allegation that the ten-year old mortgage was forged and that the land was not in respondent's dossession. There was nothing to rebut respondent's case which was fully proved. For this reason I think his attachment of the land and defence of the application for removal of attachment amount to an actionable wrong, and the decision of the Township Court on the application was unreasonable.

The appeal is dismissed with costs.

84

Civil Procedure—278, 283.

Before G. W. Shaw, Esq.

Civil Second Appeal No. 100 of 1904. October 3rd.

MAUNG TUN BYE *v.* MAUNG YON.

Mr. *C. G. S. Pillay*—for Appellant. | Mr. *Tha Gywe*—for Respondent.

Burden of Proof—Fraud.

Held—That when a claimant under section 278 or plaintiff in a suit under section 283, proves possession, section 110, Evidence Act, applies, and he is entitled to succeed unless the other party proves that he is not the owner or that he holds in trust for the judgment-debtor.

Held also—That there is nothing to prevent an owner from selling or any one from purchasing property before it is attached, provided the transaction is *bonâ fide* and for adequate consideration. It is only when the circumstances are such as to raise a strong presumption of fraud that the burden lies upon the person who sets up the scale, of proving that it was *bonâ fide* and for adequate consideration.

References—

I. L. R., 12 Bom., 270.
I. L. R., 25 Bom., 202.
I. L. R., 10 Cal., 616.
Shirley's Leading Cases, 330.
L. B. R., 1903, 152.
2, U. B. R., 1892-96, 318.
2, U. B. R., 1897-01, 270.
2, U. B. R., 1902-03, 15.
15, W. R., 507.
22, W. R., 473.
24, W. R., 292.

The Plaintiff-Appellant applied under section 278, Civil Procedure Code, for removal of attachment and failing brought a regular suit under section 283, Civil Procedure Code, for the property attached and sold, *viz.*, 77 baskets of pickled tea, or the value at Rs. 25 per 100 Rs. 704-7-6.

Defendant-Respondent had obtained on the 29th September 1900 a decree for Rs. 500 odd with costs against one Tun Gaing, plaintiff-Appellant's brother.

On the 10th September 1903 he applied in execution of this decree for the attachment of 140 baskets of pickled tea and the bamboo raft they were on, and the attachment was effected the same day,—on 77 baskets and the raft.

Plaintiff-Appellant's case is that the property was in his possession at the time of attachment on his own account and that he had bought it for Rs. 659-8-0 on the 27th July, had bought indeed 88 baskets of tea of which he had since sold 11 baskets Defendant-Respondent denies the sale. He did not allege fraud till he got to the Lower Appellate Court.

MAUNG TUN BYE v. MAUNG YON.

The First Court found for the Plaintiff-Appellant on the facts but the Lower Appellate Court reversed this decision on the ground that Tun Gaing "no doubt knew that action for the execution of the decree out against him was likely to be instituted shortly, and that the sale was fraudulent, transacted with the intention of defeating the ends of justice."

This decree is appealed on the grounds that no fraud or collusion was proved or even specifically pleaded in the First Court and that the Lower Appellate Court's reasons for reversing the First Court's decree are insufficient and unsound.

The learned Judge of the District Court did not specify any authorities for his conclusion, and I think that the legal points involved called for more particular attention.

There is first of all the question of the burden of proof. This was dealt with in *Chokalingum Chetty and another* vs. *Nga Yeik and another** which appears to be the only Upper Burma Ruling on the point. It was there held that it was for the plaintiff to prove not only possession but also that he was not the judgment-debtor's trustee.

This decision had been dissented from in *P. K. A. C. T. Kadappa Chetty* v. *Maung Shwe Bo* † in which the question was fully examined. The conclusion come to was that on proof of possession the claimant whether in the miscellaneous proceedings or in the regular suit is entitled to succeed unless the decree-holder proves that he holds in trust for the judgment-debtor, or that the property is the property of the judgment-debtor liable to present seizure and sale in execution. I am of opinion that the latter view is the correct one. My learned predecessor apparently omitted to consider two important points, first that section 279 does not require the claimant to prove that he had some interest in and was possessed of the property attached, but that he had some interest in *or* was possessed of it, and secondly that section 110 of the Evidence Act is applicable. And as pointed out by *Fox, J.*, in the Lower Burma case *Govind Atmaram* v. *Santai* ‡ does not furnish authority for the ruling in *Chokalingum's* case because there was nothing to show that the claimant *Santai* had proved possession.

I hold therefore that in the present case it was for the Plaintiff-Appellant to prove either that he had an interest in the property or that he was in possession, and if he proved that he was in possession at the time of attachment the burden of proving that he was not the owner lay upon the Defendant-Respondent. Plaintiff-Appellant's position in the regular suit was neither better nor worse than it was in the miscellaneous proceedings.

Next comes the question of fraud. On this point I think the law is clear enough. On the one hand there is nothing to prevent an owner from selling or any one from purchasing property before it is attached,

* U. B. R., 97—01, Vol. 2, page 270.
† L. B. R., 1903, page 152.
‡ I. L. R., 12, Bom. 270.

even if the parties know that an attachment is impending, or their object is to defeat an anticipated attachment provided the transaction is *bonâ fide* and for full consideration or a consideration that is not grossly inadequate.

The authorities to this effect are the case of *Ram Burun Singh* v. *Jankee Sahoo* * and *Bhagwant Appaji* vs. *Kedari Kashinath and others* † not to mention section 276 of the Civil Procedure Code itself, which declares that *when an attachment has been made* any private alienation, etc., shall be void. In the recent case of *Valleappa Chetty* vs. *Maung Ke and others* ‡ my learned predecessor took the same view.

But in *Abdul Hye* vs. *Mir Mohamed Mozafar Hossein and another* § the Privy Council held that the principles of the Statute of Elizabeth and of the common law on the subject of "covinous conveyances" whereby creditors are delayed or defrauded should be observed as principles of justice, equity, and good conscience by the Indian Courts. The leading English cases are mentioned in Cunningham and Shephard's notes to section 53 of the Transfer of Property Act and in Benjamin on Sale, page 481. The question to be decided is in the words of the judgment in Hall the Metropolitan Omnibus Company quoted in the last mentioned work, *in loc cit.* as expressing the modern doctrine, whether having regard to all the circumstances the transaction was a fair one and intended to pass the property for a valuable consideration.

There is a natural presumption in favour of honesty and fair dealing which is liable to be rebutted by evidence of circumstances that indicate fraud (*cf. Mama Gyi* vs. *Sukram Muni Lal.*) ‖

And it has been held (see *Gowhur Ali Khan* vs. *Mussamut Sakheena Khanum and others* ¶ and *Chunder Narain Sen and another* vs. *Amrito Lall Sen and others*) ** that where circumstances are proved which raise a strong presumption of fraud the burden of proving that the transaction was *bonâ fide* is laid upon the debtor.

The questions, then, which have to be answered in this case are:—

(1) whether Plaintiff-Appellant proved possession;

(2) if so whether Defendant-Respondent has shown that this possession was not in fact on plaintiff's own account or that the circumstances under which Plaintiff-Appellant came into possession raise such a strong presumption of fraud that it is for Plaintiff-Appellant to prove *bonâ fides* and adequate consideration.

(3) If this presumption is raised whether Plaintiff-Appellant has proved *bonâ fides* and adequate consideration.

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* 22, W, R. 473.
† I. L. R., 25 Bom, 102.
‡ U. B. R., 1902-03, Civ. Pro., page 15.
§ I. L. R. 10, Cal. 616.
‖ U. B. R., 1892-96, Vol. 2, page 318.
¶ 15, W. R. 507.
** 24, W. R. 292.

87

MAUNG TUN BYE
v.
MAUNG YON.

(4) If Plaintiff-Appellant did not prove possession whether he proved that he had an interest in the property entitling him to a decree.

To consider the evidence. The bailiff who made the attachment has sworn that at the time of attachment he did not see the judgment-debtor but that Plaintiff-Appellant appeared and protested against the attachment. There is no evidence to show that the judgment-debtor was in possession at this time or even that he was in Mônywa at all on this day. We have the evidence of Yo Kan, a trader, that he repeatedly bought pickled tea from Plaintiff-Appellant for some time before the attachment.

I think that the First Court was justified in holding on this evidence coupled with that relating to the sale that Plaintiff-Appellant was in possession.

Plaintiff-Appellant was not content to rest his case on possession merely. He adduced evidence to prove that the property was sold to him.

As to the sale we have the evidence of four persons who were specially called to witness it. I am about to say that their statements do not on the face of them furnish any indication that they are false witnesses or that they are witnesses to what they knew to be a "colourable" transaction. The discrepancies, such as they are, are of no importance. I note that the witness Po Tha was on the list of witnesses for Plaintiff-Appellant in the miscellaneous proceedings, and there is nothing to show that he was not then examined for any reason but because his evidence was not thought to be necessary. The Township Court in which the miscellaneous proceedings were held did not in my opinion give sound reasons for disbelieving the witnesses, who are corroborated besides by Nga Kyat for Defendant-Respondent who says that 15 days before the attachment Plaintiff-Appellant asked him to try and get his pickled tea sold. Mere miscalculations of price are no reason for discrediting evidence, nor are such discrepancies as the Judge laid stress upon.

The Subdivisional Court was satisfied on the evidence that the sale took place. The Lower Appellate Court did not pronounce a definite opinion. I do not think that there can be any doubt on the subject.

We have next to consider whether the circumstances of the sale are such as to indicate fraud.

The Plaintiff-Appellant is a brother of the judgment-debtor. The judgment-debtor had had a decree outstanding against him for Rs. 500 odd since September 1900. He was a trader in pickled tea from the Upper Chindwin and lived at a place called Kawya which is stated to be in a remote situation in the neighbourhood which produces or exports this pickled tea. He brought down the raft in question in order to sell it. According to Defendant-Respondent and his witnesses the judgment-debtor paid Rs. 20 and promised to pay Rs. 30 more towards his judgment-debt, after he had sold the tea in Lower Burma.

88

Defendant-Respondent's object in adducing this evidence was to show that the judgment-debtor had not sold the tea since he treated the tea as his own after the date of the alleged sale. But this would not prove that the sale had not taken place. The evidence mentioned shows, on the other hand, if there is any truth in it at all, that the judgment-debtor did not conceal his intention of selling the tea and indeed there is nothing to show that he observed any secrecy. The raft was anchored at the village landing-place. The sale took place before several witnesses. Defendant-Respondent himself by his own showing raised no objection to the judgment-debtor selling the tea.

The one fact, which contains the smallest trace of suspicion, is that Plaintiff-Appellant is the judgment-debtor's brother, and this is by no means conclusive because it would be natural for a trader of the Upper Chindwin who exported tea to Mônywa to sell to a brother living there whose business it was to deal in tea. The circumstances are very different from those in the English leading case (Twyne's case*) or in *Gunharali's* or *Chandar Narayan Sen's* cases above cited. There the debtor transferred nearly all his property and remained in possession afterwards. He was in a position of great embarrassment at the time of the transfer and the evidence of consideration was almost entirely wanting or there were other indications of fraud.

In short I am of opinion that the circumstances of the transfer in this case are not such as to raise a presumption of fraud.

I set aside the decree of the Lower Appellate Court and restore that of the First Court. The Respondent will pay the Appellant's costs.

* Shirley's Leading Cases, page 250.

89

Civil Procedure—295.

Civil Appeal No. 149 of 1904. November 28th.

Before G. W. Shaw, Esq.

PALANEAPPA CHETTY *v.* SHEODAT RAI BISSESUR DASS.

Mr. *H. M. Lütter*—for Appellant. | Mr. *H. N. Hirjee*—for Respondent.

Held—that an order as to priority of mortgages in execution of mortgage-decree for sale is an order in execution under section 295, Civil Procedure Code.

Held also—that a suit under section 295, Civil Procedure Code, is not a suit to set aside an order.

See Limitation, page 1.

Civil Procedure—283.

Civil Second Appeal No. 130 of 1904. January 10th, 1905.

Before A. M. B. Irwin, Esq., C.S.I.

PALANEAPPA CHETTI *v.* MAUNG PO SAUNG.

Mr. *H. M. Lütter*,—for Appellant.

In a suit under Section 283, Civil Procedure Code, the burden of proof is not affected by the summary order under sections 280, 281 or 282.

References :—

U. B. R., 1897-1901, 270, (overruled).
2, L. B. R., 152, (followed).
Civil Second Appeal No. 100 of 1904 (not reported).

Palaneappa Chetti sued Maung Po Saung as representative of his deceased father Maung Ya, and obtained a decree. In execution of that decree he attached a house which was in Maung Po Saung's possession. Maung Po Saung applied for removal of the attachment but failed. He then instituted the present suit to recover the house, alleging simply that it never was Maung Ya's property but his own. The Chetti replied that it was Maung Ya's property. The Court of First Instance dismissed the suit on the merits. The District Court reversed that decree, and declared that the house belonged to the Plaintiff. The Chetti appeals.

It is proved, and not denied, that Respondent Po Saung bought the materials for building the house, and paid the cartmen who conveyed the materials to the site, and that Po Saung and his father Maung Ya lived in the house together. The rest of the evidence is of no particular value, but I may remark that the decision of the Court of First Instance is based partly on the assumption, for which there is no evidence, that Maung Ya must have ordered his son to buy the timber, as it is customary for fathers to do so, and that when a father and son live together the house generally belongs to the father.

The Appellate Judge, on the other hand, based his decision partly on the fact that in the application for execution the house was described as Po Saung's house. This in no way compromises the Appellant's case, as Po Saung had inherited the house from his father. The learned Judge also erred in saying that the evidence showed that Po Saung had bought the house. The evidence is that he bought the materials and built it.

The evidence being so meagre, as I have described above, it is important to see on which party the burden of proof lay. I have not found any case on all fours with the present one, but I have been referred to the ruling of Mr. Copleston in this Court in *Chokalingam Chetti* vs.

PALANEAPPA CHETTI v. MAUNG PO SAUNG.

Maung Yeik,* to the effect that the order in the summary proceeding tends to throw on the Plaintiff the burden of proving something more than mere possession. This was dissented from by a bench of the Lower Burma Chief Court in *Kadappa Chetti* v. *Maung Shwe Bo*† in which the question was very thoroughly examined. My learned predecessor Mr. Shaw followed this ruling and dissented from Mr. Copleston in *Maung Tun Byu* v. *Maung Yon*‡. I also agree with the ruling of the Chief Court, the substance of which is that the Plaintiff, in a suit under section 283 of the Civil Procedure Code, is neither in a better nor in a worse position than he was in as claimant in the summary proceeding, and that section 279 does not require the claimant to adduce evidence to show both that he had some interest in, and that he was in possession of, the attached property. It is sufficient for him to adduce evidence of one or the other. If he shows that he is in possession, section 110 of the Evidence Act throws the burden of proof on the Defendant.

That principle does not afford such a clear guide in the present case as it did in the cases, just noticed, because the Plaintiff was heir of the deceased debtor, and the fact of his possession of the house does not raise any presumption that the house did not belong to his father; but it at any rate clears the ground to this extent, that the Plaintiff-Respondent is not in any way prejudiced by the decision against him in the summary proceeding. I think it may be said that if no evidence had been adduced on either side, no presumption would arise that the house belonged to Maung Ya. It would be about equally probable that it was the property of Po Saung during Maung Ya's lifetime. The Chetti then would not be justified in attaching it, unless he was in a position to adduce some evidence that it had been the property of Maung Ya when he died. Under these circumstances I think Maung Po Saung's statement on oath that the house was his own, and that he bought the materials with his own money, should be accepted as true in the absence of any evidence that the money was his father's or that he built the house under his father's orders. The statements made broadly by some of the witnesses for the defence that the house was Maung Ya's property, and that the materials were bought with his money, are, as I have said, of no particular value when the witnesses do not say how those facts come to their knowledge. The Judge of the First Court also did not notice the facts that one witness admitted being on bad terms with Po Saung, and another admitted that he himself was personally liable under the same decree under which Po Saung is liable as representative of his father, and that the Chetti had told him that he would attach his (the witness's property if the decree were not fully satisfied by the sale of Maung Ya's property.

For these reasons I dismiss the appeal with costs.

* U. B. R., 1897—01, 270.

† 2, L. B. R., 152. ‡ U. B. R., 1904, Civ. Pro., p. 8.

Civil Procedure—283.

Before G. W. Shaw, Esq.

KUMARAPPA CHETTI *v.* NGA PYI.

Mr. J. C. Chatterjee—for Appellant.

Civil Appeal No. 303 of 1904. 9th June 1905.

Held—that a suit will lie to recover costs incurred in unsuccessfully objecting to attachment of property in execution of decree when the attachment was wrongful, and that is not necessary for the plaintiff to prove that the defendant acted maliciously or without probable cause in making the attachment or resisting the application to have attachment removed.

References :—

I. L. R., 8 All., 452.
———, 9 All., 474.
———, 2 Bom., 360.
———, 3 Bom., 74.
———, 1 Bom., 467.
8 Bom., H. C., R., A. C., 29.
6 Mad., H. C. R., 192.
I. A. XVII., 17.
U. B. R. 1897-1901, II, 429.
———, 1904, Civ. Pro., 4.
I. H. & C. 621.
3 L. B. R., A. C., 413.

The Plaintiff-Respondent afer applying unsuccessfully to have an attachment removed, brought a suit under section 283, Civil Procedure Code, against Defendant-Appellant the attaching decree-holder to have it declared that the property attached, namely, 13 head of cattle, belonged to him (the Plaintiff-Respondent) and not to the Judgment-Debtor, and for the value of the cattle (Rs. 150) and also Rs. 48 being costs incurred in the miscellaneous proceedings.

The First Court found for Plaintiff-Respondent for Rs. 150, th value of the cattle, but dismissed his claim for costs. On appeal the Additional Judge of the District Court upheld the First Court's finding as to the Rs. 150, and on Plaintiff-Respondent's objection under section 561, Civil Procedure Code, modified the First Court's decree by awarding Plaintiff-Respondent the costs he claimed (Rs. 48).

The present second appeal rests on 3 grounds * * * *

The other objections are * * * and that it not being shown that Defendant-Appellant's attachment was malicious or grossly unreasonable, Plaintiff-Respondent was not entitled to costs.

* * * * * *

In regard to the Rs. 48 claimed on account of costs, I may note first that according to the record of the miscellaneous proceedings, Plaintiff-Respondent's costs came to Rs. 16-8-0, and Defendant-Appellant's

KUMARAPPA CHETTI v. NGA PYI.

(which Plaintiff-Respondent was ordered to pay), to Rs. 19-3-0. Total Rs. 35-11-0. The statement attached to Plaintiff-Respondent's plaint in the regular suit does not coincide with the decree in the miscellaneous proceedings, and includes a sum of Rs. 31 " for redeeming the cattle." Characteristically the Judge of the First Court made no attempt to ascertain what that meant. No objection however has been taken on the part of the Defendant-Appellant, to the amount or composition of the Rs. 48, and it is evident that it is not an excessive claim for damages if Plaintiff-Respondent is entitled to recover damages at all.

On this point Defendant-Appellant apparently relies on *Palaneappa Chetti* v. *Shwe Gè*,* but all that was decided in that case was that a suit for costs would lie when there was no colourable justification for attaching or for defending the application for removal of attachment. My learned predecessor did not decide whether a plaintiff who succeeds in a suit under section 283 would be entitled to recover costs in every case. Nor did he decide that costs are irrecoverable when it is not shown that the attachment was malicious or grossly unreasonable. As far as it goes I entirely concur in that judgment. But apparently my predecessor overlooked *Bhagwan Das* vs. *Law Shin* ** and from the reference to Pollock's Law of Torts, I think it probable that his attention had not been drawn to the fact that the Indian law differs from that of England on the subject of the malicious abuse of legal process and especially in regard to wrongful attachment. This is explained fully in Chapter V of Alexander's Indian Case Law on Torts. Even in cases where the person complaining is a party to the proceedings in the execution of which the process is taken out, sections 491 and 497, Civil Procedure Code, expressly recognize a right to sue for compensation, and where the party complaining is a stranger to the proceedings, this right has been even more emphatically affirmed. The latest and most authoritative of the decisions bearing on this subject is that of the Privy Council in *Kissori Mohon Roy and others* vs *Harsuk Das*† (cited in *Bhagwan Das* vs. *Law Shin*)** where their Lordships said :

" The appellants argued . . . . . that the Respondent could not recover . . . . . unless he alleged and proved that they had litigated maliciously and without probable cause. That is a rule which obtains between the parties to a suit when the Defendant suffers loss through its institution and dependence. It does not apply to proceedings taken by the injured party after the wrong is done to obtain redress. But in this case there has been no action, and no proceeding instituted by the Appellants against the Respondent. . . . . The summary proceeding under section 278 was taken by the Respondent for the purpose of getting the release of an attachment issued in a suit to which he was not a party; and it does not appear to their Lordship that in order to entitle him to recover full indemnity for the wrongful attachment of his goods the Respondent is bound to allege and prove that the Appellant resisted his application maliciously and without probable cause. The Appellants relied mainly upon the English case of *Walker* v. *Olding* †† which was cited as an authority for the proposition that a udgment-creditor is not responsible for the consequences of a sale, under a judicial

* U. B. R., 1904, Civ. Pro., 4.
† I. A., XVII, 17.
** U. B. R., 1897-04, II, 429.
†† 1 H. and C., 621.

order, of goods illegally taken in execution in satisfaction of his debt. *Walker* v. *Olding* would have been an authority of importance had the law of execution been the same in India as in England, but there is in that respect no analogy between the two systems. In England the execution of decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India warrants for attachment in security are issued on the *ex-parte* application of the creditor who is bound to specify the property which he desires to attach and its estimated value. . . . . The illegal attachment of the Respondent's jute . . . . . was thus the direct act of the Appellants for which they became immediately responsible in law, and the litigation and delay and consequent depreciation of the jute being the natural and necessary consequences of their unlawful act, their Lordships are of opinion that the liability which they incurred has been rightly estimated at the value of the goods upon the day of attachment."

The goods had been sold in execution and had realized about half what they were worth at the date of the attachment. The Respondent had sued under section 283, Civil Procedure Code, in order to establish the right which he claimed in the goods and for damages in respect of their wrongful attachment, and damages had been assessed by the Court at Rs. 24,584, being the market value of the jute at the time of the attachment.

The liability of a decree-holder who wrongfully attaches the property of a person not a party to the suit to make compensation had been affirmed in similar language in *Subjan* v. *Sariatulla* † (1869) and in *Goma Muhad Patel* v. *Gokal Das Chimji and another* †† (1878).

In the former Norman, J., said:

"If a decree-holder having obtained a warrant authorising the attachment of the goods of A, points out to the officer of the Court and causes him to attach and remove goods belonging to B as the goods of A, the decree-holder is a wrong-doer, and cannot in any way justify his proceedings under the warrant. In causing B's goods to be attached and taken out of his possession, he procures a trespass to be done to B. If a man for his own profit and advantage wrongfully or without any warrant in law trespasses on the land of another, takes away his goods or procures his goods to be seized and taken out of his possession he is responsible even though he acts innocently, or mistakenly."

In the latter Westropp, C. J., said:

"When the wrongful seizure was made at the special instance of the Defendant the cause of action was complete . . . . . and no question of remoteness of damage seems to us to arise here."

In none of these cases were the costs of the miscellaneous proceedings claimed, and the question of costs was not expressly mentioned. But there is nothing in the judgments from which it can be inferred that such costs are not recoverable. On the contrary the principle enunciated is that the decree-holder having acted unlawfully in making the attachment is liable to make full compensation to the injured person for all losses sustained in consequence of the attachment, and in *Kissori Mohan Roy's* case the subsequent litigation is expressly included among the "natural and necessary consequences of the unlawful act."

† 3 B. L. R., A. C., 413. †† I. L. R., 3 Bom., 74.

97

KUMARAPPA CHETTI v. NGA PYI.

