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1910-13

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UPPER BURMA RULINGS.

Before G. W. Shaw, Esq., C.S.I.

Criminal Revision No. 87 of 1910. March 15th.

MI SAW *v.* S——.

Mr. *A. C. Mukerjee*—for the Respondent.

Criminal Procedure—488. Maintenance—Children living separately.

Mi Nyein Me v. *Nga Kyaw*, U.B.R., 1902-03, I, Crl. Pro., p. 7, affirmed.

Mi Gauk v. *Po Hmi*, U.B.R., 1904—06, I, Crl. Pro., p. 39, affirmed.

Pachu Daso v. *Srimotti Sudhamonni*, 16 W.R., 62 (72).

* * * * *

The parties Mi Saw and S—— were married according to Muhammadan law and had nine children. S ——, an Accountant in the Treasury, was transferred temporarily to Moulmein, and during his absence Mi Saw was convicted under the Gambling Act. On this ground he divorced her when he returned. After four months Mi Saw applied for maintenance for all the children but the eldest, a young man of 21 who was married and earning his own living. Mi Saw said that the eight children for whom she claimed maintenance were all living with her and that for three months S—— had not furnished any support for them.

Apparently S—— did not deny this. His defence was that the four elder children were able to maintain themselves, and as to the four younger ones he said that he was "willing to support them as usual, but not through her" (Mi Saw). What he seems to have meant to say was that he would not support them unless they lived with him. He stated in Court that he had sent several times to ask that the children might be restored to him, but he failed to prove this. He did not even ask Mi Saw in cross-examination whether he had called upon her to send the children back to him. As regards the children unable to maintain themselves, the case is thus on all fours with *Mi Gauk* v. *Po Hmi* (1).

That decision affirmed *Mi Nyein Me* v. *Nga Kyaw* (2) and extended the rule there laid down to original applications.

As the learned Advocate for S—— before me has sought to reopen the question, I have referred to the original authorities. I find that on the point in question section 316 of the Code of Criminal Procedure, 1861, was practically identical with section 488 of the Code of 1898. Mr. Irwin's remark in *Mi Gauk's* case on *Pachu Daso* v. *Srimotti Sudhamonni* (3) therefore does not

(1) U.B R., 1904—06, I, Crl. Pro., 39. | (2) U.B.R., 1902-03, I, Crl. Pro., 7.
(3) 16 W.R., 62 (72).

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dispose of that decision. But there is no reason for dissenting from the conclusion he arrived at. There is nothing in *Pachu Daso's* case to show that the other side of the question was put before the learned Judges. Living together in the case of husband and wife is a thing of a special character. It is an incident of matrimony. It is therefore intelligible that the legislature should provide that maintenance is not to be paid to a wife living separate, unless she has good cause for refusing to live with the husband.

The case of children is different. Where the parents have divorced, the children, if in the mother's custody, must be living separate from the father. But that is no reason why he should not maintain them.

If he wishes them to live with him, his obvious course is to get an order from the proper authority giving him the custody of them. Until he does that he cannot justly refuse to maintain them on the plea that they will not live with him. I think this is why the Code says nothing about children living separately.

The only points for determination in the present case are therefore whether any, and if so which, of the eight children are able to maintain themselves, and what maintenance S—— is to pay for each of the children not able to maintain themselves.

* * * * *

Criminal Revision Case No. 103 of 1910. March 17th.

Before G. W. Shaw, Esq., C.S.I.

NGA PO YÔN *v.* KING-EMPEROR.

Mr. *Tha Gywe*—for Applicant.

Criminal Procedure—190 (1) (a), (b) and (c).

Where a Magistrate in a case sent for trial by the Police, directed another accused person to be put in the dock, *held*—that he took cognizance under section 190 (1) (*b*).

Nga Paing v. *Q.E.*, U.B.R., 1897—01, I, 56, affirmed.
Khudi Ram Mukarji v. *Q.E.*, (1896) 1 C.W.N., 105.
Jagat Chandra Mozumdar v. *Q.E.*, (1899), I.L.R. 26 Cal., 786.
Charu Chandra Das v. *Norendra Krishna Chakravarti*, (1900) 4 C.W.N., XLV.
Q.E. v. *Hirashankar*, (1898) Ratanlal's Unreported Cases, p. 951.

The Police sent one San Baik for trial on a charge of stealing a pony (section 379, Indian Penal Code). The Magistrate began his proceedings by examining the Sub-Inspector of Police who investigated the case. On the Sub-Inspector's evidence the Magistrate directed the Applicant, who was present in custody on another charge, to be put in the dock along with San Baik, re-examined the Sub-Inspector and proceeded against both accused together, and in the end convicted them.

It is contended that the Magistrate took cognizance of the case as against Applicant, Po Yôn, under clause (*c*) of section 190 (*1*),

Criminal Procedure Code, and consequently that as he did not proceed under section 191 his proceedings were void.

This is the point dealt with in *Nga Paing* v. *Q.E.*(1), the case on which the Sessions Judge relied.

It is contended on Applicant's behalf that Applicant having been examined as a witness in the Police investigation made an important difference, and that the cases of *Khudi Ram Mukarji* v. *Q.E.* (1896) (2) and *Q.E.* v. *Hirashankar* (1898) (3) should be followed.

The first of these cases was decided by a Bench of two Judges, Messrs. Kinealy and Jenkins. It was a case of a witness turned into an accused: but was otherwise on all fours with all the other cases. No reasons are given for the conclusion come to. There is nothing to show that the decision in any way proceeded on the ground of the man having been a witness, and I am unable to see in what conceivable way the fact can be relevant to the question under consideration. The witness might want time, having had no previous warning, to defend himself. But that is a totally different question. The Applicant it may be noticed in the present case, though examined as a witness by the Police, was not sent as a witness before the Magistrate.

The second case was decided by a Bench of two Judges of the Bombay High Court (Messrs. Parsons and Ranade). The judgment is extremely brief, and no reasons are given for the conclusion. It was a case where one man was sent for trial by the Police on a charge of robbery, and the Magistrate after hearing some of the evidence ordered the arrest of four more persons.

In both these cases it was held that the Magistrate proceeded under clause (*c*) of section 190 (*1*), Criminal Procedure Code. On the other hand, we have the decisions followed in *Nga Paing's* case. These were:—

(i) *Jagat Chandra Mozumdar* v. *Q.E.* (1899)(4), which was decided by J. J. Ghosh and Wilkins. A complainant made a complaint to the Magistrate charging three persons with various offences. The Magistrate, after examining the complainant and some witnesses on his behalf, issued processes against the three persons charged and *another person.* It was held that the Magistrate took cognizance under clause (*a*) of section 190 (*1*), Criminal Procedure Code, against the latter.

(ii) *Charu Chandra Das* v. *Norendra Krishna Chakravarti* (1900) (5), which was decided by J. J. Prinsep and Hill. The report is quoted at length in *Nga Paing's* case. The essential facts were similar.

On the face of them these decisions are every whit as good as the two previous ones. They do not refer to the earlier cases or expressly dissent from them. But they are later, and they

(1) U.B.R., 1897—01, I, 56.
(2) 1 C.W.N., 105.
(3) Ratanlal's Unreported Cases, p. 951.
(4) I.L.R. 26 Cal., 786.
(5) 4 C.W.N., XLV.

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were followed in *Nga Paing's* case. I see no ground for doubting the corctness of the decision in that case. The view of the law taken in it is reasonable: and the two earlier decisions do not supply any material tending to throw doubt upon it. I hold therefore that the Magistrate in the present case took cognizance under clause (*b*) and not under clause (*c*) of section 190 (*1*), Criminal Procedure Code. In my opinion he acted in a very proper manner. The Police papers were evidently before him. He could see from them that Applicant was stated by witnesses to have been concerned along with San Baik. He was only doing what was right in directing Applicant to be put in the dock along with San Baik. No bias is to be inferred from this, and the proceedings furnish no indication of bias. The conviction was reasonable, and the punishment was by no means excessive. The Application is dismissed.

Criminal Revision Case No. 120 of 1910. March 31st.

Before G. W. Shaw, Esq., C.S.I.

NGA PU GYI *v.* KING-EMPEROR.

Mr. *J. C. Chatterjee*—for Applicant.

Mr. *H. M. Lütter*, Government Prosecutor—for the Crown.

Criminal Procedure Code—110 (c). "Protecting or Harbouring."

Held,—It does not amount to protecting or harbouring a thief merely (*a*) to employ as a hired labourer or associate with a man who has a previous conviction of theft for which he has suffered punishment, even if he subsequently commits a new offence; (*b*) to employ as a hired labourer or associate with a man who is, or is reputed to be a thief.

Ram Rich Pal v. *Q.E.*, U.B.R., 1897—01, I, 133.

Applicant is a scion of a Salin *thugaung* family. He has not yet come into his own, as his mother and grand-mother are alive. Recently his house, or rather his mother's or grand-mother's house was dacoited, and some of the neighbours were fined on his information for not resisting the dacoits, while the ward-headman, and block-elders, as the Subdivisional Magistrate says, were called upon to explain their conduct. These people are witnesses against Applicant in the present case. They say that Applicant received and associated with thieves or at least with certain specified persons, Nga Ni, Lu Pe, San Hla, Nga Hmun, Po Sein, Kya Gaing, Po Thaung and Po Tha, some of whom at least they say were reputed thieves. They insinuate that he fell out with his rascal friends and that the latter therefore attacked his house, not to commit an ordinary dacoity, but to kill him for cheating them.

The second class Subdivisional Magistrate found Applicant to have protected or harboured thieves [section 110 (*c*), Criminal Procedure Code] and ordered him to find security for one year.

The District Magistrate confirmed the order in appeal.

The Subdivisional Magistrate interested himself in the investigation, if he did not initiate the prosecution, and on this account asked the District Magistrate to try the case himself. From his own account of the matter, I think it is clear that he came within section 556, Criminal Procedure Code, (see *Ram Rich Pal* v. *Q.E.*) (1).

The District Magistrate thought there was no reason why the Subdivisional Magistrate should not try the case. He was at liberty, under section 556, to permit the Subdivisional Magistrate to try it. But I doubt if he exercised a wise discretion in doing so. The Subdivisional Magistrate's judgment shows that the burden laid upon him was too heavy. With every intention of deciding only on the evidence before him, he was unable to exclude from consideration matters that were not in evidence.

The Subdivisional Magistrate added to his difficulties by recording all sorts of statements without apparently considering whether they were admissible:—at all events, he recorded many that were inadmissible.

The inconvenience of this is two-fold: it is a laborious task to separate the wheat from the chaff, and at the same time the inadmissible statements are calculated to influence the mind, which they ought not to do.

It is doubtful whether the Subdivisional Magistrate correctly distinguished between what was admissible evidence and what was not.

The District Magistrate rightly stated the essential points of the case, but he was not precise enough in dealing with the question of Applicant's assistance of Lu Pe in his appeal, and there is inconsistency in his acceptance of the evidence as sufficient to show that Applicant was generally "reputed to harbour thieves, *viz.*, Lu Pe and others," after eliminating all the others on the ground that they had not been shown to be thieves. I go further and say that the District Magistrate was in error in finding Lu Pe to be a thief. He had at a previous date been convicted of cattle theft. There was no proper proof of this previous conviction or any other previous conviction referred to in the proceedings, but they were admitted. But he had undergone a year's imprisonment for his offence, and was therefore no longer a thief within the meaning of section 110 (*c*), Criminal Procedure Code, by reason of the cattle theft. I think this is quite clear. Otherwise the law would be grossly unjust.

* * * * *

"Harbouring" is defined in section 216B, Indian Penal Code, and the definition is explained in Mayne's Criminal Law of India, 3rd Edition, paragraphs 260—264 of the Commentary. He says:—"The definition in 216B (Indian Penal Code) is itself a compendium of the principal acts which at common law rendered a man an accessory after the fact." He quotes from a summary of these given by Hawkins:—"Any assistance

(1) U.B.R., 1897—01, I, 133.

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whatever given to one known to be a felon in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose; as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape, or where one harbours and conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him, and much more when one harbours in his house and openly protects such a felon, by reason whereof the pursuers dare not take him," etc.

Again he says: "The acts which amount to harbouring must under section 212 be done with the intention of screening the offender from legal punishment, and under section 216 with the intention of preventing him from being apprehended. If a man from mere motives of humanity, and without any intention of enabling the fugitive to escape from justice, were to give food to a man who was starving, or surgical assistance to one who was wounded, even with a full knowledge of his character, it would seem that he had committed no criminal act." The "protecting or harbouring" of section 110 (*c*), Criminal Procedure Code, seems to contemplate assistance of the former kind, and not of the latter. I think the clause is designed to meet the case of the professional receiver of stolen property who assists the thief after the theft by relieving him and encouraging him, protecting him from discovery and arrest, and helping him to dispose of his stolen property. I do not think it applies to a mere associate of suspected thieves; or of persons who have at some previous date been convicted of theft and have served their sentences. The Subdivisional Magistrate and the District Magistrate alike seem to have omitted to consider what "protecting or harbouring" in section 110 (*c*) signified. The proceedings do not show what Burmese word or words the Subdivisional Magistrate translated by "harbouring." But the Charge-sheet and Information use only the words ထမ်းပေါင်းသင်းဆက်ဆံ, which mean nothing more than "receiving and associating (or associating closely) with," and the evidence went no further than this apart from the word "harbour" which the Subdivisional Magistrate used.

How far astray the Subdivisional Magistrate went appears in a striking passage in his judgment where he said: "It seems clear that Nga Pu did actually employ Nga Ni (as a hired labourer), and that in employing a man who must have already had some previous convictions he was really protecting a thief who had not reformed, for if he had not reformed he would not have committed the theft for which he is now in jail." Suppose the Applicant, out of pity, gave employment to a released convict who professed to have turned over a new leaf, and the man after a time relapsed,—committed a new offence either because he had never really reformed, or because he succumbed to temptation. According to the Subdivisional Magistrate, Applicant must be judged by the subsequent conduct of his protegé, and must be held to have protected a thief within the meaning of section 110.

This is monstrous. The District Magistrate's view of Lu Pe's case is perhaps worse. Lu Pe did not fall from grace after Applicant befriended him; at all events he was not proved to have done so. He was charged with complicity in the Kanbaung dacoity but ultimately acquitted. His only offence was that he had a previous conviction. Applicant, as the District Magistrate found, protected or harboured a thief by simply giving Lu Pe employment as a hired labourer, or receiving him at his (mother's) house. This is, if anything, more monstrous still.

I leave out of account Lu Pe's conviction in the Kanbaung dacoity-case since the conviction was reversed in appeal. As to Applicant helping Lu Pe or his wife and brother-in-law to raise money and engage an Advocate to argue his appeal, Lu Pe was as a matter of fact acquitted by the officiating Judicial Commissioner because there was no trustworthy corroboration of the approver's evidence implicating him. But whatever the ground might have been, the acquittal was the final order in the case. Lu Pe must therefore be presumed to have been wrongly convicted in the first instance, and no offence can be imputed to Applicant for helping him to get the wrong conviction set aside. On the contrary, it ought to be reckoned to his credit that he did so. It seems to be almost assumed in the proceedings now before me, that Lu Pe was guilty, and that it was a criminal act to assist him in establishing his innocence. On the same principle, the Advocate who argued his appeal, and the Judge who acquitted him, might be held to have protected or harboured a thief. It is hardly conceivable that the Magistrates should have entertained a doubt on this point. We must then put on one side all that relates to Applicant assisting Lu Pe to defend himself in the Kanbaung dacoity-case.

If we assume that the admissible parts of the evidence against Applicant are true, they come to this, that Applicant received at his mother's (or grand-mother's) house and employed or associated with (1) two *ex*-convicts (Nga Ni and Lu Pe), of whom one Nga Ni subsequently committed a new offence and was sent to jail again—some four or five years before the present proceedings; (2) two persons (San Hla and Nga Hmun) who were regarded by the neighbours as thieves, though they had no previous convictions, and one of whom (Nga Hmun) subsequently with accomplices committed the dacoity at Applicant's house, and was convicted and sent to jail for doing so on Applicant's information; and (3) the son-in-law (Po Sein) and son (Kya Gaing) of the man (San Hla) in (2) who did not get convicted.

* * * * *

It is unnecessary to decide whether it is sufficient for the purposes of section 110 (*e*) to prove that the persons harboured are reputed thieves.

Applicant perhaps displeased his neighbours and excited their suspicions and fears by employing or associating with persons of doubtful character and bad repute. But assuming them to be

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thieves, there was no proof that he *protected* or *harboured* them, within the meaning of section 110 (*c*).

On this ground the Subdivisional Magistrate's order is set aside and the bond is cancelled.

Criminal Revision No. 692 of 1909. Jany. 20th, 1910.

Before G. W. Shaw, Esq., C.S.I.

NGA YAN E *v.* KING-EMPEROR.

Mr. *J. C. Chatterjee*,—for the Applicant.

Penal Code—414.

Held,—that the words "disposing of" in section 414 must be interpreted by the light of the words they are associated with, *viz.*, "concealing" and "making away with," and cannot be taken to include restoring to the owners.

And where the accused was found to have restored to the owners jewellery believed to have been stolen by his son, and then to save his son from punishment denied all knowledge of the matter, and on this ground was convicted under section 414,—

Held,—that the accused committed no offence.

The Applicant, Yan E, was convicted by the Subdivisional Magistrate "under sections 380 and 414," Indian Penal Code, and sentenced to 45 days' rigorous imprisonment.

What the Magistrate found Applicant to have done was to restore to the owners some Rs. 250 worth of jewellery which had been stolen from his sister-in-law, Mi O. and her husband, Chaw Gè. Applicant himself, a man of 50, was not suspected of having committed the theft or of having had a hand in it at all.

There was some ground for suspecting Applicant's son, Po Hnit. There was evidence that he pawned two pieces of metal resembling some of the stolen property, and there was evidence that Applicant, on being informed of this, promised to get the stolen property back from his son. Confirmation was supplied by the fact that Applicant returned the property.

The Magistrate said that the Police sent Applicant for trial because Applicant would not explain from whom he got the property he returned.

Applicant in fact denied having ever returned the property.

The Magistrate's conclusion was that Applicant's motive was to save his son from being punished, and he was of opinion that his conduct in returning the property and then denying it with this object amounted to "assisting the act done by his son."

Apparently he thought that this brought Applicant either under section 380 or section 414, and it did not matter which.

On appeal the Sessions Judge altered the conviction to one under section 414. It is, ofcourse, quite plain that section 380 could not apply. Dealing with the property after the theft was committed would not amount either to theft or to abetment of theft: a reference to the definitions of theft and of abetment is sufficient to show that. But the Sessions Court's judgment does

not explain what considerations led the learned Judge to think that section 414 applied.

On the face of it section 414 seems to refer to assistance given to a thief to enable him to conceal the stolen property or convert it to his own uses.

The language used is (voluntarily assists in) "concealing, or disposing of or making away with." The ordinary canon of construction is that "when two or more words susceptible of analogous meaning are coupled together *noscuntur a sociis*, they are understood to be used in their cognate sense: they take as it were their colour from each other," *e.g.*, "an act which made it felony to break and enter into a 'dwelling, shop, warehouse or counting-house,' would not include a workshop, but only that kind of shop which had some analogy with a warehouse, that is one for the sale of goods." "On the same principle an Act which prohibits the 'taking or destroying' the spawn of fish would not include a 'taking' of spawn for the purpose of removing it to another bed; for the word 'destroying' with which 'taking' is associated indicates that the taking which is prohibited is dishonest or mischievous."

So the general word which follows particular words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same *genus* as those words. "The 11 Geo. II, C. 19, which authorizes the distress for rent of 'corn, grass or other product' growing on the demised lands, includes only products similar to grass and corn, but not young trees, which, though unquestionably products of the land, are of a different character from the products specified by the earlier terms." "The 3 and 4 Will. IV, C. 90, s. 33, which enacted that the owners of 'houses, buildings and property other than land' rateable to the poor should be rated at thrice the rate imposed on the owners of the land, was held confined to that kind of 'property other than land' which was *ejusdem generis* with houses and buildings and that a Railway, a canal with its towing paths . . . . . were not comprised in the expression but were rateable as land."

These extracts from Maxwell on the Interpretation of Statutes,* where many other instances are given, suffice, I think, to show that in the case of section 414, Indian Penal Code, the words "disposing of" must be interpreted by the light of the words they are associated with, *viz.*, "concealing" and "making away with," and that they cannot be taken to include "restoring to the owners."

It is to be observed that section 215 provides a special punishment for restoring to the owners, *for a consideration*, unless all means are used to cause the apprehension and conviction of the offender.

The mere restoration by itself is not made an offence. Again section 201 punishes the causing of evidence of an offence to disappear, or giving false information respecting an offence,—with the intention of screening the offender.

* 4th Edn., pages 489 *seqq.*

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But it is difficult to see how the restoration of stolen property to the owners could be regarded as causing evidence of the offence to disappear.

And I do not think it would be either fair or permissible to convict Applicant of giving false information under this section, merely because, with a view to save his son, he denied all knowledge of the restoration when required to explain it.

Of course the Applicant was not charged with an offence under section 201. But I do not consider that it would have been proper to charge him with such an offence.

It is to be noted that, as far as the proceedings show, Applicant was under no legal obligation to give information of the offence of theft of jewellery.—(Section 7, Village Act, and section 202, Indian Penal Code.)

It follows from the foregoing that in my opinion the Applicant committed no offence.

The conviction and sentence are set aside, and the Applicant is acquitted of voluntarily assisting in the disposal of stolen property.—(Section 414, Indian Penal Code.)

He has been released on bail. The bail bond is cancelled.

Civil 2nd Appeal No. 248 of 1908. August 13th, 1909.

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

NGA TUN BAW, NGA CHEIN } *v.* { MI KYE. MI SON.

Mr. *Tha Gywè*—Advocate for Appellants. | Mr. *C. G. S. Pillay*—Advocate for Respondents.

Jurisdiction—Redemption suit—Value of suit.

Held,—that in a suit for redemption of a usufructuary mortgage the subject-matter of the suit is the land sought to be recovered, and that accordingly for the purposes of jurisdiction the value of the suit is the actual market value of the land at the time the suit is filed.

Maung Kyaw Dun v. *Maung Kyaw and one*, 1 L.B.R., 96.
Kubair Singh v. *Atma Ram*, I.L.R., 5 All., 332.
Amanat Begam and one v. *Bhajan Lal and others*, I.L.R., 8 All, 438.
Rupchand Khemchand and one v. *Balvant Narayan and others*, I.L.R., 11 Bom., 591.
Ramchandra Baba Sathe v. *Janardan Apaji*, I.L.R., 14 Bom., 19.
Mana Vikrama, Zamorin Maharaja Bahadur of Calicut v. *Surya Narayana Bhatta and another*, I.L.R., 5 Mad., 284.

The Respondents sued the Appellants for redemption of certain land for Rs. 339-8-10 in the Township Court. The Appellants contended that as the value of the land was between Rs. 1,000 and Rs. 1,500, the Township Court had no jurisdiction. They also contended that the amount due on the mortgage was over Rs. 1,200.

The Township Court gave Respondents a decree enabling them to redeem for Rs. 404-2-0. On appeal the District Judge increased the amount to Rs. 474-2-0. Both Courts appear to have confounded the value of a suit for purposes of jurisdiction

with that put upon it for fiscal purposes. At any rate, neither Court quoted any authority for holding these values to be the same, though as a matter of fact as regards redemption suits there is such authority.

In this appeal the question of jurisdiction has been raised again, and it is contended that the value of the suit for the purpose of jurisdiction is the value of the land sought to be redeemed, calculated according to section 7 (V), Court Fees Act. On the other hand, for the Respondents it is contended that the value for the purpose of jurisdiction is the amount for which redemption is sought. In support of this contention Mr. Pillay has quoted several rulings, and he says that the practice in Upper Burma has for the last 20 years been as stated.

After examining various decisions of the High Courts I am of opinion that neither contention is correct, and that the decision of the Chief Court of Lower Burma in *Maung Kyaw Dun* v. *Maung Kyaw and U Myat San* [1], namely, that the value of the suit is the market value of the land at the time the suit is filed, is correct.

The question depends upon the meaning of the phrase "subject-matter of the suit" used in section 3, Upper Burma Civil Courts Regulation.

The Suits Valuation Act gives a little assistance. A redemption suit, when the land is in the possession of the mortgagee, as in this case, falls under section 7 (IX), Court Fees Act. Such a suit is not referred to in section 3 of the Suits Valuation Act which gives the Local Government power to make rules for determining the value of land for purposes of jurisdiction in certain suits, nor is it referred to in section 4. Section 8 runs: — "Where in suits other than those referred to in the Court Fees Act, 1870, section 7, paragraphs V, VI and IX, and paragraph X, clause (*d*), Court Fees are payable *ad valorem* under the Court Fees Act, 1870, the value as determinable for the computation of Court Fees and the value for purposes of jurisdiction shall be the same." Redemption suits are thus expressly excluded. Consequently the ruling of the Full Bench of the Madras High Court (dissented from by two of the Judges) in *Mana Vikrama, Zamorin Maharaja Bahadur of Calicut* v. *Surya Narayana Bhatta and another* [2], that in redemption suits the subject-matter of the suit is the amount expressed to be secured by the instrument of mortgage has been overriden by the legislature.

In *Kubair Singh* v. *Atma Ram* [3] it was held that in a redemption suit the subject-matter of the suit was not the market value of the land but the amount for which redemption was sought. This ruling does not conflict with section 8, Suits Valuation Act. The matter, however, was not discussed and no reasons were given for the ruling.