Of the cases referred to in *Palaneappa Chetti* v. *Shwe Gè* above cited, that of *Chengulva Raya Mudali* † (1871) was one where the Plaintiff sued for costs incurred by him in proceedings to compel registration, such costs not being awardable under the Registration Act in those proceedings. It was held that the suit was really one for damages directly consequent upon the egal injury caused by the conduct of the Defendant. This is precisely how the claim for costs in a case like the present presents itself to me.

In the anonymous case in 3 Madras H. C. R., 341, (1867) the decree-holder was the Plaintiff and he sought to recover the costs he had incurred in successfully resisting the application for removal of attachment, though the Judge had refused him costs in the miscellaneous proceedings.

In *Jalam Pavja* v. *Khoda Janra* * it was held that where in a special local act costs had not been provided for, the intention was that costs should not be recoverable.

In *Pranshankar Shivshankar* v. *Govindhal Parbhudas* § (1876) which was a suit by a decree holder to recover costs incurred by him in unsuccessfully resisting the application for removal of attachment, he having subsequently succeeded in a regular suit, the decision was based on the English rule as stated in Addison on Torts. In *Kabir* v. *Mahabuo* ** (1877), the facts were similar to those of the Madras anonymous case.

In *Mahram Das* vs. *Adjudhiao*†† (1886) Mahmud, J., applied the analogy of section 13, Civil Procedure Code, and held that the principle was "not limited to damages in tort."

Kadir Baksh v. *Salig Ram*¶ (1887) was a suit by a decree-holder who had been unsuccessful in the miscellaneous proceedings. His right to attach was delared, but his claim for the costs of the miscellaneous proceedings was disallowed because the Court thought, following *Mahram Das's* case, that where a Court having jurisdiction had refused costs a separate suit to recover them was not maintainable.

On this last point I concur with my learned predecessor that the principle enunciated cannot govern a case in which the substantive order to which the order for costs was subsidiary is found to be erroneous. Apart from this it will be seen that none of the five decisions last mentioned has any force or applicability in the case of a person who has had his goods wrongfully attached, and who sues for damages for the loss he has sustained in consequence.

The rule applicable is stated by Alexander at page 225 of his work (above cited). "In cases where process is executed against a third person not a party to the proceedings . . . . . an action for damages will lie, however innocently and mistakenly the decree-holder

† 6 Mad., H. C. R., 192.
§ I. L. R. 1 Bom., 467.
* 8. Bom., H. C. R., A. C., 29.
** I. L. R. 2 Bom., 360.
†† I. L. R., 8 All., 452.
¶ I. L. R., 9 All. 474.

may have acted," and it follows from what has been said above that such damages may include costs incurred in the proceedings for removal of attachment.

In short it was not necessary for the Plaintiff-Respondent in the present case to prove that the attachment was malicious or grossly unreasonable.

The appeal is dismissed with costs.

99.

Civil Procedure—551.

Before A. M. B. Irwin, Esq., C.S.I.

Civil Second Appeal No. 64 of 1905. April 6th.

MAUNG SAN KO AND TEN OTHERS *v.* MA MYO MA AND TEN OTHERS.

Mr. J. C. Chatterjee for Appellants.

In section 12 of the Limitation Act, the "time requisite for obtaining a copy" does not commence until the Appellant does something to obtain the copy. Delay in signing a decree cannot be brought in to benefit a person who has not made any application to obtain a copy.

References:—

I. L. R., 13 Cal., 104 (dissented from)
12 All., 79.
12 All., 461.
23 Bom., 442 (followed).

The dated of the decree appealed against is 21st September 1904. Copy was applied for on 7th December 1904, and delivered on 18th January 1905. The appeal was presented on 3rd March 1905.

On the back of the copy of decree is a note by the Head Judicial Clerk "Decree received from Additional District Judge on 7th January 1905." On this the Appellant asks me to hold, firstly that the decree was actually signed on 17th January, and secondly, that limitation therefore began to run from 17th January. The former proposition may be taken as true, at any rate to this extent that it was not in the power of the Court Clerk to give a copy of the decree before 17th January. The authority cited for the latter proposition is the Full Bench case of *Bani Madhub Mitter* v. *Matungini Dassi*.* The effect of that decision, as applied to the present case, is not that time began to run on 17th January, quite the contrary, but that the period from 22nd September 1904 to 17th January 1905 should be excluded in computing the period of limitation under section 12 of the Limitation Act.

That decision was dissented from by two other High Courts in *Parbati* v. *Bhola*,† *Bechi* v. *Assan-Ullah Khan*‡ and *Yamaji* v. *Antaji*.§ I think there can be no doubt about which of these decisions are correct. If the Calcutta ruling were followed, it would enable a party to appeal even though he had not applied for a copy within the period of limitation. As the learned Judges said in the Bombay case: "The time requisite for obtaining a copy must, in our opinion, be confined to the action of the party who wishes to obtain the copy and must be taken to commence only when he does something in order to obtain the copy, and to end when he obtains the copy. We fail to see how any delay in signing the decree can be brought in to benefit a person who has not made any application to obtain a copy, or how it can be said that the time during which the delay lasted was time requisite for him to obtain a copy.....It will be found, we think, in most cases that a party is quite ignorant when the decree is actually signed."

This decison seems to me to be perfectly unassailable. Applying it to the present case, the period from 21st September to 3rd March is 163 days. Deducting from 7th December to 18th January, 42 days, the remainder is 121 days.

The appeal is dismissed under section 551, Civil Procedure Code.

* I. L. R., 13 Cal. 104
† I. L. R., 12 All., 79.
‡ I. L. R., 12 All., 461.
§ I. L. R., 23 Bom., 442.

Civil Procedure—622.

Civil Revision No. 68 of 1904. May 22nd, 1905.

Before G. W. Shaw, Esq.

NGA SHWE THIN *v.* NGA NYUN.

Mr. *C. G. S. Pilly*—for Applicant. | Mr. *S. Mukerjee*—for Respondent.

Power of High Court to interfere in Revision.

Section 230, Civil Procedure Code and Article 179, Schedule II, Limitation Act. Ordering execution of decree after more than three years from date of last application for execution an illegality within the meaning of section 622.

References:—

I. L. R., 11 Cal., 6.
L. B. R., 1904, 4th quarter, 333.
U. B. R., 1897-01, 311.
————, 1897-01, 477.

On the 15th September 1897 respondent obtained a decree against applicant Shwe Thin for Rs. 300. He applied for execution in 1897, in 1899, and in 1901. Finally he applied for execution by arrest of the judgment-debtor (applicant, Shwe Thin), in Execution Case No. 66 of 1904, on the 19th July 1904. Shwe Thin objected that the application was barred by Article 179 of Schedule II of the Limitation Act. The application of 1901 was made on the 30th April 1901, and under Article 179 (4) of Schedule II above cited, the new application having been made more than three years after that date was barred.

The Judge of the Township Court however disallowed the objection and ordered execution. This was on the 30th July 1904.

On the 5th August 1904 applicant, Shwe Thin, invoked the interference of this Court in Revision.

I am opinion that the order of the Township Court was an order under section 244, Civil Procedure Code, and was therefore appealable and the applicant's proper course was to appeal, but by the time the proceedings had been called for, the time for appealing had expired, and the Limitation Act makes no provision for an extension of time in a case of the kind.

In these circumstances the application for revision was admitted and I have no doubt either of the power of this Court to interfere in revision, or of the propriety of such interference, provided there was illegality or irregularity within the meaning of section 622. The only ruling on the subject I can find is that in *Nga Thaing* v. *Thalè Ni*,* which does not conflict with this view. The cases cited by the advocate for respondent are not to the point.

It remains to consider whether the Township Court was guilty of any illegality or material irregularity in the order which it passed on the 30th July 1904. The Judge said in this order that the meaning of Article 179 when it referred to "cases not provided for by section 230 (*a*) (*sic*) Civil Procedure Code" was not clear, that section 230 (*a*) (*sic*) had been amended and cancelled and was therefore inconclusive [or "of doubtful significance" ဝတ္ထုဝယ္ဥာဒး] and it did not appear that (the application for execution) ought to be dismissed.

* U. B. R., 1897-01, II, 311.

NGA SHWE THIN
v.
NGA NYUN.

The meaning and effect of the Privy Council Ruling in *Amir Hasan's case* * have been discussed once again, and the conflicting interpretations cited. I shall follow that arrived at after an exhaustive examination of the existing decisions, by the Chief Court of Lower Burma in *Zeya* v. *Mi On Kra Zan and another*.† What I have to determine therefore is whether the Judge of the Township Court in making the order in question applied his mind to the law and the facts and used due consideration, or whether he failed to take into account some proposition of law or some facts in evidence which ought to affect his decision, whether the facts and the law applicable to the case were duly considered.

I am of opinion that it would be absurd to hold that the Judge duly considered the law, and was guilty of a mere error, which is not liable to correction in revision. The order makes clear that the Judge was unable to comprehend the meaning of section 230, Civil Procedure Code, or its bearing on Article 179, and was further under the misapprehension that section 230 had been modified and cancelled, in which case there could possibly be nothing in the way of Article 179. Section 230, Civil Procedure Code, and its bearing on Article 179 had been explained in *Po Thaung* v. *Nga Bya and another*, ‡ and the Township Court, if its order is to be interpreted as meaning that section 230 fixes a period of 12 years' limitation, went directly in the face of that ruling. In ordering execution of a decree more than three years after the last application for execution in contravention of the plain provisions of Article 179, the Township Court in my opinion acted illegally within the meaning of section 622, Civil Procedure Code. I therefore set aside the order and direct that the respondent's application for execution be dismissed with all costs.

* I. L. R., 11 Cal, 6.
† L. B. R., 1904, 4th quarter, 333.
‡ U. B. R., 1897-01, II, 477.

Civil Procedure—25.

Civil Appeal No. 16 of 1905. September 15th.

Before G. W. Shaw, Esq.

J. N. NANDI *v.* G. N. DASS.

Mr. *J. C. Chatterjee*—for Appellant.

A Superior Court cannot make an order of transfer of case unless the Court from which the transfer is sought to be made has jurisdiction to try it.

References :—

13 I. A., 134.
I. L. R., 16 All., 233.
——— 7 Bom., 487.
——— 18 Bom., 61.

The plaintiff-respondent instituted a suit in the Subdivisional Court at Mogôk. The defendant-applicant objected that that Court had no jurisdiction on the ground that the cause of action arose and the defendant-applicant resided at Thabeikkyin. It is not stated how the Subdivisional Court dealt with this objection. But the defendant-applicant applied to the District Court to transfer the case to the Court at Thabeikkyin. The District Court held that the Subdivisional Court, Mogôk, had no jurisdiction, but refused to transfer the case. Although the grounds on which this order was passed were not good grounds, there appears to be no doubt that if the Subdivisional Court, Mogôk, had no jurisdiction, the District Court was right in refusing to transfer the case. In *Ledgard and another* v. *Bull* * (1886) the Privy Council held that under section 25, Civil Procedure Code, the Superior Court cannot make an order of transfer of a case unless the Court, from which the transfer is sought to be made, has jurisdiction to try it. There are other decisions to the same effect, but the case cited is sufficient authority for disposing of the matter.

Again, it has been held that the High Court will not interfere in revision with an order made under section 25, Civil Procedure Code (*cf. Farid Ahmad and others* v. *Dulari Bibi* † and *Krishna Velji* v. *Bhan Mansaram* ‡).

If the Subdivisional Court has no jurisdiction what the plaintiff-respondent ought to do is to obtain leave to withdraw the suit under section 373 (*Jagjivan Javherdas Seth* v. *Magdum Ali*§). If the case proceeds to judgment and decree the defendant-applicant's remedy is by an appeal against that decree.

The application is dismissed.

* 13 I. A., 134.
† I. L. R., 16 All., 233.
‡ I. L. R., 18 Bom., 61.
§ I. L. R., 7 Bom., 487.

Civil Procedure—463.

Civil Appeal No. 319 of 1904. July 19th, 1905.

Before G. W. Shaw, Esq.

NGA KU *vs.* NGA THA HLAING.

Mr. *J. C. Chatterjee*—for Appellant. | Mr. *S. Mukerjee*—for Respondent.

If a person be admitted or found to be of unsound mind, although he has not been adjudged to be so under Act XXXV of 1858, or any other law for the time being in force, he should, if a Plaintiff, be allowed to sue through his next friend, and the Court should appoint a guardian *ad litem* where he is the Defendant.

References:—

I. L. R., 20 All., 2.
——13 Bom., 656.
——23 Bom., 653.
37 Ch. Dn., 420.

The plaintiff-respondent Tha Hlaing sued "as next friend of Nga Nyo." The plaint was not correctly drawn. It should have stated that Nga Nyo a person of unsound mind sued by his next friend Tha Hlaing. The defendant-appellant took no objection to the form of the suit, and did not deny either Nga Nyo's unsoundness of mind or his right to sue by a next friend.

It appears that Nga Nyo first brought a suit himself without any one's assistance, and this the Township Court allowed him to withdraw, or dismissed, directing him to sue by a next friend. On appeal to the District Court the defendant-appellant objected to the legality of the suit by Tha Hlaing as Nga Nyo's best friend, and asserted that Nga Nyo was not insane. The Additional Judge disallowed the objection on the ground that it had not been raised before.

The first grouud of second appeal is that the first suit having been dismissed and not withdrawn the second suit was barred by section 373, Civil Procedure Code. The second is that Tha Hlaing "had no status to sue during the lifetime of Nga Nyo." The wording is, strictly speaking, inapplicable to the facts, but the real objection taken, as I understand, is that Nga Nyo not having been adjudicated a lunatic under Act XXXV of 1858, could not, under section 463, Civil Procedure Code, sue by a next friend if he was insane, while if he was not insane he was equally unable to sue in this way.

The proceedings in Nga Nyo's first suit had not been submitted and it was necessary to call for them. They show exactly what happened. The Township Court found on examining the plaintiff Nga Nyo that he was of unsound mind, and after enquiry decided to appoint Tha Hlaing to be his next friend. To this course the defendant consented, but afterwards applied under section 442, after serving notice on the plaintiff's pleader, to have the case taken off the file, and the Court accordingly passed an order "dismissing the suit, with leave to plaintiff to bring a fresh suit by a next friend." In short, the

NGA KU
v.
NGA THA HLAING.

Township Court was acting under section 442, Civil Procedure Code, on the application of the defendant, and the use of the word "dismiss" instead of "take off the file" is obviously no ground on which the defendant can now call this order in question, especially as he used it himself in his application, and said he was prepared to defend a fresh suit instituted by Tha Hlaing as Nga Nyo's best friend. I am surprised at the defendant-appellant's learned Advocate now attempting to go behind this application.

With reference to the second ground there are no decisions of this Court or of the Lower Burma Chief Court on the subject, but there are several Indian cases which are directly in point. In *Tukaram Anant Joshi* vs. *Vithal Joshi* * (1889) the question was considered whether irrespective of Chapter XXXI, Civil Procedure Code, a next friend had a right to sue on behalf of a person who was of unsound mind although not so adjudicated; and it was held that the answer depended on the principles of equity as applied in the practice of the tribunals. On the basis of Daniell's Chancery Practice the learned Judges held that a suit for immoveable property could not be instituted by a next friend in such circumstances. In *Nabu Khan* vs. *Sita* † (1897) a Bench of the High Court of Allahabad took the same view of Chapter XXXI. They said "In our opinion the provisions of the Civil Procedure Code (Chapter XXXI) are not in this respect exhaustive and we hold that if a person be admitted or found to be of unsound mind, although he has not been adjudged to be so under Act No. XXXV of 1858, or any other law for the time being in force, he should, if a plaintiff, be allowed to sue through his next friend, and the Court should appoint a guardian *ad litem* where he is the defendant." They also pointed out that the English law is no longer what it was stated to be in Daniell's Chancery Practice, the case of *Porter* vs. *Porter* ‡ having decided that an action which is *primâ facie* for the benefit of a person of unsound mind (*e.g.*, a partition action) may be brought by the next friend. The same view was taken in 1899 by the Bombay High Court in *Pransukham Dinanath* vs. *Bai Lad Kor* § where it was said "The Code of Civil Procedure is silent upon the point at issue here and we must therefore act upon general principles and in conformity with the practice of the Court of Chancery," and, quoting from Lord Justice Bowen in *Porter* vs. *Porter* "The Court ought to be satisfied, so to speak, of the title of the next friend to intervene, and it ought to be satisfied that the person is of unsound mind and that he stands in need of protection as regards his property, and it ought to be shown that it would be for his true interest that the Court should exercise its jurisdiction."

Here the next friend is the son-in-law of the person alleged to be of unsound mind, and no doubt a proper person to act as next friend. As to the unsoundness of mind the Township Court besides the opinion which it formed from its own examination of Nga Nyo, examined two witnesses, who testified to the fact that Nga Nyo was of unsound mind, and it then came to the conclusion that he was of

* I. L. R., 13 Bom., 656.
† 37 Ch. Dn., 420.
‡ I. L. R., 20 All., 2.
§ I. L. R., 23 Bom., 653.

unsound mind. The fact that Nga Nyo was examined as a witness for defendant-appellant in the second case is not sufficient to show that he had ceased to be of unsound mind. On the contrary, the evidence he gave is, in my opinion, the evidence of a man of weak intellect on the face of it.

The suit being one for the redemption of land where the mortgage was denied was obviously in the interest of Nga Nyo.

The next ground of appeal is that oral evidence of the mortgage should not have been admitted since there was a mortgage deed. This objection is not sustainable. The evidence was that defendant-appellant took away the deed after it had been executed, which it was natural he should do, he being the mortgagee. In his plaint the plaintiff-respondent alleged that defendant-appellant had the mortgage deed and prayed that he might be called upon to produce it. Defendant in denying that he had any such deed and failing to produce it, it was open to plaintiff-respondent to give secondary evidence of its contents [section 65 (*a*), Evidence Act] and there is nothing in the Evidence Act to restrict the secondary evidence to the plain paper draft which, as the writer said, became useless as soon as the fair copy was written out and executed. And no doubt it was not kept at all. On the contrary, section 65 expressly declares that in a case like the present any secondary evidence is admissible.

The next ground of appeal is that registration was compulsory and the non-registration of the document therefore excludes oral evidence. In 1252 B.E. (1890-91) the law did not require the registration of documents in Pagan.

With regard to the last ground that the Lower Courts ignored the possession by defendant-appellant before 1242, it is evident that plaintiff-respondent's mortgage having been clearly proved and his witnesses having explained defendant-appellant's previous possession, the burden of proof lay upon defendant-appellant to show that he was the owner and he practically adduced no evidence. His only witnesses were plaintiff-respondent Nga Nyo and his next friend Tha Hlaing, who supported the plaintiff-respondent's case.

The appeal is dismissed with costs.

Civil Procedure—574.

Before G. W. Shaw, Esq.

Civil Appeal No. 48 of 1905. September 8th

NGA TUN MIN *v.* NGA LU GYI, THA ZAN, SHWE THI, MI LI, NGA PE, NGA KYA BIN AND PO SI.

Mr. *C. G. S. Pillay*—for Appellant. | Mr. *H. N. Hirjee*—for 1st Respondent.

The judgment of the Appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge, and that he exercised his own discrimination in deciding them.

References :—

I. L. R. 22, Mad. 12.
——————— 344.
15, W. R., Civ. 54.
25, W. R., Civ. 12.

This second appeal has been preferred on two grounds: (1) that the udgment of the Lower Appellate Court does not conform to section 574, Civil Procedure Code; (2) that the additional loans were alleged to be upon land mortgaged by a document and oral evidence was not admissible to prove the same.

As regards the second ground nothing has been said in support of it in argument, and it may be taken to have been abandoned. It is manifest that it is untenable. There was no obligation upon the parties to reduce to writing the transactions by which further loans were made on the mortgage.

On the first point it is much to be regretted that the Lower Appellate Court should have afforded an opportunity to the Appellant to come up on second appeal on such a ground. The decisions on the subject are not in entire agreement. The respondent relies on the rule laid down in *Lala Juggesar Sahai* v. *Gopal Lal* * and *Sayyid Shah Ikbal Husain*.†

"that where the decision of a case involves issues of fact chiefly, and the first Court has gone into the evidence carefully, the Court, if it agrees with the Lower Court, is not bound to state in detail the reasons previously recited and in which it concurs."

I take it that these are the rulings on which respondent relies since the reference which his learned Advocate gave is incorrect, and applies either to *Sitarama Sastrulu* v. *Suryanarayana Sastrulu*, ‡ or to *Subbaya* v. *Rami Reddi*,§ both of which are against him. In the present case the only question was whether defendant-respondents proved the subsequent loans which they alleged. The Judge of

* 15, W. R., Civ. 54.
† 25, W. R., Civ. 12.
‡ I. L. R., 22 Mad., 12.
§ *Ib.* ——————— 344.

NGA TUN MIN v. NGA LU GYI.

the Subdivisional Court did not examine the evidence at all. All he said was "No witnesses were called by the plaintiff..... and from the evidence produced by the defendants I find..... that the additional three sums were paid by the defendants to the plaintiff."

On appeal to the District Court one of the objections taken by plaintiff-appellant was that there was no sufficient proof and the evidence was untrustworthy on account of discrepancy and the witnesses, being the first defendant's relations. All that the Lower Appellate Court said on this point was "The defendant produced witnesses to prove subsequent loans up to Rs. 350..... This was not rebutted. No witnesses were produced by the plaintiff to contradict a *prima facie* case against him."

It appears to me that neither of the Calcutta cases above cited is authority for an Appellate Court, disposing of an appeal in such a way in the circumstances detailed. The 1st Court had not gone into the evidence carefully. The witnesses were relations of the defendants-respondents and there were discrepanciesi n their statements. It was a ground of appeal that the proof was insufficient for these reasons. It was the plain duty of the Lower Appellate Court to consider that ground of appeal, and to examine the evidence, and give reasons for a decision upon it. In the words of the learned Judges in *Sitarama Sastrulu's* case above cited, "the judgment of the Appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them."

I reverse the decree of the Lower Appellate Court and remand the case for the appeal to be restored to the file and disposed of according to law.

Costs will abide and follow the result.

112

Civil Procedure—15, 244.

Before G. W. Shaw, Esq.

Civil Appeal No. 28 of 1905, October 2nd.

NGA SA GYI *v.* NGA YE BAN AND NGA TUN MAUNG.

Mr. *S. Mukerjee* for Appellant. | Mr. *H. N. Hirjee* for Respondents.

A suit by a party to execution proceedings to have a Court sale certificate set aside on the ground of fraud will lie when the decree has ceased to be capable of execution, and it is no longer open to the pliantiff to apply under section 244, Civil Procedure Code, to the Court executing the decree.

Where a Subdivisional Court having jurisdiction under section 10, Upper Burma Civil Courts Regulation, entertains in contravention of section 15, Civil Procedure Code, a suit which should have been instituted in the Township Court, this is a mere irregularity, which does not vitiate the proceedings.

References:—

I. L. R. 22 Bom. 267.
10 Cal. 538.
19 Cal. 683.
25 Cal. 718.
,, 20 Mad. 349.

Plaintiff-appellant was the judgment debtor in a suit by defendant respondent Ye Ban for Rs. 509-4 in the Township Court, Lewe (Civil Regular No. 189 of 1899). In execution of decree plaintiff-appellant's land was attached and proclaimed for sale (Execution case No. 77 of 1899 of the same Court). This in 1899. In 1901 (on the 16th May) a certificate of sale was granted by the Court to defendant-respondent Tun Maung, defendant-respondent Ye Ban's son, who in 1899 was only 12 or 13 years of age.

On the 9th May 1904 plaintiff-appellant instituted the present suit in the Subdivisional Court, Pyinmana, "for a declaration that no (auction) sale by the Lewe Court ever took place and that the sale certificate was void." These are the words of the prayer in the plaint. Plaintiff-appellant's own account was that there was no sale at all, that he made an arrangement with the defendant-respondent Ye Ban at the Court house, by which the sale might be avoided, *viz.*, that he was to work the land (as defendant-respondent's tenant or servant) and to hand over all the produce to the defendant-respondent, Ye Ban, for three years in satisfaction of the judgment debt, and in accordance with this arrangement defendant-respondent, Ye Ban, got the produce for, 62 (00-01), 63 (01-02) and 64 (02-03) and gave him subsistence allowance (for two years). In 1263, he (plaintiff-appellant) came to know that defendant-respondent had got a certificate of sale, and in 1265 (1903-04) defendant-respondent Ye Ban prosecuted him for selling some of the produce of the land.

He called defendant-respondent Ye Ban as a witness and what Ye Ban said was this:—At the time for which that sale had been proclaimed the country was flooded and the land inaccessible, so an arrangement was made at the Court house, whereby plaintiff-appellant agreed to sell the land to his defendant-respondent Ye Ban's (minor) son, defendant-respondent Tun Maung (for Rs. 466). No gong was

NGA SA GYI v. NGA YE BAN.

beaten and there were no bidders; only the Bailiff and a headman were present besides the parties. In 1901 he got a certificate of sale. In a case in which defendant-respondent Ye Ban prosecuted one Shwe Waing for criminal trespass on the land in question in 1902, (Nattaw 1263) plaintiff-appellant was examined as a witness for defendant-respondent and according to the copy of his deposition filed in the proceedings he then told a story which agrees with defendant-respondent Ye Ban's statement. This copy was certified and was admissible in proof of its contents under section 65, Evidence Act, and section 145, Evidence Act, was duly complied with.

Two other important admitted facts may be mentioned. After the transaction in the Lewe Court house, defendant-respondent allowed plaintiff-appellant to sell a small part of the land, and plaintiff-appellant witnessed several leases by defendant-respondent Ye Ban to tenants The execution proceedings were not submitted and it was necessary to call for them. The diary entries are to the effect that the floods prevented the sale on the date fixed, that on the 26th September (a month and 13 days after that date), sale proceeds Rs. 509-4 were deposited and ordered to be paid to the decree-holder. Under the same date there is a report by the Bailiff that the land was sold by auction to one Tun Maung for Rs. 466+70 (=536) or deducting Bailiff's commission (Rs. 26-12) Rs. 509-4. The report does not mention when or where the sale was held. In the diary under date 9th September 1899, the Judge ordered that the "sale proceeds Rs. 509-4" were to be deposited by Tun Maung within 15 days, so that some report must have been made to him by that date, as to the fact and particulars of the alleged sale so far at least as regards the name of the purchaser and the amount paid. It is to be noted that Rs. 409-4 was the precise amount of the decree money and if anything were wanted to confirm the story told by the parties, it is to be found in the fact that the net proceeds of sale came to this exact sum. On the other hand there is nothing in the execution proceedings to throw doubt on this story.

There can be no reasonable doubt as to what took place. The parties with the assistance of the Bailiff agreed to a private assignment—perhaps they called it a sale—to the defendant-respondent, in the name of his minor son, and the probability is that there was some understanding that the land would be restored to plaintiff-appellant after a time. This is indicated by the admitted facts above mentioned that defendant-respondent afterwards allowed plaintiff-appellant to sell a part of the land and that his presence was obtained to witness leases to tenants by defendant-respondent. But whatever the actual agreement was, there was no court sale, by auction, held in a proper manner: and the sale certificate was a fraudulent document.

So much for the facts, as to which I am unable to agree with the view taken by the Lower Appellate Court.

In regard to the plaintiff-appellant's suit to have the sale certificate set aside, several legal points of difficulty have been raised.

In the first place is the question whether plaintiff-appellant ought to have proceeded by suit instead of by an application under section 244. The ruling of the Privy Council in *Prosunno Kumar Sanyal* vs. *Kali Das Sanyal** has been interpreted by the Calcutta High Court in several cases down to 1899 as having laid down that a suit to set aside a sale on the ground of fraud will not lie, the question at issue being one "relating to the execution, discharge, or satisfaction of the decree," and although the cases of *Minakshi Ammal* vs. *Kalianarama Rayera* † (1897) and *Ishwar Chandra Dutt* vs. *Haris Chandra Dutt* ‡ (1898) have been decided otherwise, in circumstances which are not readily distinguishable, the weight of authority is decidedly against a regular suit. The question at issue in the present case is clearly no less one relating to the execution, etc., of the decree than that in a suit to set aside a sale on the ground of fraud. But the decree must be a subsisting decree capable of execution. In *Neadhar Rao* vs. *Ramrao and another* § (1896) it was held that where a decree was not capable of execution (in a suit for a declaratory decree) a party could not proceed under section 244 but must do so by regular suit. And cases more directly in point are those of *Fakaruddin Mahomed Ahsan* vs. *Official Trustee of Bengal* ‖ (1884) and *Juggut Chunder Bhadooree and another* vs. *Shib Chunder Bhadooree* ¶ (1871). In the former it was held that "Court executing the decree" in section 244 means executing the decree at the time the application is made, and not to the Court which has executed the decree, and has thereby become *functus officio*, where the decree has been satisfied and the execution proceedings have been struck off. In the latter (a case under Act VIII of 1859) where a decree had been executed, and proceedings were afterwards taken (as if in execution) to recover an elephant, it was held that the decree having been executed, the claim to the elephant could not be dealt with in execution proceedings, and the parties should have been referred to a separate suit.

In the present case it is not disputed that the decree was dead at the time plaintiff-appellant instituted his suit. The application for execution had been made on the 6th July 1899 and no subsequent application had been made either for execution or to take some step in aid of execution. Therefore no further proceedings could be taken in execution [Article 179 (4), Schedule II, Limitation Act].

In these circumstances I think it is clear that plaintiff-appellant at the date of suit could not proceed by way of application under section 244, and it is immaterial whether he might have been able to make such an application at the time he became aware of the existence of the sale certificate. He was not bound to proceed then. He had three years to apply in, under Article 178 of Schedule II of the Limitation Act, and if when he did come to institute his proceedings within that time he found that the decree was dead, there was nothing to prevent him from bringing a regular suit if he was within limitation for a regular suit.

* I. L. R., 19, Cal. 683.
† ——— 20, Mad.
‡ ——— 25, Cal. 718.
§ I. L. R., 22, Bom. 267.
‖ ——— 10, Cal. 538.
¶ ——— 16, W. R. Civ. 269.

NGA SA GYI v. NGA YE BAN.

The next point is whether the plaintiff-appellant could sue in the Subdivisional Court. It is asserted on his behalf that he values the land at Rs. 2,500 but this did not appear in his plaint. On the other hand the sale certificate purports to be a certificate of a sale for Rs. 460. As will be seen from the particulars taken above from the Bailiff's report this figure was seriously incorrect; a fact by the way which in itself appears to be evidence of the fraudulent character of the document. But if the suit ought to have been brought in the Township Court, I am of opinion that the error was a mere irregularity which did not vitiate the proceedings, since the Subdivisional Court had jurisdiction under section 10, Upper Burma Civil Courts Regulation.

It remains to consider what the real nature of the suit was and whether it was barred by limitation. The learned Advocate for plaintiff-appellant contends that it was a declaratory suit,—a suit to set aside an (alleged) sale on the ground of fraud, and to cancel a document. For defendant-respondent it is contended (1) that it was a suit for a pure declaration that there was no sale and (2) that it could not lie because defendant-respondent was in possession and the plaintiff-appellant ought to have claimed consequential relief. It seems to me that the suit was plainly one under section 39, Specific Relief Act "to have the certificate of sale adjudged void" on the ground that no Court sale took place (see the prayer in the plaint quoted above) and this being so, it is immaterial which party is in possession [*cf.*, Illustration (*b*) to section 39]. There is no proviso, or other restricting clause to section 39 similar to the proviso to section 42.

In regard to limitation, the Lower Appellate Court appears to have thought that Article 12 of Schedule II applied. But this is manifestly wrong. I think that either Article 91 or Article 95 is the article applicable. In either case the suit was in time. The certificate of sale, as will be seen from the dates above stated, was given within three years of suit and the plaintiff-appellant therefore could not have been aware of its existence at an earlier date. This shows that the headman must have been making a mistake when he spoke of 1261 or 1262.

From what has been said above it follows that the plaintiff-appellant was entitled to a decree. No Court sale having been held and the sale certificate being consequently a fraudulent document he was entitled to have it set aside.

The decree of the Lower Appellate Court is set aside and that of the first Court is restored with costs.

116

Civil Procedure—525.

Civil Appeal No 283 of 1904. December 11th 1905.

Before G. W. Shaw, Esq:

(1) MI E MYA,
(2) MI THI NU,
(3) U SEIN DA,
(4) MI KYWE,
(5) NGA MYA,
(6) MI SAW NYUN,

v. NGA PE.

Mr. A. C Mukerjee—for appellants. | *Mr. Thaw Gywe*—for respondent.

In a case where a court has ordered an award to be filed under section 525 Civil Procedure Code.

Held—that an appeal impugning the award on grounds falling under section 521, Civil Procedure Code, does not lie.

References:—

29 I.A., 51 (P.C. 1901) followed.
U. B. R., 1897—1901, II, 14, to this extent overruled.
2 C. L. J., 153.

The Respondent applied under section 525, Civil Procedure Code, that an award might be filed in Court. The Appellants raised several objections imputing misconduct to the arbitrators within the meaning of section 521. The court enquired into these objections and found that they had not been made out, that no misconduct had been proved, and ordered the award to be filed.

A preliminary objection is taken to this appeal on the strength of the decision of the Privy Council in *Ghulam Jilani and others* v. *Muhammad Hasan** (1901) that no appeal lies.

In the case cited their Lordships held that an appeal does not lie against an order under section 522 even where the validity of the award is called in question, at least this appears to me to be the effect of the dicision.

The validity of the reference and the jurisdiction of the Court and the arbitrators to deal with part of the subject in dispute and by consequence the validity of the award were called in question.

The precise words used by their Lordships are, "Their Lordships would be doing violence to the plain language and the obvious intention of the Code if they were to hold that an appeal lies from a decree pronounced under section 522 except in so far as the decree may be in excess of, or not in accordance with the award. The principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decisions in this country. The time has long gone by since the Courts in this country showed any disposition to sit as a Court of appeal on awards in respect of matters of fact or in respect of matters of law."

*29 I.A., 51.

MI E MIA v. NGA PE.

In regard to cases falling under sections 523 and 525 a distinction is drawn on the ground that in cases dealt with under section 522, the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point. Whereas in cases falling under sections 523 and 525, proceedings described as a suit must be taken to bring the matter under the cognizance of the Court and those proceedings may be litigions and "it would seem that an order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code."

From this it would appear that appeals in certain circumstances are contemplated by this decision, in cases falling under sections 523 and 525.

Apparently this view has been taken in a recent case in the Calcutta High Court, *Chintamoni Aditya* v. *Haladhar Maiti** quoted from the Calcutta Law Journal in Row's current Index of Indian cases, 1905. But the full report of it has not been received.

I am however of opinion that in the circumstances of the present case an appeal according to the decision in *Gulam Jilani and others* v. *Muhammad Hasan* will clearly not lie, since the grounds on which the order of the Lower Court is impugned are all grounds falling under section 521, which the Lower Court enquired into and decided.

The present decision to this extent overrules *Mi Mi Tu* and *and another* v. *Nga Naing and others*† (1901) on the point in question.

The appeal is dismissed with costs.

The Lower Court's Judgment and decree should, I think, have been expressed in terms of the award, section 522 being read with section 526. But this is a mattet the Lower Court can deal with.

* 2 C. L. J., 153. | † U. B. R., 1897—1901, II, 14.

Civil Procedure—108.

Civil Rivision No. 95 of 1905. June 13th, 1906.

Before G. W. Shaw, Esq.

NGA THA DIN
MI TIN } v. NGA PO CHAN.

Mr. J. C. Chatterjee—for Applicants. | *Mr. S. Mukerjee*—for Respondent.

Held—that a Court re-opening a suit without making any enquiry or giving the opposite party the opportunity of opposing the application acts illegally or with material irregularity within the meaning of section 622.

References:—

I.L.R., 7 All., 345.
———2 Cal., 123.
———9 Cal., 869.
32 P. R., Civ., 20.
U. B. R., 1904-05, Civ., Pro., 26.
6 W. R., 51.
15 W. R., 210.
25 W. R., 72.

The Applicants obtained an *ex parte* decree against Respondent on the 10th June 1903. On the 6th August 1903 certain land was attached in execution, but the attachment was removed on the application of a 3rd party. The order removing the attachment was not appealed. On the 30th June 1905, certain other land was attached on a second application for execution.

On the 29th July 1905, Respondent applied under section 108, Civil Procedure Code, to have the *ex parte* decree set aside. The Township Court rejected the application as barred by Article 164, Schedule II, Limitation Act, more than 30 days having elapsed "since the first application for execution" (which was made on the 16th November 1903). The Court should have counted from the date of the attachment. Applicants appealed and the District Court reversed the order of the Township Court on the ground that it was bad in law and directed that the application should be re-entertained and dealt with on its merits. The Township Court then sent notice to the parties and forthwith set aside the *ex parte* decree, and proceeded to re-try the regular suit.

The Plaintiffs-Applicants in these circumstances seek the intervention of this Court in Revision on two grounds:—

First, that the Lower Appellate Court acted illegally in holding that the application under section 108 was within Limitation and secondly, that the Township Court acted illegally or with material irregularity in re-opening the regular suit without enquiring whether Respondent had sufficient cause for not appearing at the original trial of the suit, or giving Applicants an opportunity of opposing the re-opening of the case.

I am clearly of opinion that both these grounds are good grounds for Revision, on the principles adopted in *Nga Shwe Thin* v. *Nga Nyun*.* The District Court's judgment cites no authority and it is not very clear on what grounds the learned Additional Judge came to

* U. B. R., 1904-05, Civil Procedure, page 26.

NGA THA DIN v. NGA PO CHAN.

the conclusion that the application was not barred. It would seem that he construed the words "any process" in Article 164 as meaning either a first or a subsequent process since the judgment seems to proceed on the fact that the "later application" for execution "was made" (*sic*) on the 30th June 1905 (should have been the *attachment* on the later application was made on the 30th June). It is not disputed before me that this is opposed to the authorities, and that "any process" means the first process (*cf.*, *Har Prasad and another* v. *Jafar Ali** and *Bhaobanesari* v. *Judobandra Narayan Malik*†. But it is contended for the Respondent that in order to operate as a bar the process must be one legally executed against the person or property of the judgment-debtor. It is not denied that the property attached in the first execution proceedings was not the property of the Respondent. The order removing the attachment is admitted to have decided that finally.

The learned Advocate for Applicants however contends that in spite of this fact, the issue of the order of attachment under section 274, Civil Procedure Code, (in form No. 141 of Schedule IV), which is addressed to the judgment-debtor is sufficient to satify the requirements of Article 164. It is said that in the cases relied on by Respondent the attachment was illegal or improper whereas here the warrant of attachment was perfectly regular. No authorities however are cited.

On this point my opinion is against the Applicants. The cases of *Shib Chundar Bhaduri and others* v. *Lakhi Debia Chaudhrain*‡ (1866), and *Sukh Moyi Dasi* v. *Narmuda Dasi*§ (1871) were both cases like the present, where it was alleged that property not belonging to the judgment-debtor had been attached, and it was held that such an attachment would not operate as a bar under the Limitation law. The case of *Kali Prasad* v. *Digambar Chattarji*‖ (1876) is not in conflict with them.

In *Purno Chandar Kundu* v. *Prosonno Kumar Sikdar and another* ¶(1876), it was held that notice of execution of decree is not sufficient "process for enforcing" execution of a decree, and that process of execution means actual process by attachment of the judgment-debtor's person or property.

These cases are sufficient authority for holding that the first attachment in the present case did not bar the Respondent's application. The language of the article in question is not consistent with the interpretation put upon it by the learned Advocate for the Respondent. A warrant under section 274 is indeed addressed to the judgment-debtor among others, but it directs him not to alienate the particular property attached, and it is executed by being fixed up on the property and in other places, and by being proclaimed by beat of drum or other customary mode, in other words it is not required to be served upon the judgment-debtor. When land belonging to a third party is attached, the mere fact that the warrant purports to convey

* I.L.R., 7 All., 345. | † I.L.R., 9 Cal., 869. | ‡ 6 W. R., 51.
§ 15 W. R., 210. | ‖ 25 W. R., 72. | ¶ I.L.R., 2 Cal., 123.

directions to the judgment-debtor, cannot in itself constitute "execution of the process against the judgment-debtor's prosperty." In the Punjab case, which has been cited, *Ishra Singh* v. *Janda** (1897) it was held that the fact of the judgment-debtor's receiving notice was immaterial as it did not cure the defects of the attachment. The allegation there was that the judgment-debtor signed his name on the back of the warrant of attachment. For these reasons I hold that the Respondent's application in the present case was not barred.

In regard to the Township Court's procedure on receiving the order of the Lower Appellate Court, it is contended on the one hand that if Applicants had been given the opportunity they could have shown that Respondent was aware of the regular proceedings all along, or in short that he had not sufficient cause for not appearing, and on the other that Applicants ought to wait and appeal against the decree in the regular suit.

No doubt the Applicants could wait and take this objection in a regular appeal against the decree if the case should go against them. But I know of no reason why they should do so if they can contest the legality of the Township Court's proceedings in Revision at the present stage.

It is evident that the Township Court misunderstood the meaning and effect of the District Court's order. That order merely decided, as we have seen, that the Respondent's application was not barred by Limitation, and directed the Township Court to re-entertain it and deal with it on the merits. It did not decide that the regular case should be re-opened or direct the Township Court to re-open the regular case and deal with that on the merits. And it is equally evident that the Township Court, by re-opening the regular case as it did without making enquiry and satisfying itself on the points specified in section 108, acted illegally or with material irregularity. Section 108 only authorizes a Court to re-open a case if it is satisfied on those points. Section 109 expressly declares that a suit shall not be re-opened without notice to the opposite party. This shows that the legislature intended that the opposite party should have the opportunity of opposing the application. If the Court after giving notice proceeds immediately to re-open the case without making any enquiry at all, it does not carry out the intention of the legislature, and acts in a manner in which section 108 does not authorize it to act.

I therefore set aside the order of the Township Court re-opening the case, and direct that it proceed to deal with the application as required by sections 108 and 109. All that has been decided with reference to that application is that it is not barred by Limitation.

I make no order as to costs.

* 32 P. R., Civ. p. 20.

121

Civil Procedure 13 (II), (V).

Civil and Appeal No 46 of 1905. July 23rd, 1906.

Before G. W. Shaw, Esq.

NGA CHIT MAUNG vs. NGA PO KIN, NGA KYAN HLA, NGA PO GAUNG.

Mr. S. Mukerjee for appellant. | *Mr. J. C. Chatterjee* for respondents.

Held,—that in order to make section 13, Civil Procedure Code, applicable, it is not necessary that the matter of the subsequent suit should have been heard or have been fully decided by a competent Court in the former suit, when the case is one to which Explanation II applies.

References :—
I.L.R., 24 Cal., 711.
————20 All., 110.
————24 All., 429.
16I. A., 107.

The Defendants-Respondents, Kyaw Hla and Po Gaung, in Civil Regular Suit No. 392 of 1903, sued Plaintiff-Appellant and others to recover Rs. 400 being the value of 800 baskets of paddy, the crop on certain land, which they alleged Plaintiff-Appellant and his co-defendants to have wrongfully taken. Their case was that they were tenants of a 3rd party (the Defendant-Respondent Po Kin), and while rightly in possession under the order of some Court which was afterwards set aside in appeal they sowed and planted the crop, and that Plaintiff-Appellant, Chit Maung, and his co-defendants were only put in possession of the land by the Appellate Court and not of the crop. The defence was, leaving out technical objections of misjoinder, that the crop was raised by the defendants (Plaintiff-Appellant Chit Maung, etc.)

The Court found that the crop was sown by the Plaintiffs (Defendents-Respondents) in good faith while the Court's order in their favour was in force, and granted them a decree which was confirmed in appeal.

Then the Plaintiff-Appellant brought the present suit to recover Rs. 460 "damages" (or mesne profits) including rent (300 baskets of paddy) for the year 1265 (the same year for which the crop had formerly been in dispute), and moneys spent in seed grain and in ploughing the land and reaping and threshing "the crop sown by Defendants." It was objected that this suit was barred by section 13, Civil Procedure Code. The First Court found that it was not barred, because the issues were not the same, and the same evidence would not enable the Court to decide the case. The Lower Appellate Court held that the suit was barred because Plaintiff-Appellant ought to have made it a ground of defence that he had bought the land, and "the mere omission of the first Defendant Po Kin as a party to that suit does not prevent this suit from being *res judicata* under section 13, Explanations II and V, Civil Procedure Code.

The application of Explanation II to section 13 is a matter of considerable difficulty. The interpretation which the learned Advocate for Plaintiff-Appellant has given to it, however, is not that which is supported by the great majority of decisions. He contends that its object is merely to exclude irrelevant matters which a Court may have

NGA CHIT MAUNG v. NGA PO KIN.

unnecessarily decided, and that to bar a subsequent suit there must have been a hearing and a final decision.

But Hukm Chand in his excellent Commentary says "the effect of Explanation II is to extend the rule of *res judicata* to 'every matter which might and ought to have been made a ground of attack or defence' in the former suit and to dispense in regard to such matters with the necessity of actual hearing and decision: the fiction as to the matter being in issue necessarily implying also that it was adjudicated upon" (apparently a quotation from a Madras decision). He goes on to say with reference to Banerji, J.'s opinion in *Kailash Mondul* vs. *Baroda Sundari Dasi** one of the cases upon which Plaintiff-Appellant relies, that "so far as these observations support the contrary view they are inconsistent with the very purpose of the explanation, as well as with repeated decisions of the Privy Council." As an instance of these decisions he cites *Mahabir Prashad Singh* vs. *Macnaghten*† (P.C.) one of the cases relied upon by Defendants-Respondents, and the remarks of the Full Bench of the Allahabad High Court in *Sri Gopal* vs. *Pirthi Singh*.‡ "It is quite certain that in order to make section 13 applicable, it is not necessary that the matter of the subsequent suit should have been heard or have been finally decided by a competent Court in the former suit, when the case is one to which Explanation II applies: and indeed the Explanation would be meaningless if it were necessary, in a case which was covered by it, that the matter should have been heard and finally decided in the previous suit."

It may be observed that that particular decision was confirmed by the Privy Council no longer ago than in 1902.§ This as it seems to me disposes of the point. It remains then to consider whether it was a matter directly and substantially in issue, and Plaintiff-Appellant might and ought to have made it a ground of defence in the previous suit, that he had bought the land.

It has been held that a Plaintiff is bound to raise every title on which he can succeed, and similarly that a Defendant resisting a claim is bound to resist it upon all the grounds that it is possible for him according to his knowledge then, to bring forward. But having regard to the pleadings in suit No. 392 of 1903, it appears to me to be very doubtful if Plaintiff-Appellant can be held to have been bound to raise this defence. It is evident from the plaint that the Plaintiffs did not dispute the lawfulness of (Plaintiff-Appellant) Chit Maung's possession at the time of suit. They claimed to have been in possession in good faith on the strength of a judicial decison at the time they sowed and planted the crop. The rival claims to the crop were fought out on the ground that one or other sowed or planted the crop. And the Court decided in favour of the Plaintiffs on that ground and on the ground that they were in possession in good faith on the strength of the judicial decision. It does not appear that if Plaintiff-Appellant had set up his purchase of the land the decision would necessarily have been in his favour.

*I.L.R., 24 Cal., 711. | † 16 I.A., 107.
‡ ——— 20 All., 110. | § I. L. R. 24 All., 429.

124

I am therefore of opinion that the First Court was right on the point of *res judicata*.