(1) 1 L.B.R., 96. (2) I.L.R., 5 Mad., 284.
(3) I.L.R., 5 All., 332.

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This ruling was followed in *Amanat Begam and one* v. *Bhajan Lal and others*[1], but again no reasons were given beyond the fact that there was a long current of rulings in favour of that interpretation of the phrase "subject-matter of the suit."

The case was heard by five Judges, and one of them, Mr. Justice Mahmood, dissented and gave what in my opinion were very powerful arguments for holding against the view taken. I shall quote some of his remarks later.

In *Rupchand Khemchand and one* v. *Balvant Narayan and others* [2] it was held that the subject-matter was the amount due on the mortgage or the amount claimed on it by the mortgagee. This was the view taken by the two Judges who dissented from the Madras Full Bench ruling. If this view be correct, it follows that the mortgagee would have the absolute right to determine in what Court the suit should be brought, and could thus harass the mortgagor with impunity, as stamp fees would still be calculated according to the amount secured and not according to the amount claimed.

The most weighty objection to the proposition that the valuation should be calculated according to the amount for which redemption is sought and not according to the market value of the property is, in my opinion, that the title to a valuable property mortgaged for a petty amount might then be decided in a Court of low jurisdiction. This objection is of the greatest weight in Upper Burma, where land has enormously increased in value, and where suits for the redemption of ancient mortgages which secured petty sums, in which an absolute title to the land is set up by the alleged mortgagee, are very common.

This objection was referred to in *Rupchand Khemchand and one* v. *Balvant Narayan and others*, but it was stated that though the title to valuable property might be in issue in a suit before a Court of low jurisdiction, the Court that heard the appeal would be determined by the value of the property. This, however, would not be the case in Upper Burma. Under section 12 (3), Upper Burma Civil Courts Regulation, an appeal from a decree of a Township Court lies to the District Court, and consequently if a person sued for redemption of property worth a lakh of rupees alleging a mortgage for, say, Rs. 400, the Defendant denying the mortgage *in toto* and setting up an absolute title, and the suit were cognizable by a Township Court, the appeal would lie to the District Court, and if the District Court agreed with the Township Court on the facts and there were no point of law involved, there would be no further appeal. It is obvious that such a state of things would be utterly contrary to the spirit of the Upper Burma Civil Courts Regulation.

In *Ramchandra Baba Sathe* v. *Janardan Apaji* [3] the High Court of Bombay whilst professing to follow the above-mentioned

(1) I.L.R., 8 All., 438. (2) I.L.R., 11 Bom., 591.
(3) I.L.R., 14 Bom., 19.

decision, apparently dissented from the view that the criterion was the amount remaining due on the mortgage, and held that it was "the amount of the mortgage the rights connected with which are the subject of contention in the mortgage suit." If by this is meant the amount originally secured by the mortgage, it seems to me that the decision, which was given after the Suits Valuation Act came into force, conflicts with that Act, because, if it was intended that in redemption suits the value should be calculated for purposes of jurisdiction in the same way as for fiscal purposes, paragraph IX of section 7 of the Court Fees Act would have been omitted from section 8 of the former Act. If it does not mean that, and does not mean the amount remaining due on the mortgage, but the total amount of the loans taken on the security of the property without allowing for payments made towards extinguishment of the mortgage, the decision does not follow previous rulings but lays down a different criterion to that arrived at in any other ruling.

It seems to me that there is much force in the following observations made by Mr. Justice Mahmood in *Amanat Begam and another* v. *Bhajan Lal and others* already referred to :—"Again the allegation of the Plaintiff as to the extent of the limitation upon his ownership would seem to be equally inconclusive as to the pecuniary extent and value of the dispute, for, whilst on the one hand he may be met by the plea that the mortgage charge is far higher than that stated by him, on the other hand I think that the learned Pandit for the Respondents put the matter very forcibly, when he said that there may be cases in which the Plaintiff offers to pay nothing at all, because the whole amount of the mortgage money has been paid either from the usufruct or otherwise. I have called this last argument forcible, because, if the extent of the money which the Plaintiff mortgagor offers to pay is to regulate the value of the subject-matter in dispute, in the case contemplated there would be no standard for any calculation of the value . . . . And of course, apart from the question of the mortgage money, a redemption suit may be met by the plea that either on account of foreclosure or prescription the right of redemption no longer exists, and it is obvious that in such a dispute the whole *corpus* of the property would be at stake, whilst the question of jurisdiction lies at the threshold, and must be disposed of before the real merits of the litigation are entered upon . . . . which in cases of taxation everything is to receive a strict construction in favour of the subject, in questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court."

It seems to me that in a suit for redemption the subject-matter of the suit is the property which the Plaintiff seeks to recover. It obviously is so when the Defendant denies the mortgage and sets up a title of his own, and as the Plaintiff cannot always anticipate what defence will be set up before he files his plaint, it seems to me that the subject-matter should be held to be the

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property in every case. I prefer to follow the decision in *Maung Kyaw Dun* v. *Maung Kyaw and one* rather than the rulings of the Indian High Courts, and in doing so I adopt Mr. Justice Mahmood's reasoning.

The Appellants alleged in their written statement that the land was worth between Rs. 1,000 and 1,500. The only evidence as to the value of the land is that of the witness, Maung Pyu, who states that it is worth Rs. 600. It must be taken therefore that the land is worth more than Rs. 500, and that the Township Judge had not jurisdiction to try the suit.

* * * *

Civil Revision No. 132 of 1909. May 23rd, 1910.

Before G. W. Shaw, Esq. C.S.I.,

NGA NYAN GYI *v.* NGA KYAW NYA.

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

Mortgage—Usufructuary—lease by mortgagee whether determinable on redemption—and whether the mortgagor can redeem at any time of year without notice.

Held,—that a lease by a usufructuary mortgagee is determinable on redemption, *also*—that apart from custom the mortgagor is entitled to immediate possession and therefore to compensation for obstruction.

Shwe Thin v. *Nga Nyun*, U.B.R., 1904—06, II, Civ. Pro., 26.
San Pyi v. *Nga Tun*, U.B.R., 1897—01, II, 414.
Gour's Law of Transfer in British India, Vol. 3, page 1225.
Ghosh's Law of Mortgage, 3rd Edition, page 376.

Land called *natyin* belonging to Plaintiff-Applicant was under mortgage and sub-mortgage. The sub-mortgagee let to Tun Baw, who sublet to Defendant-Respondent, Kyaw Nya. Kyaw Nya again sublet to Nga Si. All the leases were for the one year 1268 B.E., and were made in or about the month of *Wazo* of that year. In *Tawthalin* Plaintiff-Applicant redeemed. The land was *mayin* which would be cropped in *Tabodwè*. The sub-mortgagee on receipt of the mortgage-money told the tenant and sub-tenants to give Plaintiff-Applicant possession. Plaintiff-Applicant put down a stock of paddy plants on the land with a view to planting them, but Defendant-Respondent by his protests prevented him from using them.

Plaintiff-Applicant therefore sued for damages, which he estimated at Rs. 100 being the entire value of a year's outturn in paddy.

Plaintiff-Applicant first sued Nga Si unsuccessfully, and Nga Si, as he says, also sued Plaintiff-Applicant unsuccessfully for damages for the loss he sustained through Plaintiff-Applicant preventing him from cultivating the land. Owing to the dispute nobody cultivated the land in the year in question.

The sub-mortgagee, Tun Baw and Kyaw Nya had all got their rent in advance and refused to give back any of it.

These were the facts proved or admitted. Both the Lower Courts decided against Plaintiff-Applicant. The Lower Appellate

Court held that Plaintiff-Applicant redeemed too late in the year, that the lessee and sub-lessee were entitled to notice as pointed out in *San Pyi* v. *Nga Tun* (1) and that Plaintiff-Applicant in preparing to cultivate before he had ascertained whether the lessee and sub-lessee were willing to give up possession, did not act in a business-like manner, and was therefore entitled to no compensation.

It may be noted that Defendant-Respondent merely denied having received intimation of the redemption. It is contended for Plaintiff-Applicant that the Lower Appellate Court was wrong, that the sub-mortgagee could not give a better title than he had himself, that Plaintiff-Applicant was under no obligation to wait till after the cultivating season, and that if the lessee was damnified his remedy was against his lessor. To bring the case within section 115, Civil Procedure Code, it is contended that the Additional Judge of the Lower Appellate Court did not apply his mind to the fact that Plaintiff-Applicant was not a party to the tenancies.

The governing principles are those of equity, justice, and good conscience, but to assist in deciding on these principles the rules contained in the Transfer of Property Act as interpreted by decisions of the High Courts, and works like that of Dr. Ghosh on the Law of Mortgage, may be referred to. The learned Advocates have not cited any authorities, and I have not been able to find in the books anything about leases by usufructuary mortgagees such as we have in Upper Burma.

The general rule is that a lessor cannot transfer a larger estate than he has himself. Hence a life-tenant cannot give a perpetual lease.

If the lessor's interest is terminable on his death, or is dependent upon any other contingency, the lessee's interest cannot enure beyond that period.

But though in such a case the lease is determined, the lessor is not thereby personally exonerated from such liability as he may have incurred by virtue of his covenants. He may then be still liable to pay damages for breach of his covenant. (Gour's Law of Transfer in British India, Vol. 3, page 1226.)

In other words, the lessee has to give up the property, and claim damages from the lessor.

Ghosh says generally (without excepting any particular description of mortgage), "It should be noticed that a mortgagee in this country cannot alter the terms of a subsisting tenancy, or make any new lease which would be binding upon the mortgagor on redemption." (Ghosh's Law of Mortgage, 3rd Edition, page 374.)

The argument put forward on behalf of the Plaintiff-Applicant assumes that these rules apply to a lease by a usufructuary mortgagee.

The learned Additional Judge of the District Court apparently

(1) U.B.R., 1897—01, II, 414.

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assumed on the contrary that the lease by the usufructuary mortgagee and the sub-leases in the present case held good against the mortgagor on redemption, unless notice was given, just as though they had been made by the owner. *San Pyi's* case had to do with a lease by the owner or his agent (if "owner" is a term that can be used of an occupant of State land), and therefore properly speaking it had no bearing on the present case.

The Additional Judge gave no reason for applying that decision, and cited no other authority for his finding.

The usufructuary mortgagee of Upper Burma, as we know, takes the profits towards interest, and has no accounts to render. The contract is that he "restores the land on payment of the (principal) mortgage-money."

A mortgage of this kind kept alive by further advances, often lasts much longer than 60 years, and the mortgaged property is handed down by inheritance in the family of the mortgagee. The mortgagee therefore enjoys all the advantages of an owner, except that he must allow redemption if the mortgagor pays the mortgage-money within limitation. While he has the land he deals with it in practically the same way as he would deal with land of his own, and he very frequently leases it to tenants. These circumstances seem to put the Upper Burma usufructuary mortgagee in an exceptionally favourable position. But I cannot find any authority for holding that he is able to make a lease which will bind the mortgagor on redemption. In spite of the advantages enjoyed by the mortgagee, the mortgagor's right to redeem remains unimpaired. I think it must therefore be held that a lease by a usufructuary mortgagee is determined by redemption.

The question then arises whether it is equitable that the mortgagor should be permitted to oust the lessee at any time of year without letting him get his crop and without having given notice. It may be that the Lower Appellate Court proceeded on this ground. Here the position occupied by the lessee must be taken to be no better and no worse than that of the mortgagee. My experience in this Court affords some indication of a custom —at least in parts—by which land is redeemed only at certain seasons of the year, so as not to deprive the mortgagee or his tenant of the crop. But as far as I know, there is no generally admitted custom of the kind, and there was no proof of such a custom in the present case: no such custom was even alleged. Apart from custom it would seem that the mortgagee or his tenant has no just ground of complaint. The contingency of redemption is one that he must reckon with and may provide against. Here the crop was not yet planted at the date of redemption; the time for planting had not yet come. Hence the lessee had nothing to lose by giving immediate possession: he could get a refund of his rent from the lessor. It is true the lessor would lose his rent, but then the mortgagor had redeemed,

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which was a perfectly good reason why the lessor should not get rent for the coming season. Therefore nobody need really have been a penny the worse.

But anyhow I think the Plaintiff-Applicant was entitled to immediate possession and therefore to compensation.

Did the Lower Appellate Court's finding to the contrary involve any illegality or material irregularity? I think it must be held that the rules being what I have stated, and there being no authority for the view taken by the Additional Judge, the Lower Appellate Court did not duly consider the law, or else that as the learned advocate has contended, the Lower Appellate Court in overlooking the fact that the Plaintiff-Applicant was not a party to the tenancies did not duly consider the facts. This being so there can be no doubt that there was illegality or material irregularity—see *Shwe Thin* v. *Nga Nyun* [1].

It remains to decide what compensation Plaintiff-Applicant is entitled to.

No doubt, as the Additional Judge of the District Court said, Plaintiff-Applicant was in great measure to blame for the loss of his plants. But if he had not put any plants on the land he would still have been entitled to compensation for being prevented from cultivating the land.

To give him the value of a full crop, however, would be going too far in any circumstances. The crop might have been wholly or partly destroyed by drought or floods, before the time of harvest. I set aside the decree of the Lower Appellate Court and grant Plaintiff-Applicant a decree for Rs. 30 against Defendant-Respondent Kyaw Nya. Costs in proportion.

Criminal Revision No. 175 of 1910. April 6th.

Before G. W. Shaw, Esq., C.S.I.

J. M— *v.* KING-EMPEROR.

Intoxication in reference to Intention—Penal Code, 85—86.

Held,—that voluntary drunkenness may be considered in determining the intention where an act is not an offence unless done with a particular intention, and where the intention is a fact which has to be proved and is not a mere presumption of law.

Q.E. v. *Dasser Bhooyan*, (1867) W.R., VIII, Crl. Rs., 71.
Ram Sahoy Bhur, (1864) W.R., January-July, Crl. Rs., 24.
Nga San v. *K.E.*, (1904) 2 L.B.R., 204.
Reg. v. *Doherty*, 16 Cox, C.C., 306.
Abdul Karim v. *Q.E.*, (1892) S.J., L.B., 650.

Applicant, a Eurasian aged 29, has been convicted in this case of three robberies committed on the same occasion on adjoining houses and sentenced to one month's rigorous imprisonment and a fine of Rs. 20 or in default two weeks' rigorous imprisonment for each offence.

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[1] U.B.R., 1904—06, II, Civ. Pro., 26.

J. M— *v.* KING-EMPEROR.

In another case he has been convicted of two other similar robberies committed on two other adjoining houses on the same occasion, and he has been sentenced to similar punishment for them, making the total imprisonment five months and the total fine Rs. 100 or in default ten weeks' further rigorous imprisonment.

* * * * *

The circumstances were of an exceptional character. It was New Year's Eve, and Applicant was one of a party of merry-makers at the Railway Institute at Kanbalu. Applicant's gun was used to fire salutes in honour of the New Year.

At 2 A.M., when the last of the company dispersed, Applicant was very drunk, and the billiard-marker, Abbas, was sent with him to see him safely home.

Applicant, however, on the way broke into the houses of five shop-keepers in succession and demanded money (Rs. 5) with threats. He had his gun in his hand and he enforced his demands by exhibiting it. In each case he got a small sum of money (Rs. 2) and in one some cigarettes in addition, and having got these things he made his way home.

Abbas accompanied and assisted him all through. There was no evidence that he was drunk. I agree with the Committing Magistrate that it was very improbable he would have been drinking with his masters. It is unnecessary to interfere with the sentences passed on him.

The shop-keepers went promptly to the police station and laid information, and the accused were arrested on the afternoon following.

Applicant denies all knowledge of the robberies, his defence drunkenness merely. He denies having received the money, etc., extorted from the shop-keepers.

Abbas admittedly received the loot in the first instance. He says that he gave it to Applicant when they got to the latter's house, and the Sessions Judge has accepted this statement as a fact. There is no admissible evidence to support it. The statement of the Police Officer as to an admission made to him by Applicant was, of course, directly in contravention of section 25, Evidence Act, and cannot be regarded.

There is no *primâ facie* reason why Abbas's statement about the money should be credited rather than Applicant's. On the contrary the probability is in favour of Applicant.

The learned Sessions Judge recognized that the robberies were not crimes of the ordinary kind, which was certainly right. He overlooked, however, the provisions of section 397, Indian Penal Code. If the offence was robbery, section 397 undoubtedly applied, and in that case the sentences passed were illegal.

Applicant has accordingly been called upon to show cause why the sentences should not be enhanced. The first point for determination is whether the offence amounted to robbery. Unfortunately I have not had the assistance of legal argument, and the question is one of considerable difficulty.

The Committing Magistrate and the Sessions Judge alike assumed that Applicant's drunkenness did not affect the question of his guilt. The law is contained in sections 85 and 86, Indian Penal Code. The Rulings on the point are extraordinarily few. In *Q.E.* v. *Dasser Bhooyan* (1867)[1] it was assumed that knowledge and intention stood on the same footing, and it was held that the fact of drunkenness should be eliminated so far as knowledge or intention was concerned.

The same assumption was made in *Nga San* v. *K.E.* (1904).[2] The late Chief Judge of the Chief Court there said: "Intoxication does not affect the presumption as to intention or relieve him of responsibility" and "although intoxication cannot be considered as affecting the intention of the accused (section 86, Indian Penal Code)."

Neither of these decisions, however, quotes the language of section 86 or explains why it is to be taken as treating intention and knowledge in the same way.

That section runs as follows:—"When an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will."

The remarkable fact about it is that it does not say that the accused shall be liable to be dealt with as if he had the *same intention* as he would have had if he had not been intoxicated.

It appears to me that this omission cannot be assumed to be accidental. Several reasons might be given for this opinion. One is that according to English law the fact of intoxication, where the intention of the person committing the crime is an element of the crime itself, may be taken into consideration in determining whether he formed the intention necessary to constitute the crime. This is said to have been laid down in a series of decisions beginning with *Reg.* v. *Doherty*[3]—(*See* notes to section 86, Indian Penal Code, in Kinealy's Indian Penal Code (4th Edition, 1909), and Ratanlal's Law of Crimes (5th Edition, 1909).

Mayne says: "There seems no reason to suppose that the framers of the Code proposed to introduce a different rule from that of the English law"—(Criminal Law of India, 3rd Edition, paragraph 201).

Kinealy says: "The same rule" (as the Rule of English law) "prevails in India where it has been laid down that intoxication is a material element in determining the intention, but that to plead it successfully as a bar to punishment it must be of such a nature as to exclude the idea of deliberation or design."

(1) 8 W.R., Cr. Rs., 71. (2) 2 L.B.R., 204.
(3) 16 Cox, C.C., 306.

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Unfortunately the four cases which he cites as authority for this proposition are not published in any volumes of Reports available to me.

In *Ram Sahoy Bhur* (1864),[1] Mr. Justice Glover said: "Voluntary drunkennesss does not palliate any offence, but it is generally taken into account as throwing light on the question of intention." That was a case of a drunken quarrel where the accused hit the deceased with *lathis* and so ruptured his spleen. It was held that there was no intention to kill. Presumably what was meant by this was that there was no intention to cause death or injury sufficient in the ordinary course of nature to cause death. The accused were found guilty of culpable homicide not amounting to murder. Apparently they were presumed under section 86 to have known that they were likely to cause death.

The only other case I have been able to find is also the only Burma case besides *Nga San* v. *K.E.* above referred to, where the question under consideration is dealt with. This is *Abdul Karim* v. *Q.E.* (1892).[2] The Judicial Commissioner of Lower Burma, Mr. Hosking, there said: "The Legislature appears to have intended to make a distinction between the presumption as to knowledge and the presumption as to intention, and though ordinarily intention is to be inferred from knowledge, I do not think it is to be inferred where the knowledge is merely a legal fiction," that is, as I understand, where by reason of intoxication the accused actually does not know but under section 86 is presumed to know. The distinction here drawn between knowledge and intention is in accordance with the view I have expressed above. The limitation on inference is not to be found elsewhere.

Mayne's remarks on intention are in point here. He says: "Intention is sometimes a presumption of law" (as where the accused kills a man by striking him on the head with a loaded club and he is presumed to have intended to cause death as he is presumed to have intended the natural or necessary consequence of his act even if he is drunk), "sometimes it is a mere fact to be proved like any other fact" (*e.g.*, where, in determining the quality of an offence evidence is necessary of a specific existing state of mind which must be found as a fact and cannot be assumed, as when grave and sudden provocation has been received but the accused is shown to have acted from a preconceived malicious resolve to kill, or under the excitement of drunken passion rather than under fixed and settled malice: or where a man is found in the house of another at night and it is shown "that he was drunk and therefore did not enter with the intention of committing robbery)"—*see* Mayne's Criminal Law, 3rd Edition, paragraph 201.

On consideration of the foregoing authorities I am of opinion

(1) W.R., January-July, 1864, Crl. Rs., 24.
(2) S.J., L.B., 650.

that where an act done is not an offence unless done with a particular intention, it is permissible to consider voluntary drunkenness in determining whether the accused had that intention. In doing this I think that regard must be paid to the distinguishing circumstances illustrated by Mayne.

These points are of vital importance in the present case. Here is a man who according to the evidence is of good character and is not even in the habit of getting drunk. On a festive occasion he gets very drunk and then on his way home breaks into five petty shops in succession, and demands small sums of money with threats enforced by the exhibition of a gun which he happens to have with him. On the face of it his offence was robbery of the kind in which extortion is involved (Section 390, Indian Penal Code). Now a man is said to commit extortion who "intentionally puts any person in fear of any injury . . . . and thereby dishonestly induces him to deliver . . . . any property" (section 383).

And a man does a thing "dishonestly" when he does it "with the intention of causing wrongful gain and wrongful loss" (section 24)—wrongful gain being "gain by unlawful means of property to which the person gaining it is not legally entitled," and wrongful loss "loss by unlawful means of property to which the person losing it is legally entitled" (section 23).

Must we or can we hold on the evidence that Applicant acted "dishonestly" within this definition?

As we have seen, there was no admissible evidence to show that Applicant ever got the money. He denied all knowledge of what became of it.

In my opinion Applicant must be taken to have acted under the unreflecting influence of intoxication, and not with the intention of causing wrongful gain or wrongful loss.

As regards the element "dishonestly," the case appears to be one where the particular intention must be proved and cannot be presumed.

I hold therefore that the necessary intention was wanting and that Applicant did not commit robbery.

But he did commit house-breaking by night with intent to commit criminal intimidation and with criminal intimidation, sections 457, clause 1, and 506, Indian Penal Code.

Here the intention was, I think, clearly of the other kind and must be presumed.

I alter the three convictions here in question to convictions under section 457, clause 1, Indian Penal Code, and I reduce the three sentences to one month's rigorous imprisonment for each offence, the sentences to run concurrently.

Civil Appeal No. 305 of 1909. May 11th, 1910.

Before G. W. Shaw, Esq., C.S.I.

MI ME *v.* NGA ON GAING AND NGA PO TIN.

Mr. *J. C. Chatterjee*—for Appellant.
Mr. *C. G. S. Pillay*—for 1st Respondent.

Contract—Section 56.

Impossibility discussed and explained.

Pollock's Indian Contract Act, 2nd Edition, Notes to Section 56.
Cunningham and Shepherd's Contract Act, 10th Edition, Notes to Section 56.
Pollock's Principles of Contract, 7th Edition, pages 398—437.
Transfer of Property Act, Section 108 (*e*).

I see no reason to doubt the correctness of the order setting aside the abatement. I therefore confirm it.

Plaintiff-Appellant sued to recover 425 baskets of paddy or the value Rs. 340 as rent of her land for the year 1270 B.E.

The first paragraph of the plaint alleged that the land was leased by "the attached document." This was the lease, Exhibit ဃ.

The Defendants-Respondents in their Written Statement admitted having worked Plaintiff-Appellant's land for a rent of 425 baskets of paddy "as alleged in paragraph 1 of the plaint" (အဆို(၁)အချက်ပါစကားအရ).

Their defence was that as the early rain failed they "returned" (*i.e.*, asked Plaintiff-Appellant to take back) the land—this in *Wagaung*,— when Plaintiff-Appellant made a further or supplementary agreement (ထပ်ဝင်တိုးစေး) that they were not to pay rent if owing to failure of rain they got no crop and would have to buy paddy to pay the rent.

The pleadings do not show that Plaintiff-Appellant disputed the failure of rain and Defendants-Respondents' failure to get a crop, but the Township Court put this in issue.

Although the Township Court did not consider it necessary to come to a finding on the point, I think the evidence showed clearly enough, as the Lower Appellate Court said, that there was a general failure of rain at the right time, and that Defendants-Respondents were unable to work the land or get a crop accordingly. It was not the Plaintiff-Appellant's case that the Defendants-Respondents got or might have got a crop. I do not think it is open to her to say so now. What she alleged was that Defendants-Respondents were liable for the rent whether they got a crop or not. The lease expressly provided that rent should be payable whether Defendants-Respondents got a crop or not. This stipulation appears as an interpolation, and it is contended now on Defendants-Respondents' behalf that the Defendants-Respondents never expressly admitted the correctness of the document, and that on the face of it it disclosed a material alteration and as such was invalid. But I am of opinion that these objections cannot be entertained at this stage, in face of the admission

above mentioned in the Written Statement (*see* O. VIII, r. 5) and the nature of the defence set up. Plaintiff-Appellant admitted that Defendants-Respondents wished to give up the land in *Tawthalin* or *Thadingyut*, but she said that she refused to take it back, and called two witnesses to prove this. As the Township Court observed, there was no apparent contradiction on this point, as Defendants-Respondents admitted that when they returned the land in *Thadingyut* Plaintiff-Appellant refused to take it back.