On the merits, the Lower Appellate Court held that although the mortgage was unregistered, Defendant-Respondent Po Kin and Mi Bwe Dok (the mortgagors) "admitted" the mortgage, and that Plaintiff-Appellant "had notice of the mortgage." Apparently on these grounds the learned Additional Judge was of opinion that Plaintiff-Appellant's suit must be dismissed though he does not say so.

The alleged "admissions" are not admissions by or on behalf of Plaintiff-Appellant and therefore can have no relevancy as against him. He claims to be owner of the land and makes the alleged mortgagee a Defendant, and he denies the validity of the mortagage. The defence is based, so far as the merits are concerned, on the mortgage.

It appears to me that in these citcumstances section 6 of the Registration Regulation applies. The Court cannot allow the mortgage to be proved.

And the Defendants-Respondents' possession is no defence to the Plaintiff-Appellant' suit.

I am unable to find anything in witness, Hla Baw's statement to show that Plaintiff-Appellant had notice of the mortgage. Apparently the learned Additional Judge meant to refer to the witness, Hla Gyaw. But he is a brother of Defendant-Respondent, Po Gaung, and a witness for the defence, and Hla Baw does not corroborate him. The sale to Plaintiff-Appellant is satisfactorily proved.

For these reasons I set aside the decree of the Lower Appellate Court and restore that of the Court of 1st Instance. Defendants-Respondents will pay Plaintiff-Appellant's costs.

Civil Procedure, 43, 211, 212, 244.

Civil Appeal No. 12 of 1906. September 28th.

Before G. W. Shaw, Esq.

NGA LU PE *v.* NGA SHWE YUN.

Mr. J. C. Chatterjee, for appellant.

Held—That mesne profits for the period prior to institution which can be claimed in a suit for immoveable property, must be profits which the person in wrongful possession actually received or might with ordinary diligence have received during that period.

Reference :—

Upper Burma Rulings, 1904-05, I, Civil Procedure, page 1, referred to and partly dissented from.

Plaintiff-Appellant sued on the 8th April 1905 for Rs. 36 being the value of 200 viss of jaggery, which he claimed as mesne profits for the period Natdaw to Hnaung-Tagu 1266B.E. (December 1904 to April 1905) during which Defendants were in wrongful possession of his land. He had previously, namely, on the 17th February 1905, sued for possession of the land, and had obtained a decree on the 5th April.

The land consisted of a palm grove of 80 trees and the amount claimed represented what Plaintiff-Appellant alleged to be the outturn during the period named.

The First Court for Plaintiff-Appellant for the quantity of jaggery claimed, but valued it at Rs. 34. On appeal the District Court set that decree aside and dismissed the suit on the ground that it was barred by section 43, Civil Procedure Code. The Additional Judge in doing so relied on the Ruling of this Court in *Chit Le* v *Pan Nyo and another.** That case may have misled the Additional Judge, though he overlooked the difference between the date of institution and the date of decree.

What it decided was that mesne profits which can be claimed in a suit for immoveable property up to date of suit, but are not so claimed, cannot be subsequently sued for in a separate suit. My learned predecessor arrived at that conclusion after an examination of the conflicting decisions of the Indian High Courts, and I see no reason for dissenting from it. But I venture to doubt whether he applied it correctly to the facts of the case before him. The mesne profits claimed consisted of the value of a millet crop which was on the ground at the date the suit for possession was instituted.† It was only half grown at that time ("as high as the waist or knee or a man's height.") The explanation to section 211, Civil Procedure Code, defines mesne profits as those profits which the person in wrongful possession *actually received* or *might with ordinary diligence have received*, etc. It is plain that nothing could possibly have been received from a crop which was not full grown. I think my predecessor was mistaken in his reference to section 211, Civil Procedure Code. Comparing sections 211, 212, and 244 it seems clear that section 211 deals with the case where no mesne profits are claimed in the plaint.

* Upper Burma Rulings 1904-05, Civil Procedure, page 1.

† "Present" suit is a *lapsus calami* for *previous* suit.

NOA LU PE
v.
NOA SHWE YUN.

In short I am of opinion that mesne profits up to date of suit which can be claimed in the suit for possession are profits which were actually received or might with ordinary diligence have been received before that date.

In the present case the Plaintiff-Appellant stated that palm trees begin to yield in Tabodwe, and Defendent Respondent said the same thing. Tabodwe 1266 began on the 4th February and ended on the 4th March 1905 There was no allegation and nothing to show that any jaggery had been or could have been obtained from the palms. in suit before the institution of the suit for possession. Plaintiff-Appellant therefore could not have claimed mesne profits in that suit. Under section 211, Civil Procedure Code, as I understand it, the Court might nevertheless have included mesne profits from date of institution in its decree in that suit. But as it did not do so there was nothing to prevent Plaintiff-Appellant from bringing a fresh suit for such mesne profits, afterwards (section 244, Civil Procedure Code).

Even if Plaintiff-Appellant wrongly included in the fresh suit a claim for mesne profits for the period before the institution of the former suit, which he might have claimed in the former suit, that would not justify the dismissal of his claim for mesne profits for the period after institution. And as we have seen there was nothing to show that any part of the mesne profits claimed fell within the period previous to the institution of the suit for possession.

The Lower Appellate Court was therefore in my opinion wrong i dismissing any part of Plaintiff-Appellant's claim.

It was admitted that the trees in suit were leased for a rent of 200 viss of jaggery for "the year" *i.e.*, for the working season which was said to extend from Tabodwe to Thadingyut, the male trees being tapped from Tabodwe to Tagu and the female from Nayôn. to Tawthalin. There was also evidence that a tree yields five viss of jaggery in a year. There were 40 male trees here in question. The estimate of 200 viss for the period claimed was therefore reasonable. Hnaung Tagu 1266 extended from the 4th to the 14th April 1905.

The value fixed by the First Court was that which the evidence required.

The decree of the Lower Appellate Court is reversed and that of the First Court is restored with costs.

128

Civil Procedure 525—526.

Civil Appeal No. 14 of 1906. October 22nd.

Before G. W. Shaw, Esq.

NGA HMAUNG
NGA NYO
NGA SAN GYAW
NGA YE GYAW
NGA SAN GYAUK
MI TIN
MI DAI.I
NGA PAW TU
} *vs.* {
NGA KYAW YA.
MI AMA.
MI NYI MA.

Mr. C. G. S. Pillay for *Mr. J. N. Basu*—for Appellants. | *Mr. S. Mukerjee*—for Respondents.

Arbitration without the intervention of the Court—Appeal.

Held,—that in a case where an award has been ordered to be filed in Court under section 526, Civil Procedure Code, the Court having disallowed an objection as to the validity of the submission, no appeal lies except on the grounds specified in section 522.

References :—

U.B.R. 1904-05, Civil Procedure, 40.
29 I. A. 51.
10 C.W. N. 601.
————————609 (followed).

Plaintiffs-Appellants sued to enforce an award. The plaint prayed for a decree giving effect to the award. The Township Court treated the plaint as an application under section 525, Civil Procedure Code, and ordered the award to be filed. Decree was to the effect that the award exhibit B should be filed in Court.

Defendants-Respondents appealed to the District Court on three grounds, (1) that the arbitrator omitted to examine parties and witnesses according to law, (2) that the reference having been with regard to the land of Bo Yan Aung and Mi Eik, and the award having dealt with land belonging to Bo Chit Saya and Mi Ywe it was invalid, (3) that the land of Bo Yan Aung and Mi Eik having been divided in 1252 B. E. (the proceedings before the arbitrator) were barred by limitation.

The District Court without questioning its jurisdiction proceeded to set aside the decree of the Township Court on the ground that two of the Defendants-Respondents had not signed the reference, and therefore the arbitrator had no authority and the award was invalid. The learned Additional Judge relied on paragraph 1 of Chapter III of Russell's work on Arbitration (8th Edition) relating to the case "where there are several parties to the deed of submission, and the consideration to each to execute it is the accession of all the parties to the reference."

I do not think it necessary to go into the point. But I may remark that it does not appear that the present was a case of that kind. What the Township Court found was, in effect, that Defendant-Respondent Kyaw Ya was acting for his two sisters the other Defendants-Respondents, with their authority express or implied, in other words that he was their agent (Contract Act, sections 182 and 186).

NGA HMAUNG v. NGA KYAW YA.

The point now for determination is whether an appeal lay to the District Court. This was dealt with in *Mi E Mya* and *others* vs. *Nga Pe.** The difference that distinguishes the present case is that the allegation that the two female Respondents were not parties to the reference is an objection to the validity of the submission, and that is not one of the grounds mentioned or referred to in sections 520 and 521, Civil Procedure Code.

The ruling of the Privy Council in *Ghulam Jilani* and *others* vs. *Muhammed Hasan*† (1901) referred to in *Mi E Mya's* case has been the subject of numerous and conflicting decisions of the different High Courts. The latest of these is the case of *Janoki Nath Guha* vs. *Brojo Lal Guha*‡ (1906) which was decided by a Full Bench of the Calcutta High Court so recently as April last. In it the case of *Chintamoni Aditya* vs. *Haladhar Maiti*§ (1905) metioned in *Mi E Mya's* case (the full report of it is published in the same volume§) and all the other relevant decisions are referred to. The result is to confirm the view taken in *Mi E Mya's* case as far as that decision went, and also to explain further the effect of the Prvy Council Ruling. The learned Judges were not in agreement. But the majority held that "no appeal lies from an order passed under section 526 of the Code directing the filing of an award made on a submission to arbitration without the intervention of a Court of Justice". They were of opinion that, under the Ruling of the Privy Council, an appeal would lie from an order refusing to file an award under section 526, such an order being a decree as defined in section 2, and no appeal being barred by section 522; but that if the order was one directing the award to be filed, no appeal would lie except in the case specified in section 522, *i.e.*, where the decree is in excess of, or not in accordance with, the award.

I do not find that they intended to restrict this decision to cases in which the grounds alleged against the award were among those specified in sections 520 and 521; that they intended to exclude, for instance an objection to the validity of the submission, as suggested by Mr. Justice Mukerji in *Chintamoni's* case.

The ground on which they seem to have proceeded is that, as explained in the Privy Council judgment, the provisions of the Civil Procedure Code are intended to give effect to the principle of finality, and that, as interpreted by the Privy Council, the order of the Court filing an award is final except on the grounds stated in section 522. Hence, when the Court has considered objections and disallowed them, there is no appeal against that decision. It is for the Court to which an application is made under section 525, to consider whether there was a reference, that is a valid reference, to arbitration. The objections that may be taken are not strictly confined to those enumerated in sections 520 and 521. Section 526 says, "If no ground *such as* is mentioned or referred to in sections 520 and 521 be shown." Among the grounds in section 520 is an objection to the legality of the award apparent on the face of it. Putting these provisions together, it appears

* U. B. R 1904-05, Civ. Pro. 40.
† 29 I.A., 51.
‡ 10 C.W.N., 609.
§ 10 C.W.N., 601.

to me that if an objection to the validity of the submission is made and the Court disallowed it, no distinction can be drawn between such a case and one where an objection is taken, which is specifically mentioned in section 520 or section 521. The intention of the Code seems to be that in the one case as much as in the other no appeal shall lie except on the grounds mentioned in section 522. The principle of finality appears to be equally applicable.

Now in the present case the objections which Defendants-Respondents took in their written statement were the same which they put forward in their petition of appeal to the District Court. They did not include the allegation that the female Respondents were not parties to the reference. The Judge of the Township Court took notice of this fact, and further gave good reasons for his opinion that Respondents were fully aware of the reference and the arbitrarion proceedings, in short that they authorized Respondent Kyaw Ya to act for them. This was a sound and a reasonable conclusion, in accordance with the admitted facts, and also with the practice of Burmans in matters of family partitions. Defendants-Respondents constituted one branch and the Plaintiffs other branches. Each branch was represented by one or more of its members. In these circumstances I am of opinion that no appeal lay from the decree of the Township Court.

The decree of the Lower Appellate Court is set aside and that of the First Court is restored with costs.

Contract.

Before A. M. B. Irwin, Esq.

Civil Appeal No. 206 of 1903, Jany. 18th, 1904.

E. A. LUDDY *v.* C. P. R. ARUNACHELLUM CHETTY.

Mr. H. M. Lütter—for appellant. | *Mr. H. N. Hirjee*—for respondent.

Held,—that a lien over money lent may be created by deposit of a non-negotiable document which is evidence of the loan. Such a transaction is not necessarily contrary to public policy.

Rahim Bakhsh, Head Clerk to the Cantonment Committee, apparently gave security for the due performance of his duties by a deposit of Rs. 500, in the Post Office Savings Bank, and subsequently agreed to the Committee taking and using that money in the purchase of bullocks, the Committee giving him in exchange a receipt in the following terms:—

"I acknowledge to have received from Rahim Bakhsh, Head Clerk, the amount of his security deposit, namely, five hundred rupees, as an advance to the Cantonment Committee for the purchase of conservancy bullocks. The same to be replaced in the Post Office Savings Bank within three months.

* * * * *

Cantonment Magistrate."

Rahim Bakhsh died, and appellant obtained two decrees against his legal representative. In execution of these decrees he attached the security deposit of Rs. 500. Respondent then sued the same representative on a promissory note for Rs. 225 and put in the Magistrate's receipt which had been deposited with him as security for the loan of Rs. 225. On this he obtained a decree, with a declaration that he had a lien on the deposit of Rs. 500.

Appellant sued to set aside this declaration in the decree, on the ground that it was wrongfully and fraudulently obtained, and that the "handing over" of the receipt did not create a lien over the Rs. 500. The Lower Court held that there is a valid lien, and dismissed the suit. The allegation of fraud is abandoned, and the only question in this appeal is whether the deposit of the document creates a lien over the money.

Appellant cited Ghose's Law of Mortgage in India, pages 202 and 147, and respondent cited Cavanagh's Law of Money Securities, page 223.

Appellant's argument, as finally stated, was, if I understood it aright, that the document is not evidence of title, but merely evidence that Rahim Bakhsh lent the money to the Cantonment Committee and that hypothecation of the money by deposit of the receipt is not lawful,

NGA HLAING v. NGA KYAN THA.

respect of the smaller bets ကစ်ကျားဖိုး. They sat at tables and received money wagered on the race, granting receipts for the same. Their business was simply to keep this money till the race was decided and then it to pay over to the winners. In other words they were stake-holders. (*c.f.* Cunningham and Shephard's Contract Act, 9th edition pages 133, 134, bet on the definition of a wager.

Plaintiff-applicant appears to have bet Rs. 38 on "Seinban," against Rs. 35 on "Shwelaung" by somebody else.

If the plaintiff-applicant had simply sued for the recovery of his stake, it would have been necessary to set aside the decrees of the Lower Courts. The ruling of this Court already cited and the authorities therein referred to would have required this.

Only one heat was run, which Seinban won. A quarrel then arose among the crew of the Shwelaung, the captain of which was suspected by his men of having been bribed by the other side. The race was therefore stopped for fear of a riot. The managers of the race held an enquiry and gave out by public proclamation that the stakes of honest bettors would be returned, but those of bettors suspected of having engaged in the swindle would be confiscated and applied to the purposes of the Pagoda.

There was evidence that friends of the plaintiff-applicant repeatedly demanded from defendants-respondents money on behalf of their party, whether the original stakes or the whole winnings is not very clear. Plaintiff-applicant was unable to show that he had made a specific demand for the return of his particular stake. But there seems no reason to doubt that he did all he could to get back his money, if not to get his winnings too. It is not pretended that his money was paid over to the other side on the event of the wager. He was suspected of being one of the swindlers, and his stake was therefore confiscated.

The 1st defendant-respondent who was the headman and the chief manager of the whole Pagoda festival, including the boat race, claimed to have acted on the authority of rules drawn up by himself beforehand for the management of the race. These rules provided that if any breach of them was committed the decision of the Managers ဖွဲ့ဖွဲ့ဝေါ်း should be final.

I think they were also intended to declare that the decision of the Managers should be final in any other matters connected with the Pagoda festival. But the language is not very clear, and the Court Translator does not think it bears this meaning. The rules for the race contained no express reference to the confiscation of stakes deposited by bettors. Apart from this it was not shown that plaintiff-applicant had been made acquainted with the rules, or had agreed to abide by the decision of the Managers in a matter of the kind.

The point, however, which must, I think, decide this case is one that was overlooked by both the Courts below. This is the more extraordinary because it was that on which the special Court of Lower Burma decided the case of *Queen-Empress* v. *Po Twe*,* *viz.*, that where the plaintiff did not repudiate the wager but demanded the whole winnings he could get nothing, not even the stake he had himself deposited.

*S. J. L. B., 130.

The same rule was laid down in *Mearings* v. *Hellings* quoted in the note to page 366, of Pollock on Contracts:—

"A man cannot sue a stake-holder for the whole of the sweepstake he has won "in a lottery and then reply to the objection of illegality that if the whole thing is "illegal he must at all events recover his own stake. *Allegans contraria non "est audiendus.*"

I am unable to find that this rule has been departed from in any recent decision.

In *Burge* v. *Ashley and Smith* cited above Lord Justice Smith quoting from a previous case in which he had summed up the law on the matter said:—

"It has been held by authorites which it is far too late now to question, that, as "soon as one party to a gaming contract receives notice from the other party that "the former declines to abide any longer by the wagering contract, money dep- "sited by him thereupon ceases to be money deposited in the hands of the latter "'to abide the event on which any wager shall have been made'; and any money "still in the latter's hands unappropriated by him becomes money of the former "without any good reason for the latter detaining it; and in such circumstances "an action for money had and received to the plaintiff's use will lie."

From this I think it is clear that there must be a substantial repudiation of the wager before a depositor can recover his stake.

On this ground, therefore, I hold that plaintiff-applicant's suit must fail.

The application is dismissed with costs.

Contract—23.

Before A. M. B. Irwin, Esq., C.S.I.

Civil Revision No. 53 of 1904. January 24th, 1905.

MAUNG THA DUN *v.* MAUNG SU YA.

Mr. *A. C. Mukerjee*—for Applicant. | Mr. *S. Mukerjee*—for Respondent.

Money lent for the purpose of enabling the borrower to gamble is not recoverable by civil suit if the gambling contemplated by the parties when the money was lent is such as is prohibited by law, but if the gambling is not illegal a suit for the recovery of the loan will lie.

Reference:—

U. B. R., 1897-1901, 322.

Respondent sued applicant on a bond for Rs. 48, dated 24th May 1902. Applicant replied that the bond was executed for money lost at gaming, and therefore he should not pay. He was not examined as a witness, but before settlement of issues he said that Rs. 40 of the whole amount had been borrowed by him from plaintiff for the purpose of gambling at a pagoda festival in 1900. Plaintiff denied that he had lost the money gambling. He did not expressly deny that the money was lent for the purpose of enabling defendant to gamble.

The issues fixed were whether the money was due for money borrowed, and whether it was on account of a gambling debt at a pagoda festival. There was no issue on the point whether it was lent for the purpose of enabling defendant to gamble nor whether the gambling was such as is prohibited by law.

The Court of First Instance found that Plaintiff had treated a gambling debt as money borrowed, and that plaintiff had instituted a previous suit for the same debt and had withdrawn it has he did not think he would succeed. For these reasons the suit was dismissed.

The District Judge said that plaintiff alleged that Rs. 48 was the balance due on a decree which he obtained for Rs. 60-10-0 in the previous suit, No. 37 of 1903. He found that the bond was executed for that balance, and held that it was too late to raise the defence that the money was lent for the purpose of gambling. He gave plaintiff a decree for Rs. 72-7-8. I may remark here that the appellate decree does not agree with the judgment; it gives plaintiff nothing.

I do not know where the learned Judge got the allegation which he imputes to Plaintiff. There was no decree for plaintiff in suit 37. On the contrary it was dismissed by consent. Consent was given because the bond now sued on was executed the same day.

The bond was executed to secure money lent to enable defendant-applicant to gamble. If the gambling contemplated by the parties when the money was lent was such as is prohibited by law, then the consideration or object was opposed to public policy and the agreement is void, but if the gambling was not illegal then the agreement is not void and the suit would lie. So much, or at least the first part of

MAUNG THA DUN v. MAUNG SU YA.

the proposition, was clearly laid down in *Maung Po Saung* v. *Maung Min Naung*,* and both the Lower Courts ought to have seen that the case turned on this point, yet it was not considered at all. The evidence is that the gambling was first in the *Myothugyi's* compound and afterwards in the bazaar, where there was a *daing*. If these were places to which the public have access, or if they were used as common gaming houses, then but not otherwise, the gambling was illegal.

The first Court found that the money was not borrowed at all. The Lower Appellate Court has not considered that finding, and it goes beyond the defendant's own statement. The learned Judge remarked that the plea of the consideration being unlawful, ought to have been raised, in suit No. 37. It was raised, but that suit never came to trial. The decision of the Appellate Court being based on the wholly imaginary supposition that the bond was for balance of decree money, it must be held that the Court acted with material irregularity.

I reverse the decree of the District Court and direct that it readmit the appeal and dispose of it according to law. It may perhaps be necessary to take further evidence to ascertain whether the object of the loan was to enable defendant to play in a common gaming house or to play for money with an instrument of gaming in a place to which the public have access.

There will be no order for costs, as applicant, on his own showing, is trying to avoid paying a debt of honour.

* U. B. R., 1897-1901, 322.

Contract—55, 107.

Before G. W. Shaw, Esq.

Civil Appeal No. 69 of 1905. October 2nd.

NGA SHWE TU *v.* NGA CHIT SON.

Mr. C. G. S. Pillay—for Appellant. | *Mr. H. N. Hirjee*—for Respondent.

Where a party to a contract is at liberty to rescind it under section 55, and does so, section 107 has no application. The meaning of section 107 is that "if Defendant-Respondent instead of rescinding the contract had chosen to resell at the Plaintiff-Appellant's risk, then, in order to be abe to hold Plaintiff-Appellant liable for any loss on resale he would have had to comply with section 107 by giving reasonable notice to the Plaintiff-Appellant."

Reference :—

I. L. R. 6 Cal. 64.

Plaintiff-Appellant sued for Rs. 2,000 damages for breach of a contract to sell 5,500 baskets of chillies.

The first Court found for the Plaintiff-Appellant for the full amount claimed. This decision was reversed on appeal by the District Court.

The grounds of the present second appeal are (1) that the findings of the Lower Appellate Court are against the weight of evidence; (2) that the Lower Appellate Court did not correctly apply the law bearing on the case; (3) that the Lower Appellate Court should have held that the market value was Rs. 40 per 100 viss.

Both Courts have found that there was an express agreement that Plaintiff-Appellant was to take delivery before the end of the month of second *Waso*, and that no extension of time was granted. This finding must, I think, be accepted. It is evident that there was no evidence to support the witness Paw Ta, and the conduct of Plaintiff-Appellant is inconsistent with an extension of time having been agreed to. The first Court did not come to a definite finding as to whether Plaintiff-Appellant made default. The learned Judge went astray as to the effects of ownership having passed, and the rights of the seller under his lien, and also as to the application of section 107 of the Contract Act, and decided in Plaintiff-Appellant's favour on the ground that the Defendant-Respondent did not give the notice required by section 107, thereby assuming that Plaintiff-Appellant did make default in delivery.

The Lower Appellate Court applied section 55 of the Contract Act and held that Plaintiff-Appellant failed to take delivery within the stipulated time. On this point I am clearly of opinion that the learned Additional Judge was right.

It is evident from the conduct of the parties, and especially of Plaintiff-Appellant himself, that the understanding was for payment on delivery. If this had not been so, there would have been no necessity for Plaintiff-Appellant to take any money at all, much less to go back to Pakôkku to get the Rs. 2,000 odd rupees which were short. It

NGA SHWE TU v. NGA CHIT SON.

has not been suggested that payment at a future date was a part of the contract. Apart from this the conduct of Plaintiff-Appellant and his companions on the last day of second *Waso* was not that of persons who really wished to make a *bonâ fide* offer to make delivery on that day. They did not arrive on the spot till 5 o'clock in the evening, Shwe Tu, the Plaintiff-Appellant himself, instead of going to Defendant-Respondent's house and saying he had come to take delivery, never went near it, but spent his time in visiting an aunt, and contended himself with sending Po Thein and a Chinese servant of a Chinaman to whom it would appear he had resold the chillies, and whose money the Rs. 1,000 were. Then Po Thein made no proper enquiry for Defendant-Respondent or his wife. He was contented with the information given him by a boy outside Defendant-Respondent's house that Defendant-Respondent was out and at once marched off again. The offer, if it was an offer, by Paw Ta, the broker at 10 o'clock at night was not in time. Section 47 of the Contract Act is clear authority as to that.

Then the Lower Appellate Court rightly enough said that it was open to Defendant-Respondent to rescind the contract (under section 55) or to resell under section 107. But here the Additional Judge went wrong. He says the Defendant-Respondent elected to resell (under section 107) and therefore had to give Plaintiff-Appellant notice. This is to misunderstand the situation. If Defendant-Respondent was at liberty to rescind the contract under section 55, the property in the chillies if it had passed was thereupon revested in him (see *Buldeo Doss* v. *Howe** quoted in Cunningham and Shephard's note to section 55), and he could do what he liked with them. What section 107 means is that if Defendant-Respondent, instead of rescinding the contract, had chosen to resell at the Plaintiff-Appellant's risk, then, in order to be able to hold Plaintiff-Appellant liable for any loss on resale, he would have had to comply with section 107 by giving reasonable notice to the Plaintiff-Appellant. This is not what Defendant-Respondent did at all. There was no occasion for him to resort to section 107; he was able to sell at an advantage, and the election which he made was to rescind his contract with Plaintiff-Appellant (*see* Cunningham and Shepherd's note to section 107). In these circumstances, it is unnecessary to go into the question whether Defendant-Repondent gave reasonable notice within the meaning of section 107. It is also of course immaterial whether the property had or had not passed to Plaintiff-Appellant. To sum up the case there was a contract in which time was of the essence. Plaintiff-Appellant failed to do his part of it within the time stipulated. The Defendant-Respondent was therefore entitled to rescind and did rescind the contract. The Plaintiff-Appellant has no cause of action against Defendant-Respondent and his claim must be dismissed.

The appeal is dismissed with costs.

* I. L. R. 6 Cal. 64.

Execution of Decree, Sections 230, 235 and 245, Civil Procedure Code.

Before A. M. B. Irwin, Esq.

MAUNG THA DUN *v.* MAUNG THIN.

Civil Appeal No. 227 of 1903. March 17th 1904.

Mr. F. C. Chatterjee, for Appellant. | *Mr. H. N. Hirjee*, for Respondent.

A Civil Court may send a decree simultaneously to two other Courts for execution and issue process in execution itself without waiting for the reports of the other Courts.

Execution may not be ordered on an application which does not comply with the provisions of section 235, Code of Civil Procedure.

Execution may be had simultaneously against the person and property of the judgment-debtor unless there be special cause to the contrary.

Reference:—

14, M. I. A., page 529 (1872).

The District Court of Mandalay sent copies of its decree for execution to the Courts both of Katha and of Sagaing. Before any certificate of the result of execution in those districts had been obtained, the decree-holder applied to the Mandalay Court to arrest the debtor in execution. He was arrested, and objected to the arrest on the grounds that it was not proved that he had made away with any property in the other districts nor that he had tried to abscond. The Additional Judge ignored these objections altogether and recorded that the only points for consideration were whether the debtor was too poor or for any sufficient reason could not pay the debt. Not being satisfied on these points he committed the debtor to prison.

In this Court it is said that the Mandalay Court should not proceed to execute the decree in any manner until it obtains a certificate from the other Courts of the results of execution there. It is admitted that there is no express prohibition in the Code, but the learned Advocate for Appellant argues that it is the manifest intention of the legislature that execution of one decree should not proceed simultaneously in two different Courts. Curiously enough he has not objected to the sending of the decree simultaneously to Katha and Sagaing, but only to the warrant of arrest issued in Mandalay. The point was decided by the Privy Council in *Soroda Prosand Mullick* v *Luchmeeput Singh Doogur*.* "On consideration of the Code their Lordships can find nothing to prevent this being done. On the contrary the procedure is well adapted to allow of it, and of its being done most beneficially for the creditor and without injustice to the debtor." That was not under the present Code, but I can find nothing in the present Code to prevent the practice. I hold that the sending of the decree to other Courts is not a legal bar to its execution at the same time in Mandalay.

* 14, M. I. A., page 529 (1872).

MAUNG THA DUN v. MAUNG THIN.

Appellant takes exception to the application on which the warrant of arrest was issued. It is not in the form prescribed in section 235, it is not verified as required by that section, and the so-called affidavit appended to it has not been sworn to. Is is urged that section 245 prohibits the Court absolutely from taking action on an application for execution until the provisions of section 235 are complied with. In particular it is said that the information required by clauses (*e*) and (*f*) is not supplied. Respondent replies that the information required by clause (*f*) is contained in the application and is sufficient and that section 245 leaves the Court a discretion. The language of section 245 is puite clear. The last sentence of paragraph 1 makes it plain that the only discretion allowed by the preceding paragraph is to either reject the application or allow it to be amended. No other course is permissible. In the present case neither was done. The issue of the warrant was irregular and wrong, but under section 578 that is not a sufficient reason for reversing the order of committal unless the irregularity affects the merits of the case.

Appellant says the arrest was applied for on insufficient grounds, in order to prevent the debtor from appealing against the decree, and that the Court has not exercised a proper discretion in ordering imprisonment. It is pointed out that the decree-holder had no personal knowledge of the results of execution in the other districts, and there is nothing to show that the debtor tried to abscond. The Lower Court brushed aside all this considerations, and imprisoned him because it was not shown that he could not pay. The law is contained in the second paragraph of section 230. I have not been referred to any rulings bearing on this clause, nor have I found any which would govern the present case. I take it that as a rule the decree-holder can proceed simultaneously against both the person and the property of the debtor, and the Code merely gives the Court a discretion to refuse for special cause. I do not think any special cause has been shown in the present case.

I dismiss the appeal, but without costs, as the application for execution was not made in proper form.

Evidence 58—Non-registration.

Before G. W. Shaw, Esq.

Civil Second Appeal No. 60-32 of 1904. August 22nd.

MAUNG KYAW YAN
MA MEIN MA GYI
MA THET TU
MA E ME
MAUNG THET PON
U BYA
MA E NYEIN
MAUNG SHEIN
} *v.* { MAUNG PO WIN.
MA SAN ME.

Mr. H. N. Hirjee—Advocate, for appellant.

Mr. A. C. Mukerjee—Advocate for respondents.

Held,—that where a document is by reference included in the plaint or written statement, and its terms and execution admitted on the record by the pleadings it is not necessary to prove it or put it in evidence and its non-registration is immaterial.

See Buddhist Law—Inheritance, page 1.

Evidence 35, 91, 115.

Before G. W. Shaw, Esq.

Civil Appeal No. 244 of 1904. October 6th, 1905.

MI SA U
MI NGE GYI
NGA CHIT MAUNG } *v.* NGA PYAN.
NGA SHWE THAW
NGA HLWA

Mr. S. Mukerjee—for Appellants. | *Mr. C. G. S. Pillay*—for Respondent.

Effect and value of entries of mortgages in Settlement Records—Estoppel—

Held—that entries of mortgages in Settlement Records are made in the course of official duty and are relevant under section 35, Evidence Act.

Held also—that if the Defendants allowed the Plaintiff to register himself as the owner in the Settlement Records, this did not estop him from contesting Plaintiff's claim to the land.

References:—

2 L. B. R., 56.
U. B. R., 1892–1896, II, 379.

The Plaintiff-Respondent sued to redeem certain land called Tanaungbin on payment of Rs. 233-6-0. He alleged that Defendants-Appellants' predecessors in title had a dispute with himself and his brother Kan Gyi in 1238 B. E. about this land and that as a result of an arbitration award, it was decided that Plaintiff-Respondent's party was to redeem for Rs. 233-6-0, but being unable to do this, they mortgaged the land to Defendants-Appellant's predecessors. The Defendants-Appellants denied all these allegations. It was admitted that Defendants-Appellants and their predecessors had been in possession for a great number of years,—66 years or more.

It was stated that the award was lost in a fire, and secondary evidence of its contents may be taken to have been admissible.

The Plaintiff called two witnesses, and as the First Court pointed out, they gave three different accounts of the arbitration proceedings. But assuming that the award was proved, this would not help the Plaintiff-Respondent. Anything might have happened after the award. To succeed, it was necessary for Plaintiff-Respondent to prove the mortgage he alleged.

He produced what he said was the original mortgage deed a *parabaik* document, but he failed to prove it. The only surviving witness Kan Gyi, the Plaintiff-Respondent's brother (who ought to have been a co-plaintiff), was illiterate, and therefore incapacitated from proving it. In these circumstances oral evidence of the mortgage was excluded by section 91, Evidence Act. The First Court dismissed the suit.

In the petition of appeal to the District Court, the Plaintiff Respondent raised a new point, *viz.*, that the land stood in the Revenue Records in the name of Plaintiff-Respondent's grandmother, Mi Hla We (deceased) as owner, and of the Defendant-Appellants as mortgagees. The extract from the *Kwin* map and register for the year

MI SA U
v.
NGA PYAN.

1903-04, filed by the Plaintiff-Respondent with his plaint supported this assertion. Acting apparently on this fact, the Lower Appellate court sent for the Settlement map and Register and found that they contained similar entries. The learned Additional Judge, however, omitted to have copies of this additional documentary evidence filed in the record, and the consequence is that it is not now before me.

The Lower Appellate Court applying the Ruling in *Mi Zet* vs. *Kyi Nyo*,* held that Defendants-Appellants "intentionally allowed Kan Gyi to appear as the ostensible owner of the land and themselves as the mortgagees when the public survey and tenures were registered," and that this "estops them from setting up a claim as the owners of the land."

The learned Additional Judge omitted to observe that Mi *Zet's* was not a parallel case. There, the Plaintiff was a third party, who had been led to purchase the land from the apparent owner owing to the Defendant allowing the latter to hold himself out as the owner. In the present case there was no third party, and Defendants-Appellants, if they intentionally allowed Plaintiff-Respondent to hold himself out as the owner, did not cause or permit *him* or any one else to believe it to be true and to act upon such belief (section 115). The question of estoppel does not arise at all, and the admission of the Defendants-Appellants' Advocate in the Lower Appellate Court goes for nothing, as it was an erroneous opinion which does not bind the Defendants-Appellants.

The Settlement Records are merely a piece of evidence relevant under section 35, Evidence Act, and the weight and probative value to be given to them is a matter to be decided by the Court.

Entries as to mortgages are made by Settlement Officers in accordance with the Directions to Settlement Officers, which are executive instructions for the purpose of giving effect to the rules framed under section 29 of the Land and Revenue Regulations as to "the documents (including maps) to be comprised in the record of rights and their contents," etc. These rules themselves do not in fact prescribe entries as to mortgages in the original record of rights though they do provide for such transactions occurring afterwards, being reported and recorded.

It is, therefore, perhaps, open to doubt, whether the entry of a mortgage in the settlement map and register is, strictly speaking, covered by legislative authority.

But I do not think it can be said that it is not "made" by the Settlement Officer "in the discharge of his official duty" in the face of the detailed instructions contained in the Directions referred to above.

These lay down that the Register of holdings and tenures, Register I (which is here in question) is to show the exact circumstances of each holding in the last year of Settlement operations, and the materials are to be compiled from records made in the field during the marking of holdings. As to this marking of holdings, the people should be required by written notice to be in readiness to accompany the holding

*U. B. R., 92-96 II, 379.

marker on a specified day to point out their holdings. The holding marker is to write down the name of the person in possession, his father's name, etc., adding the name of any tenant or mortgagee there may be, and the Settlement Officer is to check the holding marker's lists, which are also checked by the Inspector. Then when all are marked off on a map, the Settlement Officer or Assistant Settlement Officer is to fix a day for the attendance of the people of the village, and when all are before him he is "to determine and record the tenure upon which each person holds." When the record of tenures is completed, the papers are to be made over to the Record Department of the office "for entry of the holdings in Register I."

It is evident therefore that if this procedure is properly carried out the remarks made by the Privy Council in the case quoted in the Lower Burma case of *Ya Gyaw* vs. *Mi Ngwe*,* are as applicable to entries, *e.g.*, relating to mortgages, as to maps and surveys.

The question is whether this evidence in the present case is sufficient to establish the mortgage on which the Plaintiff-Respondent relies.

Section 91, Evidence Act, declares that no evidence shall be given of the terms of any disposition of property reduced to writing, but the document itself (or secondary evidence of its contents where secondary evidence is admissible).

The evidence as Settlement records is apparently an exception to this rule. It is not an admission in writing by the party within the meaning of section 65 (*b*). It comes in simply under section 35.

Is it then in its nature, and having regard to the circumstances under which the entries ought to have been made, to be regarded as sufficient proof of the mortgage, in the absence of all other evidence? It is to be observed that the directions referred to provide for the possibility of mistakes, and it is apparent that in the present case, the holding marker might have been induced to make the preliminary entry by the fraud of the Plaintiff-Respondent, and that it might have been confirmed by the Settlement Officer in the absence of the Defendants-Appellants. There is no evidence whatever on the record as to the circumstances under which the entry was made: nothing to show even what Defendants-Appellants had to say about it. The point was not specifically raised in the First Court, and the Judge characteristically took no notice of it, and never thought of asking about it. This was a fault on the part of the Judge, but the Plaintiff-Respondent must be held responsible for not putting this evidence properly before the Court. In view of the admitted fact of Defendants-Appellants' long possession, it appears to me that it would not be safe to act upon the evidence of the Settlement Records alone. The Plaintiff Respondent comes into Court alleging an ancient mortgage, and on the strength of it he seeks to oust the Defendants-Appellants who have been 60 years or more in possession. It is, in accordance with the principles on which the decisions of this Court have gone for many years, that in such a case the Plaintiff-Respondent must be required to prove his alleged mortgage by the strongest and most satisfactory evidence.

*2. L. B. R. 56.

MI SA U
v.
NGA PYAN.

Allowing all due weight to entries in Settlement Records, I do not think they can be held to be evidence of this character, alone and unsupported in any sort of way.

For these reasons I am of opinion that the Plaintiff-Respondent's suit ought to be dismissed.

I set aside the decree of the Lower Appellate and direct that the Plaintiff-Respondent's suit be dismissed with costs.

Evidence—110.

Civil Appeal No. 70 of 1905. October, 6th.

Before G. W. Shaw, Esq.

MI EIN KIN *v.* NGA LE.

Mr. *J. C. Chatterjee*—for Appellant.

Meaning of possession—Burden of proof in cases of wrongful dispossession in suits under section 9, Specific Relief Act, and suits based on title.

Held—that possession in section 110, Evidence Act, means actual present possession and that in suits (other than suits under section 9, Specific Relief Act, in which wrongful possession is alleged, the burden of proof lies upon the plaintiff to prove title as well as the wrongful dispossession. Also that in such suits evidence of previous long possession is evidence of title.

References:—

8 W. R. Civil	... 386	I. L. R., 8 Bom.	... 371
12 Do.	... 472	Do., 25 Bom.	... 287
20 Do.	... 458	Do., 23 Mad.	... 179
7 I. A.	... 73	Do., 20 Cal.	... 834
5 C. L. R.	... 278	Do., 12 All.	... 46

U. B. R., 1897—1901, II, 421.

On the 30th September last Plaintiff-Respondent sued for possession of ·89 acre of land called *pomèsabin* alleging that it belonged to his father, Kauk Ya, who got it on a partition between himself and his sister Mi Se, that he (plaintiff-respondent) succeeded to it on his father's death, and worked it for six years, and that on the 11th *Tawthalin lasan* 1266 (=19th September 1904), Defendant-Appellant forcibly ploughed the land and disturbed his possession. Defendant-Appellant admitted that she entered upon the land at the time stated, and that it had previously been worked by Plaintiff-Respondent. Her defence was that the land was not Kauk Ya's, but was part of the inheritance of Mi The The, the mother of Kauk Ya, and Mi Se (who was Defendant-Appellant's mother). She denied the division alleged by Plaintiff-Respondent and said that there was a partition of Mi The The's inheritance among the co-heirs "about five years ago," at which she (Defendant-Appellant) obtained the land in suit (as part of her share). Evidence was adduced on both sides and the Township Court found against Plaintiff-Respondent on the grounds that the land was included in the partition alleged by defendant-appellant, and that Plaintiff-Respondent had failed to produce satisfactory evidence that the land was his father's share.

The Lower Appellate Court reversed this decision, holding that Plaintiff-Respondent was in possession and that the burden of proof was on Defendant-Appellant, the forcible ouster, and that she had not discharged it. In this second appeal it is one of the objections that there was no proof of forcible dispossession, and therefore the burden of proof was on the Defendant-Appellant.

EIN KIN
v.
NGA LE.

On this point the learned Advocate for the Defendant-Appellant has sought to maintain the position that even if Defendant-Appellant is a trespasser, the decision must be apart from section 110, Evidence Act, in favour of the party which adduces the better proof of title.

In their note to section 110, Evidence Act, Messrs. Amir Ali and Woodroffe say, quoting from Domats' Civil Law, "The ordinary rule is that force does not interrupt possession. He, whose possession has been interrupted by an act of violence without any form of law or justice, is nevertheless considered as a possessor because he has the right to enter into possession again."

The English law appears to be based on this principle and the earlier decision in this country were in accordance with it. *Khwaja Ingatullah Chudri* v. *Kishn Sundar Sarma* (1867);* *Gour Paroy and another* v. *Wuma Sundari Debia and others* (1869),† and *Muhamad Bakhsh* v. *Abdul Karim and others* (1873)‡. Then the Privy Council in *Wise* v. *Amirunnisa Khatun* (1879)§ laid down the section 15 of Act XIV of 1859 (corresponding to section 9 of the Specific Relief Act, 1877) bars a plaintiff's right to recover simply on the strength of previous possession without entering into the question of title, when his suit has not been brought within six months of dispossession.

In the same year Prinsep, J., dissenting from the judgment in *Kawa Manji and others* v. *Khawadè Nussie* (1879),‖ a case almost precisely like the present case, expressed the same view. His exposition of the law was that there are two kinds of suit provided by law (1) a possessory suit under section 9, Specific Relief Act, (2) a suit for possession by establishment of title, that if a plaintiff neglects to bring a suit under section 9 he loses the advantages of section 110, Evidence Act, which applies only to actual and present possession, that proof of previous possession is no evidence of title except in a possessory suit, and though the plaintiff may sue within 6 months of dispossession, if he does not choose to bring a possessory suit, but seek to recover by proof of his own title, he foregoes the advantages which he might otherwise have obtained in return for which he has been able to have his dispute determined in one suit, with full right of appeal. In later cases Benches of the Calcutta High Court followed *Wise* v. *Amirunnisa*, which they interpreted in the sense above noted.

But a Bench of the Bombay High Court in 1884 in *Krishnarav Yashvant and others* v. *Vasudev Apaji Ghotikar*¶ held that the judgment in *Wise* v. *Amirunnisa* is not to be understood as laying down that a plaintiff is precluded from relying on his possession against a trespasser where he has not availed himself of the provisions of section 15 of Act XIV of 1859 (section 9, Specific Relief Act), since in that case the defendants were persons deriving title from the real owners.

* 8 W. R. Civil 386.
† 12 W. R. Civil 472.
‡ 20 W. R. 458.
§ VII, I. A. 73.
‖ 5 C. L. R., 278.
¶ I. L. R., 8 Bom. 371.

In *Hanmántrav and another* v. *Secretary of State for India* (1900) * it was held that a plaintiff in possession (not shown to have wrongfully originated) had right to possession against the whole world except a person who could show a better title, and the onus was therefore on the defendant. That was a declaratory suit, and the plaintiff was in possession. But Mr. Justice Ranade said, "whena a person who is in possession has been dispossessed and sues to recover, the fact of his previous possession will not entitle him to a decree unless he sues under section 9, Specific Relief Act, within six months. If he sues after six months he must prove a *primâ facie* title. In such a case possession is evidence of title. A plaintiff who proves such possession and subsequent disturbance shifts the burden of proof on to the defendant when a *prima facie* title is made out. But mere wrongful possession is insufficient to shift the burden of proof."

In *Mustafa Sahib and others* v. *Santha Pillai* (1899) † it was held by Subramania Ayyar that a person ousted by another who has no title is entitled to recover by virtue of the possession he had before ouster, even though that possession was without any title, and that section 9, Specific Relief Act, cannot be held to take away any remedy available with reference to the well recognized doctrine that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. But Mr. Justice O'Farrell in the same case was of opinion that a plaintiff seeking to recover possession without title after being forcibly ousted by a defendant having a good title can only do so under section 9, Specific Relief, Act.

In *Ismail Arif* v. *Muhammad Ghaus* ‡ the Privy Council in 1893 had held that lawful possession was sufficient evidence of right as owner as against a person who had no title whatever and was a mere trespasser and the former was entitled to a declaratory decree and an injunction. The ground taken was that if he had been dispossessed the plaintiff could have sued for possession under section 9, Specific Relief Act.

From this selection of decisions it will be seen that there is a remarkable want of unanimity on the subject of possession and dispossession.

The weight of authority, however, appears to be in favour of the view that where a plaintiff who has been dispossessed omits to take advantage of the provisions of section 9, Specific Relief Act, he must prove title.

And I think in view of the Privy Council's remark in the case last cited, that whereas in the present case the plaintiff sues within six months, proof of his previous recent possession is evidence of title.

As to the burden of proof, I think Mr. Justice Prinsep's definition of the possession contemplated by section 110, Evidence Act, as opposed to judicial possession is correct. This view also appears to be supported by the accepted decisions of this Court, in connection with section 110, Evidence Act.

* I. L. R., 25, Bom., 287. | † I. L. R. 23, Mad., 179. | ‡ I. L. R. 20, Cal., 834.

MI EIN KIN v. NGA LE.

It follows that in the first instance the burden of proof in the present case lay on the Plaintiff-Respondent. But I think that if he proved his previous recent possession, and dispossession by Defendant-Appellant, and also adduced evidence sufficient to make out *primâ facie* that he was in possession lawfully on his own account by gift or partition, the burden of proof was shifted to Defendant-Appellant to prove her title and right to oust the Plaintiff-Respondent.

This I take to be the effect of *Lachho* v. *Har Sahai* * (1887), a case quoted in *Min Din* v. *On Gaing*,† and not there dissented from, as applied to cases of wrongful dispossession.

By section 9, Specific Relief Act, dispossession without the plaintiff's consent is all that is required to entitle him to sue, and this I take to be wrongful dispossession. In the present case Plaintiff-Respondent was admittedly in possession for years. Defendant-Appellant disturbed that possession without the permission of the Plaintiff-Respondent. There is nothing to show that Plaintiff-Respondent was on the spot or signified his acquiescence in any way. On the contrary as we have seen, he lost no time in taking measures to recover the possession from which he had been ousted, and actually instituted the present suit within 11 days of Defendant-Appellant's entry. He might have sued simply for possession under the Specific Relief Act. He would then have enjoyed the advantage that the *onus probandi* would have unmistakably lain upon the Defendant-Appellant in any subsequent proceedings based on title. But as explained by Mr. Justice Prinsep in the case above referred to, Plaintiff-Respondent did not choose to proceed in that way. He sued on the basis of his title, and as a compensating advantage he was able to get his dispute determined in one suit, with full right of appeal.

On the point of Plaintiff-Respondent's title apart from his recent possession, there was the evidence of Nga Yauk and Nga Sin that Mi The The gave the land to Kauk Ya and that he was in possession for many years, Nga Yauk says 30 years, Nga Sin "over 15 years" he thinks. Both these witnesses are uncles of the parties, no more nearly related to the Plaintiff-Respondent than to Defendant-Appellant, and as far as can be seen impartial.