Defendants-Respondents called two witnesses to prove that they first offered to return the land in *Wagaung*, and that Plaintiff-Appellant then told them to keep it, and made a (supplementary) promise that they need not pay rent if they got no crop and would have to buy paddy to pay it. The Plaintiff-Appellant denied all this.

There can be no doubt that the Township Court was right in finding that Defendants-Respondents failed to prove this supplementary agreement of *Wagaung* which they alleged. The only witnesses they had to it were Defendant-Respondent, Po Tin, and his brother-in-law, Po Naing, whose statements are not convincing, and without corroboration cannot be held sufficient. The Additional Judge of the District Court apparently concurred with the Township Court on this point, though his remarks are not very precise, and hardly indicate as correct an appreciation of the evidence as the Township Court had.

The Township Court in this state of facts found for the Plaintiff-Appellant. But the Lower Appellate Court upset that decision in a very summary manner. The learned Additional Judge assumed that section 56, Contract Act, stood in the Plaintiff-Appellant's way. He said,—"The contract to work the land and pay rent was contingent on the rainfall being favourable. It was not, and therefore it became impossible to work the land. The contract is void."

The Additional Judge in these remarks gave no heed to the express stipulation interpolated in the lease as already mentioned; he also assumed that the rent was to be paid out of the produce of the land, and that it became impossible for Defendants-Respondents to pay if they did not get a crop: which was a very large assumption to make even if there had been no stipulation for the payment of rent whether Defendants-Respondents got a crop or not.

Having regard to the language of the lease I am of opinion that all that it stipulated for was the delivery of so much paddy as rent.

Section 56 of the Contract Act is not free from difficulty as the commentaries sufficiently show. It is supposed to have been intended for a broad simplification of the English law on the subject (*see* Pollock's Indian Contract Act, 2nd Edition, notes to section 56). But it is admitted to have introduced a very important variation (Pollock *ibid*, also Cunningham and Shepherd's

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Contract Act, 10th Edition, notes to section 56). According to English law, a contract to do an act which becomes impossible *in law* after the contract is made, becomes void when the act becomes impossible, but a contract to do an act which becomes impossible *in fact* does not become void unless, according to the true intention of the parties, the agreement was conditional on its performance being or continuing possible in fact (Pollock's Principles of Contract, 7th Edition, pages 398—437). The Contract Act makes no distinction of this kind. In the second paragraph of section 56, so far as contracts to do an act which becomes impossible in fact are concerned, it lays down as a general rule what was the English law only in certain exceptional cases (*see* Pollock's Contract Act, *in loc cit.*' Also his Principles already cited, page 437).

Cunningham and Shepherd say of the second paragraph, "further it is to be observed that the term used is no longer 'impossible in itself' but 'simply impossible,'" and hence it may be inferred that "the contract becomes void when the act stipulated for becomes impracticable in the ordinary sense of the word, provided that the inability is not due to the promisor's act or default." .... But they go on to add, "It cannot, however, be intended that a contract should become void on the ground of impossibility merely because the promised act becomes more difficult or burdensome than was expected, or because the consent of some third person on whom the performance of the act depends cannot be obtained." And I think we must add, it cannot be intended that a contract to pay Rs. 10,000 by a person who becomes a pauper should become void. If it were, every debtor unable to pay would be at liberty to avoid his contract under this section on the plea that it had become impossible to perform it. In fact the distinction observed in the English law between subjective and objective impossibility must be taken to subsist. Pollock explains it as follows in a quotation from Savigny (Obl., I., 384) [1]:—

"Impossibility may consist either in the nature of the action in itself, or in the particular circumstances of the promisor. It is only the first or objective kind of impossibility that is recognized as such by the law. The second or subjective kind cannot be relied on by the promisor for any purpose, and does not release him from the ordinary consequences of a wilful non-performance of his contract. On this last point the most obvious example is that of the debtor who owes a sum certain, but has neither money nor credit. There is plenty of money in the world, and it is a matter wholly personal to the debtor if he cannot get the money he has bound himself to pay."

My opinion, therefore, is that, apart from the interpolated stipulation before referred to, the contract in question was not void under section 56, Contract Act.

(1) Pollock on Contracts, 7th Edition, page 403.

It may be noted that in English law, for the reason just explained, *viz.*, that the impossibility is personal and relative, a tenant is not released from his obligation to pay rent by the accidental destruction of the premises demised. By the Civil law, on the contrary, it is an incident of the contract to pay rent that it is suspended by inevitable accident destroying or making useless the thing demised (Pollock's Principles, page 410), and the Transfer of Property Act in section 108 (*e*) appears to have adopted the latter rule to a certain extent. It is there provided that "if by fire, tempest, flood or violence of an army, or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall at the option of the lessee be void."

But it is to be observed that neither the Civil law nor the Transfer of Property Act provides that the contract to pay rent is to be void if owing to a failure of rain the tenant does not get a crop.

The failure of rain is, I think, a contingency which the parties could have foreseen and provided for by a special condition in the Contract; and one of the ordinary risks which they must be understood to have had before them and to have taken upon them in making such a contract, like contrary winds in a charter-party. It thus differs from what is called an "Act of God," which Pollock defines as "an event which, as between the parties and for the purpose of the matter in hand, cannot be definitely foreseen or controlled." (Pollock's Principles, pages 414-415.)

As in the case of the demised premises being burnt by fire, the question is which, in the absence of a special agreement, is the better distribution of the hardship. It is hard for a tenant to pay rent for land out of which he has failed to extract a crop. It is hard for a landlord to lose the rent of land which he has let (Pollock's Principles, page 413). I have gone into these questions because of the doubt thrown on the interpolated stipulation, and because of the contention put forward on Defendants-Respondents' behalf that it is inequitable to make Defendants-Respondents pay rent when they did not get a crop.

In truth, it is no more inequitable that Defendants-Respondents should pay the rent, than that Plaintiff-Appellant should lose the rent; and as far as my study of the question enables me to say, the law would have laid the loss upon the Defendants-Respondents in the circumstances of the present case—apart from their special covenant to pay whether they got a crop or not.

But that covenant, for the reasons before explained, must be taken to have formed part of the contract.

It has been suggested that such a covenant is unconscionable and should not be enforced.

I have already said enough to show that in my opinion it is not unconscionable, and I know of no provision of law by which

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the Courts could refuse to enforce it. No question of undue influence arose here: the parties stood on equal terms when they entered into the contract.

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

Civil Revision No. 128 of 1909. May 25th, 1910.

Before G. W. Shaw, Esq., C.S.I.

MI HLA MIN *v.*

1. MI KET, LEGAL REPRESENTATIVE OF MI HMYIN (DECEASED).
2. NGA NYO
3. NGA PO TÔK.
4. NGA YUSUF.
5. NGA HMUT.
6. NGA KIN.
7. NGA PE.
8. NGA KASIM.
9. KIN MI, LEGAL REPRESENTATIVE OF NGA HLA (DECEASED).

Mr. *S. Mukerjee*—for Applicant. | Mr. *H. M. Lütter*—for Respondents.

Civil Procedure Code, Section 151; O. XXXIII, r. 7.

Where the Lower Court dismissed an application for permission to sue as a pauper, on the ground that the Applicant had coheirs with means who had not sued and might come in as Defendants in an administration suit, and that these circumstances disclosed an abuse of the process of the Court,

Held,—that no such abuse was disclosed, and that the Lower Court was bound to decide under O. XXXIV, r. 7, on the grounds specified in r. 5.

This application was originally presented as an appeal under O. XLIII, r. 1 (*w*). But as such an appeal lay only on the grounds specified in O. XLVII, r. 7, and as none of those grounds existed in the present case, I allowed it to be amended into an application in Revision.

Applicant applied for permission to sue as a pauper to recover her share of the inheritance of Nga O, a cousin, deceased. There is nothing on the Lower Court's record outside the judgment to show that any opposition was offered. From the judgment, however, it appears that some of the Respondents objected that Applicant had coheirs who were not paupers and that there was "some reason to suspect that they have induced her to bring this suit, in order that they may obtain the decision of the Court regarding what property the estate consists of and what shares the several heirs are entitled to" (without paying Court Fees).

The learned Judge (Mr. Moore) thought that the Court might not be limited in passing orders under O. XXXIII, r. 7, to the grounds specified in r. 5, but was of opinion that the suspicion of collusion was too vague to act upon, and therefore granted the permission asked for.

Respondents, Mi Hmyin (the widow) and Nga Nyo, Po Tôk, Yusuf and Nga Hmut (the business agents of the deceased as they are described in the plaint), then applied for a Review on the grounds (1) that the Court was not bound to be satisfied of collusion. (2) that the fact that there were coheirs who were not paupers was a sufficient ground for the Court to refuse permission, and (3) that the Court had overlooked section 151, Civil Procedure Code.

It is explained by the learned Advocate for Respondents that the first two grounds did not rest upon section 151. The underlying contention is that O. XXXIII, r. 7, does not require the Court to proceed solely on the grounds specified in rule 5.

As to this, rule 7 is practically identical with section 409 of the old Code, and the plain construction of the phraseology employed seems to me to show that what the Legislature contemplated was a decision for or against the application on the grounds stated in rule 5. If it had been intended to authorize the Court to proceed on other grounds, I think that this should and would have been stated in the rule.

Mr. Moore's successor (Captain Roberts), who disposed of the application for Review, applied section 151. After hearing the learned Advocates and referring to such authorities as have been cited on one side or the other, I am of opinion that section 151 was not applicable.

The view which I take is that there could be no abuse of the process of the Court, when the Applicant had a *bonâ fide* claim of inheritance on her own account, and was not entitled to require financial assistance from her coheirs towards the payment of the Court Fees. If she was a pauper, and it was not denied that she was, she was entitled to the benefit of O. XXXIII. The fact that she had coheirs, who were men of means, was immaterial. They were under no obligation to pay her Court Fees. Nor were they under any obligation to sue for their shares of inheritance when they could come in as Defendants. The whole argument on which the Respondents' case rests appears to me to be fallacious. I can see no reasonable possibility of Government losing the Court Fees: the first order would be for the payment of the Court Fees out of the estate; and the same order would probably be made if the suit were instituted in the ordinary way on payment of Court Fees. But this consideration is immaterial so far as the question under discussion is concerned, except that it tends to prove the improbability of the alleged collusion.

The point is that even if the parties contemplated the Government losing the Court Fees they were within their rights in acting as they did.

I think that the Lower Court in applying section 151 did not duly consider the law, and therefore committed an illegality or material irregularity within section 115, Civil Procedure Code.

I set aside the order granting the Review and dismissing the Applicant's application for permission to sue as a pauper.

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Respondents will pay Applicant's costs in all the proceedings on that application up to and including the present proceedings in this Court—2 gold mohurs.

Civil Revision No. 193 of 1909. May 16th, 1910.

Before G. W. Shaw, Esq., C.S.I.

MI MYA *v.* MI GYI.

Mr. *S. P. Sarvadhikari*—for Applicant. | Mr. *San Wa*—for Respondent.

Civil Procedure Code, Section 2 ; O. XXXIII, rr. 5 and 7.

Held,—an order rejecting or refusing an application for permission to sue as a pauper is not a decree, and no appeal lies.

The Secretary of State for India in Council v. *Fillo*, (1898) I.L.R., 21 All., 133.

Applicant applied for leave to sue as a pauper to recover—

(1) Property left by her aunt, Mi Shin, who died in 1271 B.E.

(2) Property left by her grand-father, Nga Hmè, who died in 1212.

As to the latter, her allegations were that Nga Hmè's estate was kept undivided and the profits shared among his heirs, and that she as an heir enjoyed her share of profits down to Mi Shin's death.

She claimed to be sole surviving heir to both Nga Hmè and Mi Shin ; Defendant-Respondent, Mi Gyi, another niece of Mi Shin's, having been an out-of-time grand-child of Nga Hmè's, and having been adopted into another family, and therefore not entitled to inherit from Mi Shin.

The Judge of the District Court in a very summary order, without citing any authority, declared that Applicant was barred by Article 123, Schedule I, Limitation Act, as regards Nga Hmè's estate, and that under no circumstances could she be held to be an heir to Mi Shin. He did not explain on what grounds he came to either conclusion.

Without determining the question of Applicant's pauperism, he proceeded to *dismiss the plaint* as not showing a cause of action.

The first point for determination is whether an appeal lies from that order.

On the face of it, it was not such an order as the Civil Procedure Code authorized the Judge to make.

He might, without sending notice to the other side, have *rejected* the *application* under O. XXXIII, r. 5, if he thought that Applicant's allegations did not show a cause of action.

He did not, however, do that, but sent notice. What he had to do, then, if he did not *grant the application* was to *refuse* it under r. 7.

A plaint is *rejected* if it does not disclose a cause of action (O. VII, r. 11).

And an order rejecting a plaint is a decree which is subject to appeal (section 2).

An order rejecting (r. 5) or refusing (r. 7) an application for permission to sue as a pauper does not involve the rejection or dismissal of the plaint, as the Applicant may proceed with the plaint if he can procure the necessary Court-fee Stamps (r. 15).

On a consideration of the language of section 2 defining "decree," I am of opinion that such an order is not a decree. It is not an adjudication in a suit. The Allahabad High Court in *The Secretary of State for India in Council* v. *Fillo* (1898) [1] decided on this ground in the same sense under the Code of 1882, and the definition of "decree" in the New Code does not substantially differ from the old one in this respect.

As no provision is made for an appeal under O. XLIII, it follows that no appeal lies from an order rejecting or refusing an application for permission to sue as a pauper.

The incorrect phraseology employed by the District Judge might, of course, be relied upon as a ground for admitting an appeal. But I think it must be assumed that what the Judge intended was to pass an order under O. XXXIII, r. 7, and that he expressed himself incorrectly owing to carelessness or inadvertence.

It seems obvious that the Judge's phraseology would not prevent the applicant from proceeding with the suit in a regular manner, if she chose to do so under r. 15.

My conclusion, therefore, is that the Judge's order is not open to appeal.

But it is manifestly open to Revision, and I am clearly of opinion that it calls for interference in Revision.

Clause (*d*) of r. 5 and clause (*2*) of r. 7, of course, justify and indeed require the Court to see whether the Applicant's allegations disclose a cause of action. But it cannot be supposed that they contemplate the decision of disputed questions of law, such as whether Article 123, Schedule I, Limitation Act, applies to the case and bars the Applicant's claim, and whether under Buddhist Law a niece by the half-blood is wholly debarred from inheriting in presence of a niece by the whole-blood, even when the latter has been adopted into another family.* Such questions as these are matters for determination, when the suit is heard.

On the face of the plaint, it cannot be said that the Applicant's allegations disclose no cause of action.

I am of opinion that the District Court did not duly consider the law, and was guilty of illegality or material irregularity in refusing Applicant's application on the grounds stated.

I set aside the District Court's order and direct that the Court proceed to dispose of the application according to law.

Respondent will pay Applicant's costs in the present application—2 gold mohurs.

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(1) I.L.R., 21 All., 133.

* It is stated that this is the view which the District Judge took in the present case.

Civil 2nd Appeal No. 204 of 1909. March 9th, 1910.

Before G. W. Shaw, Esq., C.S.I.

NGA CHIT NYO *v.* MI MYO TU.

Mr. *Tha Gywè*—for Appellant. | Mr. *San Wa*—for Respondent.

Buddhist Law—Divorce.

Held,—that a suit for bare divorce without and as distinct from partition of property will not lie under Buddhist Law.

Mi Gyan v. *Su Wa*, U.B.R., 1897—01, II, 28, explained and affirmed.

Nga Pye v. *Mi Me*, U.B.R., 1902-03, II, Budd. Law, Divorce, 6, partly overruled.

Tha So v. *Mi Min Gaung*, U.B.R., 1902-03, II, Budd. Law, Divorce, 12, superseded.

Mi Lôn Ma Gale v. *Nga Pe*, 5 L.B.R., 114, partly dissented from.

Mi Kin Lat v. *Ba So*, U.B.R., 1904—06, II, Budd. Law, Divorce, 3, referred to.

Plaintiff-Respondent sued for divorce on the ground of ill-treatment without praying for partition. Defendant-Appellant in his written statement objected to the omission The Courts below took no notice of this objection. But no doubt they were bound by the decision of this Court in *Nga Pye* v. *Mi Me* [1], which has not yet been overruled, to the effect that a suit may be brought for divorce without a prayer for partition. They agreed in finding Plaintiff-Respondent entitled to a divorce as by mutual consent. Defendant-Appellant now comes up in 2nd Appeal. The first point raised is that a suit for bare divorce does not lie under Buddhist Law. The decision in *Tha So* v. *Mi Min Gaung* [2], the complement to *Nga Pye* v. *Mi Me*, was recently dissented from by a Bench of the Chief Court, Lower Burma, in *Mi Lôn Ma Gale* v. *Nga Pe* [3]. The Chief Judge there agreed with the view taken in *Nga Pye* v. *Mi Me* that *Mi Gyan* v. *Su Wa* [4] did not decide that a suit for bare divorce would not lie, but differing from Mr. (now Sir Harvey) Adamson in *Tha So* v. *Mi Min Gaung* held that the claim for divorce and the claim for partition arise out of the same cause of action, and consequently where there had been a suit for bare divorce, that a second suit for partition was barred by section 43, Civil Procedure Code, 1882 (= O. II, r. 2). All these cases, except the recent Lower Burma one, were summarized and discussed in *Mi Kin Lat* v. *Ba So* [5], but it was not necessary there to decide whether a suit for bare divorce is maintainable.

The learned Advocates have not been able to advance any new facts or arguments to assist me in coming to a decision. But in view of the Lower Burma case it appears advisable to reconsider the question.

First as regards *Mi Gyan* v. *Su Wa*, I have read and re-read Mr. Burgess's judgment again, with all the care and attention I can bestow, and I find myself unable to concur in the interpretation of it given in *Nga Pye* v. *Mi Me*.

(1) U.B.R., 1902-03, II, Budd. Law, Div., 6. | (3) 5 L.B.R., 114.
(2) U.B.R., 1902-03, II, Budd. Law, Div., 12. | (4) U.B.R., 1897—01, II, 28.
(5) U.B.R., 1904—06, II, Budd. Law., Div., 3.

In setting out the principles of the Buddhist Marriage Law it says:—"Another striking feature, again, 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 worldly 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*," etc. It proceeds:—"The conclusion to be drawn from these premises is of course that the Appellant in suing for a bare divorce has mistaken her remedy. Her learned Advocate has indeed admitted that there is but one cause of action for divorce and partition of property, and that Appellant's proper course was to sue for both together. The Appellant seems to be placed in this dilemma. Either the decree of the Court of First Instance is bad because it is incomplete and imperfect, inasmuch *as it does not deal with the property without doing which there can be no divorce in Buddhist Law*, or if the decree stands, it amounts to a decree of divorce leaving all the property to the husband, to whom the wife has abandoned it . . . . . The Appellant by suing separately for a share of the estate has shown, however, that this is not the position taken by her" (*i.e.*, that she has not abandoned the property). "This separation of suits was contrary to section 42 of the Civil Procedure Code . . . . . and in obedience to this rule the plaint in the present action" (*Sc.* the first suit for a bare divorce) "ought to have been returned for amendment under clause (iv) (*6*) of section 53, Civil Procedure Code, if it were not rejected under the first part of the section as not disclosing a cause of action. *But if I am right in the analysis which I have made above of the principles of Buddhist Marriage Law, there was no cause of action for divorce without and as distinct from division of property, and the plaint should either have been rejected for that reason, or, the suit failing by reason of such formal defect, the Plaintiff should under section 373, Civil Procedure Code, have been permitted to withdraw with liberty to bring a fresh suit* for the subject-matter of the suit. *The effect of the order now to be passed will be as if this had been done originally.*"

Therefore the suit was dismissed "upon the grounds now set forth" (*Sc.* as not disclosing a cause of action), and the effect was evidently to leave the second suit (for partition) to stand as a suit for divorce and partition.

In face of the quotations just given, it is not intelligible to me how Mr. Adamson came to the conclusion "that there is nothing in *Mi Gyan* v. *Su Wa* from which it can be inferred that a suit for bare divorce does not lie," and that what was decided was that the first suit barred the second.

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It appears to me to be incontestable that there was a clear decision that a suit for bare divorce would not lie; and the head note was perfectly correct. The second suit (for partition) was not under appeal, and the question whether it was barred was not before the Court. Moreover, the first suit having been dismissed, as we have seen, because it disclosed no cause of action, the second suit could not be barred.

The Chief Judge of the Chief Court in *Mi Lôn Ma* v. *Nga Pe* agreed in the conclusion come to in *Mi Kin Lat* v. *Ba So*, that the quotation there given from *Mi Gyan* v. *Su Wa* contained a correct statement of the Buddhist Law, but he went on to say, "I do not think it follows from it that, as stated in the head note to *Mi Gyan* v. *Su Wa*, a suit for bare divorce without partition of property will not lie, or that there is no cause of action for divorce without and as distinct from division of property." There is nothing in the judgment to explain how the learned Judge arrived at this conclusion. But in reproducing the quotation he only gave a small part of it, and omitted what in my opinion was the most important part. Is it possible that he overlooked the passages quoted above which I have emphasized? His reference to the head note is consistent with this hypothesis.

The judgment contains no original analysis of the Buddhist Law, and cites no texts to show that divorce can be effected without partition.

I venture to think that the examination of the authorities made in *Mi Kin Lat* v *Ba So* fully supported Mr. Burgess's opinion that divorce and partition are inseparable. The first thing which I undertook to prove in *Mi Kin Lat's* case was that partition does not arise only after divorce, but accompanies it and is inseparable from it, and the conclusion come to was 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."

Section 441 of the 2nd Volume of the Kinwun Mingyi's Digest contains the texts from ten Dhammathats which expressly deal with the question whether a divorce is complete without partition of property. Nine distinctly declare in effect that a divorce is not complete till the property has been divided. The tenth is *apparently* in conflict with the rest. This is the extract from the Manugyè. In *Nga Pye* v. *Mi Me* Mr. Adamson relied on this passage as his authority for dissenting from "Mr. Burgess's dictum in *Mi Gyan* v. *Su Wa*, that there can be no divorce in Buddhist Law without partition of property." He quoted from the translation given in Note 2 of Mr. Jardine's notes (*see* at page 25). Richardson's translation and that in the English version of the Digest differ somewhat from this and from each other. All fail, as it seems to me, to give the full meaning and effect of the original; they overlook the little word (ဝေါ) "only," and thus lose the point of the passage. The following is my

rendering :—"After husband and wife have divorced, if the property, animate and inanimate, has not been divided, only let the property be divided, according to the original decision, if it is liable to partition.

Let it not be said that the husband cannot remarry on the ground that the property and debts have not been divided yet, let him be at liberty to remarry, and let the wife also be at liberty to remarry."

The meaning, I think, is clear: the author of the Manugyè does not approve of remarriage being hindered on such a ground, and he says "*only* let the property be divided." *i.e.*, the only thing to do is to divide the property. Divide the property and be done with it: why let it remain undivided and so raise an unnecessary obstacle to remarriage?

I can find no support for the decision in *Nga Pye's* case here. It would be remarkable if the Manugyè stood alone against nine other Dhammathats, the language of which admits of no misconstruction. But as I understand it, there is no real contradiction. That this interpretation is correct is, I think, proved by the Manugyè passage given in section 442. On the other hand, I have gone through the Digest once more, and I am unable to find any texts which justify the conclusion that divorce can be effected without partition.

I hold therefore, as it is necessary to come to a new decision, that a suit for bare divorce without and as distinct from partition of property will not lie under Buddhist Law. This overrules *Nga Pye* v. *Mi Me* on this point, supersedes *Tha So* v. *Mi Min Gaung*, and partly dissents from *Mi Lôn Ma* v. *Nga Pe*.

In view of this finding, the question whether O. II, r. 2, bars or does not bar a second suit for partition after a first suit has been brought for bare divorce, cannot arise, and it is unnecessary to decide, whether, as Sir C. Fox held in the Lower Burma case last cited, the cause of action in a subsequent suit for partition is the same as that in the first suit for bare divorce, or whether, as Mr. Adamson held in *Tha So* v. *Mi Min Gaung*, it is different. O. II, r. 2, does not bar the subsequent suit where the previous suit disclosed no cause of action (*see* Hukm Chand's Civil Procedure Code, 1882, note to section 43). But it may be noted that Mr. Adamson based his arguments for a separate cause of action on the ground that the question of partition only arises after divorce. And as we have just seen the view taken of the Buddhist Law in *Mi Gyan* v. *Su Wa* confirmed in *Mi Kin Lat* v. *Ba So*, and now reaffirmed involves the negation of that proposition. It remains to determine what course should be taken in the present case.

The position is not the same as that in *Mi Lôn Ma's* case, which had to do with the subsequent suit, or as that in *Mi Gyan's* case. Here no subsequent suit has been brought, and the new Code of Civil Procedure has introduced a wider rule for the amendment of a plaint.

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O. VI, r. 17, authorizes the Court to allow amendment at any stage of the proceedings, and directs that all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

I allow the Plaintiff-Respondent to amend the plaint by adding a prayer for partition, and appending schedules of the property for this purpose.

Criminal Revision No. 216 of 1910. June 9th.

Before G. W. Shaw, Esq., C.S.I.

NGA PO SAW *v.* MI THET.

Mr. *S. Mukerjee*—for Applicant.

Criminal Procedure—488. Effect of decree for restitution of conjugal rights.

Held,—where a decree for restitution against a wife is in full force and no new cause for living apart is alleged, the wife's application for maintenance should be dismissed.

In re Bulakidas, (1898) I.L.R., 23 Bom., 484; *Nga Waing* v. *Mi Chit*, (1904) U.B.R., 1904—06, I, Crl. Pro., 10; *Mi Nyein Me* v. *Nga Kyaw*, (1902) U.B.R., 1902-03, I, Crl. Pro., 7; *Mi Gauk* v. *Po Hmi*, (1905) U.B.R., 1904—06, I, Crl. Pro., 39; *Mi Saw* v. *S*—, U.B.R, 1910, Vol. I, page 1.

In his written statement the present Applicant pleaded that he had sued for and obtained a decree for restitution of conjugal rights, and that the Respondent still refused to live with him.

The Subdivisional Magistrate overlooked this altogether. The point was a very important one. In *In re Bulakidas* (1898) [1] it was held by the Bombay High Court, following previous decisions of the Allahabad and Calcutta High Courts, that an order of a Civil Court for restitution of conjugal rights supersedes any previous order for maintenance if the wife should persist in refusing to live with her husband, and that a Magistrate ought to cancel his order, or rather to treat it as determined, if the wife, failing to comply with the decree for restitution, refuses to live with her husband

The position in the present case was only different in this, that the Respondent applied for maintenance *after* the decree for restitution had been passed against her.

The Civil Suit was Civil Regular No. 111 of 1908 of the Township Court, Yenangyaung, which was decided on the 29th July 1908.

The Respondent first applied for maintenance on the 22nd September 1908, and the Township Magistrate, who happened to be the same officer who as Judge of the Township Court had tried the Civil Suit, naturally did not overlook the decree for restitution, and dismissed the application for maintenance on the ground that the present Applicant had obtained a decree for restitution which was in full force, and had also obtained an order in execution directing the Respondent to live with her husband. This on the 2nd October 1908.

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(1) I.L.R., 23 Bom., 484.

On the principle followed in *Bulakidas's* case I am of opinion that the Township Magistrate was right.

The present proceedings were instituted on the 7th October 1909, when the Respondent made a fresh application for maintenance to the Subdivisional Magistrate. She alleged the same ill-treatment on which the Township Court had found against her, and she now alleged for the first time as a grievance that the Applicant had reunited with his former wife.

That was a point which she had never touched upon before. If she had raised it no doubt the Township Court would have investigated the circumstances. It was not a new occurrence since the decree for restitution. The Respondent plainly stated in her application to the Subdivisional Magistrate that the Applicant had been living with his former wife since *Nayôn* 1268 (30th May—27th June 1908), *i.e.*, precisely the time when the Civil Suit was going on. The grievance against an elder wife has never been held sufficient cause in Upper Burma for a wife to refuse to live with her husband,—see *Nga Waing* v. *Mi Chit* (1904) [1]. The present is certainly not a case where it would be proper to reopen that question. The Subdivisional Magistrate of course was bound by the decisions of this Court. As far as the Respondent herself is concerned, therefore, I am of opinion that the Subdivisional Magistrate was in error in granting her maintenance.

The case of the children is different. According to the Ruling of this Court in *Mi Nyein Me* v. *Nga Kyaw* (1902) [2], affirmed and extended in *Mi Gauk* v. *Po Hmi* (1905) [3] and again affirmed recently in *Mi Saw* v. *S*— (1910) [4], a father is not at liberty to refuse to maintain his children on the ground that they are not living with him. If he does not wish to provide them with separate maintenance, it is his business to apply to the proper authority and get the custody of them.

The Magistrate's order is modified: so far as the maintenance of the Respondent is concerned it is set aside.

Before H. E. McColl, Esq.

Civil Appeal No. 95 of 1909. April 25th, 1910.

U KUTHALA *v.* U SANDA.

Buddhist Law—Ecclesiastical.

Suit for possession of a monastery based on a decision of the *Thathanabaing*. The Defendants contended that they were schismatics and were not subject to the *Thathanabaing's* authority.

Held,—that the *Thathanabaing's* authority was based on ancient custom, and that as the monastery in dispute was *thingika* property, which had been dedicated to the monastic body before the sect to which the Defendants

(1) U.B.R., 1904-06, I, Crl. Pro., 10.
(2) —— 1902-03, I, Crl. Pro., 7.
(3) —— 1904-06, I, Crl. Pro., 39.
(4) —— 1910, Vol. I, p. 1.

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professed to belong came into existence, the *Thathanabaing* had jurisdiction in the matter, and his decision ought to be enforced.

U Thi Ha v. *U Thudatthana and others, U.B.R., 1907—09, II, Budd. Law, Ecclesiastical, 5.*

The parties are Buddhist monks. The Plaintiff-Respondent brought a suit for a declaration that he was entitled to reject, the Defendant-Appellant and four others from the group of monasteries in Mandalay known as the *Bôngyaw Taik*, and for an order to eject them. He based his claim on three grounds, namely, (1) that he was the successor of the *Bôngyaw Sayadaw* who owned the *Taik*, (2) that he was *Taikkyat*, or Superintendent of the *Taik*, duly appointed by the *Thathanabaing*, and (3) that he had obtained an order from the *Thathanabaing* for the ejectment of the Appellant and his co-Defendants.

He set out in his plaint various reasons why it was desirable that these monks should be ejected, but the learned District Judge declined to go into the merits.

In the course of the trial of the suit the Plaintiff-Respondent abandoned the first ground, and admitted that the monasteries were *Thingika* property and that therefore no individual monk could own them.

Before filing the suit the Plaintiff-Respondent laid a complaint before the *Thathanabaing*, who referred the matter to the Taungbyin *Gainggyôk* within whose jurisdiction the *Taik* in question is said to be situated. The latter sent a notice to the Defendant-Appellant to appear and defend himself, but he refused to do so. The *Gainggyôk* then passed an *ex-parte* order that the Defendant-Appellant should leave the *Taik*. This order was in due course confirmed by the *Thathanabaing*.

These facts are admitted, but the Defendant-Appellant denied that the *Thathanabaing* had authority to appoint Plaintiff-Respondent or any other monk *Taikkyat*, and denied that he was subject to the *Thathanabaing's* authority on the ground that he belonged to a sect which recognized the authority of certain twelve *Sayadaws* only. He also denied the facts set out in the plaint as grounds for ejecting him. The learned District Judge following the rulings of this Court declined to go into the merits and found that the *Taik* in question was within the jurisdiction of the Taungbyin *Gainggyôk*, that the *Thathanabaing* had acted within the scope of his authority, and that he and the *Gainggyôk* had done nothing contrary to law, and gave the Plaintiff-Respondent a decree, which is badly worded but is to the effect that the Defendant-Appellant must leave the *Taik* and pay the costs of the suit, and dismissed the suit as against the other Defendants, because the *Gainggyôk's* order did not direct them to leave the *Taik*.

The Defendant-Appellant has appealed against this decree on eight grounds, which will be considered *seriatim*.

The first ground is that the learned District Judge erred in holding that the *Thathanabaing* had jurisdiction to oust the Defendant-Appellant, who had lived in the *Taik* for twenty years,

in spite of the fact that he belonged to a sect which did not recognize his authority.

This is the main ground of appeal as it was the main defence.

The length of time that the Defendant-Appellant has lived in the *Taik* is clearly immaterial. The question is whether the Defendant-Appellant is subject to the authority of the *Thathanabaing*.

The present *Thathanabaing* was elected as head of the hierarchy, not unanimously but by a majority of the monks of Mandalay, if not of Upper Burma. He was granted a Sanad in which is set out the extent to which the Local Government recognize his authority. It has been held in numerous cases by this Court that the possession of a monastery is a matter within the jurisdiction of the Ecclesiastical authorities, and it is not seriously contended that the *Thathanabaing* has no jurisdiction to order one of his own followers to leave a monastery. But it is argued that the granting of the Sanad had not legislative effect, and that it did not and cannot oust the jurisdiction of the Civil Courts which is clearly laid down in section 9 of the present Civil Procedure Code (section 11 of the Code of 1882), and that as the Defendant-Appellant is not a follower of the *Thathanabaing* but a Schismatic, he is in no way bound by the latter's orders, and that the District Court was bound to adjudicate upon the merits of the case.

The matter is not free from difficulty. In the years immediately following the annexation, the authority of the *Thathanabaing*, who had been appointed by the late King of Upper Burma, was not questioned, and it was held by this Court that so long as his orders were within the scope of his authority and were not contrary to law, Civil Courts could not go into the question, whether they were proper or not, but were bound to give effect to them. Then after his death, during the time that there was no *Thathanabaing* recognised by Government, it was held that monks were bound to obey their immediate Ecclesiastical superiors, and that the Civil Courts were bound to give effect to their orders on the same condition. None of these rulings explain the grounds on which the ordinary jurisdiction of the Civil Courts to decide suits between monks in accordance with equity, justice, and good conscience was held to be ousted. If the matter be considered a question of religious usage or institution, the Buddhist law would be applicable under section 4, Civil Courts Regulation. But no text of Buddhist law has been quoted as an authority for the rulings. The constitution of the Buddhist hierarchy in Burma, however, is very ancient, and what I think the rulings lay down is, that there is a custom in Upper Burma, which has the force of law, that the monk recognized by the State as the head of the hierarchy should have jurisdiction to decide certain disputes between other monks, and the giving of the Sanad to the present *Thathanabaing* was a recognition by the British Government of this custom. This is borne out by the opening words of the Sanad: "Whereas

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by ancient custom Ecclesiastical affairs in Upper Burma are superintended by a *Thathanabaing*."

So far there is no difficulty, but the important question arises whether no variation of this custom is ever to be allowed. It is not the policy of Government to interfere in matters of religion, and it would be utterly contrary to every British tradition to lay down that there should be but one Buddhist sect in Burma, and that every Burman who wished to embrace a religious life should accept the dogmas laid down by the *Thathanabaing*. It is expressly stated in the Sanad that the recognition of the *Thathanabaing* by the State does not extend to matters of dogma, but it seems obvious that if the *Thathanabaing* had power to direct a monk to leave a monastery, and to enforce his order through a Civil Court without the merits being gone into, that the life of a Schismatic might be made intolerable, the way would be laid open to persecution, and the effect would be the same as if the Government openly recognized the *Thathanabaing's* authority on matters of dogma.

The solution of the difficulty lies, I think, in the consideration of the matter from the point of view of property. In *U Thi Ha* v. *U Thudatthana and 14 others* (1) the latest ruling on the point, which was also a suit for possession of a monastery, in which the Defendant raised the defence that he was not subject to the authority of the *Thathanabaing*, it was held that the fact that the Defendant professed to be a Schismatic and to refuse recognition to the *Thathanabaing* was apparently immaterial, but this remark was rather of the nature of an *obiter dictum*, as the Defendant had voluntarily submitted to a decision of the dispute by the *Sayadaws* to whom the matter had been referred by the *Thathanabaing*.

If property were dedicated to a particular sect which did not recognize the *Thathanabaing*, then I think it is clear that the latter would have no jurisdiction to decide disputes relating to its possession. But in the present case it is admitted that the *Taik* is *Thingika* property, *i.e.*, that it belongs to the whole body of monks. The sect to which the Defendant-Appellant belongs is of recent origin. The *Taik* in question was dedicated to the priesthood before this sect came into existence. There can be no doubt, therefore, that according to ancient custom the *Thathanabaing* had authority to decide disputes relating to it.

This view of the matter does not get rid of all difficulties. It implies, for instance, that the question whether property is *Thingika* or *Pôkgalika* is one for the Civil Courts and not for the Ecclesiastical authorities to decide, but it is not necessary to go further into this point in this case because it is admitted that the *Taik* in question is *Thingika* property, and therefore

(1) U.B.R., 1907-08, II, B.L., Ecc., page 5.

every monk who lives in it must submit to the *Thathanabaing's* authority.

The second ground of appeal is that the District Court erred in holding that an order passed *ex-parte* was binding under the Ecclesiastical law. It is urged that had the Defendant-Appellant appeared before the *Gainggyôk* in order to contest the case on the merits, it would have been held that he had submitted to the authority of the *Thathanabaing*, and that the decision had the effect of an award. I do not think that this necessarily follows. The Defendant-Appellant might have appeared under protest, and have expressly declined to waive the objection that the *Thathanabaing* and *Gainggyôk* had no jurisdiction. A Defendant may object to the jurisdiction of a Civil Court, but if he declines to appear to contest the case on the merits, he does so at his peril, and if on appeal the question of jurisdiction is decided against him, he will not be allowed to reopen the case on the merits. Moreover, the matter is one of procedure. It is not the province of the Civil Courts to decide whether an order of the *Thathanabaing* or any other Ecclesiastical authority is strictly in accordance with the *Vinaya* or not.

The next ground of appeal has already been dealt with.

The fourth ground of appeal is that the District Court erred in holding that the *Thathanabaing* could appoint a *Taikkyat* to a *Kyaungdaik* where there was one already. This has reference to the second ground on which the Plaintiff-Respondent's claim was based, but it was not on this ground that the learned District Judge based his decree. He expressly held that it was not shown that a *Taikkyat* alone had authority to evict a monk from his monastery. He based his decree purely on the *Thathanabaing's* order and the decision of the *Gainggyôk*. The question whether the *Thathanabaing* had power to appoint the Plaintiff-Respondent *Taikkyat* of the *Taik* in suit or not is therefore immaterial.

The next ground of appeal is that the learned District Judge erred in not considering whether the *Gainggyôk's* decision was in conformity with the general principles of equity, justice, and good conscience. But there is a series of rulings of this Court to the effect that the Civil Courts cannot go into questions of this sort. If they were competent to do so, the decisions of the Ecclesiastical authorities would be of less effect than an award of arbitrators. I am of opinion that the learned District Judge was right in refusing to go into the merits.

The next ground of appeal is that it was not proved that the *Bôngyaw Kyaungdaik* was within the jurisdiction of the *Gainggyôk* of Taungbyin, or that the *Thathanabaing* acted within the scope of his authority in passing the order that he did. This ground has not been strongly pressed, and it is only necessary to say that there is evidence that the *Taik* is within the jurisdiction of the Taungbyin *Gainggyôk*, and that it has been held several

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times by this Court that disputes as to the possession of a monastery are within the scope of the *Thathanabaing's* authority.

The seventh ground of appeal is that the Plaintiff-Respondent having brought the suit on certain allegations of fact on which he asked the Court to adjudicate, the learned District Judge erred in holding that he could not enter into those facts.

This is practically the same as the fifth ground, but I may add that the Plaintiff-Respondent did not ask the Court to adjudicate upon the facts set forth in the plaint as reasons why it was desirable that the Defendant-Appellant should have the monastery. The 17th paragraph of the plaint runs as follows:—That the Plaintiff, either as successor in interest to the *Kyaungdaik* as aforesaid or as *Taikkyat*, having control of the *Kyaungdaik* by the authority of the *Thathanabaing*, or by reason of the decision of the *Gainggyôk* of Taungbyin which was confirmed by the *Thathanabaing*, or on all these grounds together, is entitled to evict the Defendants from the *Kyaungdaik* in question.

The last ground of appeal is that, even supposing that the Ecclesiastical authorities had the right to decide in the matter, the proper officers to whom the Plaintiff-Respondent should have appealed were the *Taikôk* and *Taikkyat* of the *Taik*, namely, U Aseinna and U Tilawka, who had been acting as such for over twenty years.

There is nothing in this ground of appeal. U Aseinna and U Tilawka were two of the monks whom the Plaintiff-Respondent wished to evict, and obviously the dispute could not be decided by them, and the proper person to whom to refer the dispute for enquiry was the Ecclesiastic to whom all the parties were subordinate.

I am thus of opinion that the decision of the District Court is correct, and I dismiss the appeal with costs.

Civil Miscellaneous Case No. 27 of 1910. August 3rd.

Before G. W. Shaw, Esq., C.S.I.

KODA BUKSH *v.* { 1. LOKEMAN KHAN. 2. NATHAN.

Mr. *A. C. Mukerjee*—for Applicant.

Provincial Small Cause Courts—35.

Held,—that a suit for compensation for maliciously causing a search for stolen property to be made by the Police in the Plaintiff's house is not a suit for compensation for injury to the person within Article 35, and is not excluded from the cognizance of a Small Cause Court.

Addison's Law of Torts.
Collett's Law of Torts.

This is a reference under O. XLVI, r. 6, by the Judge of the Small Cause Court, Mandalay. The suit is for compensation for maliciously causing the Plaintiff's house to be searched by the Police (for stolen property). The plaint does not allege that the Defendant laid information of theft *against the Plaintiff.*

Hence no allegation of either malicious prosecution or defamation is involved.

The question is whether the suit is cognizable by a Court of Small Causes.

No decisions either in India or Burma can be traced, which is certainly remarkable since it is generally supposed to be a common practice in India for a malicious person to cause the Police to search an enemy's house for stolen property.

The learned Advocate for Plaintiff has not been able to adduce any authority. The Defendants have not had the assistance of an Advocate, and of course have not helped to a decision.

The Small Cause Judge is inclined to think that the case falls within Article 35 (*l*).

In most of the Standard Works on Tort,[1] malicious prosecution and libel and slander are classed under the head of personal wrongs, but these are subdivided; injuries to the person properly so-called are confined to assault, battery, false imprisonment, malicious arrest and such likes, and malicious prosecution is placed in the category of injuries to the reputation or in that of what Pollock calls "wrongs affecting the estate generally," which are made into separate sub-classes.

"Maliciously causing a search" goes very near to malicious prosecution and also to defamation. But Addison and Collett are the only authorities I can find who so much as mention it. Collett, after treating malicious prosecution, says, "similarly and subject to the same rules, if a person maliciously and without probable cause, knowingly or recklessly, and without due inquiry, swears to what is false and so causes a search-warrant to issue, he is liable to an action for damages at the suit of the party who has been damnified by the execution of the warrant. There may in such a case be no invasion of the rights of the person, but the damages are given for the trespass under the malicious abuse of process." (7th Edition, page 61.)[2]

I apprehend that causing search to be made by the Police would be dealt with in the same way.

In that case it would not come within clause (*l*) of Article 35.

On the face of it the language of that clause leads to the same conclusion. The phrase "injury to the person" conveys to my mind personal wrongs in the restricted, and not in the extended sense. If it had been intended to include all descriptions of personal wrongs not already mentioned in the preceding clauses, including wrongs to the reputation and to the "Estate generally," as well as injuries to the person properly so-called, I think that this would have been more clearly stated. The ordinary meaning of the words "injury to the person" in English is the narrow one.

My conclusion is therefore that the present suit is not excluded from the cognizance of a Small Cause Court, and I direct the Small Cause Court to proceed with the suit.

(1) Addison's Law of Torts. | (2) Collett's Law of Torts.

Civil Appeal No. 87 of 1910. Feby. 24th.

Before H. E. McColl, Esq.

1. MI KIN GALE.
2. KIN KIN GYI } MINORS BY THEIR
3. KIN MAUNG MAUNG } MOTHER, 1ST
4. MI KIN NGE } APPELLANT.

v.

1. MI KIN GYI.
2. MAUNG MAUNG GYI, MINOR BY HIS MOTHER, 1ST RESPONDENT.
3. MI TAIK } MINORS BY THEIR
4. NGA LE NYO } MOTHER, 3RD RES-
5. AN INFANT DAUGHTER } PONDENT.
6. KIN MA GYI.
7. NGA TU TU, BY HIS GUARDIAN *AD LITEM*, 6TH RESPONDENT.

Mr. *H. M. Lütter*—Advocate for Appellants.

Mr. *C. G. S. Pillay*—Advocate for 1st and 2nd Respondents.
Mr. *J. C. Chatterjee*—Advocate for 6th and 7th Respondents.

Buddhist Law—Inheritance—Distinction between wife and concubine.

Held,—that the Buddhist law recognized polygamy, and that a Buddhist might marry two or more women at the same time, and that they might all have the status of a wife and not that of a concubine, that the woman first married was the chief wife and that as long as she was not divorced her status could not be lowered by any conduct of her husband, except perhaps if she were barren.

Held,—*also*, that wives were entitled to equal shares of their husband's *atet* property, and that the rules laid down in sections 231 and 234 of the Attathankepa that a superior wife takes three shares and an inferior wife two shares, have reference to the caste system and have no application to Burman Buddhists.

Mi Shwe Ma and one v. *Mi Hlaing and one*, U.B.R., 1892—96, II, 145.
Mi Ka v. *Nga Thet and others*, S.J., L.B., 6.
Mi U Byu v. *Mi Hmyin*, U.B.R., 1897—01, II, 160.
Mi Gywè and 4 others v. *Mi Thi Da and 3 others*, U.B.R., 1892—96, II, 194.
Mi Hmôn and one v. *Nga Paw Dun*, U.B.R., 1897—01, II, 138.

This was a suit for a share of the estate of the late official, U Kyaw Gaung, Mobyè *Sitkè*. The estate which is in the possession of the 1st Defendant-Appellant, Kin Kin Gale, was valued in the plaint at Rs. 3,68,854. The Plaintiffs, Kin Kin Gyi and her son (now 1st and 2nd Respondents), claimed a third share. Kin Kin Gyi claimed to be a widow of the deceased, and the 2nd Respondent is admittedly his son. The 1st Defendant-Appellant, Kin Kin Gale, is a widow of the deceased, and the other Appellants are her children by him.

The District Judge found that the 1st Respondent, Kin Kin Gyi, was U Kyaw Gaung's wife at the time of his death, but that her status was inferior to that of the 1st Appellant, Kin Kin Gale, that she was entitled to inherit, that if she were not, her son, the 2nd Respondent, would be entitled to the share to which he considered she was entitled.

U Kyaw Gaung, who appears to have been originally poor, first married Kin Hmôk also called Kin Nyein. Her children died and the couple adopted Maung O, father of the Defendants-Respondents, Kin Ma Gyi and Maung Tu Tu. The 1st Defendant-Appellant, Kin Kin Gale, who was Kin Hmôk's cousin, lived as a child with her mother, Kin Myit, in U Kyaw Gaung's house. During Kin Hmôk's lifetime U Kyaw Gaung made two expeditions to the Shan States. On account of the first expedition he was given the title of Mobyè *Sitkè*, and in the second, which was undertaken just before the annexation for the purpose of raising money to fight the English, he obtained his wealth.

Kin Myit died in 1244 and the 1st Defendant-Appellant continued to live in U Kyaw Gaung's house until Kin Hmôk's death, which took place in 1253. She then went and lived for some time in her uncle Maung Sin's house at Mandalay, and then went and lived with her aunt, the Sagazein *Mibaya*, in Rangoon. In 1254 U Kyaw Gaung brought the 1st Plaintiff-Respondent to his house and cohabited with her openly. She alleges that she had been demanded in marriage by U Kyaw Gaung from the Chundaung *Minthami*, her sister by adoption, that the latter had given her consent and that she became U Kyaw Gaung's wife, by the most approved form of marriage, though there was no actual ceremony. It is on the other hand alleged by the defence that the 1st Plaintiff-Respondent was carried off by U Kyaw Gaung from a pagoda festival, and that this was a common way in which wealthy men obtained concubines.

In the same year, 1254, U Kyaw Gaung cohabited with Ma Taik, a Shan woman, whom he had brought as a girl from the Shan States and kept in his house as a servant. His intimacy with her only became known owing to her pregnancy. Thereafter she appears to have been given the status of a *kyunmaya*, called by the District Judge a servant-wife.

In the same year, 1254, a woman called Ma Kin—referred to throughout the proceedings as Sagaing Ma Kin—was brought to U Kyaw Gaung's house and occupied the position of a concubine.

In the following year U Kyaw Gaung demanded the 1st Defendant-Appellant in marriage from her aunts, the Sagazein *Mibaya* and two other *Mibayas* now deceased. The negotiations took place through the Kyaukmyaung *Atwinwun* and the Padein *Myoza*, who were sent to Rangoon by U Kyaw Gaung for the purpose, but there was no ceremony; the 1st Defendant-Appellant says that on arrival at Mandalay she went straight to U Kyaw Gaung's house, and that the next day she was given presents and cohabitation commenced. Thereafter undoubtedly the 1st Defendant-Appellant was treated by U Kyaw Gaung as his favourite wife, though a good deal of the evidence is discounted by the fact that the 1st Plaintiff-Respondent did not live continuously with U Kyaw Gaung. It is not clear when she first left the house, but it was not until after she had given birth to a child, the 2nd Plaintiff-Respondent. She then appears to have

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become an invalid and, after continuing to live with U Kyaw Gaung for some time, she went and lived with the Chundaung *Minthami*. The 1st Defendant-Appellant says that the 1st Plaintiff-Respondent, Kin Kin Gyi, frequently visited U Kyaw Gaung after this, but never slept in his house except during one visit when she lived in the house for two months in 1259. During this visit she became *enceinte*. She was on this occasion confined in the Chundaung *Minthami's* house. Kin Kin Gyi herself states that after leaving U Kyaw Gaung's house she lived with him off and on for three years, and that two years after the birth of her first child she miscarried, that during those three years she lived more in his house than with the *Minthami*, and that afterwards she spent less of her time in his house, but that she continued to sleep with him five or six times a month up to the time of his death.

This is a point which those of the witnesses who lived in U Kyaw Gaung's house should have been able to clear up, but their evidence is not of much assistance. It is clear, however, I think, that U Kyaw Gaung never broke off relations with Kin Kin Gyi, and it is certain that there was no regular divorce.