This evidence in my opinion is amply sufficient to shift the burden of proof on to Defendant-Appellant. What evidence has Defendant-Appellant of her right to oust the Plaintiff-Respondent. She produces a *parabaik* as containing the document evidencing the partition "about five years ago" on which she relies. But the document is illegible. Her two witnesses Taik Kyi and Nga Thaw say that it was written by Nga Yauk and that it dealt with the land in suit among other lands, but they admit that Mi Thin (Plaintiff-Respondent's mother who was present as representing her deceased husband Kauk Ya) was not told that this land was to be included in the partition. They say that the document was read out to Mi Thin. But it would be quite unsafe to assume from this fact, if it was true, and if the document did purport to affect the land in dispute that Mi Thin admitted this

* I. L. R. 12 All., 46. | † U. B. R. 97-01, II, 421.

land to be liable to partition. It is unnecessary to consider what the effect of such an admission would have been if it had been proved.

Nga Yauk, the man who admittedly effected the partition and wrote the document, states that Defendant-Appellant's *parabaik* is not the document he wrote and that the land in suit was not included in the partition.

When we find that Nga Taik Kyi and Nga Tha are both husbands of Mi Se (defendant's mother) Nga Thaw indeed is Defendant-Appellant's father, there can be no hesitation in preferring to believe Nga Yauk, as the Lower Appellate Court has done.

For these reasons I am of opinion that there is no reason for interfering with the decree of the Lower Appellate Court.

The appeal is dismissed with costs.

Evidence—92.

Civil Second Appeal No. 274 of 1904, May 11th, 1906.

Before G. W. Shaw, Esq.

1. Nga Saing.
2. Mi Thit.

v.

1. Nga Lu Aung.
2. Nga Po Maung.
3. Nga Myat Maung.
4. Nga Shwe Kin.
5. Nga Chaw.
6. Nga Mon.
7. Nga Kya Tun.

Mr. S. Mukerjee—for appellants.

Held—that in a suit between mortgagees and mortgagors it is not open to some of the executants of the mortgage deed, who signed as principal debtors and mortgagors, to adduce oral evidence to prove that they were only sureties.

References:—

I. L. R. 10 All., 421. | I. L. R. 3 Cal., 174.
——, 25 All., 337. | 8 C. W. N., 101.

Plaintiffs-Appellants sued for Rs. 500 the balance after relinquishment of Rs. 63 of principal and interest due on a mortgage deed for Rs. 430 with interest at Rs. 5 per cent. per mensem, dated the 1st February 1902 (9th *Pyatho Lazok* 1263) signed by all seven of the Defendants-Respondents as principals. Four of the Defendants-Respondents replied that they had settled the debt in full by the payment of Rs. 350 by two of them on the 2nd *Wazo Lazan* 1265 and the assignment of *Kugon* land worth Rs. 300 and two bullocks worth Rs. 60 by the other two at a later date. To this Plaintiffs-Appellants rejoined that the land and pair of bullocks were transferred in satisfaction of another debt.

The other three Defendants-Respondents said that they were only sureties and that they were discharged by the transaction between the borrowers and the lender transferring the mortgaged land and bullocks, a transaction of which they had no knowledge.

The first Court framed suitable issues, but in writing its judgment did not deal separately with them, and omitted all reference to the question whether the last mentioned three Defendants-Respondents were sureties. It found against all the Defendants-Respondents for the amount sued for with costs.

The Lower Appellate Court remanded the case twice, the first time for determination of an issue whether the three Defendants-Respondents Lu Aung, Nga Chaw and Kya Dun were sureties and the second time for determination of issues as to the amount due on the day Rs. 350 were paid, the value of the mortgaged property transferred to Plaintiffs-Appellants (afterwards without the knowledge of the sureties on account of another debt). Both Courts then seem to have lost sight of

Land and Revenue Regulation—53 (2) (ii).

Civil Appeal No. 95 of 1905. Novem 15th.

Before G. W. Shaw, Esq.

MI MA GYI *v.* NGA SHWE ZIN.

Mr. *K. K. Roy*—for appellant.

A right of way as an easement is an interest in land within the meaning of section 53 (2) (ii), Land and Revenue Regulation, and the Civil Courts are debarred from entertaining a suit to establish such a right over State land.

References:—

U. B. R. 1897-01, II, 207.
——— do ——— 209.
Wharton's Law Lexicon.
Peacock's Law relating to Easements in India.
Encyclopædia of the Laws of England, Volume II.
Mitra's Law of Limitation, 4th Edition, pages 414, 437.
Kerr's Blackstone's Commentaries.

Plaintiff-Appellant sued for a declaration of a right-of-way as an easement over certain State land in the occupation of Defendant-Respondent. Defendant-Respondent objected that the suit was barred by section 53 (2) (ii), Upper Burma Land and Revenue Regulation.

The Judge (Mr. Ross) who first dealt with the case held on a preliminary issue framed on the point that the suit was "not for any interest in State land, but merely for a right of way over State land," and that there was "nothing in section 53 of the Land and Revenue Regulation which forbids the trial of such a claim by a Civil Court."

He cited no authorities except the cases of *Tha Aung* v. *San Ke* * and *Nga Nut and another* v. *Mi Mi* † from which he remarked the present suit was distinguishable since it was neither for possession nor redemption. Before evidence was taken on the remaining issues, another Judge (Mr. Carr) succeeded him, and in his final judgment the latter held deferring from Mr. Ross that a right of way constituting a distinct detraction from the dominion of the proprietor creates in favour of its holder what he found it difficult to call anything but an interest adverse to that of the proprietor. He therefore dismissed the suit.

The question is what is to be understood by the word interest in section 53 (2) (ii) of the Land and Revenue Regulation. The contention for the Appellant implies that it is used in some restricted technical sense. Let us see what signification it bears in English law, where if at all we may expect to find technical limitations.

Interest is defined in Wharton's Law Lexicon (S. V. "Interest, 2,") as "a Chattel Real, as a lease for years or a future estate, or indeed any estate, right, or title in realty" and *Right* in the same work (S. V. "Right") is defined as "a liberty of doing or possessing something consistently with law."

* U. B. R., 1897—1901, II, 207.
† U. B. R., 1897—1901, II, 209.

MI MA GYI
v.
NGA SHWE ZIN.

At page 5 of Peacock's Law relating to easements in India, I find "an easement strictly speaking is nothing more than a privilege appurtenant to land carrying with it the right to do something or to require something not to be done on the land of another. But a *profit a prendre* includes not merely the privilege to do, but the right to take and use and is therefore something more than an easement. Further, while an easement, in its strictest sense can never import an interest in land, a *profit a prendre* which gives the right to take away a portion or the produce of another's soil may be said to be an interest in land. Moreover a *profit a prendre* considered as a right is an incorporeal hereditament equally with an easement."

Again at page 64 of the same work it is said, "an easement is an incorporeal right exercised in or over corporeal property for the beneficial enjoyment of other corporeal property" and "excluding for the moment the extended meaning given to an easement by the Indian Limitation Act, and Indian Easements Act, and confining the right within the limits of the English definition, it is apparent that an easement is not an interest in land but a mere privilege appurtenant to the dominant tenement and imposing upon the servient owner an obligation to suffer something to be done or not to do something in or upon the servient tenement. This view of the real nature of an easement is not affected by section 3, clause (*b*) of the Land Acquisition Act (I of 1894), which provides that if a person is interested in an easement he is to be deemed to be interested in land, such a provision applying merely to the purposes of the Act itself." This statement is supported by the citation of six cases dating from 1610 downwards to 1887, but none of them are available.

In the Encyclopædia of the Laws of England, Volume II, S. V "Real property", "hereditaments" is explained as a comprehensive term including not only lands and tenements, but whatsoever may be inherited, and among "incorporeal hereditaments appurtenant" are included "rights of way.....annexed to corporeal hereditaments by prescription."

The extension of the meaning of easement given by the Limitation Act, and Indian Easements Act referred to in the passage quoted above is the inclusion of *profits a prendre*.

Thus Peacock understands an easement proper like a right of way, to be an incorporeal hereditament appurtenant to land, and yet not an *interest* in land. But the distinction drawn does not appear to be consistent with Wharton's definitions of "Interest" and "Right" already quoted.

It is difficult to see how a right of way is not *a right in realty*, being as it is an incorporeal hereditament appurtenant to land, and as Peacock himself says (page 3) involving a breaking off or subtraction of, a right or rights from the *dominium* or full ownership of some person and the annexation of such subtracted right or rights to the *dominium* of another person, for the better or necessary enjoyment of that person's property.

162

I think perhaps the explanation may be found in Mitra's Law of Limitation and Prescription (4th Edition). At page 414 I find "In one sense every easement may be regarded as a right of property in the owner of the dominant tenement, not a full or absolute right, *but a limited right* or *interest*, in land which belongs to another whose *plenum dominium* is diminished to the extent to which his estate is affected by the easement". And at page 437, "When it is said that an easement is an incorporeal right, all that is meant is that it is not a right to the *soil* of another's land, nor to any *corporeal* interest in such land, though it creates an obligation or duty, which attaches upon or is annexed to the land."

The last passage was cited by the learned Advocate for the Plaintiff-Appellant as authority for his contention that a right of way is not an interest in land. I do not find that it supports his case at all. On the contrary I think it shows that what Peacock apparently meant to say was that an easement is not a *carporeal* interest in land.

As we have seen *Interest* as defined by Wharton is not limited to corporeal rights. And I think that in the absence of anything to show that *interest* in section 53 of the Land and Revenue Regulation was used in this limited sense, it must be construed to have the wider meaning which is not only warranted by Wharton's definition, but by common usage. This conclusion is supported by Blackstone's definitions of "*jura rerum*", "things real", "hereditaments" "incorporeal hereditaments", "ways", and "estates" (Kerr's Blackstone, Vol. 2, Chaps. I, II, III, pp-1, 13, 16 and 30 and Chap. VII).

I hold therefore that a suit to establish a right of way over State land is a suit to establish an interest in State land within the meaning of section 53, Land and Revenue Regulation, and that the jurisdiction of the Civil Courts is barred.

The learned Advocate has contended further that it was not competent to Mr. Carr to overrule his predecessor's finding on the issue in question. But he has cited no authority, and I see no reason to doubt the correctness of Mr. Carr's view on this point.

The appeal is dismissed with costs.

Land and Revenue Regulation—53 (2) (ii).

Civil Appeal No. 45 of 1905. March 9th.

Before G. W. Shaw, Esq.

MI MIN DWE v. MA MA KIN KYIMYIN MIBAYA.

Mr. *S. Mukerjee*—for appellant. | Mr. *C. G. S. Pillay*—for respondent.

Held—that a *twinyo* or *ayo* is an interest in State land, and consequently in view of section 53 (2) (ii) of the Upper Burma Land and Revenue Regulation, the Civil Courts have no jurisdiction to entertain a suit to recover a *twinyo* or *ayo*.

References:—

U. B. R., 1892—96, II, 327.
Kerr's Blackstone, Vol. II, Chaps. I, II, III, VII.
U. B. R., 1897-01, II, 443.
——————————207, 209, 211.

Plaintiff-Appellant sued "to recover from Defendant (Respondent) who is now enjoying it, a *twinyo*, the value of which it is not possible to estimate." These are the words of the plaint.

A *twinyo* is what is called an *ayo* or *twinzayo* in *Tha Zin and another* v. *Mi In*,* and is there described as "an hereditary right (as now understood) to apply for and get 12 fresh well-sites every year within the Burmese Oil Reseves of Twingon or Bemè."

In the present case, the Subdivisional Court in its first judgment remarked as follows:—

"It must be remembered that an *ayo* is not concerned with any existing well-sites. These are subject to the ordinary laws of inheritance, and frequently go to other members of the family, while the *ayo* passes down according to special rules. An *ayo* therefore is not an interest in any existing well-sites, that is, in any immoveable property that exists. An *ayo* is simply a right to petition for well-sites, and that right is limited by Government to 24 families. An *ayo* does not give a right to any specific spot, nor does it guarantee that any spot will be granted. It is not, properly speaking, a right to immoveable property. Government is not bound to grant any site. It is primarily a right against all who are not *yoyas*. I do not hold that because the ground is in existence on which the well-site may be granted, an *ayo* is 'an interest in immoveable property'. An ungranted well-site is not existent. It cannot be property moveable or immoveable. To show how entirely the *ayo* is separated from rights to specific property, I cite one custom among *twinzayos*. If a *twinzayo* has petitioned for a certain site, and dies before it is granted, that site when granted, follows the rest of his property and is inherited by wife and children, and does not to go to the inheritor of the *ayo*. Once a well-site is defined it ceases to be part of the *ayo*."

The District Court said:—

"Government recognized the hereditary rights of certain persons called *twinzayos* in certain pieces of land at Yenangyaung, called Reserves. Claims in these Reserves are allotted yearly to the *Twinzayos*. I think these claims must therefore be considered an interest in immoveable property."

What the District Judge meant was that well-sites were allotted and that the *ayos* must be considered an interest in immoveable property.

Also (in its final judgment) the same Court said:—

"The points for decision would seem to be.....whether the suit can be disposed of by a Civil Court in view of the fact that the land with regard to which the right is claimed is admittedly State land.....There have been conflicting rulings as to whether a case of this kind cognizable by a Civil Court, but as the High Court at Mandalay has tried cases of this class, and as neither of the Advocates has raised objections on this point, I have proceeded to dispose of the appeal, but it seems to me

*U. B. R., 1892—96, II, 327.

MA MIN DWE
v.
MA MA KIN
KYIMYIN MIBAYA.

it is quite open to the Revenue authorities to issue grants to persons they consider entitled to them, on State land, irrespective of the Civil Courts' decision."

It may be noted that the Plaintiff-Appellant appealed to the District Court against the first judgment of the Subdivisional Court, holding that an *ayo* was not an interest in immoveable property, and that the suit was therefore governed by Article 120, and not by Article 144 of the second Schedule to the Limitation Act.

The nature of an *ayo* was therefore a matter which was brought to the notice of the Court from the first, though as between the parties it does not appear to have been in issue. The plaint stated that to each *twinzayo* the Government annually grants 12 well-sites, and the Defendant-Respondent's written statement said that grants had been issued (by Government) to Defendant, and Defendant-Respondent put in evidence what purported to be a list of *ayos* on the authority of the Secretary to the Financial Commissioner.

From the quotations given above it is clear that an *ayo* is a hereditary right to obtain from Government yearly so many well-sites on State land within the areas known as the Twingon and Bemè Reserves, and that it does not include any specific well-site, or even the right to obtain any specific well-sites.

But the Subdivisional Court appears to me to have been in error in holding that an *ayo* was not an interest in immoveable property because it was only a right to obtain undefined well-sites which, when granted, did not form part of it.

Blackstone is instructive on the point.

After defining *jura rerum* as the rights which a man may acquire in and to such external things as are unconnected with his person, otherwise the rights of dominion or property, he goes on to explain that the objects of dominion or property are things which by the law of England are of two kinds, things real and things personal, and defines things real as things permanent, fixed, immoveable, which cannot be carried out of their place, as lands and tenements, as distinguished from things personal, *i.e.*, goods, money and all other moveables.

He then describes the different sorts or kinds of things real, *viz.*, lands, tenements and heriditaments.

Land consists of all things of a permanent substantial nature.

Tenements include "everything that may be holden, provided it be of a permanent nature, whether substantial and sensible, or unsubstantial and ideal", *e.g.*, a right of common is a tenement.

Hereditaments include "whatever may be inherited, corporeal or incorporeal".

Incorporeal hereditaments "are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation". They are rights "issuing out of a thing corporate .....or concerning, or annexed to, or exercisable within the same"..... "something collateral thereto", a sort of accidents, which inhere and are supported by" the corporeal. They are not to be confounded with their effects or profits which may be frequently objects of our bodily senses. "So tithes, if we consider the produce of them,

as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments . . . being merely a contingent springing right, collateral to or issuing out of lands: that casual share of the annual increase is not, till severed, capable of being shown to the eye", etc.

The right of way, *i.e.*, the right of going over another man's ground, is an incorporeal hereditament. This does not refer to public or common ways, but to private ways " in which a particular man may have an interest and a right though another be owner of the soil."

Again an estate in lands, tenements and heriditaments (*Status*, or " the condition or circumstance in which an owner stands with regard to his property") is defined as " such interest as the tenant has therein ".*

I think this is sufficient to show that an *ayo*, as described above, is an interest in immoveable property and it is also evident that that immoveable property being State land, an *ayo* is an interest in State land.

It is contended for Defendant-Respondent that, not having been raised by the parties, the question of jurisdiction cannot now be gone into in second appeal, unless it is apparent on the face of the record that the land is State.

This point was dealt with in *Mi Lok and others* v. *San Yatha and others*.† The statement of the law there given has not been contested.

"The question of jurisdiction is vital, and where it appears that a Court has decided a case in which it had no inherent jurisdiction over the subject matter this cannot be overlooked by a Court of appeal or second appeal."

On the facts above stated I am of opinion that it does appear on the face of the record that the subject matter of the present suit was an interest in State land. Consequently I am bound to hold that the Civil Court had no jurisdiction.

The fact that such cases have been dealt with before by this Court is immaterial.

At the date when *Tha Zin's* case was tried, my learned predecessor, Mr. Burgess, was of opinion that where Government was not a party to the suit, the jurisdiction of the Civil Court would not be barred, but he subsequently receded from this position in *Tha Aung* v. *San Ke* ‡ and the decision in that case was affirmed in *Nga Nut* v. *Mi Mi*,§ and *Nga Ke* v. *Po Ni*.‖

In more recent cases that have been referred to in which *ayos* have formed the subject matter, the point was not brought to the notice of the Court.

With regard to the question of valuation, I am of opinion that the order of my predecessor directing the memorandum of appeal to be

* Kerr's Blackstone, II, Chaps. I, II, III, VII.
† U. B. R., 1897—01, II, 443.
‡ ——————, 207.
§ ——————, 209.
‖ ——————, 211.

167

MI MIN DWE
v.
MA MA KIN
KYIMYIN MIBAYA.

stamped *ad valorem* according to the value of the *ayo* and finding that value to be Rs. 40,000—on a telegram from the District Judge—was incorrect.

There is obviously no means of determining the value of an *ayo*. At most, a suit to recover an *ayo* can only be a suit "for a right to some benefit (not herein otherwise provided for) to arise out of land" [section 7 (iv), Court Fees Act] in which case it is to be stamped according to the value at which the relief sought is valued in the plaint.

For these reasons I am of opinion that the plaint and memoranda of appeal must be held to have been sufficiently stamped with a Rs. 10 stamp in each case.

If the stamp has been cancelled, a certificate will be granted to the Plaintiff-Appellant under Direction 8A, page 147, Stamp Manual, to enable her to recover the value of the additional stamp duty. If it has not been cancelled it will be returned to her.

I regret that the matter in dispute between the parties cannot be decided in these proceedings. But this cannot be helped.

The Civil Courts having no jurisdiction to entertain a suit to establish an interest in State land in view of section 53 (2) (ii) of the Land and Revenue Regulation, the appeal is dismissed with costs.

Limitation Schedule II—13.

Before G. W. Shaw, Esq.

Civil Appeal No. 149 of 1904, November 28th.

Palaneappa Chetty—Appellant *v.* {Sheodat Rai / Bissesur Dass} Respondent.

Mr. *H. M. Lutter*—for appellant. | Mr. *H. N. Hirjee*—for respondent.

Order in execution of mortgage decree.—Section 295, Civil Procedure Code, Suit to recover assets paid to persons not entitled to receive them.

Held,—that an order as to priority of mortgages in execution of mortgage-decrees for sale is an order in execution and an order under section 295, Civil Procedure Code.

Held also,—that a suit under section 295, Civil Procedure Code, is not a suit to set aside an order.

Held further,—that Article 13 of Schedule II of the Limitation Act is inapplicable to such a suit.

References:—

I. L. R., 23 All., 313.
———15 Bom., 438.
———12 Cal., 499.
———13 Cal., 159.
———8 Mad., 82.
———9 Mad., 57.
2 Cal., W. N., 429.
Civil Appeal No. 308 of 1902.

On the 4th July 1901, the appellant Palaneappa Chetty instituted a suit for Rs. 1,593 against Shwe Li and Mi Tin (Civil Regular No. 156 of 1901 of the District Court, Mandalay), on a promissory note and equitable mortgage by deposit of title deeds, and on the 24th July 1901, he obtained a decree ordering the payment of the amount claimed within six months, and in default of payment the sale of the mortgaged property.

On the 23rd August 1901, the respondent Sheodat Rai instituted a suit against the same defendants for Rs. 1,730 on a registered mortgage deed relating to the same property, and obtained a similar decree on the 7th October 1901, but in this case only one month was allowed for payment.

On the 15th November 1901, respondent Sheodat Rai applied for the sale of the mortgaged property (Execution Case No. 275 of 1901). On the 20th the Court ordered the sale and proclamation was issued fixing the 9th January 1902 for the sale to take place. On the 23rd January 1902 in Execution Case No. 29 of 1902, appellant applied for the sale of the property in execution of his decree. The sale was proclaimed for the 4th March. Meanwhile nothing had come of respondent's application for execution.

On the 16th December 1901 the Additional Judge had passed an order for the property to be sold, subject to the Chetty's prior mortgage, unless both mortgagee decree-holders agreed to allow it to be sold free of incumbrance, in which case he declared that he would give the

Limitation, Schedule II—Article 164.

Civil Revision No. 95 of 1905. June 13th 1906.

Before G. W. Shaw, Esq.

NGA THA DIN
MI TIN } *v.* NGA PO CHAN.

Mr. *J. G. Chatterjee*—for Applicants. | Mr. *S. Mukerjee*—for Respondent.

Held,—that an attachment of property not belonging to the judgment-debtor is not execution of process for enforcing the judgment and does not bar an application under section 108, Civil Procedure Code.

See Civil Procedure, page 42.

Limitation 142, 144, 148.

Civil Appeal No. 30 of 1906. November 19th.

Before G. W. Shaw, Esq.

NGA KYAW DUN *v.* MI MIN SIN.

Mr. *H. N. Hirjee* for Mr. *H. M. Lutter*—for Appellant.
Mr. *A. C. Mukerjee* for Mr. *C. G. S. Pillay*—for Respondent.

Trespass on mortgagor's interest by person who redeems in his own right.

Where the mortgagee was in possession and a third party, a trespasser, redeemed without the knowledge of the mortgagor, and without notice to him:

Held—that the redemption extinguished the mortgage and the mortgagor could only sue for recovery of the interest from which he had been ousted, but that article 144 applied, and it was for Defendant, the trespasser, to show when his possession became adverse.

Also—that Defendant's possession could not become adverse till he did something to affect the mortgagor with notice of his adverse claim.

References:—

U. B. R., 1897-01, II, 469.
———————473.
———————461.
———————464.
———————1892-96, II, 502.
———————509.
I. L. R., 2 Mad., 226.
———————4 Cal., 327.
———————18 Bom., 51.

The facts are practically undisputed. Plaintiff-Respondent's father Nga Lu mortgaged the land in suit to Defendant Tu Nyo's father Nga Thi in 1235 (or 1240 B. E., for Rs. 78-8-0. In 1249 (or 1250), Defendant-Appellant Kyaw Dun claiming to be a co-heir of Nga Lu's, redeemed it, and in 1251, after working it for two years, re-mortgaged it to Defendant Tu Nyo for Rs. 130. In *Kason* 1267 Plaintiff-Respondent offered to redeem, but was not allowed to do so. In *Nayon* 1267 Defendant-Appellant redeemed and re-mortgaged to Defendant Ye Gyan for Rs. 240. Then Plaintiff-Respondent sued for redemption.