The learned District Judge has found that Kin Kin Gyi was U Kyaw Gaung's wife, but of inferior position to Kin Kin Gale who was his chief wife, and that after 1259 Kin Kin Gyi lived entirely separate from U Kyaw Gaung and had no share whatever in the management of his property or affairs, and following *Ma Shwe Ma and one* v. *Ma Hlaing and one* (1) has held that Kin Kin Gyi is only entitled to two-fifths of the share awarded to Kin Kin Gale.

The learned District Judge has quoted no authority for the proposition that a man who already has a wife can take another wife and make her his chief wife. To do this would involve the degradation of the first wife and, so far as I know, there is no authority for supposing that this can be done. If Kin Kin Gyi was U Kyaw Gaung's wife when he married Kin Kin Gale, that is a wife in the proper sense of the word, a lady whom he introduced as his wife to his friends and whom he treated as his social equal and not a woman whom he merely maintained for pleasure or as a servant, I am unable to see how her status could be lowered by the introduction of Kin Kin Gale into the house or by any other means. The facts that he visited other officials with Kin Kin Gale, that she joined with him in religious works, that she attended a garden party at Government House with him and so on, are very good evidence of the estimation in which he held her, and of the estimation in which he wished her to be held by others and they may by contrast be used as evidence that the tie which existed between him and Kin Kin Gyi, before he married Kin Kin Gale, was not that of marriage, but the way in which he treated Kin Kin Gale could not alter Kin Kin Gyi 's status.

(1) U.B.R., 1892—96, II, 145.

As pointed out by Mr. Burgess in the case quoted above, the application of the rules contained in the various Dhammathats to questions of marriage in modern times is a matter of great difficulty. The rules were framed for conditions which no longer exist, they differ not only in different Dhammathats but sometimes in the same Dhammathat, and there is always a danger that terms used in the Dhammathats may have now lost their original meaning.

* * * * *

The passage from the 8th Book of the Manugyè quoted by Mr. Burgess in *Ma Shwe Ma and one* v. *Ma Hlaing and one* is translated by Richards on as follows: "If the husband, without the knowledge of his wife, shall make a present to another of a portion of the property common to both and the receiver be not his lesser wife or concubine . . . ." In the Burmese the last sentence is အိမ်ထောင်ဖက်မယားငယ်အသိမ်းအဖြောင်မထုတ်က။ The word အသိမ်း means a bought concubine, and the word အဖြောင် means a free concubine. The term အိမ်ထောင်ဖက် means literally "a partner in the household" and clearly conveys the idea of a high status, but in this passage cannot refer to the chief wife on account of the context. It must therefore go with မယားငယ် and would seem to indicate that there was a considerable difference between a lesser wife and a concubine. On the other hand, it is possible that the words အိမ်ထောင်ဖက် and အသိမ်း were merely introduced for the sake of rhythm.

It is thus almost impossible to draw sound conclusions from isolated passages. In many passages in the different Dhammathats the expression မယားငယ် is used as distinct from the expression အဖြောင် with reference to a wife contemporaneous with the chief wife. Section 38, Book X of the Manugyè, runs: "In case of a husband living in the same house with many wives who eat out of the same dish, the two laws are these . . . . If they shall have the same number of male children, it is said the first married wife shall be the head wife." Mr. Burgess was of opinion that this passage had special reference to Hindu usages, and that the general scheme of inheritance was drawn up on the basis of a man having but one wife at a time though he might have many concubines, and he apparently considered section 227 of the Attathankepa an instance of this. The heading of that section in the English translation runs: "The law of partition between the chief wife, a concubine and a hereditary slave wife." This is the translator's summary of a page of Burmese. The first sentence in the Burmese is ထီးငယ်မယား ဖြောင်မယားတို့။ ခြားနားအပ်သိ။ "Chief and lesser wives must be distinguished from concubine wives." Further on occurs the expressions ထက်ဆုံးမယား။ ဖြောင်မယားနှင့်ကျွန်မယား။ These occur in the original text. In the last part of the section the compiler gives his views as to what is meant by the text and by the rule of partition

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called *le*, *te* and *adda* (4, 3, ½). This is the only part that has been translated into English. Now it certainly cannot be contended that this section implies that a man cannot have more than one concubine or more than one slave wife. The singular number is apparently used to denote a class. I am unable therefore to see how this or similar passages can be cited as authorities for the proposition that a man can have only one wife, and the expression ဘိုးတော်ဘွား seems to me to imply that this section lays down the law of partition between wives, including the chief and lesser wives, free concubines and slave concubines.

Again the Manugyè and other Dhammathats describe six kinds of concubines. Of these the first five are slaves, the sixth is a free woman, not bought, but who does not eat out of the same dish as her husband. This seems to imply that a free woman, who did eat out of the same dish, would not be a concubine but a wife.

In his judgment on review in the same case Mr. Burgess somewhat receded from the view that a Burman Buddhist could have but one wife and that all other so-called wives were in reality concubines, and seems to have been of the opinion that a distinction was to be drawn between a lesser wife and a free concubine.

With great deference to so great an authority as Mr. Burgess, I venture to express the opinion that the Dhammathats do provide for the case of a man marrying more than one wife at a time, and recognize polygamy and draw a marked distinction between a wife, who is not the head wife, and a concubine. As Mr. Burgess says, many passages in these books have reference to Hindu usages and can no longer be applied to present conditions, but the Buddhist law is a modified system of law derived from the Hindu system, and I am unable to see why any particular rule contained in a Dhammathat should be held to be obsolete merely because it displays its Hindu origin. The question is whether it really is obsolete or still applies to modern conditions. I am of opinion, then, that a Burman Buddhist may have at the same time two or more wives, who are on equal footing, though one of them may be styled the head wife, and her status may be superior to that of a free concubine, and that when a *maya nge* is mentioned in the Dhammathats it is such a wife that is referred to and not a free concubine. I am fortified in this opinion by the ruling of Mr. Sandford in *Ma Ka* v. *Maung Thet and others* (1) and that of Mr. (now Sir) H. T. White in *Ma U Byu* v. *Ma Hmyin* (2), in which it was held "that when the husband has lived indifferently with both his wives, and when neither of them can be considered as having lived separately from him, the status of both wives seems to be precisely the same, though one may have been the first or chief wife."

I have laboured this point because it appears to have been tacitly argued that, as Kin Kin Gale was treated in every way as

(1) S.J., L.B., 6. (2) U.B.R., 1907—01, II, 160.

a chief wife, she cannot have been a concubine and therefore Kin Kin Gyi must have been a concubine and not a wife. I have wished to make it clear that in my opinion, even had the positions been reversed and U Kyaw Gaung had married Kin Kin Gale before he married Kin Kin Gyi, the fact that the former had been the chief wife would not be incompatible with the latter's having been a wife with an equal status. I have also wished to make it clear that though the formal demand of Kin Kin Gale from her aunts by U Kyaw Gaung, and his subsequent treatment of her as an honoured wife, show clearly enough that she had the status of a wife and not of a concubine, these facts are compatible with her having been a lesser wife and not the chief wife. Polygamy proper is undoubtedly coming to be looked on with more and more disfavour, but it is by no means extinct even in Lower Burma, where it is not very uncommon for the daughter of respectable parents to be openly given in marriage with great ceremony to a man who already has one wife. In Upper Burma, before the annexation, polygamy was more common, especially amongst the official class. Only one wife was recognized by the King and received at the palace. She was called the *pwèdet* or *pwèwin maya* (approved wife). But the other wives were treated with respect by others than the royal family. The evidence in this case has made this abundantly clear. As the Kinwun Mingyi in his evidence says, the expression *pwèdet maya* ceased to have any meaning with the annexation and therefore it could never have been properly applied to Kin Kin Gale, but even if she had been married before the annexation and had been received at the Burmese Court, that would not make her Kyaw Gaung's chief wife, if Kin Kin Gyi were already his wife when he married Kin Kin Gale. The rule laid down in the Manugyè and Attathankepa Dhammathats is that of wives who have borne an equal number of male children the chief wife is the one first married. A wife who is barren may be "put away" but not divorced, and then another wife may be married without fault. It would thus appear that a wife who bears no male children can be degraded, and that another wife can be set over her as chief wife, but this rule appears to be the only one according to which a subsequently married wife can be set over a previously married one as chief wife, and this rule does not apply to Kin Kin Gyi, because she bore a son to U Kyaw Gaung before Kin Kin Gale did and they now each have one son.

The main question for decision therefore is whether Kin Kin Gyi was a *letsônmaya* or a concubine, and this must be decided not by the position which she occupied relatively to Kin Kin Gale but by the way in which she was treated before Kin Kin Gale's arrival in the household.

I apprehend that the term *letsônmaya* means a wife who lives on terms of equality with her husband, and that eating out of the same dish is but one, though perhaps the chief, *indicium* of such equality. The manner in which Kin Kin Gyi was treated

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by U Kyaw Gaung is more important than the manner in which he took her to his house. I agree with the learned District Judge that the story of the pagoda festival is not likely to have been invented and, as pointed out by the learned advocate for the Defendant-Appellants, the fact that U Kyaw Gaung obtained the consent of the Chundaung *Minthami*, if true, is not of much importance, because he would probably have obtained her consent even if he had intended no more than concubinage. There is however the evidence of the Chundaung *Minthami*, a daughter of the late Mindôn Min, that her mother, the Taungshweye *Mibaya*, adopted Kin Kin Gyi as her daughter, and she is corroborated byher cousins,the Myinbyin and Myingundaing *Minthamis* I see no reason to disbelieve this evidence, and it fits in with the fact that Kin Kin Gyi went to live with the Chundaung *Minthami* when she left U Kyaw Gaung's house. It seems to me highly improbable that the *Minthami* would have consented to Kin Kin Gyi's living in concubinage with U Kyaw Gaung, and she has stated in her evidence that U Kyaw Gaung demanded her in marriage.

It is urged for Appellants that if Kin Kin Gyi had been taken as a wife she would have been married with the same pomp as Kin Kin Gale. But this is a mistake. The latter herself admits that she was married without any ceremony at all.

Again Kin Kin Gyi was confined of her first child in a little temporary room specially built for the purpose, and it is urged that this is incompatible with her being a wife. But Kin Kin Gale had arrived by that time and had apparently taken the first place in U Kyaw Gaung's affections and slept with him in the main-room. Moreover, the fact that the room was specially built for the purpose indicates that there was some reason, which has not been disclosed—possibly a superstitious or an astrological one—for this course, because there were plenty of other rooms in which she could have been confined. I do not think this point is of any importance.

Then it is urged that if Kin Kin Gyi had been a wife she would not have left U Kyaw Gaung's house as she did. But as the learned District Judge has remarked, she probably did not relish having to take second place and, being an invalid, she was probably unequal to fighting for her proper position.

But these arguments refer to what took place after Kin Kin Gale's arrival. What is more important is the treatment accorded to Kin Kin Gyi before then.

The Minbyin *Minthami* says that she lived nearly opposite U Kyaw Gaung's house, that she visited him and was received by him and Kin Kin Gyi.

The Myingundaing *Minthami* gives similar evidence.

Maung Nyun's evidence may be disregarded, as he is clearly an untrustworthy witness.

The Tabayin *Wundauk*, who lived next door to the Chundaung *Minthami*, says that Kin Kin Gyi was spoken of as U

Kyaw Gaung's wife, but she never visited his house, nor did his family visit Kin Kin Gyi, though he was intimate with U Kyaw Gaung.

U Tezawun, a *pôngyi*, says that U Kyaw Gaung visited his *kyaung* with Kin Kin Gyi, and that he was present at the ceremony of the cradling of her first child.

Against this evidence there is that of the Defendant-Appellant's witnesses which is to the effect that after Kin Kin Gale's arrival Kin Kin Gyi took second place and that Kin Kin Gale was chief wife, but they practically all agree that her position was superior to that of Ma Taik, and the Kinwun Mingyi, the compiler of the Attathankepa Dhammathat, whose faculties however appear to have been impaired owing to his great age, states that Kin Kin Gyi was known as U Kyaw Gaung's wife.

At the time Kin Kin Gyi went to live with U Kyaw Gaung the latter had no wife, and was not living openly with any concubine. He may have had intercourse with Ma Taik secretly, as stated by her, but she was not openly recognized as a concubine until long afterwards. There is a presumption in favour of marriage. Kin Kin Gyi lived openly with U Kyaw Gaung: it is not suggested that at that time she was treated in any way as an inferior, or that she did not "eat out of the same dish," she visited a *kyaung* with him and received guests and was reputed to be his wife. The presumption is that she was his wife, and I do not see how this presumption can be rebutted by what happened after Kin Kin Gale's arrival. Had U Kyaw Gaung died whilst the negotiations for his marriage with Kin Kin Gale were going on, can it be doubted that Kin Kin Gyi would have been recognized as his chief wife?

It is urged, however, on behalf of the Appellants that, even if Kin Kin Gyi were a wife, she assumed the position of an "*eingya maya*," *i.e.*, a wife living separately from her husband and not entitled to inherit, by leaving U Kyaw Gaung's house and living separately. But it is clear that there is no such separate class of wives. A wife who lives in a separate house from her husband is entitled or is not entitled to inherit according as she is a wife or a concubine. The portion of the Attathankepa Dhammathat quoted by Mr. Hodgkinson in *Ma Gywè and 4* v. *Ma Thi Da and 3* [1] is clearly not an authority for the proposition that a wife may be disentitled to inherit by separate residence from her husband. As pointed out in *Ma U Byu* v. *Ma Hmyin*[2] this passage does not refer to the husband's estate at all; it merely prohibits claims among several wives living separately to property received by other wives in the husband's lifetime. This ruling and *Ma Hmôn and another* v. *Maung Paw Dun* [3] make clear that the wife living separately from her husband, who is not entitled to inherit, is not a wife at all but a concubine, and that separate residence merely affords a presumption which, however,

(1) U.B.R., 1892—96, II, 194. (2) U.B.R., 1897—01, II, 160.
(3) U.B.R., 1897—01, II, 138.

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may be rebutted that such a woman is a concubine and not a wife. But as I have said above, the circumstances show that Kin Kin Gyi was U Kyaw Gaung's wife before he married Kin Kin Gale and, having once obtained that status, she could not lose it except by divorce. It has not been suggested that there was any divorce, and the evidence shows that Kin Kin Gyi visited U Kyaw Gaung and he visited her constantly after she had left the house. At a big *ahlu* which he gave in 1259 she took a prominent part, and U Kyaw Gaung with some high *ex*-officials were present at the cremation of her second child. He gave her money up to the time of his death, and there is no sign of relations having been broken off.

My finding therefore is that Kin Kin Gyi was U Kyaw Gaung's wife and that her status was in no way inferior to that of Kin Kin Gale, and that if U Kyaw Gaung can be properly said to have had a chief wife after the death of Kin Hmôk, it was she who was the chief wife and not Kin Kin Gale.

Civil Miscellaneous Case No. 30 of 1910. August 26th, 1910.

Before G. W. Shaw, Esq., C.S.I.

MR. —— *v.* TIN BYU U.

Mr. *H. M. Lütter*—for the Applicant.

Mr. *L. K. Mitter*—for the Respondent.

Advocates—Professional misconduct.

Where an advocate for one party appeared seven years afterwards in a subsequent suit on the same subject for the opposite party, and it was not shown that he had carried any secrets away from his first client,—

Held,—that the circumstances did not warrant an order prohibiting the advocate from appearing further in the case for his second client.

Pallanji Marwanji v. *Kallabhai Lallubhai*, (1887) I.L.R., 12 Bom., 85.
Damodar v. *Bhavani Shankar*, (1902) I.L.R., 26 Bom., 423.
In re Cutts, 16 L.T. (N.S.), 715.
Ali Muhammad v. *Sham Lal*, (1903) P.R., 1904, Crl., No. 2.
Mya U v. *Sun Singh*, (1900) U.B.R., 1897—01, II, 368.

This purports to be an application under section 8 (*2*), Civil Courts Regulation, 1896. Applicant is an advocate of the 1st grade. He appeared on behalf of Mi Kin, the Appellant in Civil Appeal No. 15 of 1910, in the District Court, and also in the Court of First Instance during a further enquiry ordered by the District Court. When the proceedings went back to the District Court, the Respondents, who were the Defendants-Respondents in that Court, objected to Applicant's appearing for Mi Kin, on the ground that he had appeared for them in a previous suit in 1903, and had been made acquainted with their secrets. They filed an affidavit to that effect sworn by Respondent, Tin Byu U.

The District Court, after calling upon Applicant for explanation, and examining Respondent, Tin Byu U, passed an order prohibiting Applicant from appearing further as Mi Kin's advocate

in the case, and making some remarks on Applicant's conduct, to the effect that it had "not been nice" if it had not been unprofessional.

Applicant seeks to have that order set aside.

The cases on the subject which have been cited are these:—*Pallanji Marwanji* v. *Kallabhai Lallubhai* (1887) [1], *Damodar* v. *Bhavani Shankar* (1902) [2], *Ali Muhammad* v. *Sham Lal* (1903) [3]. They are practically at one.

In the first a pleader was originally retained by P. and N. jointly to defend a suit on their behalf. Later, P. and N. quarrelled and the pleader withdrew from the case. Afterwards he filed a power of attorney signed by N., and claimed to conduct the case on behalf of N. alone. P. objected. It was held that the pleader was not proved to be in possession of any confidential information either from P. or from P. and N. together, which would give him an unfair advantage when acting on behalf of N., also that as a general rule the Court will require a very strong case to be made out before it will interfere, by way of injunction, restraining a pleader from appearing for a client, and there must be clear affidavits made to show that special knowledge was acquired by the pleader during his employment by the former client "but from the nature of the thing it will, in general, be satisfied with an affidavit of a person who says he made confidential communications—without requiring him to go into details, the statement of which would be a disclosure of the very matters which it is his purpose to keep concealed."

In the second the rule laid down in *In re Cutts* [4] was followed: "Those things which an attorney learns from his client or in consequence of his employment by his client, he is forbidden to disclose, and any betrayal of his confidence would be visited by the Court as gross misconduct. But if he leaves matters relating to his client under such circumstances, that if questioned about them in a Court of Justice he could not refuse to answer them, he is not within our jurisdiction."

In that case a pleader appeared for V. in a suit he brought against a tenant for rent of certain land, and fifteen years later defended in Criminal proceedings instituted by V.'s son and successor certain persons who had carried a crop off the land. It was alleged that the pleader became acquainted in the suit for rent with flaws in V.'s title and used that information in the Criminal proceedings.

It was held that the pleader was not guilty of gross misconduct because the information he was said to have used had become public property,—was no longer a secret, but that he had shown neither candour nor nicety of behaviour and should express regret.

In the third case one A.M. brought a complaint against several persons under section 457, Indian Penal Code, and engaged all the local pleaders. The accused was discharged, but the

(1) I.L.R., 12 Bom., 85. (2) I.L.R., 26 Bom., 423.
(3) P.R., 1904, Cri., No. 2. (4) 16 L.T. (N.S.), 715.

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District Magistrate ordered further enquiry, and in the further proceedings one of the pleaders appeared for the accused.

Following *Pallanji Marwanji's* case it was held that "a pleader after his dismissal without misconduct, or after the close of the business, is at liberty to take sides against his former employer, provided always he has no secrets to carry with him that can be used to his former client's prejudice," but that in the case before the Court the pleader had not been discharged by his client, neither was his business closed: and he was therefore guilty of gross misconduct deserving grave censure.

Practically the law laid down in the three cases is the same.

The only Upper Burma case is *Mya U* v. *Sun Singh* (1900) [1]. There the opinion expressed was in substantial agreement with the decisions just summarized. But the matter was not directly in issue, as it is in the present case. The law in Upper Burma in regard to advocates is of course contained in the rules made under the Civil Courts Regulation, but in deciding what is professional misconduct the principles applied in the rest of India must be observed. On the point here in question the rule is, putting it shortly, that it is not open to a legal practitioner who has appeared for a party in a case to act for the opposite party in a later stage of the same proceedings or in subsequent litigation, unless he has been discharged without misconduct, or he has completed the business he was engaged to perform, and unless he has no secrets to carry with him that can be used to his former client's prejudice.

In the present case Applicant admits that he appeared seven years back for the Respondents in a suit (Civil Regular No. 85 of 1903) in which Mi Kin sought to cancel a deed of sale of certain land on the ground of failure of consideration. He drafted the Respondents' written statement in that case, upholding the deed of sale mainly on the ground of admissions by Mi Kin, but the suit was dismissed as barred by limitation, and the merits were not gone into.

Here Mi Kin sues to redeem the same land relying on a mortgage which preceded the sale, and ignoring the sale; and the Respondents in their defence set up the sale. As Respondents' advocate in the previous case Applicant was, as the Lower Court says, prepared to support the sale. As advocate for Mi Kin in the present case, it is his business to try and make out that the sale was invalid for want of consideration.

There can be no doubt that it would be improper for Applicant to appear for Mi Kin in the present case if he had any secrets communicated to him by Respondents which could be used to their prejudice.

Respondent, Tin Byu U, in his affidavit swears that all "confidential communications and all necessary instructions were given" by Respondents to the Applicant: and that in the proceedings in the Subdivisional Court after the remand Applicant actually made use of that information in favour of Mi Kin.

(1) U.B.R., 1897—01, II, 368.

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But when examined by the District Court, he specified the instances in which, as he thought, Applicant used the information: and as the learned Judge perceived, that specification knocked the bottom out of Respondents' allegations. It was obvious that no confidential information was involved.

The District Court, however, thought that Respondent, Tin Byu U, might not have disclosed the confidential information. It had warned him that he need not do so. But Respondent Tin Byu U's statement is quite clear. He said: "These are all the matters from my former instructions that — used." He did not say "There were other confidential matters which I do not wish to disclose." This is important. I do not think that in face of such a statement as Tin Byu U made, a Court can be satisfied on the general statement in the affidavit that any confidential information was communicated.

I have called upon the Applicant to file an affidavit, and he has done so. He states there that he has not got his old brief, and that he does not remember any confidential information, or the nature of the instructions he received from Respondents in the previous case.

The text of the written statement in the old case suggests that there was no confidential information, and the length of time —seven years—that has elapsed, suggests that if there was any such information the Applicant must have forgotten it. This goes to support the Applicant's affidavit.

It is to be regretted that the Applicant has not explained how he came to take up Mi Kin's case after having appeared for Respondents in the previous litigation.

But in the circumstances before mentioned, I am of opinion that he is not shown to have been guilty of misconduct in appearing for Mi Kin in the subsequent case, as far as the proceedings have gone, and that whether that case is remanded again or not, there is no reasonable ground for apprehending that Applicant will use confidential information, and consequently that the Lower Court was not warranted in making the order it did.

I therefore set the order aside.

The Respondent will pay the costs of this application.

Before G. W. Shaw, Esq., C.S.I.

Civil Second Appeal No. 12 of 1910. August 1st.

SOMASUNDRAM CHETTY *v.* ALLAGAPPA CHETTY.

Mr. *H. M. Lütter*—Advocate for Appellant. | Mr. *J. C. Chatterjee*—Advocate for Respondent.

Civil Procedure—63, 73.

Where A, the holder of a decree in the Township Court, attached and sold property in execution, and B, the holder of a decree in the Subdivisional Court against the same judgment-debtor, applied for execution, before the proceeds of the sale were received by the Township Court, and the Township Court, in contravention of section 63, distributed the proceeds, though it had notice of the proceedings in the Subdivisional Court, and without giving a share to B:

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Held,—that B was entitled to recover in a regular suit the share which he would have received, on a proper rateable distribution, from the persons to whom it had been wrongly paid.

Sit Saing v. *Po Kaing*, 1 L.B.R., 121.
Har Bhagat v. *Anandaram*, (1897) 2 C.W.N., 126.
Baikant Nath Shaha v. *Rojendro Narain Rai*, (1886) I.L.R., 12 Cal., 333.
Bithal Das v. *Nan Kishor*, (1900) I.L.R., 23 All., 106.
Bhagwan Chander Kritiratna v. *Chandra Mala Gupta*, (1902) I.L.R., 29 Cal., 773.

This purported to be a suit by the Plaintiff-Appellant under section 73 (*2*), Civil Procedure Code. Defendant-Respondent obtained a decree against one Ôn Gaing, in Civil Regular No. 73 of 1909 of the Township Court, on the 19th March 1909 and applied, in Execution Case No. 57 of 1909 of the Township Court (Additional Judge), for execution (by attachment and sale of a house, compound and granary belonging to the Judgment-Debtor) on the 30th of the same month. A warrant of attachment bearing the same date was executed on the 31st March. On the 2nd April the Court issued a warrant and proclamation of sale fixing the 5th May. The proclamation was published on the 4th April. The sale was held on the 5th May, and the proceeds received by the Court in full on the 6th May, and paid (part) to Defendant-Respondent, and (the balance) to the Judgment-Debtor, on the 5th June and 26th July, respectively.

Meanwhile several things had happened in connection with a suit in the Subdivisional Court by Plaintiff-Appellant against the same Ôn Gaing (Civil Regular No. 7 of 1909 of the Subdivisional Court).

On the 16th April Plaintiff-Appellant got his decree. On the 17th April he applied, in Execution Case No. 12 of 1909, for execution by attachment and sale of the same property. The Subdivisional Court disposed of the application on the 30th April, by ordering warrant of attachment to issue. A warrant of attachment was issued on the same day, the 30th April, and was executed on the 2nd May. On the 4th May Plaintiff-Appellant applied (*see* the first paper in the process file of Execution Case No. 57) to the Additional Judge of the Township Court stating, with precise details of number and date, that he held a decree against Ôn Gaing in the Subdivisional Court, had attached the property in execution, and applied for its sale, and therefore *requesting permission to bid at the sale*. The Additional Judge granted the permission without taking further notice of the Plaintiff-Appellant's allegations, or considering the consequences.

On the 19th May Plaintiff-Appellant applied to the Subdivisional Court stating that the property had been sold in execution of Defendant-Respondent's decree in the Township Court, and praying that the proceeds might be rateably distributed. This application was forwarded by the Subdivisional Court "for rateable distribution" to the Township Court on the 12th June, the date the Subdivisional Judge had fixed for the sale on Plaintiff-

Appellant's application for execution, and the Additional Judge replied that it was too late.

These are the facts out of which the present suit arose. The learned Judge of the District Court was mistaken in saying that no warrant of attachment but only a temporary injunction was issued by the Subdivisional Court on Plaintiff-Appellant's application for execution. The warrant was in the form required by O. XXI, r. 54. It was identical with Form XX of Appendix E of the New Code, though actually an old form referring to section 274 of the Old Code.

I do not know whether the District Judge noticed Plaintiff-Appellant's application of the 4th May to the Township Court. It has not been referred to in argument before me at all.

The District Judge was certainly in error in applying clause (*c*) of the proviso to section 73 (*1*). This was not a case in which the decree ordered the sale of immoveable property for the discharge of an incumbrance. Both the decrees in question were simple money decrees.

Section 73 is the old section 295 modified. The effect of the alterations is not very clear. On consideration I am disposed to think that it is still necessary for application for execution to be made to the Court which holds the assets. If so, it is still necessary, as explained in the Lower Burma case of *Sit Saing* v. *Po Kaing* [1], for a decree-holder who wishes to share in a rateable distribution to get his decree transferred to the Court which holds the assets if it is not there already.

[The Calcutta decision under the Old Code quoted at the end of Amir Ali and Woodroffe's note to section 63, referred to by the Additional Judge of the Township Court, *Har Bhagat* v. *Anandaram* (1897) [2], does not appear to me to be reconcilable with the language of section 295 and therefore of section 73 as above construed.]

Hence, if the Township Court had been the holder of the assets within the meaning of section 73, Plaintiff-Appellant could not be entitled to share in a rateable distribution unless he had got his decree transferred to that Court, and then applied to it for execution "before the assets were received," *i.e.*, before the 6th May.

But the Township Court was not the proper Court to distribute the assets. By section 63 it was the Subdivisional Court and not the Township Court upon which that duty fell.

The Additional Judge of the Township Court said that he had no notice of the attachment by Plaintiff-Appellant in execution of his decree in the Subdivisional Court, and the District Court took it that the Township Court had no notice,—or as the learned Judge says, no proper notice. As already noted the Plaintiff-Appellant's application of the 4th May to the Township Court has not been touched upon in argument. But in face of that application it appears to me that the Township Court must be

(1) 1 L.B.R., 121. (2) 2 C.W.N., 126.

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held to have had notice. The Plaintiff-Appellant's allegations were, as I have said, precise. It was on the basis of them that he asked for leave to bid. The Additional Judge could not ignore them. If he wanted proof of them he had only to ask for it, and he would have been satisfied at once.

Under the Old Code a sale by the Subordinate Court without notice was held to be valid in *Baikant Nath Shaha* v. *Rojendro Narain Rai*(1). The implication was that with notice the Subordinate Court's proceedings would have been invalid. Section 63 now expressly provides that nothing in it shall invalidate any proceedings taken by a Court executing one of such decrees.

But while the sale and disposal of the proceeds may be valid in the present case, in consequence of this proviso, it does not follow that Plaintiff-Appellant is debarred from recovering the share which he would have got if the Township Court had proceeded according to law.

Under section 63 the Township Court could not lawfully proceed with Defendant-Respondent's application for execution. The Additional Judge, as soon as he found that Plaintiff-Appellant had a decree against the same Judgment-Debtor in the Subdivisional Court, and had applied for execution there, and even attached the same property, ought to have stayed his hand, and told Defendant-Respondent that he could do no more for him, and that if he wished to proceed with his claim against the property he must get his decree transferred to the Subdivisional Court and apply there for execution.

I cannot agree with the District Court that section 63 did not apply.

I do not think that Plaintiff-Appellant can be deprived of the share of the proceeds he was entitled to, either because he asked for leave to bid at the sale instead of merely informing the Township Court of the proceedings in the Subdivisional Court, or because the Township Court proceeded to sell the property and dispose of the proceeds in contravention of section 63.

If the Township Court did its duty Plaintiff-Appellant was safe. His decree was in the Subdivisional Court. He had applied for execution there, and when the Subdivisional Court received the proceeds he would be entitled to his rateable share.

The result of the illegal procedure followed was that Plaintiff-Appellant did not get that share while Defendant-Respondent and the Judgment-Debtor, who were not entitled to it, got it. That seems to me to be precisely the kind of case which section 73 (*2*) was designed to meet.

Whether section 73 (*2*) strictly applied here or not is, in my opinion, immaterial. Plaintiff-Appellant having obtained his decree and applied for execution in proper time, the attachment and sale by Defendant-Respondent "enured for his benefit" as

(1) I.L.R., 12 Cal., 335.

SOMASUNDRAM CHETTY v. ALLAGAPPA CHETTY.

well as Defendant-Respondent's.—See *Bithal Das* v. *Nand Kishor* (1900)[1]. When therefore the money was wrongly paid to Defendant-Respondent and the Judgment-Debtor, Plaintiff-Appellant had a good cause of action.

It is not necessary to decide whether Plaintiff-Appellant could still have maintained his suit if the Township Court had not received notice of his decree and application for execution in the Subdivisional Court. But probably he could, the essential grounds on which his claim rests being, as it seems to me, that he had a right to share by reason of his decree and his application for execution in the Subdivisional Court, and that the money he should have got was paid to Defendant-Respondent and the Judgment-Debtor.

My conclusion is that, although based on grounds which were not strictly correct, the decree of the Court of First Instance was right. The facts of the present case were very like those in *Bhagwan Chandar Kritiratna* v. *Chandra Mala Gupta* (1902)[2], only there no regular suit was brought.

If we suppose that what section 73 contemplates is merely that application must be made for execution to the Court which passed the decree, or to a Court to which the decree has been transferred,—whether this is the Court that holds the assets or not,—the result is the same.

I set aside the decree of the Lower Appellate Court and restore that of the Township Court with costs.

Before G. W. Shaw, Esq., C.S.I.

Criminal Revision No. 686 of 1910. Nov. 30th.

K.E. *v.* NGA SAN MYIN.

Criminal Procedure—341.

The power of the High Court under section 341. The Criminal responsibility of deaf-mutes.

Q.E. v. *Bauka*, 22 W.R., Cr., 35, 72; *Q.E.* v. *Somir Baura*, I.L.R., 27 Cal, 368 = 4 C.W.N., 421; *Haldar* v. *Kamte*, 22 W.R., Cr., 35; *Atu Ram* v. *Empress*, P.R., 1885, p. 98; *Empress* v. *Gahna*, P.R., 1889, p. 139.

The accused, a deaf-mute with two previous convictions, was charged before the District Magistrate, with stealing a bundle containing clothes and other things from a blind man. The fact was very clearly proved. The District Magistrate, on the ground that he was unable to explain anything to the accused, forwarded the case to this Court under section 341, Criminal Procedure Code, after finding the accused guilty and sentencing him to a year's imprisonment.

The sentence ofcourse was a mistake in a case under section 341, Criminal Procedure Code.

The conviction and sentence were both set aside, and the District Magistrate was directed to try and get into communication with the accused with the assistance of his relations.

(1) I.L.R., 23 All., 106. (2) I.L.R., 29 Cal., 773.

K.E. v. NGA SAN MYIN.

This has always been insisted on by this Court, the view taken being that it is impossible a deaf-mute should be able to live to maturity without being able to communicate with his relations, and that he and his relations must have established some practicable method of inter-communication by signs or otherwise.

The same course was taken in the case of *Queen* v. *Bauka*(1) under the corresponding section of the Code of 1872.

The proceedings have now been submitted again under section 341 by the Headquarters Magistrate who retried the case by the District Magistrate's order. I did not direct a retrial: it was not necessary for the witnesses to be examined all over again. The District Magistrate ought to have held the further enquiry himself. It was desirable that he should do so, if only because the case was one of some difficulty.

The Magistrate who retried the case has found the accused guilty under section 379, Indian Penal Code, of the theft laid to his charge, and his grounds for submitting the case under section 341, Criminal Procedure Code, are that the accused "did not appear to be able to understand the purport or details of the evidence given by the witnesses, or the nature of the proceedings against him," and that in the Magistrate's opinion he was "no better than a domestic animal, and as such incapable of knowing that what he did was wrong or contrary to law."

The Headquarters Magistrate employed the accused's father, Kauk Ya, as an interpreter. The father admitted that he has "been in the habit of communicating with the accused by signs from his childhood," and that the accused "can communicate on ordinary matters by making signs and by pointing out objects." Unfortunately he seems to have thought it incumbent upon him, in the interest of the accused, to represent him as perfectly incapable of understanding the proceedings. He even asserted that the accused denied having taken the blind man's property, whereas he had always admitted this.

The father was therefore an unfortunate selection as an interpreter.

Before the District Magistrate the accused gave the impression that he "knew quite well what he was being tried for."

In the retrial he was asked by signs, and made answer in the same way to the effect that he travelled in the Railway carriage with the blind man and took his bundle from him. This in spite of the father's attitude.

The accused's previous convictions were for similar offences (stealing clothes). In September 1909, he was sentenced in the first case to a whipping of ten stripes. In April 1910, in the other case he was sentenced to three months' rigorous imprisonment. He had hardly been out of jail a month when he committed the offence with which he was charged in the present case.

(1) 22 W.R., Cr., 35, 72.

The Magistrates who tried the previous cases apparently had no doubt about accused's ability to understand the proceedings in those cases.

On a consideration of all these circumstances it seems to me to be at least open to question whether the accused was so incapable of understanding the proceedings in the present case as the Headquarters Magistrate thought.

Anyhow, I have no doubt that section 341 gives this Court power to pass sentence on the Magistrate's finding

This was the view taken in *Queen* v. *Bauka* already cited: and was also the opinion of the learned Judges who decided the much more recent case of *Q.E.* v. *Somir Baura*.[1] They said "the High Court can in a case triable by a Magistrate pass sentence on what is termed a conviction, though it cannot, strictly speaking, be so termed seeing that the accused cannot in such a case make a proper defence. The proceedings are anomalous and in all respects do not represent a complete trial. If they did, a special report for the orders of the High Court would be unnecessary"

It remains to consider the accused's responsibility. Taylor (Principles and Practice of Medical Jurisprudence, 5th Edition, Volume I, page 815) says that it was formerly laid down in the old law books that a person born deaf and dumb was, by presumption of law, an idiot, but that in modern practice want of speech and hearing does not imply want of capacity either in the understanding or memory, but only a difficulty in the means of communicating knowledge.

There may be mental deficiency at the same time (as in the case of *Q E.* v. *Somir Baura* just cited), but it is not necessarily involved in the deaf-mute condition. Curiously enough Taylor goes on to say that a deaf and dumb person who has never been instructed is "altogether irresponsible for any action, Civil or Criminal," but he gives no authority for this statement and illustrates it by no example.

Such a statement seems more consistent with the old law books than the modern practice.

The law in India certainly does not expressly provide for a sane deaf-mute who has never been instructed being exempted from punishment. I find it difficult to distinguish such a case from the case of a person who is not deaf and dumb but has never been instructed.

It seems to be very doubtful whether a sane deaf-mute could live to the age of, say, seventeen, as in this case, without learning something of his duty towards his neighbour in person and property. I think it must be presumed that if the mind is sound there is this knowledge in the deaf-mute; as it is in the case of the ordinary adult who is not so afflicted and is not permitted to plead that he has never been instructed, though he may have been brought

(1) I.L.R., 27 Cal., 368 = 4 C.W.N., 421.

K.E. v. NGA SAN MYIN.

up by criminals from his infancy and never taught the difference between right and wrong.

My opinion is that to escape punishment a deaf-mute, to whom sections 82 and 83, Indian Penal Code, do not apply, must, like his brother who can hear and speak, come within section 84, Indian Penal Code; in other words, if his mind is sound his inability to hear and speak will not excuse him.

I am aware that in *Haldar* v. *Kamte*[1] an apparently different view was taken, and that that decision was followed in *Atu Ram* v. *Empress*,[2] but the subject was not discussed in either; in the former case there was probably a doubt of the accused's dishonest intention, in the report of the latter no particulars are given.

In *Empress* v. *Gahna*,[3] a case of murder, where the accused was said to be sane but unable to understand the proceedings, the High Court acting under section 341, Criminal Procedure Code, treated the accused as if he had been insane when he committed the crime; but the learned Judges did not discuss the question of responsibility in such cases, and evidently felt themselves in a difficulty: they did not like convicting, I take it, in a capital case where the accused did not understand the proceedings.

No doubt section 341, Criminal Procedure Code, gives the High Court full discretion to do whatever the circumstances of the particular case require.

I prefer, for the reasons just explained, to follow, where this is possible, the course taken in *Queen* v. *Bauka* and indicated in *Somir* v. *Baura*.

In the present case there is nothing beyond the statement of the father, Kauk Ya, to indicate that the accused is mentally deficient, except the fact that in all the three cases in which he has been charged with theft he has readily admitted the offence, and apparently made no attempt to conceal the property. But in two of them part of the property was never recovered, and it is possible and not at all improbable that the accused kept it back purposely.

I cannot regard the accused's persistence after being twice punished in repeating the offence, as evidence of mental unsoundness. The same phenomenon is to be observed frequently in people who are not deaf and dumb, and are certainly quite sane.

The father states that from the age of ten the accused has been in the habit of staying away from home for five or ten days or even a month at a time, and of wandering about in trains, that though flogged for this he could not be made to remember what he was flogged for, and that for the last five or six years he has let the accused go about as he pleased without attempting to control him.

(1) 22 W.R., Cr., 35. | (2) P.R., 1885, page 98. | (3) P.R., 1889, page 139.

K.E. v. NGA SAN MYIN.

Nothing is disclosed here but wilful disobedience in the son, and probably failure on the part of the father to exercise proper control.

Besides, as already noted, the father is not to be depended on for the truth.

The accused all through these proceedings has betrayed no defect of memory or understanding, and for the reasons before mentioned I am of opinion that he must be punished.

I sentence the accused, San Myin, under section 379, Indian Penal Code, to one year's rigorous imprisonment.

Civil Appeal No. 30 of 1909. Jany. 11th, 1910.

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

MI NGWE ZAN *v.* MI SHWE TAIK.

Mr. *C. G. S. Pillay*—Advocate for Appellant.

Mr. *J. C. Chatterjee*—Advocate for Respondent.

Probate and Administration—Res judicata—Burden of proof—Evidence Act—ss. 41 and 110.

The Defendant as widow had applied for letters-of-administration to the estate of Maung Ba Ya. Her status had been denied, and the question had been fought out at length in the proceedings under the Probate and Administration Act.

In a suit brought against her for the estate on the ground that she was not a widow and had no right to inherit from Maung Ba Ya, *held*,—that the question of the Defendant's status could be fought out again, and that section 41, Evidence Act, had no application.

But *held, further*,—that as the Defendant was in lawful possession of the estate the burden of proving that she was not the owner lay on the Plaintiff.

Ma Gaung v. *Ma Nyun*, Civil Appeal No. 217 of 1904 (unpublished).
Kanhya Lall v. *Radhachurn*, 7 W.R., 339.
Ma Hnyin and one v. *Ma On Gaing and 5 others*, U.B.R., 1902-03, II, Probate and Administration, page 1.

On the death of Maung Ba Ya one Ma Pwa Saing claimed to administer his estate as an adopted daughter. Her application was opposed by the Plaintiff-Respondent, Ma Shwe Taik, who claimed as niece and adopted daughter, and by the Defendant-Appellant, who claimed to be Maung Ba Ya's widow. Ma Pwa Saing's application was dismissed and it was held that the Defendant-Appellant was Maung Ba Ya's widow, and letters of administration were granted to her. This finding and the order based on it were confirmed by this Court on appeal. Final orders were passed on the 17th April 1907.

On the 26th February 1908, that is, considerably more than a year after letters had been granted to the Defendant-Appellant, the Plaintiff-Respondent applied for permission to sue *in formâ pauperis* for the whole of the estate, on the ground that the decision that the Defendant-Appellant was Maung Ba Ya's widow was wrong, and that she (Plaintiff-Respondent) either as niece or as *kittima* daughter was the sole heir. The issue whether the Defendant-Appellant is Maung Ba Ya's widow or not has been tried again on the merits and decided against her,

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and she has been ordered to make over the whole of the estate to the Plaintiff-Respondent.

This is an appeal against that decree.

I at first had some doubt as to whether the judgment in the administration proceedings was not conclusive proof under section 41, Evidence Act, that the Defendant-Appellant was Maung Ba Ya's widow. It seemed to me that as it was necessary in such proceedings to decide the status of the Applicant, and as the Probate and Administration Act provided for the issue of citations in order that all interested parties might have an opportunity of contesting the application, there could be no possible advantage in permitting the question of the applicant's status to be fought out again in a regular suit, and that the remedy of an interested person who had not been made a party to the administration proceedings lay in an application to revoke the letters or probate, on the ground that proper citations had not been issued or on the ground of fraud. It also seemed to me that to permit a question of status which had to be determined in the administration proceedings to be fought out again in a regular suit, would be contrary to the very principle on which section 41, Evidence Act, is said to be founded, namely, that public policy requires that matters of social status should not be left in continual doubt. Further, it appeared to me that the expression "legal character" must include wife-hood and widow-hood from the fact that a Matrimonial Court is included amongst the Courts, to the judgments of which the section relates.

In *Ma Gaung* v. *Ma Nyun*[1] it was held that a question of status decided in administration proceedings could be fought out again in a regular suit. But the ground of that decision was that proceedings under the Probate and Administration Act were not a suit, and that therefore section 13 of the Civil Procedure Code of 1882 did not apply. Moreover, the opinion expressed by Mr. Irwin was really an *obiter dictum*, because what he had to decide was whether a question of status decided in proceedings under the Lunacy Act could be fought out again in a regular suit, and of course section 41, Evidence Act, had no application and was not referred to.

Since then it has been held by this Court in more than one case that a question of status decided in proceedings under the Probate and Administration Act can be gone into again in a regular suit, but the decisions appear to have been based on the wording of section 13 of the Civil Procedure Code, 1882 (section 11 of the present Code), and not on that of section 41, Evidence Act. Had the procedure prescribed under the Probate and Administration Act been summary, there would have been very good reasons for denying finality to the judgment of a Probate Court, but it is prescribed in section 83 that the procedure to be adopted when there is contention, is to be as far as possible that prescribed for a suit and ordinarily, when the status

(1) Civil Appeal No. 227 of 1904 (unpublished).

of the applicant is denied, the question is fought out at great length. It seemed to me that to allow it to be fought out again would only encourage useless and costly litigation.

But it is not for me to say what I think ought to be the law. The question is what the legislature intended the law to be.

Previous to 1871 it was frequently held by the High Courts of India that a decision by a competent Court of a question of status was binding on all the world. In *Barrs* v. *Jackson*, the leading case in England, it was held that a question of legitimacy decided by a Court of Probate could be reopened in a regular suit. From the report of the Select Committee appointed to consider the Bill to introduce the Evidence Act of 1871, it appears that section 41 was based on the judgment of Sir Barnes Peacock in *Kanhya Lall* v. *Radhachurn*.(1) After a consideration of his judgment I have no doubt that it was the intention of the legislature to adopt the law laid down in *Barrs* v. *Jackson*, and that the expression "legal character" in section 41, Evidence Act, when it has reference to a judgment of a Court of Probate, means the status of an Administrator or Executor and that only, though when it has reference to a Matrimonial Court it includes wife-hood and widow-hood, and that a judgment of a Court of Probate is conclusive proof that the person to whom letters or probate have been granted has been clothed with the powers and the responsibilities of the deceased and of nothing else, and that a question of status decided by a Court of Probate can be raised again. This is in accordance with section 242 of the Indian Succession Act, which, however, was enacted some years before the Evidence Act of 1871 became law. This also appears to be the interpretation which the Indian High Courts have put upon section 41, Evidence Act.

I am therefore of opinion that the learned Additional Judge was right in trying the issue whether the Defendant-Appellant was Maung Ba Ya's widow again. But the Defendant-Appellant was not in the same position in this suit as she would have been in had the issue never been decided in her favour.

It was pointed out in *Ma Hnyin and one* v. *Ma On Gaing and 5 others*(2) that a person claiming to be an heir to an estate could not sue the administrator for partition, but that, when the estate had been administered and the residue after the payment of debts and expenses had been distributed to those claiming to be heirs to the estate, he could follow his share of the estate in their hands. It is not clear whether the Defendant-Appellant has exhibited in Court the account prescribed by section 98, Probate and Administration Act, of the manner in which she has disposed of the estate, but she has apparently taken the residue of the estate herself as sole heir, and the suit was brought against her personally and not as administratrix. Otherwise the suit would be bad *ab initio*.

The Defendant-Appellant therefore, by virtue of the letters-of-administration granted to her, has as administratrix delivered to

(1) 7 W.R., 339. | (2) U.B.R., 1902-03, II, Prob. & Admn., p. 1.

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herself claiming as sole heir the residue of the estate. She is therefore in lawful possession and it is for anyone, who disputes her right, to prove that she is not the owner.

The learned Additional Judge of the District Court apparently placed the burden of proving her marriage with Maung Ba Ya upon the Defendant-Appellant, and it has been strongly urged in this Court that it lay heavily upon her to prove the marriage. This contention is clearly wrong. The Defendant-Appellant was in lawful possession and under section 110, Evidence Act, it lay upon the Plaintiff-Respondent to prove not merely that she was Maung Ba Ya's adopted daughter or niece but that she was entitled to inherit, and to prove that she had to prove that the Defendant-Appellant was not Maung Ba Ya's widow.

Had the burden of proof been on the other side I should have been unable to hold that the view taken of the evidence adduced by the Defendant-Appellant was clearly wrong, though I think that the part which she took immediately upon Maung Ba Ya's death, and the fact that the Plaintiff-Respondent allowed her to remain in possession of Maung Ba Ya's house without immediately asserting her rights are very strong points in her favour.

But the question for decision is whether the Plaintiff-Respondent proved that the Defendant-Appellant was not Maung Ba Ya's wife.

She is said to have been bought by Maung Ba Ya as a slave, and to have remained on in his house after the annexation as a servant. The presumption of continuity does not arise on account of the death of Maung Ba Ya's wife, Ma Kye Hmôn. In an English household—in England—there would be nothing extraordinary in a female servant continuing to serve her master after her mistress's death, and no adverse conclusions would be drawn from this fact alone. But from what I know of Burmese customs such a female servant would be in a very equivocal position, and adverse conclusions as to her relations with her master would be drawn, and in the present case I do not think that Maung Ba Ya's age would make any difference.

The Defendant-Appellant's case in fact was that, owing to her equivocal position after Ma Kye Hmôn's death, she told Maung Ba Ya that she must leave him, and that he promised to marry her in order to prevent her from doing so, and that he did marry her. She was at that time treated as more than a servant, as she took her meals with Maung Ba Ya, and there is nothing improbable in her story. Moreover, the question is not whether her story is probable or not, but whether the Plaintiff-Respondent has proved it to be false.

The evidence adduced by the Plaintiff-Respondent is entirely negative, and is to the effect that neighbours, who might be reasonably expected to know of the marriage, if a marriage had taken place, had heard nothing of it. In estimating the value of this evidence the fact that Maung Ba Ya was an old man and was

not likely to have a ceremonial wedding, the ease with which Burman Buddhist *eindaunggyi's* can marry, and the short space of time in which there could be any repute, have to be taken into consideration. The principal witnesses for the Plaintiff-Respondent are Maung Shwe Daing and Maung Shwe Kan, and the rest of the evidence can hardly be said to have any value. Maung Shwe Daing is a near neighbour, and Maung Shwe Kan says that he lived in Maung Ba Ya's house from the time of Ma Kye Hmôn's death until that of Maung Ba Ya. They both state that the Defendant-Appellant never slept with Maung Ba Ya. On this point Maung Shwe Daing appears to have gone beyond the mark, because he did not continuously sleep at Maung Ba Ya's house until some twenty days before his death, and therefore was not in a position to know. Maung Shwe Kan is to a certain extent contradicted by his own brother, Maung Shwe Than, and he appears to be biased in favour of a *pôngyi*, U Oktama, who also claimed the estate and who has given evidence on behalf of the Plaintiff-Respondent, and his evidence is consistent with that of the doctor who attended Maung Ba Ya in his last illness, to the effect that the Defendant-Appellant rubbed medicine all over Maung Ba Ya's body including his private parts, a task which would not be performed by a female other than a wife, at any rate, if there were males present in the house, as there were, and it would be in my opinion unsafe to rely upon his evidence in the face of the admitted facts that, immediately upon Maung Ba Ya's death the Defendant-Appellant borrowed money to help defray the expenses of the funeral, not clandestinely but openly, and remained in possession of the house and took charge of Maung Ba Ya's affairs without any opposition on the part of the Plaintiff-Respondent, who was in the house at the time. The Defendant-Appellant appears to have done everything both before and after Maung Ba Ya's death which could be expected of a wife, and Maung Shwe Kan's evidence that she never slept with him is in my opinion untrustworthy considering the other evidence.