Defendant-Appellant Kyaw Dun in his written statement said that as Plaintiff-Respondent's father, Nga Lu, was his uncle, he had, or thought he had, a right to redeem the original mortgage, and as he did so more than 12 years before suit, Plaintiff-Respondent's suit was barred Article 142 or 144 of the Second Schedule to the Limitation Act. In re-mortgaging to Defendant Tu Nyo in 1251, the Defendant-Appellant admittedly used Nga Lu's name. The parabaik document was put in evidence, as it would seem, by Defendant Tu Nyo, and was admitted by Defendant-Appellant. But it disappeared from the record (no copy of it was filed, and the Judge noted in the list of documents that it was neither admitted nor proved. The only witness examined in the case, however, was Nga Min Zin, the writer who swore to this document being the one he wrote. There is no denial of its genuineness on the part of Plaintiff-Respondent. It is not intelligible what led the Township Court to treat it as it did. Plaintiff-Respondent says that she only knew of the redemption and re-mortgage by Defendant-Appellant when she sent to redeem in 1267. Defendant Tu Nyo admits that he did not tell Plaintiff-Respondent about the redemption by Defendant-Appellant in 1249 (or 1250) till *Kason* 1267. Defen-

NGA KYAW DUN
v.
MI MIN SIN

dant-Appellant in his second examination on oath admits that he was not related to Nga Lu at all, and that he does not know what right he had to redeem also that Nga Lu was dead when he redeemed, and that he "re-mortgaged by putting in Maung Lu's name." He does not allege that Plaintiff-Respondent had notice of his proceedings. In short Defendant-Appellant goes as near as possible to admitting that he obtained the land by means of two fraudulent acts, which he now seeks to make permanently successful by the help of the Limitation Law.

He relies on *Shwe Nyan* v. *Tok Pyu* * which, if the Lower Courts had been as familar with the Rulings of this Court as they ought to have been would have undoubtedly led them to dismiss the Plaintiff-Respondent's suit

At first sight that case seems to lay down (1) that when land is said to be redeemed, the transaction is invariably a redemption which extinguishes the mortgage, and (2) that in such a case the redeemer's possession is invariably averse from the first. In *Po Myin* v. *Mi Daw and another* † it was pointed out that it did not appear to have been intended to lay down the first of these propositions, and that it must depend on the circumstances of each case whether a mortgage was in fact extinguished or merely transferred. *Po Myin's* case was itself a clear instance where the redemption in question did not extinguish the mortgage.

It is necessary in the present case to examine the second proposition. The first remark to be made is that here too it does not appear that it was really intended in *Shwe Nyan's* case to lay down such a proposition. All that was decided was that in that case the defendant challenged the equitable state of the mortgagor, and that his possession became adverse as soon as he acquired it.

I have referred to the principal authorities cited in that case, and I am unable to find in them any support for the view that when a stranger redeems adversely to the mortgagor, adverse possession necessarily begins from the date of the redemption.

In *Ammu* v. *Ramakishna* (1875)‡ which declared that the interest of the mortgagor might be invaded as well as that of the mortgagee, it was distinctly stated that "where the mortgagor may have made over possession to the mortgagee if the interest of the mortgagor be invaded, although he has not actual possession, he cannot bring a suit for redemption against the wrong-doer, but a suit for the recovery of the interest from which he has been ousted. *According as he has or has not been actually dispossessed of the land, the limitation which would have applied to his suit under the Act of* 1871 *is prescribed by clause* 143 *or* 145 *to the Second Schedule of that Act*" (corresponding to articles 142 and 144, respectively, under the Schedule to the present Act).

In that case the mortgagor's interest was invaded by possession based on a lease from Government granted after an enquiry by the Deputy Collector at which the mortgagor was represented, so that the mortgagor had notice of the possession from the first, and it was adverse from the first.

* U. B. R., 1897-1901, II, 469. | † U. B. R. 1897-01, 473.
‡ I. L. R. 2 Mad., 226.

178

In *Bijoy Chander Banerji* v. *Kali Prosanno Mukarji* * (1879), where adverse possession is defined as "possession by a person holding the land on his own behalf, or on behalf of some persons other than the true owner, the true owner having a right to immediate possession," it was held that the trespasser's possession was adverse from the first, though acquired in the owner's absence and without his knowledge. But that was not a case of mortgage. The owner was not a mortgagor out of possession. He was in possession through his wife.

In *Chinto* v. *Janki*† (1892), which was a case like the present of a mortgage with possession and a trespass by a third party, it was held that article 144 applied, and that it was for the trespasser to show when his possession began to be adverse. Mr. Justice Fulton said: "*Primâ facie*, by his act of possession he merely ousts the mortgagee who is entitled to hold the property. Such ouster, unaccompanied by any further act of aggression on the mortgagor's rights, cannot give any cause of action to the latter . . . The mere fact of possession by a stranger is not necessarily an invasion of the mortgagor's right. It may, however, become so. But it is for the Defendant to show when it become adverse".

There it was alleged that the Defendant who had been in possession as owner for 40 years took proceedings to remove the Plaintiff's name from the Survey Records, but there was no finding as to when they took place, whether they were successful, and whether Plaintiff had any notice of them, and the learned Judge remarked that, except for this statement as to proceedings to remove Plaintiff's name, it did not appear in what way the Defendant's possession was adverse to him. Mr. Justice Telang in the same case observed that the question, whether, when a mortgage is effected and the mortgage is put in possession, a stranger to the mortgage can, by 12 years' possession, obtain a title against the mortgagor, is not capable of an answer in the abstract without reference to the circumstances of each case. He said: "It is well established in this Court that there may be a possession adverse to the interest of a mortgage which is, nevertheless, not adverse to the interest of the mortgagor". And on the ground that a mortgagor is not entitled to immediate possession, he held that, in the case before the Court, it lay upon the Defendant to show that his possession became adverse 12 years before suit.

In *Mi Mon* v. *Mi Shwe Ma*,‡ the Plaintiff had been sent for by the Burmese tribunal at the time of the redemption by the third party and refused to come; that is, she had notice from the first, and there was no doubt of the possession being adverse. The same was the case in *Mi Yan* v. *Nga Taik and another*,** where a member of another branch of the family having redeemed, litigation between him and the mortgagor immediately ensued, 19 years before suit.

The report of *Shwe Nyan's* case does not show whether the mortgagor had any notice of the redemption. The same remark applies to the report of *Nga Paw and another* v. *Nga Kin*.†† In neither was it

* I. L. R. 4 Cal., 327. † I. L. R. 18 Bom., 51. ‡ U. B. R. 1892-96, II, 502.
** U. B. R. 1892-96, II 509. ‡‡ ——— 1897-01, 464.

1879

NGA KYAW DUN v. MI MIN SIN.

considered whether article 142 or article 144 applied. It was assumed that possession was adverse from the date of the redemption. I venture to think that in both decisions the importance of the distinction between the two articles was overlooked, and that as a consequence the question when adverse possession began did not receive full consideration.

In the circumstances of the present case it must be held that the redemption by Defendant-Appellant extinguished the mortgage, and the Plaintiff-Respondent can only sue to recover the interest from which she was ousted. The redemption took place more than 12 years before suit. Plaintiff-Respondent, therefore, is within time only if article 144 applies, and if the possession of Defendant-Appellant began to be adverse within 12 in years.

I am of opinion, following *Chinto* v. *Janki*, that article 144 applies in cases of the kind. The mortgagor, not being in possession, cannot be said to be dispossessed within the meaning of article 142 when a third party redeems without his knowledge. Therefore the case must fall under article 144. And, as explained in *Nga Hman* v. *Shwe Ka and others*,* the burden of proof, where article 144 applies, lies on the Defendant to show when the possession became adverse.

I think that before the trespasser can begin to be adversely in possession to the mortgagor, he must do something to affect the mortgagor with notice of his adverse claim, *e.g.*, as in *Chinto's* case, by removing his name from the revenue records.

It follows that in the present case where, as we have seen, the mortgagor knew nothing of the redemption till 1267, and Defendant-Appellant failed to show that he had any notice of it at all, the (Defendant-Appellant's) possession did not become adverse till that date and the Plaintiff-Respondent was not barred.

The form of the suit was incorrect. But there is no reason why the Plaintiff-Respondent should not get a decree in these proceedings. She is entitled to recover the land on paying the mortgage debt. This is the conclusion at which the Lower Courts both arrived without being aware, as it would seem, that any question of difficulty arose.

The appeal is dismissed with costs.

* U. B. R. 1897-01, II, 464.

Master and Servant.
Contract—74.

Before G. W. Shaw, Esquire.

Civil Revision No. 80 of 1904. June 30th, 1905.

RAJA SHEW BAKHSH BOGLA,
BALLAB DAS *v.* PIRUMALL,

Mr. Basu—for Applicants.

In the absence of a building contract by which the servant agrees to forfeit wages if he withdraws without giving notice, a monthly servant who leaves without notice, is entitled to be paid down to the date when wages were last due, but not for the period he has served since that date.

References:—
2 C. W. N., 687.
10 Bom. H. C. R., 57.
I. L. R., 13 Cal., 80.
Smith on Master and Servant, page 182.

Plaintiff-Respondent sued for Rs. 50, which he alleged to be due to him on account of wages for December 1903 and January 1904, as a belt-mender in Defendant-Appellant's mill. It is admitted that he received Rs. 30 for December and Rs. 20 for January, and also that Rs. 25 a month was his salary for day work. It is also admitted before me that for night work he was to be paid at the rate of Rs. 25 a month, but Defendant-Appellant contended that he was only to be paid for the hours he worked, and that Rs. 5 for December (already paid) and Rs. 2 for January was all that he was entitled to on this account. The First Court found for Plaintiff-Respondent for the full amount claimed, but the District Court on appeal held the Plaintiff-Respondent was entitled to be paid only for each night the mill worked, and awarded him Rs. 25-12-10 for night work during the two months. No appeal is admissible in respect of this finding, and it must be accepted.

In the original Court the Defendant-Appellant alleged that Plaintiff-Respondent discontinued working at the mill without notice (thereby causing serious loss, trouble, and inconvenience to the mill), and on this ground was not entitled to the balance of Rs. 7, which the Defendant-Appellant admitted to be due to him.

The First Court did not deal adequately with this plea, and the District Court in remanding the case under section 566, Civil Procedure Code, framed issues on it, *viz.*, was there any agreement, express or implied, that Plaintiff should forfeit a month's wages in lieu of giving a month's notice? Did Plaintiff leave his work without a month's notice? If so, should he forfeit a month's wages? The Township Court found that there was no agreement to forfeit a month's wages in lieu of giving a month's notice, that Plaintiff did leave the work without notice, and that, as there was no agreement, Plaintiff should not forfeit a month's pay. The Lower Appellate Court very strangely

RAJA SHEW BAKHSH BOGLA BALLAB DAS v. PIRUMALL.

Applying this rule to the present case, Plaintiff-Respondent, who got leave of absence for a day on the 1st February and did not return to work again, is entitled to be paid for the previous month, *i.e.*, down to the 31st January inclusive, and the only pay which he forfeits is that for the 1st February which he has not claimed.

It follows that the decree of the Lower Appellate Court must be confirmed.

The application is dismissed with costs.

Muhammadan Law.

Before A. M. B. Irwin, Esq., C.S.I.

Civil Appeal No. 284 of 1904. February 8th, 1905.

MA LE and MA ME *vs.* MAUNG HLAING and MA MI.

Mr. *H.N. Hirjee*—for appellants. | Mr. *H. M. Lutter* and Mr. *J. C. Chatterjee*—for respondents.

A custom having the force of law by which Zerbadis in Mandalay are governed in respect of succession and inheritance by Buddhist law does not exist. They are governed in those matters by Muhammadan law.

Reference.—U. B. R., 1892-96, 529.

The only question for decision in this appeal is whether the Zerbadi Muhammadans of Mandalay are governed in respect of inheritance and succession by Muhammadan or by Buddhist law. The Statute law applicable to the case is contained in section 13 of the Burma Laws Act, 1898, *viz*: "Where in any suit or proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance..... ....the Muhammadan law in cases where the parties are Muhammadans.....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." There is no question of alteration by enactment The case for the Appellants, which has been very ably argued by Mr. Hirjee, is that there is existing from time immemorial a custom having the force of law, by which questions of inheritance and succession affecting the Zerbadis of Mandalay have been decided by Buddhist law. The District Court found that the custom existed before and for some time after the Annexation of Upper Burma, but that it has not the force of law.

The question was raised before in this Court, in *Ahmed* v. *Ma Pwa*.* Mr. Burgess held that the evidence adduced in that case did not prove the existence of a custom having the force of law. The evidence seems to have related only to the practice of the Burmese Courts, and Mr. Burgess held that the consent and approbation of the Zerbadi community, which are essential to a custom having the force of law, so as to affect that community, could not be inferred from the practice of the Burmese Courts, because those Courts never administered any law except that of the Burmese *Dhammathats*.

The Appellants do not take exception to any of the principles laid down by Mr. Burgess for determining whether a custom has the force of law or not; but they say that, in the present case, there is abundant evidence that outside the Courts the Zerbadis voluntarily and habitually applied the Buddhist law in cases of inheritance, that immemorial usage amounts to consent of the people who are subject to the law, and that, even if there was compulsion at first, consent must be presumed to have come in course of time, from the fact that the Buddhist law

* U. B. R. 1892-96, 529.

MA LE
v.
MAUNG HLAING.

has been followed even in cases in which resort was not had to the Courts.

The District Court found that prior to the decision in *Ahmed* v. *Ma Pwa*, Buddhist law was applied to Zerbadis in matters of inheritance, and that in so applying it the British Courts were following the practice not only of the Burmese Courts but of the Zerbadis themselves. This finding is, I think, rather too favourable to the Appellants: the weight of evidence seems to show that the Zerbadis, including persons who acted as arbitrators, knew very little about either Buddhist or Muhammadan law, and that when questions of inheritance were settled outside the Courts, they were generally settled on broad principles of equity without much reference to either law, though it is pretty clear that the widow of a deceased Zerbadi generally excluded his children from inheriting during her lifetime, and so far the practice was opposed to Muhammadan law.

But if the finding of fact of the District Court be accepted as it stands, I think the further finding that the custom had not the force of law is correct. The burden of proving the existence of a custom having the force of law lies on the Appellant. There is evidence that the order of Mindon Min, appointing a judge and prescribing the law to be administered, was merely a sample of such orders usually issued on such occasions, and, in fact, no attempt was made to show that any other law than that of the *Dhammathats* was ever administered by the Burmese Courts before Mindon Min's time, nor is it alleged that the Zerbadis before their arrival in Burma did not conform to Muhammadan law. Therefore it must be presumed that the subjection of these people to Buddhist law was at first compulsory, and I must emphatically dissent from the proposition that consent and approbation can be inferred from any number of centuries of subjection to the law as administered by Courts, even when such subjection resulted in a voluntary application of the law outside the Courts.

The case of the Khojas and the Kachi Memons of Bombay are of no value as precedents in this case, for they were Hindus who had been converted to Muhammadanism but retained some of their Hindu customary law: here the Zerbadis, while retaining their old religion, are alleged to have adopted the customary law of another religion. In the Bombay cases there was no suggestion that the Hindu law had been imposed on the people by the Courts of an alien nation.

For these reasons I dismiss the appeal with costs.

Judgment of the District Court of Mandalay.

The preliminary issue to be decided in this case is as follows: "Whether Zerbadi Mahomedans in Upper Burma by custom having the force of law are governed in questions of inheritance and succession by Buddhist law." The point was raised by the Defendants in their written statements, and it is no doubt one of the very highest importance for the whole Zerbadi community of Upper Burma. The law on the subject was first authoritatively laid down in Upper Burma by Mr. Burgess in the case of *Ahmed and another* v. *Ma Pwa* (U. B. R., 1892-96, 529). But in that case it was observed as follows: "Of course there may be a custom having the force of law that the Zerbadi community is governed by the rules of Buddhist law

which they have adopted in matters of inheritance, and if that custom were proved it would override the Mahomedan law which is *primâ facie* to be presumed to be the law of a cummunity professing like the Zerbadis the Mahomedan religion." And again "All that I am at present deciding is that the evidence adduced in this case as to the practice and procedure of the Burmese Courts is without weight in regard to the question of the existence of the custom set up. Evidence of a very different kind would be required to establish the custom it is sought to prove."

The next reference to the subject which has been brought to my notice is contained in the case of *Ma Le and one* v. *K. T. Maung Po Thet* (Civil Revision Case No. 90 of 1902) where Mr. Adamson remarked as follows with reference to the ruling quoted above: "The ruling referred to may be right or wrong, but there are no materials to contest it in this case, and it certainly could not properly be contested in a miscellaneous execution case.

Relying on these two rulings that the question of custom has never been decided, Mr. Hirjee has now brought it up and has examined a number of witnesses, all I think, from the town or neighbourhood of Mandalay. He has also produced certain documentary evidence. I will deal separately with each kind of evidence. First then as regards the oral. The first witness, Mulla Ismail, is a well known Sarati who has resided in Upper Burma for the last 30 years. For some time he held the Office of Akauk Wun or Customs Wun under the Burmese King. He says that prior to, and for some years after, the British annexation of Upper Burma questions of inheritance amongst Zerbadis were decided amongst themselves voluntarily as well as in the Courts according to the laws applicable to Burman Buddhists. He says that at the same time the Mahomedan law was applied to foreign Mahomedans, but he was unable to quote any specific cases. He added that in the case of a foreign Mahomedan dying in Burma and leaving a Burmese wife the wife took all his property and conversely if the wife died the husband took it. I understand the argument from this to be that the Mahomedan law was only applied in cases of inheritance where none of the parties were subject to Buddhist law. The second witness, Aga Javad, is a Persian gentleman who has lived in Mandalay for forty years. He states that Mahomedan law was never applied to Zerbadis in matters of inheritance, and he never heard of any Zerbadi who asked for its application. In cross-examination he referred to the case of Hadji Takee who came to Mandalay and married a Zerbadi wife. Before he left he divorced her. She sued for a division of property and claimed half under Buddhist law, but as he was a Mahomedan the case was decided according to Mahomedan law and she only got her dower. It is not clear when this case was decided, but so far as it goes, it seems to be opposed to the Defendant's general contention.

The third witness, Mahomed Isask, is a Zerbadi. He is an Honorary Magistrate of Mandalay, and was born 65 years ago in Amarapura. He says that ever since he can remember, and from what he has heard from his forefathers, Zerbadi Mahomedans divided their property according to Buddhist law. If the wife died the husband succeeded and *vice versâ*. If the parents died the children inherited and children could not demand inheritance while the parents were alive. Then he goes on to say that in the King's time Buddhist law was applied to all (except Europeans about whom he did'nt know) including foreign Mahomedans which is in contradiction of what Aga Javad says. And he adds that Zerbadis divided according to Buddhist law without going to Court—that is, they were guided by it but did not follow it strictly. He stated that he had himself arbitrated according to Mahomedan law, but had only done so after that law came to be generally followed some time after the annexation. The fourth witness, Maung Hla, is a Zerbadi, Advocate, aged 50. He was born in Rangoon but was brought up in Mandalay. He seems to have studied what is known concerning the origin of the Zerbadis, but the point is far from being clear. He stated, however, that except in religious and in marriage ceremonies, Zerbadis adopted nearly all the Burmese customs. He referred to the well known patent appointing Judges in the King's time in which the law to be followed was specified and Mahomedan law found no place in it. He says that ever since he was big enough to wear a paso, Zerbadi cases were never decided according to Mahomedan law to his knowledge. The fifth witness, Ma Cho Gyi, aged 62 years, says that in the King's time Zerbadis divided their inheritance according to Buddhist law—never according to Maho-

MA LE
v.
MAUNG HLAING.

medan law to her knowledge, and she adds that the property acquired was the joint property of husband and wife, thus showing that Buddhist law was followed. The sixth witness, U Lat, Wet-Masut Wundauk, was a high official in the King's time and is now 59 years of age. He is a Burman Buddhist. He says his position connected him with the Hlutdaw as well as the Civil Court. He adds that in the King's time Zerbadis were subject to Buddhist law in matters of inheritance. Foreigners were also subject to Buddhist law prior to the establishment of the Consular Courts. The seventh witness, Maung Pu, Moda Wundauk, is another *ex*-official of the Burmese Government and an elderly gentleman of high standing; he also states that in the King's time Zerbadi inheritance cases were decided according to Buddhist law. Zerbadis did not differ from the Burmese except in religion, and most of them have Burmese names. The eighth witness, Ma Ma Gyi, gives evidence similar to that given by the other Zerbadi witnesses. The ninth witness, Maung Po Thet, says Zerbadi inheritance cases were decided according to Buddhist law. But sometimes there were consent divisions which were not in accordance with any law. He says in the King's time all inheritance cases had to go to Court, which seems to contradict what he said just before. This witness appears to be hostile to the first and second defendants, but I think it is clear that his evidence generally speaking corroborates that of the other Zerbadi witnesses. He admits that when the husband died the wife inherited, though he qualified this admission by adding that she only did so when there were no children. If there were children they worked jointly with the mother, and he never heard of an instance where the children demanded inheritance from the widowed mother. He does not know of any instance in which the brother of a deceased husband claimed a share from the widow of her children. He says Zerbadis have applied Mahomedan law to themselves since the British annexation. He admits that on a previous occasion he said it had only been so applied for about six years, but he has since learnt that it has been applied longer. He referred to a case in 1886 which was decided according to Mahomedan law. The evidence of the other five witnesses tends to show that Buddhist law was applied to Zerbadis in the Burmese King's time.

Some of the first and second defendants were further examined on behalf of the plaintiff, but I do not think anything of importance was elicited. The fifth witness Hadji Thaing, aged 80, is a Zerbadi and was in Mandalay in the King's time. He says that in those days if lugyis were called on to decide inheritance cases amongst Zerbadis they decided as best they could to the satisfaction of both sides. He himself did not decide any such cases, but has decided three since the annexation, and in all the Mahomedan law as understood was followed. I think this is quite clear, notwithstanding that the witness was unable to satisfactorily answer all the questions put to him, with a view to testing his knowledge of Mahomedan law. He never heard or knew of any instance in the Burmese King's time where Zerbadis divided according to Mahomedan law. The general effect of this witness' evidence is, I think, merely that after the annexation in some cases attempts were made to apply parts of the Mahomedan law and that so far as he knows, Mahomedan law was not applied in the King's time. The next witness, Hadji Ko Po Myit, says that in the King's time if the Zerbadis went to Court their inheritance cases were decided by Buddhist law. If division was made outside the Court it was neither according to Buddhist or Mahomedan law, but just as was thought fit (taw aung). The general effect of this witness evidence is that after the annexation attempts were made to apply Mahomedan law in Zerbadi inheritance cases, but that prior to the annexation the Courts applied the Buddhist law, and cases settled out of Court were settled as was thought just and equitable. Maung Naing's (seventh witness for plaintiff) evidence is to the same effect, but as he was only about thirty at the time of the annexation it does not seem likely that he would be employed to decide inheritance cases at that age. I was unfavourably impressed by this witness' demeanour. The eighth witness, U Maung, had to admit in cross-examination that in the King's time if a Zerbadi husband died his wife got the whole of his property. His own father took a second wife and on his death the stepmother took the whole of the property. He stated at first that inheritance cases were decided as was thought right by lugyis, but on cross-examination he explained that Zerbadis in the King's time were guided by Buddhist law in mak-

ing division of inheritance. He afterwards explained that they did so to please the King, who was a Buddhist. The ninth witness says he acted as lugyi in deciding Zerbadi inheritance cases in the King's time, and that no law was followed, the lugyis deciding as they thought right. He added, however, that on the death of a husband the property remained with the wife and children, and that the children could not claim their shares from either surviving parent because if they did so they were liable to be beaten publicly to the sound of a gong. I think the general effect of this witness' evidence is that Buddhist law was applied to Zerbadis before the annexation. The last witness merely witnessed a document of division by mutual consent.

So far then as the oral evidence goes there seems to be little doubt that the Buddhist law was the invariable rule of decision in inheritance cases amongst Zerbadis in the neighbourhood of Mandalay prior to the annexation.

Turning now to the documentary evidence some cases have been referred to, all of which have of course been decided since the annexation. The first is No. 92 of 1886 of the Civil Court. The plaint is missing, but the issues were: (1) Under Mahomedan Law, can Plaintiff, as an adopted son, succeed to the property of his adoptive parents; (2) Can written Mahomedan law be overruled by evidence of special custom. The Judge decided both questions in the negative, but I think the only importance this case has is to show that thus early after the annexation there was conflict as to whether the Mahomedan or the Buddhist law applied. The next case is No. 216 of 1890 (*Maung Po* v. *Ma Cho and six*), but it does not seem to assist, as the decision was that the suit was *res judicata*. The copy of the Hlutdaw's judgment referred to is not now on the record. The next is *Ahmed and one* v. *Ma Paw*, which I have already referred to. I extract as follows from Mr. Richardson's judgment:—

"It seems to be rather late in the day to raise the question as to the law of intestate succession that applies to the Zerbadis. The Courts have all along decided such cases by the Burmese Dammathat. But Plaintiff, it seems, has had a difficulty in producing a single judgment which is an authoritative ruling in the matter, and has had to resort to the evidence of experts alone."

The first and second defendants have not been any more successful in their quest. They have, however, produced another of Mr. Richardson's judgments, Exhibit 1, from which it appears that he held that Zerbadis were governed by Buddhist law in matters of inheritance and succession. Mr. Richardson presided in the Civil Court of Mandalay for many years, and I think he may be accepted as an authority on its practice prior to Mr. Burgess' decision in *Ahmed* v. *Ma Pwa*. I think it may be taken that prior to this decision the Buddhist law was applied to Zerbadis in inheritance matters, and that in so applying it, the British Courts were following the practice not only of the Burmese Courts but of the Zerbadis themselves. The only point then that remains for decision is the very difficult one as to whether the custom under which the practice arose has the force of law. The main argument against this, in the words of Mr. Burgess in *Ahmed* v. *Ma Pwa*, is "In other words, people who had to go to Court had to swallow Buddhist law because they could not help it." The Zerbadis found that they could not get Mahomedan law from the Burmese Courts, and so they followed Buddhist law. Can then custom thus created ever become a custom having the force of law? Mr. Hirjee contends that although the Zerbadis were free after the British annexation to adopt Mahomedan law they did not do so, and he points to this as proof that the Zerbadis consented to, and appoved of, the custom. And as regards the argument that Mahomedan must adopt Mahomedan law he has referred to the Koja Mahomedans, the Cutch Memons, and Malabar Moplahs as instances of Mahomedans who in some matters are subject to Hindu law.

On the question of custom the arguments on which Mr. Hirjee mainly relies are to be found in Broom's Legal Maxims, Chapter X, Seventh Edition. I make the following extracts: (page 698) "Custom *consuetudo* is a law not written, established by long usage and the consent of our ancestors," (page 702) "the custom must have existed from time immemorial. It is no good custom if it originated within the time of legal memory" (page 703). "the custom must have continued without any interruption," (page 704) "the custom must have been *peaceably enjoyed and*

MA LE
v.
MAUNG HLAING.

acquiesced in not subject to contention or dispute." I do not think I need quote any more. It seems to me that all Mr. Hirjee's arguments are vitiated by the cardinal fact that Buddhist law was forced on the Zerbadis. They had no choice in the matter, for the Judges were required to decide according to Buddhist law only. Can it then be truthfully asserted that the custom was established by consent of ancestors? I think not. There is no pretence that the Zerbadis ever consented to be governed in matters of inheritance by Buddhist law. All that can be said is that they acquiesced in it, but here again their acquiesence to be valid must have been free. and what freedom had they in the matter? None at all. It is not any concern of mine to say whether Buddhist law is better than Mahomedan law, or what the effect of relegating the Zerbadis to Mahomedan law may have on the Zerbadi women of Upper Burma. All that I have to decide is as to the custom having the force of law. I find that prior to, and for some years after the British annexation, Buddhist law was the rule in matters of inheritance and succession; but that prior to the British annexation this law was forced on the Zerbadis by a despotic monarchy, and that it was for this reason that the Zerbadis adopted Buddhist law. I can find no plain authority for the proposition that a custom for which the force of law is claimed, could have originated in this way.

My finding on the preliminary issue is that Zerbadis Mahomedans in Upper Burma are not by custom having the force of law governed in questions of inheritance and succession by Buddhist law.

Registration.

Before J. W. Shaw, Esq.

Civil Second Appeal No. 101 of 1904 October 3rd

MAUNG KYAN BET *v.* MAUNG LU DOK.

Mr. *C. G. S. Pillay*—for appellant. | Mr. *Tha Gywe*—for respondent.

Held,—that an unregistered document affecting immoveable property is admissible to prove a personal obligation where it contains a distinct, *i.e.*, separate admission of liability or personal undertaking to pay and not otherwise.

References :—

I. L. R., 18 Bom., 745.
——19 Bom., 663.
——20 Bom., 553.
——9 Cal., 520.
——26 Cal., 334.
——5 Mad., 119.
——8 Mad., 182.
P. J. L. B., 125.
P. J. L. B., 212.
S. J. L. B., 195.

Plaintiff-Appellant sued originally to compel Defendant-Respondent to redeem certain land alleged to be mortgaged for Rs. 302-8 and to pay Rs. 75-10 alleged to be due as rent on the same. Plaintiff-Appellant relied on two unregistered mortgage-deeds. As the Township Court could not try a land suit, Plaintiff-Appellant with the leave of the Court amended the plaint so as to make the suit one for a simple money decree.

The Township Court held the unregistered documents admissible as evidence of the debt, and their execution proved and gave Plaintiff-Appellant a decree.

The Lower Appellate Court thought the amendment of the plaint converted the original suit into one of an inconsistent character, and held the documents inadmissible, and the Plaintiff-Appellant's claim unproved.

It is contended on Plaintiff-Appellant's behalf that the amendment of the plaint merely amounted to the relinquishment of part of the claim and did not convert the suit into one of an inconsistent character.

There is a good deal to be said for this view of the matter, but I do not think it is material. It does not appear that an amendment wrongly permitted, would be a good ground of appeal, and the Lower Appellate Court's decree was based on a different and more serious objection, *viz.*, the inadmissibility for want of Registration of the documents relied on by the Plaintiff-Appellant.

The tenour of Exhibit A is as follows:—On the 15th Tazaungmôn lazan 1262 Ludôk asked Kyanbet...to accept on mortgage for Rs. 170 his land ..(boundaries and description stated). According to the

MAUNG KYAN BET v. MAUNG LU DOK.

request of Ludôk Kyanbet paid Rs. 170 and received the land in mortgage "on condition that pending redemption the land should not be damaged and that *a fixed yearly rent* နှစ်ရွဓလပ်ဝေ (or interest) of 20 baskets of *pegya* for every 100 rupees, or 34 baskets on the Rs 170 should be paid."

Exhibit B is expressed in exactly similar terms.

The First Court professed to admit these documents on the authority of two Lower Burma Rulings *Baing Wut and another* v. *Ko Nyaung and another** and *Maung Zin* v. *Shin Aung Tun* †—The second was not applicable at all, and the first as the Lower Appellate Court has pointed out was against the admission of the documents.

It has been brought to my notice that *Baingwut's* case was in a manner superseded by *Mi Tha and another* v. *Mi Shwe Hnit and another* ‡ and the learned advocate for the Plaintiff-Appellant has referred in general terms to the rulings mentioned in Desai Narotam's edition of the Registration Act, in which a great number of decisions are cited or summarized.

It is one of the grounds of appeal that the documents in question should have been admitted to prove the alleged debt and as I understand, the contention on behalf of Appellant is that any unregistered document affecting immoveable property is admissible as evidence of the debt or personal obligation, whether it is divisible or not, and however it is expressed.

I have examined practically all the rulings mentioned in Narotam's work, over 30 in number, besides those already cited, with the result that I have not found one to support this contention. It would have been so easy and simple to lay down a rule of this kind, that if any of the High Courts had taken this view, I think we should have had, a plain pronouncement to this effect.

The actual facts are very different. Mi Tha's case (1894) was one where the document in question contained an express undertaking to pay, and the case of *Ulfatunnissa* v. *Husain* § there referred to was concerned with a document of the same description. In these cases it was held that it was unnecessary to consider whether the document was divisible, *i.e.*, embodied a single transaction, or two transactions, but all that was actually decided was that a document containing a personal undertaking to pay is admissible and the undertaking was a distinct separate undertaking. *Ulfatunnissa's* case was decided by a Full Bench in 1883. I am unable to find that any later decision has gone further, or in short, that the principle of divisibility has been altogether abandoned.

Apparently the only Calcutta case of later date is *Mugniram and others* v. *Gurmnukh Roy* ‖ (1889) where a mortgage bond unregistered was admitted "for a collateral purpose" *viz.*, to prove an admission of liability sufficient to save Limitation. It does not appear that it was admitted as evidence of the debt or held to be admissible as such.

* S. J. L. B. 195.
† P. J. L. B. 212.
‡ P. J. L. B., 124.
§ I. L. R. 9 Cal., 520.
‖ I. L. R. 26 Cal., 334.

192

In *Kattamuri Jagappa* v. *Padalu Latchappa and others* * (1882) an unregistered mortgage bond had been admitted by the Madras High Court as evidenec of a personal obligation, but the bond contained a distinct admission of liability. In *Venkata Nayadu* v. *Papi Reddi* † (1885 the same Court held inadmissible an unregistered mortgage bond by which A stipulated that B should enjoy certain and for a term of years in order that a debt and interest might be liquidated by receipt of profits estimated at a fixed sum and it was provided that if B's possession was disturbed in the meantime A should pay the balance of the principal then due and interest from the date of the loan. B having been ejected sued A upon the covenant to pay.

The ground on which the Court held this document inadmissible was that the principal contract being invalid for want of registration and the covenant to pay dependent upon it, the document could not be admitted to prove the covenant to pay. Here there was an undertaking to pay but it was not distinct or separate from the mortgage transaction.

It may be noted that the facts of this case were very like those alleged by Plaintiff-Appellant in the present case the main difference being that they were set out in full in the unregistered document in the former and were not in the latter.

In a later Madras case (1895) where the document was admitted, it contained a distinct personal covenant to pay the debt secured by the mortagage.

In Bombay there are three cases of later date than *Ulfatunnissa's* case. The first is *Gurunath Sharinivas Desai* v. *Chenbasappa* ‡ (1894). Here there was a clause in an unregistered lease of land, by which the lessor agreed to indemnify the lessee against any loss he might incur by reason of disputes between the lessor and his kinsmen. Lessor and lessee having been dispossessed in a suit by a kinsman, the lessee thereupon sued the lessor under this clause. The document was held inadmissible, on the ground that the clause could not be separated from the lease.

In the second case *Venkaji Bobajai Naik* v. *Shid Ramapa Balapa Desai* § (1895) the *vahivat* of assessment of certain land was assigned as security for a loan and the bond provided that the assignee should retain the balance of assessment receipts in lieu of interest until the principal should be repaid. The assignee afterwards sued for the principal sum. It was held that the bond was inadmissible to show why rent had been received, because it could only be ascertained why rent had been paid by reading the whole bond, and the suit was therefore declared to be barred by limitation.

In two words the document was not divisible.

In the third case *Vani and others* v. *Bani and another* ‖ (1896) the document was held to be admissible but it contained a distinct admission of liability.

In the Allahabad and Punjab High Courts there are also cases since 1883 where unregistered documents were admitted to prove

* I. L. R. 5, Mad., 119.
† ——8, Mad., 182.
‡ I. L. R., 18 Bom., 745.
§ 19 Bom., 663.
‖ 20 Bom., 553.

MAUNG KYAN BET v. MAUNG LU DOK.

personal liability, but the documents similarly contained a distinct admission of liability.

It is unnecessary to go back to cases before 1883 but I have not been able to find any of the old cases, which unmistakably allow an unregistered document affecting immoveable property to be used as evidence of a debt where there was no distinct or separate admission of liability or personal undertaking to pay.

The conclusion to be drawn from this examination of the Indian High Courts' decisions is that it has always been held that an unregistered document relating to immoveable property of which registration was compulsory must in order to be admissible as evidence of a personal obligation contain a distinct, *i.e.*, separate admission of liability or personal undertaking to pay, and having regard to this weight of opinion I do not think I should be justified in holding that a document which does not contain such an admission or undertaking is admissible.

From the summary of the terms of the documents in this case which has been given above it will be seen that they are records of a single transaction, and that a mortgage, and contain no distinct admission of a debt or promise to repay a loan.

They are therefore inadmissible, and were rightly excluded by the Lower Appellate Court.

There is no admissible evidence of any money being due on account of a debt, or of rent or interest.

The appeal is dismissed with costs.

Specific Relief—39.

Before G. W. Shaw, Esq.

NGA SAGYI *v.* NGA YE BAN AND NGATUN MAUNG.

Civil Appeal No. 28 of 1905. October 2nd.

Mr. *S. Mukerjee*—for Appellant. | Mr. *H. N. Hirjee*—for Respondents.

In a suit under section 30 it is immaterial which party is in possession.

See Civil Procedure, page 36.

193

Civil 2nd Appeal No. 84 of 1905. March 12th 1906

SPECIFIC RELIEF—30.

Before G. W. Shaw, Esq.

U WATHAWA *alias* NGA TUN MIN } *v.* NGA PO.

Mr. *S. Mukerjee*—for Appellant. | Mr. *Tha Gywe*—for Respondent.

When an award has been made in arbitration proceedings held without the intervention of a Court of Justice during the pendency of a suit or appeal, a party can bring a regular suit to enforce it under section 30, Specific Relief Act, even though the existence of the award was not brought to the notice of the Court before the suit or appeal was decided.

References :—
24 W. R, 41.
4 Mad. H. C. R, 119
I. L. R., 15 Mad. 99.
————, 19 Mad. 290.
————, 20 Mad. 490.

Plaintiff-Appellant sued to enforce an award by which Defendant-Respondent was ordered to give Plaintiff-Appellant 25 palm-trees and pay him Rs. 30.

There was litigation pending between the parties with respect to 70 palm-trees standing on *kyaung* land at Ingôn village, Thazi township, and the land on which they stood. While the case was before this Court in second appeal (Second Appeal No. 263 of 1903) the parties admittedly agreed to abide by the award of an arbitrator, one Shwe O, whatever decision the Court might come to, and Shwe O admittedly made an award in favour of Plaintiff-Appellant, as above stated, for 25 palm-trees and Rs. 30. The reference to arbitration and the award were made without the knowledge of this Court, and judgment and decree accordingly followed in the ordinary course. The decision was one dismissing Plaintiff-Appellant's suit on the ground that he had failed to prove possession or enjoyment within 12 years.

In consequence of this decision Defendant-Respondent refused to carry out the award. Hence the present suit.

Defendant-Respondent's defence was that the award was contrary to section 23, Contract Act. His meaning apparently was that by superseding the decree of this Court or being made on the understanding that the decree of this Court should not be executed, it was a contract which, if permitted, would defeat the provisions of some law. This of course was a mistake. There was nothing illegal in the contract.

The Township Court granted Plaintiff-Appellant a decree. But the Additional Judge of the District Court on appeal held that the subject matter of the dispute having been finally decided by the High Court, Plaintiff-Appellant's remedy was by way of Revision to that Court and not by filling a suit, and that the Township Court had no jurisdiction to entertain it. The learned Additional Judge did not cite any authority for this view of the matter. It was apparently suggested to him by the memorandum of appeal, where it was the only ground taken. The Advocate for Defendant-Respondent before me admits that if there was a valid reference and valid award, there

NGA KYE
v.
NGA PO MIN.

In 1225 B. E. Plaintiffs-Respondent's grandfather mortgaged for 150 ticals of ywetni silver the land ၀၆ and ၅ to Shwe Ket, father of Tha Be, of Mi Po (mother-in-law of Defendant Taunglaung) and of Defendant Tha Gaing. In 1235 Shwe Ket partitioned his estate among his three children, ၀၀ fell to Mi Po, and ၅ to Tha Be. Tha Gaing received some other land. In 1240 some of the mortgagor's heirs took a further advance of Rs. 15, and in 1255 others took a further advance of Rs. 30 from Mi Po. Meanwhile in 1240 Tha Be had sub-mortgaged his share ၀ to Defendant-Appellant for Rs. 190. In 1266 Plaintiffs-Respondents redeemed the whole of the mortgaged property ၀၀ and ၅ for Rs. 220 which was reckoned to be the equivalent of the original mortgage-money together with the further advances of Rs. 15 and Rs. 30.

Tha Be was present, but Defendant-Appellant was not and Defendant-Appellant's sub-mortgage was not taken into account. The mortgagees professed to give possession of the land, and effected a mutation of names in the Revenue Records. Taunglaung and Tha Be divided the mortgage money, each taking Rs. 110. Then Tha Be went off to Lower Burma without redeeming his sub-mortgage, and Defendant-Appellant refused to surrender the land ၅ to the Plaintiffs-Respondents.

Tha Be being in Lower Burma and, as Plaintiffs-Respondents say, his whereabouts being unknown, Plaintiffs-Respondents did not make him a party to the suit.

Defendant-Appellant appeals under section 584, Civil Procedure Code, on the grounds that the non-joinder of Tha Be was in contravention of the law as contained in section 85 of the Transfer of Property Act, that the Lower Courts failed to determine a material issue of law in allowing Plaintiffs-Respondents to redeem without payment of Defendant-Appellant's mortgage money, and were guilty of a material error of procedure in maintaining Plaintiffs-Respondent's suit in the absence of any offer on the part of Plaintiffs-Respondents to pay Defendant-Appellant's mortgage money.

The grounds of appeal are not well expressed. But there was certainly a material error or defect of procedure which entitles the Defendant-Appellant to come up in second appeal, as will appear from what follows.

I am not surprised at the Lower Courts finding a difficulty in deciding on Defendant-Appellant's claim, for in spite of the fact that sub-mortgages are extremely common, there is no Ruling of this Court or of the High Court of Lower Burma explaining how they should be treated, and the libraries of District and Subdivisional Courts contain no books of reference from which assistance on the point can be obtained, except perhaps Woodman's Digest where, for example, the case of *Chinayya Rawutan* vs. *Chidambram Chetti** is given in Volume III at page 6168. But Woodman's Digest is not, I fear, made use of as much as it might be. The Transfer of Property Act is not in force, but its provisions on the subject of mortgages have been prescribed

* I. L. R. 2 Mad., 212.

202

as rules of practice for the Courts in Upper Burma (Upper Burma Courts Manual, paragrapbs 659—661).

Unfortunately, as Gour says, though it "deals partially with the rights and liabilities of puisne mortgagees," *i.e.*, of persons to whom the original mortgagor has made a subsequent mortgage, "the Act is silent as to the rights and liabilities of sub-mortgagees." (Gour's Law of Transfer in British India, 2nd edition, Volume II, paragraph 822.)

It is contended on behalf of Defendant-Appellant that the equitable rule contained in section 41 of the Transfer of Property Act applies, that Defendant-Appellant took a mortgage from the ostensible owner without notice of Plaintiffs-Respondents rights, and that "his equity should be considered."

On this point I am of opinion that section 41 will not help the Defendant-Appellant. As Shephard and Brown say in their notes to that section, the person dealing with the property "must appear to have full powers of disposition, for if the circumstances under which he holds are equally consistent with some limited authority to deal with the property, there is no estoppel." It appears clear to me that in a country like Upper Burma where mortgages are universal, the mere possession of land is not calculated to induce any one to believe that the person in possession is the owner rather than the mortgagee. In other words, the circumstances are such as ought to put an intending purchaser upon an enquiry which, if prosecuted, would lead to a discovery of the real title.

Furthermore, I can find nothing to show that section 41 has been applied to the case of a mortgagee in possession in any other part of India.

It seems that the possession of a mortgagee is not such possession with the consent of the owner as the section contemplates.

Apart from this, mere quiescence on the part of the owner, while others are dealing with the property, does not prevent him from asserting his right (Shephard and Brown's Transfer of Property Act, note to section 41).

But there is nothing to prevent a mortgagee from transferring his interest in the mortgaged property.

"In a mortgage the interest conveyed to the creditor is a real right available to him as well against the owner as against subsequent purchasers from him."

"In the usufructuary mortgage it is the right of possession and enjoyment of the usufruct that is transferred." (Shephard and Brown's Transfer of Property Act, note to section 58.)

"Transfer" in the Transfer of Property Act, includes the "conveyance" or "assignment" of English Law.

Section 6 of the Transfer of Property Act declares what kinds of property may be transferred, and these include such an interest as a mortgagee in possession has in the mortgaged property.

Gour says in his note to section 5:—

"Property is a generic term for all that a person has dominion over, and includes within its purview all the interests into which it is capable of division.

CIRCULAR MEMORANDUM No. 1 of 1905.

FROM

THE REGISTRAR,

Court of the Judicial Commissioner, Upper Burma,

TO

THE DISTRICT AND DIVISIONAL JUDGES.

Dated Mandalay, the 2nd February 1905.

In future in the Civil Monthly Statements the work of Additional Judges should not be shown separately. There should be only one line to each Court.

In case the work of any Court is shared by two Judges it should be so noted, thus in column 1:—

Sagu Township (2 JJ.)

By order,

ED. MILLAR,
Registrar.

CIRCULAR MEMORANDUM No. 4 of 1906.

FROM

THE REGISTRAR,

Court of the Judicial Commissioner, Upper Burma,

TO

THE COMMISSIONERS AND DEPUTY COMMISSIONERS,
UPPER BURMA.

Dated Mandalay, the 14th November 1906.

Attention is drawn to paragraph 683, Rule IV (*g*), Upper Burma Courts Manual. This rule must not be contravened by the appointment of the Sub-Accountant to be Deputy Bailiff where there is a sub-accountant.

Circular Memorandum No. 3, dated the 23rd October 1905, of this Court is hereby superseded.

By order,

ED. MILLAR,
Registrar.

CIRCULAR MEMORANDUM No. 6 of 1906.

FROM

THE REGISTRAR,

Court of the Judicial Commissioner, Upper Burma;

TO

ALL DIVISIONAL AND SESSIONS JUDGES AND DISTRICT MAGISTRATES AND JUDGES IN UPPER BURMA.

Dated Mandalay, the 6th December 1906.

In order to prevent the institution of groundless Civil suits against defendants in Courts so far distant from their homes that it is practically impossible for them to contest the claims satisfactorily, the services of the Criminal Investigation Department are placed at the disposal of Civil Courts and Magistrates in the following circumstances:—

(*a*) A Civil Court may invoke the aid of the Criminal Investigation Department when it see ground for an enquiry under section 476, Criminal Procedure Code, or when it is necessary to make an enquiry on an application for sanction under section 195, Criminal Procedure Code, presented by the defendant, with a view to the prosecution of the plaintiff under sections 193, 209 or 210, Indian Penal Code.

(*b*) A Magistrate may invoke the aid of the Criminal Investigation Department on receipt of a complaint in a case of the kind, when the Civil Court before sending the case to him under section 476, or granting sanction under section 195, has not already invoked such aid.

In such cases the cost of the prosecution, including the actual expenses incurred in the Criminal Proceedings by the defendant in the Civil case and his witnesses, will be borne by Government.

The request for assistance should be addressed to the Deputy Inspector-General for Railways and Criminal Intelligence.

Magistrates should bear in mind that when there is evidence that a plaintiff has given or fabricated false evidence, a charge under section 193, Indian Penal Code, should be added, since the offence punishable under section 193 is more serious and carries a more severe penalty than offences punishable under sections 209 and 210, Indian Penal Code.

By order,

ED. MILLAR,
Registrar.

G. B. C. P. O.—No. 17, J. C., U. B., 25-11-1914—1,000—A. DeS.