The fact that Maung Ba Ya entrusted Rs. 900 to Maung Shwe Daing and not to the Defendant-Appellant before his death has been relied upon by the Plaintiff-Respondent. But there is no evidence as to the precise date on which it was entrusted to Maung Shwe Daing. The latter states that the money was entrusted during Maung Ba Ya's illness. But it is not clear what this means. Maung Ba Ya apparently took to his bed some 20 or 25 days before his death, but he is described as having been more or less ill from the date of Ma Kye Hmôn's death.

I think it probable that the Additional Judge came to the conclusion that he did come to, owing to his having misplaced the burden of proof. I am of opinion that the Plaintiff-Respondent failed to prove that the Defendant-Appellant was not Maung Ba Ya's wife, and I therefore reverse the decree of the District Court and dismiss the Plaintiff-Respondent's suit with all costs.

Criminal Revision No. 586 of 1910. Dec. 13th.

Before G. W. Shaw, Esq., C.S.I.

NGA PO AUNG *v.* K. E.

Criminal Procedure—88—Claim by a third party to attached property.

The Magistrate should give the claimant an opportunity of establishing his right, but if he does not do so or he rejects the application, the claimant's remedy is by Civil Suit against the Secretary of State and the person at whose instance the property was attached.

Q.E. v. *Govindan*, (1896) I.L.R., 20 Mad., 88; *Secretary of State for India in Council* v. *Jagat Mohini Dasi*, (1901) I.L.R., 28 Cal., 540.

Nga Pyaw, a village headman, who was accused of an offence under section 420 or section 406, Indian Penal Code, having absconded, a house was attached under section 88, Criminal Procedure Code, as his property. Applicant claimed that it was his and not the headman's.

The Magistrate could find no authority for investigating a claim of the kind, but made some informal enquiry and dismissed the application. Applicant now comes up in Revision.

If the Magistrate had referred to the Commentaries on the Criminal Procedure Code he would have found that there are several decisions on the point in question. The more recent and the only ones, which it is necessary to mention are—*Q.E.* v. *Govindan* (1896),[1] and *Secretary of State for India in Council* v. *Jagat Mohini Dasi* (1901)[2].

Although no provision is expressly made for such cases in the Criminal Procedure Code, it is proper to give a claimant an opportunity of establishing his right.

If, however, a claim is put forward which the Magistrate has not enquired into or has rejected, the claimant's remedy is by Civil Suit against the Secretary of State and the person at whose instance the attachment was effected.

I can therefore do nothing for the Applicant.

The application is dismissed.

Civil 2nd. Appeal No. 167 of 1910. Dec. 21st.

Before G. W. Shaw, Esq., C.S.I.

NGA PO TUN
MI TWE
NGA PO U } *v.* MI THET PÔN.

Mr. *C. G. S. Pillay*—for Appellants.

Mr. *F. C. Chatterjee*—for Respondent.

Civil Procedure—11 and 47.

Where the Lower Appellate Court summarily dismissed a suit decreed by the Court of First Instance on the ground that it was barred by section 47 and that the Plaintiff had set up a new case in an amended plaint,

Held,—that the order was bad, as it was not shown that the new plaint was inconsistent with the original case, or that on any ground the suit ought to be dismissed.

(1) I.L.R., 20 Mad., 88. | (2) I.L.R., 28 Cal., 540.

Nga Kye v. *Mi E Me*, U.B.R., 1897—01, II, 249.
Fakaruddin Mahomed Ahsan v. *Official Trustee of Bengal*, I.L.R., 10 Cal., 538.
Nga Sa Gyi v. *Ye Ban*, U.B.R., 1904—06, II, Civ. Pro., 36.
Manekbai v. *Virchand*, 9 Bom. L.R., 1020.

On the 23rd June 1908 Plaintiffs-Appellants sued (in Civil Regular No. 4 of 1908 of the Subdivisional Court) to recover certain palm-trees, which Defendant-Respondent, as they alleged took possession of in excess of the number she was entitled to under the decree in Civil Regular No. 4 of 1904 (executed in Execution Case No. 4 of 1905, and subsequent Execution Cases) of the same Court. The original plaint omitted to state when the Defendant-Respondent took possession, whether at the time of delivery by the Bailiff, or afterwards, it only said that now when Plaintiffs-Appellants came to count the trees they found that Defendant-Respondent had taken too many. In his preliminary examination Plaintiff-Appellant, Po Tun, said that Defendant-Respondent took the trees at the time of delivery (ဆင်းတဲတဲ) by the Bailiff under the order of the Appellate Court, the plaint was amended, and a retrial ordered. In the amended plaint Plaintiffs-Appellants said that the Bailiff delivered the correct number of trees, and that Defendant-Respondent took the excess afterwards.

The Subdivisional Court on the retrial gave Plaintiffs-Appellants a decree, distinguishing the case from *Nga Kye* v. *Mi E Me*[1] on the ground of the alleged taking having been after the delivery by the Bailiff.

The District Court on appeal reversed that decision and dismissed the suit, holding that the amended plaint put forward a new case, and that Plaintiffs-Appellants must be held to that originally made in the previous proceedings.

Before me it is contended on behalf of Defendant-Respondent that the suit was not maintainable. *Fakruddin Mahomed Ahsan* v. *Official Trustee of Bengal*[2] (1884) is relied on.

The Lower Courts do not seem to have noticed two points which are not referred to in *Nga Kye's* case; but are dealt with in *Nga Sa Gyi* v. *Ye Ban*.[3]

(1) If the execution proceedings are still going on, it is not material whether the dissatisfied party applies expressly under section 47, Civil Procedure Code, or purports to bring a regular suit, provided the Court is the same. This, as the authorities cited in *Nga Sa Gyi* v. *Ye Ban* show, was held under the old Code, and now clause (2) of section 47 makes express provision for mistakes of the kind. Here the Court was the same, as already stated. Hence no valid objection could be taken to the present suit merely because it was called a regular suit.

(2) To admit of an application under section 47 the decree must be capable of execution, and must be still in course o

(1) U.B.R., 1897—01, II, 249. (2) I.L.R., 10 Cal., 538.
(3) U.B.R., 1904—06, II, Civ. Pro., 36.

NGA POTUN v. MI THET PÔN.

execution. This is what was declared in *Fakaruddin's* case. I may add a third point. If an application has been made under section 47, and disposed of, the decision is *res judicata*, and on that ground a subsequent regular suit will be barred.

I have referred to the three decisions cited in *Nga Kye's* case, and I find that two of them were cases of the last-mentioned kind, in which a previous application had been made under section 11 of Act XXIII of 1861 or section 244 of the Code of 1882 corresponding to section 47 of the present Code, and had been disposed of.

The third was one where there had been no such application, but apparently the property was made over in the course of execution proceedings. It was held that the dissatisfied party ought to have applied (under section 11 of Act XXIII of 1861), and *not having done so could not bring a regular suit.* Apparently the execution proceedings were at an end when the suit was brought, but the report does not clearly say that they were. The judgment, however, seems to assume that the bar holds good even after the execution proceedings have closed, and that in all circumstances.

This is a very difficult question, also depending apparently on the rule of *res judicata* applied to the case where an objection was not but might or ought to have been raised in the previous proceedings. In the present case the execution proceedings were very troublesome. It was only on the 13th March 1908, just a little over three months before the institution of the present suit, that the final order seems to have been passed (*see* Execution Case No. 6 of 1907). It is not impossible that the execution proceedings were still incomplete then, but as far as I can gather from the proceedings before me, that was the final order, and if so, it was no longer possible for Plaintiffs-Appellants at the date of suit to make an application under section 244, Civil Procedure Code, 1882; and it was also too late to appeal from or apply for review of the order finally closing the execution proceedings. Suppose, as they alleged, that Plaintiffs-Appellants did not become aware of Defendant-Respondent's taking possession of more trees than the Bailiff made over to her, till, say, within a week of the date of institution of the present proceedings, what is to prevent them from bringing a Regular Suit?

The law of limitation gives them twelve years to sue under ordinary circumstances, for immoveable property of which they have been wrongfully dispossessed.

Even if the Bailiff had made over the excess trees by mistake, I cannot see why Plaintiffs-Appellants should be barred, if they were not aware of the fact till the execution proceedings had closed, and the time for an appeal from or a review of the final order in execution was past. For Explanation IV of section 11, Civil Procedure Code, to apply, the claim must have been within the knowledge of the person making it, during the

previous proceedings.—*See* Amir Ali and Woodroffe's Civil Procedure Code, notes to sections 11—14, on page 119, from *Manekbai* v. *Virchand* (1907)[1].

But I do not find that Plaintiffs-Appellants ever alleged the Bailiff to have made over the excess trees. It is not clear to me that there is any really irreconcilable contradiction between their allegations in the first proceedings and their allegations after the remand. They were not required by the Court at first to give precise details. The Lower Appellate Court also seems to have taken this objection of its own motion and to have decided on it without having given the Plaintiffs-Appellants an opportunity of explanation.

I set aside the decree of the Lower Appellate Court and remand the case for the appeal to be disposed of on its merits. Costs will abide the final result. A certificate under section 13, Court Fees Act, will be granted.

Civil Appeal No. 143 of 1910. Nov. 11th.

Before G. W. Shaw, Esq., C.S.I.

NGA PWE *v.* MI CHAN THA.

Mr. *C. G. S Pillay*—for Appellant.

Probate and Administration Act —Scope and object of the Act—Effect of grant of letters.

Questions of title can only be determined finally in a regular suit. The District Court after granting letters is *functus officio*, except in regard to the exhibition of an inventory and the revocation of the letters.

Ye Gyan v. *Mi Hmi*, (1902) 1 L.B.R., 155.
Karim Baksh v. *K.E.*, (1903) 2 L.B.R., 161.
Mi Pwa v. *Mi Thein Yôn*, (1908), 4 L.B.R., 287.

This purports to be an appeal under section 86, Probate and Administration Act, against an order made by the District Court under that Act. The order, as will appear further on, was not in reality one contemplated by the Act. But I do not think that fact renders an appeal inadmissible. The Judge appears to have thought that the order was one which he had power to make as subsidiary to the grant of letters.

Respondent under an appellate order of this Court obtained letters of administration to the estate of Mi Min Thet, deceased. After that Respondent, or rather her husband, Aung Hla, on her behalf* applied to the District Court to be put in possession of a house which she alleged to be part of the estate, and which he represented to be unoccupied and in danger of destruction by fire. The District Court thereupon made the order in question authorizing Aung Hla to take possession. It did this without notice to the other side, without any sort of enquiry, and without considering whether it had jurisdiction in the matter.

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(1) 9 Bom. L.R., 1020.

* The record does not show, as it ought to do, that he held a Power of Attorney entitling him to appear for his wife (O. III, r .2).

NGA PWA v. MI CHAN THA.

In acting *ex parte* the learned Judge contravened a fundamental rule, which can hardly ever be departed from in judicial proceedings:—"*Audi alteram partem.*"

The natural result was that no sooner was effect given to the order than Appellant came forward with a petition objecting to it and praying that it might be set aside.

The order which the District Judge passed on this application shows that he misconceived the meaning and effect of this Court's order in appeal, and also the whole scope and object of proceedings under the Probate and Administration Act.

These are well explained and exemplified by Sir Charles Fox in three Lower Burma Cases—*Ye Gyan* v. *Mi Hmi* (1902),[1] *Karim Baksh* v. *K.E.* (1903)[2] and *Mi Pwa* v. *Mi Thein Yôn* (1908).[3] It was not necessary in the proceedings under the Probate and Administration Act on Respondent's application for letters to decide what the estate consisted of. Questions of title could only be determined in a regular case. The remarks about the gift of the house in the appellate order of this Court therefore did not finally decide the question of the gift or give Respondent a right to possession of the house.

Again the fact that the District Court had granted letters to Respondent did not authorize it subsequently to give her possession of any property. For the reason just explained, the grant of letters did not, without further proceedings, entitle her to possession; and except in regard to the exhibition of an inventory and the revocation of the letters the Court was *functus officio*. In making an order that Respondent, or rather her husband Aung Hla, should take possession of the house the Court was acting entirely without jurisdiction.

It appears that Respondent has since in a regular suit established her right to the house and other property either as administrator to the estate or as heir of the deceased, and the Appellant therefore has nothing substantial to gain from a reversal of the order now in question.

But it is clear that that order cannot on any ground be sustained, and I must therefore set it aside. Respondent will pay Appellant's costs in this Court,—one gold mohur.

Criminal Revision No. 564 of 1910. Nov. 24th.

Before G. W. Shaw, Esq., C.S.I.

NGA SAN HMI *v.* K.E.

Mr. H. M. Lütter—Advocate for the Applicant.

Criminal Procedure—15, 16, 261, 403 and 530.

Where a 2nd class Bench tried regularly a case under section 456, Indian Penal Code, which the District Magistrate had transferred to them, and acquitted the accused, and the District Magistrate ordered a retrial,

Held,—that the Honorary Magistrate's proceedings were not void and that the District Magistrate's order was bad.

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(1) 1 L.B.R., 155. | (2) 2 L.B.R., 161. | (3) 4 L.B.R., 287.

Aung Myat v. *Q.E.*, U.B.R., 1897—01, I, 100; *Po Han* v. *Thaleni*, U.B.R., 1897—01, I, 91; *Q.E.* v. *Nga Chin*, U.B.R., 1892—96, I, 11.

NGA SAN HMI v. K.E.

This is a case in which the District Magistrate might very well have instructed the Government Prosecutor. When a difficult question has to be dealt with by this Court, it is fitting that it should be properly argued. As it happens, Mr. Lütter is here supporting the application, and he has characteristically put both sides of the case very fairly before the Court.

The District Magistrate of Mônywa transferred for disposal to the Bench of Honorary Magistrates the present case in which Applicant, San Hmi, was sent for trial by the Police, on a charge under section 456, Indian Penal Code.

The Bench was a 2nd class Bench and could not try *summarily* an offence falling under section 456, Indian Penal Code.

The District Magistrate in transferring the case overlooked rule (4) of the rules concerning Benches of Magistrates made by the Local Government (see Courts Manual, paragraph 111).

The Honorary Magistrates proceeded to try the case, not summarily, but in the regular way, and acquitted the accused.

The Informant then applied to the District Magistrate in Revision. The District Magistrate being of opinion that the Honorary Magistrates' proceedings were void under section 530 (*p*), Criminal Procedure Code, and that as held by the Bombay High Court the order of acquittal was no bar to a retrial and need not be set aside, ordered the case to be retried. What is particularly extraordinary, he did this without giving the accused (the present Applicant) an opportunity of being heard—an infringement of a fundamental judicial principle, *cf.* section XII of the Schedule to the Criminal Justice Regulation, also *Aung Myat* v. *Q.E.*(1). Apart from this objection the order was bad for more reasons than one.

The subject of setting aside orders of acquittal otherwise than in an appeal by the Local Government under section 417, Indian Penal Code, was dealt with in *Po Han* v. *Thaleni* (2), where the Bombay Ruling relied on by the District Magistrate here was commented on. I venture to think that the present case furnishes a good illustration of the inconvenience indicated, and a proof of the justice of the opinion expressed there.

On the face of it the order of acquittal was a good order. It was made by a Bench invested with the powers of a 2nd class Magistrate competent as such to try a case under section 456, Indian Penal Code. The proceedings also were held in a regular manner. If the Honorary Magistrates had tried the case summarily, their proceedings would certainly have been void under section 530 (*q*). But they did not do that. The only ground on which the validity of their proceedings can be called in question is the Local Government rule already cited, which says that Benches shall try only such cases as may be transferred. It does

(1) U.B.R., 1897—01, I, 100. (2) U.B.R., 1897—01, I, 91.

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not say directly that they shall only try cases that they can try summarily, though it might have done so, but it directs that only cases they can try summarily shall be transferred to them.

The point to be decided is whether on the face of this rule the Honorary Magistrates' proceedings here were void. Manifestly it is at least arguable that the proceedings were not void. The question might have formed the subject of a decision of this Court in an appeal by the Local Government, or in Revision on the principles explained in *Po Han* v. *Thaleni* already cited.

The District Magistrate practically disposed of it summarily by the order now under consideration. By doing this I am of opinion that in effect he assumed a jurisdiction which he did not possess, and set aside an order of acquittal.—See *Q.E.* v. *Nga Chin*(1).

It remains to decide the question just set out on its merits.

The jurisdiction of the Bench is determined by the order of the Local Government appointing them, read with sections 15 and 16, Criminal Procedure Code. By section 15 the Local Government is authorized to direct a Bench to exercise its powers in such cases or such classes of cases only as the Local Government thinks fit: by section 16 to make rules respecting, among other things, the classes of cases to be tried. The order of appointment (Judicial Department Notification No. 506, dated the 29th July 1908) here did not contain any direction. But the rules before cited purport to be made under section 15 as well as under section 16 (see Judicial Department Notification Nos. 266, dated 12th August 1905, and 148, dated 16th November 1908). Of these Rule 4 is the only one bearing on the subject under consideration, and as already indicated it does not direct Honorary Magistrates to try only cases they can try summarily, or lay down directly that the only classes of cases which they are to deal with are cases they can try summarily. The direction is that they are to try only cases transferred to them, and then comes the direction as to what classes of cases are to be transferred. The object, I think, of these directions is to ensure (1) that Honorary Magistrates who are as a rule men without legal training or experience should not deal with cases of difficulty, and (2) that they should not be called upon to try even cases within their competence in which the full record of a regular trial has to be made. My conclusion is that when the present case came before the Bench on transfer from the District Magistrate, they had power to try it, because it was a case within the competence of a 2nd class Magistrate, and the only restriction imposed directly by the Local Government on the exercise of their powers was fulfilled.

The District Magistrate's contravention of rule (4) in transferring a case which the Bench could not try summarily came within section 529 (*f*). Hence the order of transfer was not void.

(1) U.B.R., 1892—96, I, 11.

NGA SAN HMI v. K.E.

The only result was that the Honorary Magistrates tried a case in the regular manner, whereas the Local Government rules contemplate that they should not have the burden of doing so laid upon them.

It seems to me that in these circumstances the order of acquittal was a valid one, and its existence is a bar to further proceedings. No ground has been shown for interference with it in Revision. The District Magistrate's order directing a retrial is set aside.

Criminal Revision No. 453 of 1910. October 13th.

Before G. W. Shaw, Esq., C.S.I.

NGA THA TU *v.* K.E.

Mr. *J. C. Chatterjee*—for Applicant.

Mr. *H. M. Lütter*—for the Crown.

Criminal Procedure—200, 202, 203.

Held,—(1) that the examination of a Complainant under section 200, Criminal Procedure Code, is not a matter of form, and when a Magistrate dismisses a complaint under section 203, or directs a local investigation under section 202, Code of Criminal Procedure, without making such an examination himself, he does what he has no authority to do and the omission is a material one.

(2) That when the officer making a local investigation under section 202, Criminal Procedure Code, finds that there is evidence in support of the Complainant's charge his function is fulfilled, and it is not contemplated that a local investigation under this section should supersede a regular trial.

K.E. v. *Nga Pwe*, (1904) U.B.R., 1904—06, I, Crl. Pro., 51.

Applicant presented to the Senior Magistrate a complaint charging one P—K—, a Myoôk (Township Officer and Township Magistrate and Judge), with adultery.

The Senior Magistrate sent the complaint to the District Magistrate for orders. The District Magistrate was on tour and ordered the Senior Magistrate to examine the Complainant and "as he (the District Magistrate) had doubts as to the truth of the complaint" to send it under section 202 (*1*) to the Subdivisional Magistrate, who would hold a local investigation and submit this investigation with his report to him (the District Magistrate) for further orders. These things were done, and the District Magistrate on the report of the Subdivisional Magistrate dismissed the complaint.

It is admitted by the Government Prosecutor, who has been instructed by the District Magistrate to support his order, that the District Magistrate's proceedings were highly irregular.

Section 200 required the District Magistrate to examine the Complainant himself, unless he transferred the case under section 192, which he did not do. Section 202 authorised him to direct a local investigation before issuing process, only after the Complainant had been examined (by himself) and after recording reasons. Section 203 authorized him to dismiss the complaint,

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only after examining the Complainant and considering the result of the investigation.

It is obvious that the examination of a Complainant is not a matter of form, and that when a Magistrate dismisses a complaint without making such an examination himself the omission is a material one, and he does what he has no authority to do under the Code.

Again it is obviously contemplated that there should be some material in the complaint or in the examination of the Complainant, or in his demeanour on which the Magistrate who has examined him can reasonably entertain a doubt of the truth of the complaint. The District Magistrate here had no such material before him.

It is difficult to distinguish such a case from one where a Magistrate makes an order under section 250 without complying with the requirements of that section.—See *K.E.* v. *Nga Pwe* (1).

There is some ground for the contention put forward on behalf of the Applicant that the local investigation was not only irregular but held without jurisdiction. It was actually the Senior Magistrate who ordered it, but he did not do that because he distrusted the truth of the complaint and after recording his reasons (for that distrust) but merely in obedience to the District Magistrate's instructions.

If we suppose that there was nothing more than irregularity in the proceedings of the District Magistrate and the Senior Magistrate, it is difficult to say that the Complainant was not prejudiced by the irregularities when his complaint was dismissed by a Magistrate who had not examined him.

Again the Subdivisional Magistrate who made the local investigation found that there was "definite evidence" in support of the Complainant's charge "without serious discrepancy of any kind." But he went on to examine the accused, and to examine witnesses named by the accused, and at least one witness, Po Gaung, whom he sent for of his own motion. He then decided where in his opinion the truth lay.

It appears to me that that was usurping the functions of the Magistrate who in the ordinary course would try the charge in a regular way. I cannot believe that a local investigation was intended by the legislature to supersede a regular trial.

This must obviously be unfair and improper.

Here it does not appear that Complainant was asked to explain why he did not call Po Gaung or what he had to say to the charges brought against his witnesses by the accused. There was no cross-examination on either side. When the Complainant's witnesses were examined the accused was not present, and as far as the proceedings show the witnesses of the accused may have been examined in the absence of the Complainant.

It seems to me that when it was found that there was evidence in support of the Complainant's charge the function of the officer

(1) U.B.R., 1904—06, I, Cr. Pro., 51.

making the local investigation was fulfilled. Process should then have been issued, and the truth or falsity of the evidence have been determined in a regular manner.

The object of section 202 is to prevent the issue of process where there is some initial ground for doubting the truth of the complaint, and where on a local investigation there appears to be no evidence to support it.

Here in my opinion the Complainant has been prejudiced by the proceedings taken, and has not had a fair opportunity of establishing his charge.

Under section 437, Criminal Procedure Code, I direct the District Magistrate by himself to make further enquiry into the complaint which has been dismissed, and I transfer the case for disposal by the District Magistrate, Myingyan.

Before G. W. Shaw, Esq., C.S.I.

Civil Revision No. 62 of 1910. Dec. 21st.

NGA TÔK *v.* SUBRAMONIAN CHETTY.

Mr. *C. G. S. Pillay*—for Applicant.

Mr. *R. G. Aiyangar*—for Respondents.

Civil Procedure, Schedule I, O. XXI, rr. 58—63.

Where land in possession of the Judgment-Debtor was attached, and the Subdivisional Court refused to entertain a claim by a person who alleged that he was the owner and mortgagor and that the Judgment-Debtor was only a mortgagee in possession,

Held,—that the Court was bound to investigate the claim, and if satisfied of its truth to remove the attachment to the extent of the claimant's interest, and that it acted illegally or with material irregularity in refusing to entertain the application.

Monmohini Dasi v. *Radha Kristo Das*, I.L.R., 29 Cal., 543.
Hamid Bakht Majumdar v. *Bakhtiyar Chand Maho*, I.L.R., 14 Cal., 617.
Sheoraj Nandan Singh v. *Gopal Suran Narayan Singh*, I.L.R., 18 Cal., 290.
Kumarappa Chetti v. *Nga Pyi*, U.B.R., 1904—06, II, Civ. Pro., 18.
Lal Das v. *Jamal Ali*, 9 W.R., 187.
Jogendranath Malik v. *Ram Narayan*, 9 W.R., 488.
Kalyan Das v. *Sheo Nandan Parshad Singh*, 18 W.R., 65.
Nga Kye v. *Po Min*, U.B.R., 1904—06, II, Sub-Mortgage, 1.

Respondent in execution of a decree against his Judgment-Debtor, Nga Hlwa, attached certain land in his possession.

Applicant applied for removal of the attachment on the ground that he was the owner, and Nga Hlwa merely in possession as mortgagee.

The Subdivisional Court summarily dismissed the application, saying: "The land is admittedly in possession of Judgment-Debtor. The remedy of Maung Tôk is therefore by regular suit for redemption and not by suit (*sic*) for removal of attachment."

The learned Judge in this order apparently bewildered himself by speaking of a (Miscellaneous) application for removal of attachment as a suit, and lost sight of O. XXI, r. 63, which expressly provides that when a (Miscellaneous) application for

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removal has been disposed of, the unsuccessful party may "institute a suit to establish the right which he claims to the property, but subject to the result of such suit, if any, the order" (in the Miscellaneous proceedings) "is conclusive."

But it is not intelligible how the Judge came to think that Applicant's remedy was by a suit *for redemption*.

Before me it is contended for Applicant that the Subdivisional Court's order was marked by illegality or material irregularity, it being the duty of the Court to allow Applicant an opportunity of establishing the interest which he claimed to have in the property.

For Respondent the ground is taken that the provisions of O. XXI, rr. 58—63, confine the Court to the question of possession. Reliance is placed on *Monmohini Dasi* v. *Radha Kristo Das* (1902)(1) and the decisions there followed: *Hamid Bakht Majumdar* v. *Bakhtiyar Chand Maho*(2) (1887) and *Sheoraj Nandan Singh* v. *Gopal Suran Narayan Singh* (1891)(3); and it is contended that a mortgagee in possession is in possession on his own account, and not partly on his own account and partly on account of the mortgagor, as a co-parcener in undivided joint property might be, and that in such a case the Court is bound to dismiss the application for removal, and leave the mortgagor to his regular suit under O. XXI, r. 63.

If that is what the learned Judges who pronounced the decisions referred to meant, I find myself unable, with all respect to them, to accept their interpretation of the Code. And the new Code is practically identical with the Code of 1882 in this matter.

Rule 58 says: "If any claim is preferred to . . . . any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim", etc. If Applicant was the owner and mortgagor, his interest in the property was not liable to attachment. He was at liberty to prefer a claim under this rule and the Court was bound to investigate it.

Rule 59 says: "The claimant . . . . must adduce evidence to show that at the date of the attachment he *had some interest in, or* was in possession."

This shows that a claim may be made by a person who has an interest in the property although he is not in possession.

Rule 60 says: "Where, upon the said investigation, the Court is satisfied that for the reason stated in the claim . . . . such property . . . . being in the possession of the Judgment-Debtor at such time" (*sc.* the time of attachment) "it was so in his possession *not on his own account*, or *as his own property*, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, *wholly or to such extent as it thinks fit*, from attachment."

(1) I.L.R., 29 Cal., 543. | (2) I.L.R., 14 Cal., 617.
(3) I.L.R., 18 Cal., 290.

I am under no doubt that a mortgagee in possession is in possession "on account of or in trust for" the mortgagor, to the extent of the mortgagor's interest, that the property is not in his possession, "as his own property," but partly on his own account, *i.e.*, to the extent of his interest as a mortgagee in possession, and partly on account of the mortgagor, *i.e.*, to the extent of the mortgagor's interest, within the meaning of this rule, and that the Code contemplates and requires the Court to investigate the claim of a mortgagor in such a case, and, if it finds it established, to release the property, to the extent of the mortgagor's interest, from attachment.

Rule 62 may be compared. It evidently deals with the case of a mortgagor in possession. It implies that the mortgagee out of possession may put forward his claim, and that the Court may investigate and allow it, but it provides that in such a case the Court (instead of releasing the property from attachment to the extent of the mortgagee's interest) may continue the attachment (on the whole property) *subject to the mortgage.*

It is not sufficient to find that the property is or is not in possession of the Judgment-Debtor. The nature of the possession, whether this is in the Judgment-Debtor or in the claimant, has to be gone into: in other words, the question of title cannot be ignored.

As a matter of principle, it would be unreasonable if the Court were debarred from going into the claim of an owner and mortgagor in the circumstances of the present case. So far as the interest of such an owner and mortgagor is concerned, the property is not liable to attachment. To attach that interest is to commit a trespass for which the owner and mortgagor would be entitled to recover full compensation. (See *Kumarappa Chetti* v. *Nga Pyi.*[1]) His interest as mortgagor is none the less his property, because it is less than the full *dominium* by reason of the mortgagee's interest having been subtracted from it.

Why should such a claimant be excluded from the benefit of rr. 58—61 ?

A perusal of the Calcutta cases cited does not seem to me to support the contention of the learned Advocate for Respondent. The facts in them were distinguishable from those of the present case. They were not cases where the Judgment-Debtor was a mortgagee in possession. They were not cases of mortgage at all. But if they are applicable to the present case, I think that the effect of them is this :—that the Court in finding the Judgment-Debtor's possession was ostensibly that of a mortgagee of the Applicant's, was bound to make an order accordingly releasing the property from attachment to the extent of the mortgagor's interest, and was not at liberty to go into the validity of the mortgage.

I am aware that Dr. Ghosh objects to the term trustee being applied to a mortgagee in possession on the ground that,

(1) U.B.R., 1904—06, II, Civ. Pro., 18.

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although he is under certain obligations to the mortgagor, he has rights of his own which he may exercise adversely to the mortgagor. (Law of Mortgage, 3rd Edition, page 257.) But in *Lal Das* v. *Jamal Ali*[1] (1868) it was thought necessary to decide that a mortgagee in possession *after the mortgage was satisfied* was not a trustee within the meaning of the Limitation Act of 1859. Subsequent acts, *e.g.* the present Act in section 2, expressly exclude such a mortgagee from the definition of trustee): in *Jogendranath Malik* v. *Ram Narayan*[2] (1868)—cited by Dr. Ghosh—and *Kalyan Das* v. *Sheo Nandan Parshad Singh*[3] (1872) a mortgagee in possession was called and treated as a trustee, and, as pointed out by Gour, the Transfer of Property Act in section 76 subjects the mortgagee in possession to substantially the same penalties as those laid upon a trustee by section 23 of the Trusts Act (II of 1882). (See Gour's Law of Transfer in British India, Volume 2, pages 795, 804 and 809.) But it is not material whether a mortgagee in possession is or is not actually a trustee. From the nature of a mortgage as understood in India, as to which see *Nga Kyè* v. *Po Min*,[4] I do not think it can be seriously disputed either that a mortgagee in possession is not in possession as owner, or that he is in possession partly on his own account and partly on account of the mortgagor. From another point of view his possession is the mortgagor's possession, and the mortgagor is in (constructive possession through him.

In making the order it did I am of opinion that the Subdivisional Court did not duly consider the law, and was therefore guilty of illegality and material irregularity.

I set aside that order and direct that the Subdivisional Court proceed to deal with the application in the manner laid down in O. XXI, rr. 58 *seqq.*

The costs of this application will follow the event.

Civil and Appeal No. 127 of 1910. Nov. 14th.

Before G. W. Shaw, Esq., C.S.I.

U TEIK KA
U TILAW KA } *v.* NGA TIN BYU.
U WIMALA

Mr. *Tha Gywe*—Advocate for the Applicants.

Mr. *S. Mukerjee* (*Senior*)—Advocate for the Respondent.
Mr. *S. Mukerjee* (*Junior*)— Do.

Buddhist Law—Ecclesiastical.

Where the Plaintiff, a layman, applied to the *Thathanabaing* for the restoration of *wuttagan* land, originally the subject of a dedication by his grandfather to a monastery, and then confiscated and rededicated by the Burmese King, the Defendants, the Monks in occupation, objected pleading the confiscation, and after the parties were under the *Thathanabaing's* instructions heard and their evidence examined by the *Gainggyôks*, the *Thathanabaing* and his Council decided on the grounds of a religious rule

(1) 9 W.R., 187.
(2) 9 W.R., 488.
(3) 18 W.R., 65.
(4) U.B.R., 1904—06, II, Sub-Mortgage, 1.

laying down the duties of Monks towards their supporters, that the land should be restored to the Plaintiff.

Held,—that there was nothing to prevent the ecclesiastical authorities from making such an order, that the Defendants could not object to it, that questions of *res judicata* and Limitation did not arise, and consequently that the Lower Courts were right in granting the Plaintiff a decree to enforce the order.

Wun Chit v. *Zawta*, U.B.R., 1897—01, II, 52.

The Plaintiff-Respondent sued in the District Court to enforce a decision by the *Thathanabaing* and his Council with respect to 99·89 acres of land. The Defendants-Appellants, besides denying the facts that they appeared before the *Thathanabaing* or were aware of his decision, pleaded that the case had been decided by the former *Thathanabaing*, and apparently that the suit was barred by Limitation, *i.e.*, that on these grounds the decision sought to be enforced was contrary to the Civil law. They also objected to the order on grounds affecting the merits of the dispute.

In appeal to the Divisional Court they took similar objections, but no longer denied having taken part in the proceedings ending in the *Thathanabaing's* decision.

Before me they add two new objections—(1) that Plaintiff-Respondent being a layman, the ecclesiastical Courts had no jurisdiction; (2) that it was not competent to the ecclesiastical Courts to give a decision in conflict with the decisions of the Revenue authorities.

The District Court found (1) that the alleged decision of the former *Thathanabaing* was not proved, and that anyhow it was open to the present *Thathanabaing* under the Buddhist Law to revise it; (2) that the matter was within the competence of the ecclesiastical Courts, and therefore if the Civil Court was satisfied that the order sought to be enforced was made, all it could do was to enforce it. Presumably the learned Judge was of opinion that in these circumstances the question of Limitation was immaterial.

The Divisional Court took a similar view. Holding that the jurisdiction of the ecclesiastical Courts is not confined to ecclesiastics, and that the matter here in dispute was within the competence of the ecclesiastical Courts, it considered that the Civil Courts "should not go behind the order to ascertain if it was according to Buddhist Law and procedure, barred by Limitation and so on."

As regards the Defendants-Appellants' appearance before the *Thathanabaing*, they admitted the documents produced by Plaintiff as having been filed or put in evidence by them before the *Gainggyôks*, to whom the *Thathanabaing* referred the case for enquiry, and there was sufficient evidence to show that they were represented also before the Council.

The dispute was as follows:—

Plaintiff-Respondent's grandfather, Kyaukkè, in 1224 B.E. dedicated the produce of one piece of land (85½ *tingyès*) described

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in maps on the proceedings as ∞ and the produce of $\frac{1}{10}$ of 4 other pieces of land ɔ, o, ∞, and c (aggregating 400 *tingyès*) to Defendants-Appellants' monastery. In 1228 he was implicated in the Myingun Prince's rebellion and in consequence all his property was confiscated. A *pôngyi* then represented to Mindôn Min the case of the Defendants-Appellants' monastery, and the King thereupon made a new dedication of the whole produce of ∞ and $\frac{1}{10}$ of the produce of the other lands. In 1231 the *Lè Wun* and *Lè Ok* substituted for $\frac{1}{10}$ of the produce of the 4 lands ɔ, o, ∞, and c, $\frac{1}{10}$ of the land (40 *tingyès*), and as such made over, for the benefit of the monastery, ɔ and o. The remainder thenceforth was exclusively State.

In 1893 the Deputy Commissioner classed the land ∞, ɔ, and o as *wuttagan*, and the Financial Commissioner confirmed that decision in 1904.

Plaintiff-Respondent in the present case sought to recover the land ∞, ɔ and o, undertaking to give the monasteries $\frac{1}{10}$ of the produce.

He relied on an alleged condition in the grant of 1224 by Kyaukkè, that his descendants, if reduced to poverty, might modify the dedication and offer $\frac{1}{10}$ of the produce or in case they were obliged to sell $\frac{1}{10}$ of the produce only. He contended that the Burmese King did not confiscate the dedicated land, but reaffirmed the dedication with its attendant condition.

This is not borne out by the text of the Royal order put in evidence in the case and apparently admitted. It expressly states that the lands were confiscated, and in making the new dedication says nothing about Kyaukkè's condition. It seems highly unlikely that the King would have intentionally maintained a provision for Kyaukkè's descendants. Defendants-Appellants pleaded the confiscation.

But the order now in question ultimately rests on a quotation from a Pali authority laying down the duties of Buddhist Monks in such matters. The sum of it is this. If a donor suffers loss through the King, fire, or a thief and becomes poor and therefore asks for the return of what he has given, it should be given back even if it was a *thingika* gift. Plaintiff-Respondent's grandfather was a *taga* who supported the monastery, and it is therefore the duty of *rahans* to support him.

The *Thathanabaing* and Council accordingly found that Plaintiff-Respondent "should work the land and make an offering" (of a part of the produce), and that "the Defendants who own the produce should agree."

It appears to me that this is manifestly a matter within the competence of the ecclesiastical authorities. It is a pronouncement on the religious duty of Monks towards the descendant of a *taga*, and it purports to give effect to the religious rule on that point. It is directed against subordinate ecclesiastics. I am unable

to find in the published decisions any foundation for the contention put forward on Defendants-Appellants' behalf, that the ecclesiastical Courts were deprived of jurisdiction merely because Plaintiff-Respondent was a layman. Sir Herbert White in the case cited by the Lower Appellate Court, *Wun Chit* v. *Zawta*,[1] was evidently disposed to see no obstacle in this fact.

Assuming Plaintiff-Respondent to have had no right to reclaim the land which he could have enforced in a Court of law, what was to prevent him from addressing himself to the ecclesiastical authorities and invoking their own religious rules or maxims in his favour?

And how can the Defendants-Appellants object to the order of their ecclesiastical superiors giving effect to those rules or maxims?

In this view of the case neither the question of *res judicata* nor the question of Limitation can possibly arise. It is immaterial whether the alleged order of the previous *Thathanabaing* is genuine, or whether Kyaukkè made a condition in favour of his descendants or whether, after the confiscation, that condition helps the Plaintiff-Respondent in any way.

Nor can the decisions of the Revenue authorities be a bar to such an order as the one in question. The land has been declared to be *wuttagan* of class (*a*). The ecclesiastical authorities choose to resign their rights in it to a grandson of a former owner. There is nothing to prevent them. The Land Records staff will have to record the transfer in their Registers, and henceforth the land will be shown as *bobabaing* of Plaintiff-Respondent instead of *wuttagan*.

All the Defendants-Appellants' objections are thus disposed of, and the omissions of the Lower Courts are of no consequence.

Apart from the foregoing the Defendants-Appellants also appear to have submitted to the ecclesiastical authority and taken part in the proceedings, in spite of their initial attempt to deny this.

They filed a written defence and put in evidence a long list of documents on which they prayed the *Sayadaws* to decide in their favour.

Therefore, if the order in question were considered as an ordinary award, there would still be no apparent reason why it should not be enforced.

The appeal is dismissed with costs.

(1) U.B.R., 1897—01, II, 52.

Civil Second Appeal No. 319 of 1910. Feby. 6th, 1911.

Before G. W. Shaw, Esq., C.S.I.

BAIJNATH SINGH *v.* MI GAUK AND MI TA.

Mr. *C. G. S. Pillay*—for Appellant.

Mr. *S. Mukerjee*—for Respondents.

Suits Valuation Act—Section 11.

Where a suit for specific performance of a contract for sale was tried without objection in the Subdivisional Court, Plaintiff's allegations being that, of the total consideration of Rs. 4,600, Rs. 600 had been paid, Rs. 2,000 were to be paid by redemption of a mortgage held by a third party, and only Rs. 2,000 remained payable to the Defendants, and that the value of the suit was therefore Rs. 2,000, and where, on an objection raised by the Defendants in the Lower Appellate Court, the decree was set aside and the Subdivisional Court directed to return the plaint for presentation to the proper Court on the authority of *Maung Myaing* v. *Maung Shwe Yôn*,

Held,—dissenting from *Maung Myaing* v. *Shwe Yôn*, that section 11, Suits Valuation Act, applied, and that it was not competent to the Lower Appellate Court to make the order it did unless satisfied that the under-valuation prejudicially affected the disposal of the suit on its merits.

Ma Lôk v. *San Ya Tha*, U.B.R., 1897—01, II, 443.
Nga Myaing v. *Shwe Yôn*, I L.B.R., 85 (dissented from)
Krishnasami v. *Kanakasabai*, I.L.R., 14 Mad., 183.
Vasideva v. *Madhava*, I.L.R., 16 Mad., 326.
Gaurachandra Patnaikudu v. *Vikrama Deo*, I.L.R., 23 Mad., 367.

Plaintiff-Appellant sued in the Subdivisional Court for specific performance on a contract to sell an oil-well and obtained a decree. On appeal by Defendant-Respondent the District Court reversed the decision and directed the plaint to be returned to Plaintiff-Appellant for presentation to the proper Court. The ground which the Additional Judge took was that the value of the subject-matter was beyond the jurisdiction of the Subdivisional Court, and that the defect of jurisdiction was vital. Defendant-Respondent had raised an objection in the Appellate Court to this effect.

For Plaintiff-Appellant it is contended that the District Court should have been guided by section 11 of the Suits Valuation Act. The Additional Judge, without expressly touching upon section 11, cited *Ma Lôk* v. *San Ya Tha* (1) and *Nga Myaing* v. *Shwe Yôn* (2) as authorities for his order. The first of these cases laid down the general rule relating to defects of jurisdiction, but section 11, Suits Valuation Act, enacts an exception to that rule. The second case is certainly in Defendant-Respondent's favour. It apparently decided that where the value of the subject-matter is not definitely set out in the plaint, section 11, Suits Valuation Act, does not apply. This is indeed the contention put forward before me on Defendant-Respondents' behalf. In support of it, the learned Advocate has cited the cases of *Krishnasami* v. *Kana-*

(1) U.B.R., 1897—01, II, 443. (2) I.L.B.R., 85.

kasabai,[3] *Vasideva* v. *Madhava* [4] and *Gaurachandra Patnaikudu* v. *Vikrama Deo* [5]. But the first of these appears to be against him. It says, "What the section provides for is the over-valuation or under-valuation of a suit or appeal, and there is nothing to show that any distinction should be made according as the mistake was made in one way or another." The other two decisions have no bearing on the case at all. The Lower Burma case again cites no authority and gives no reasons for the restricted interpretation of section 11 of the Suits Valuation Act which it adopts. I prefer the wider construction which was apparently placed upon the language of the section in *Krishnasami* v. *Kanakasabai* above cited. It deals with "an objection that by reason of the over-valuation or under-valuation of a suit or appeal, a Court of First Instance or Lower Appellate Court which had no jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto." It says nothing about the value being stated definitely in the plaint. It seems on the face of it to include all cases of over-valuation or under-valuation, *i.e.*, all cases in which a Court has in fact tried a case which, by reason of over-valuation or under-valuation, it had no jurisdiction to try. I have referred to all the decisions under section 11, Suits Valuation Act, mentioned in Woodman's Digest and the continuations of it down to 1908 inclusive, and I can find no support whatever for the view taken in the Lower Burma case. My opinion is that the present case was clearly within the mischief of section 11.

The allegations in the plaint were that Defendants agreed to sell for Rs. 4,600, of which Plaintiffs paid Rs. 600 and agreed to redeem a mortgage to the Burma Oil Company for Rs. 2,000, leaving Rs. 2,000 payable to Defendants, and hence that the value of the suit was Rs. 2,000. On these allegations the District Court was right, having regard to section 7 (x) (*a*), Court Fees Act, and section 8, Suits Valuation Act, in holding that the value of the subject-matter for purposes of jurisdiction was Rs. 4,600. But it is impossible to say that there was no valuation. Plainly there was under-valuation of the suit and "by reason of the under-valuation the Court of First Instance which had no jurisdiction with respect to the suit exercised jurisdiction with respect thereto." The objection on which the Lower Court acted was in substance an objection to this effect. This being so, the District Court's order cannot be sustained. No objection had been taken in the Court of First Instance, and there was no allegation that the under-valuation prejudicially affected the disposal of the suit on the merits. This, however, was a point for the Lower Appellate Court to determine.

The order of the District Court is set aside and it is directed that the District Court proceed to dispose of the appeal in

(3) I.L.R., 14 Mad., 183. (4) I.L.R., 16 Mad., 326.
(5) I.L.R., 23 Mad., 367.

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accordance with law, that is to say, unless it finds that the under-valuation prejudicially affected the disposal of the suit on its merits, to dispose of the appeal on the merits.

Defendant-Respondent will pay Plaintiff-Appellant's costs in this Court.

A certificate will be granted to the Appellant under section 13 of the Court Fees Act.

Civil Appeal No. 115 of 1910. Jany. 6th, 1911.

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

MI BU *v.* NGA PO SAUNG.

Mr. S. Mukerjee—Advocate for Appellant.

Provincial Insolvency Act—Sections 15 and 16—Acts of bad faith—Adjudication.

Held,—that the words "for any other sufficient reason" in section 15, Provincial Insolvency Act, have reference to petitions presented by a creditor, and that when a petition has been presented by a debtor, if the Court is satisfied of the matters referred to in section 6 (3)(*a*),(*b*) and (*c*), it must pass an order of adjudication, and that questions of acts of bad faith do not arise for consideration until a later stage, when the debtor applies under section 44 for his discharge.

Re Aranvayal Sabhapathy Moodaliar v. *Karamalli Joosub*, I.L.R., 21 Bom., 297; *Nathu Mal* v. *The District Judge of Benares*, I.L.R., 32 All., 547; *Uday Chand Maiti* v. *Ram Kumar Khara*, 15 Cal. W.N., p. 213.

This is an appeal under section 46 of the Provincial Insolvency Act, against an order passed by the District Judge of Yamèthin adjudicating the Respondent an insolvent.

It is contended that as the Respondent had been guilty of various acts of bad faith the order of adjudication ought not to have been made.

Re Aranvayal Sabhapathy Mudaliar (1) has been cited, but it is a ruling under the Indian Insolvency Act and has no bearing on the present case.

There is a very recent ruling, however, which supports the Appellant's contention, *viz.*, *Nathu Mal* v. *The District Judge of Benares* (2) In that case the District Judge had found that the Applicant had been guilty of very bad faith, but had nevertheless adjudicated him insolvent. The learned Judges of the High Court before whom the matter came on appeal said, "We wish to clearly express our opinion that the learned Judge, holding the opinion he did, was clearly wrong in granting the petition of Nathu Mal and declaring him insolvent. Section 15 of Act III of 1907 provides, amongst other things, that if the Court is of opinion for any sufficient reason that the order of adjudication should not be made the Court should dismiss the petition."

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(1) I.L.R., 21 Bom., 297. | (2) I.L.R., 32 All., 547.

With this view of the law I am unable to agree. It seems to me that the learned Judges misread section 15 of Act III of 1907. The words "for any other sufficient reason" clearly must be read with the words "is satisfied by the debtor," and have reference to petitions presented by creditors.

The result of dismissing a petition presented by a debtor would be that he could be imprisoned in the Civil Jail. Now the object of committing a judgment-debtor to jail in execution of a decree for money is not to punish him but to compel him to satisfy the decree. If he has no property, nothing whatever can be gained by committing him to jail. "Insolvent" means "unable to pay," and there is no reason why the Court should not declare that a person is insolvent merely because he has committed acts of bad faith. Such an adjudication only protects the insolvent from imprisonment in the Civil Jail at the cost of his creditors—a mild form of imprisonment which, as I have said, is not meant to be a punishment. If an insolvent has committed acts of bad faith he can be sentenced to one year's simple imprisonment under section 43 of the Act or the Court may merely refuse to grant him his discharge. The debtor then may at any time, if he commits an act of bad faith with respect to the duties imposed upon him by section 43, have proceedings instituted against him under that section, and if he obtains credit to the extent of Rs. 50 without disclosing the fact that he is an undischarged insolvent he may be sentenced by a Magistrate to six months' imprisonment of either description and fined.

An order adjudicating a debtor an insolvent therefore in no way protects a dishonest debtor, though it does protect an honest one, and therefore there is no reason why such an adjudication should not be made even though the debtor has been guilty of acts of grossly bad faith, and I am of opinion that the District Court is bound to make an order of adjudication if the application is presented by the debtor and the Court is satisfied that he is insolvent and of the matters referred to in section 6 (3) (*a*), (*b*) and (*c*).

Since the above was written I have referred to *Uday Chand Maiti* v. *Ram Kumar Khara* [3], also a very recent case, in which it was held that the question whether a debtor has or has not committed acts of bad faith was to be determined by the Court, not at the preliminary stage when the order of adjudication has to be made, but at the final stage, when, after the order of adjudication, an application is made for an order of discharge.

This ruling fortifies me in the opinion which I have already expressed.

The appeal is dismissed with costs.

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(3) 15 Cal. W.N., p. 213.

Civil Appeal No. 135 of 1910. Jany. 17th, 1911.

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

NGA NAING *v.* MI BU.

Mr. S. Mukerjee—Advocate for Appellant.

Provincial Insolvency Act—Sections 15 and 16—Acts of bad faith—Adjudication.

Uday Chand Maiti v. *Ram Kumar Khara*, 15 Cal. W.N., p. 213; *Nathu Mal* v. *The District Judge of Benares*, I.L.R., 32 All., 547; *Lamiruddin* v. *Kadumogi Dasi*, 12 C.L.J., 446; *Girwadhari and one* v. *Jai Narain and others*, I.L.R., 32 All., 645.

This is an appeal under section 46, Provincial Insolvency Act, against an order of the District Judge, Yamèthin, dismissing the Appellant's application to be adjudicated an insolvent on the ground that he had committed an act of bad faith.

In Civil Appeal No. 115 of 1910 I recently held that this was not a good ground for dismissing such an application, that the words "sufficient cause" in section 15 had reference to petitions presented by a creditor, and that if the Court is satisfied that the debtor had a right to present the petition it must pass an order of adjudication under section 16. In that case I stated that my decision was in accordance with the decision of the Calcutta High Court in *Uday Chand Maiti* v. *Ram Kumar Khara* (1), though opposed to the dictum in *Nathu Mal* v. *District Judge of Benares* (2). I have now been referred to the ruling *Lamiruddin* v. *Kadumogi Dasi* (3), in which the matter was very fully discussed and the previous decision affirmed. It also appears that the Allahabad High Court has in *Girwadhari* v. *Jai Narain and others* (4) overruled the dictum of the learned Judges who decided the previous case.

In the present case the Appellant stated that he had been arrested in execution of a decree for money. If the District Judge were satisfied as to that, he was bound to adjudicate the Appellant an insolvent. Instead of making any enquiries as to this he went into questions which could only properly arise when the Appellant applied for his discharge.

I accordingly set aside the order of the District Judge and remand the application in order that it may be disposed of according to law.

This appeal has not been opposed. There will therefore be no order as to costs.

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(1) 15 Cal. W.N., p. 213.
(2) I.L.R., 32 All., 547.
(3) 12 C.L.J., 446.
(4) I.L.R., 32 All., 645.

Before G. W. Shaw, Esq., C.S.I.

Criminal Appeal No. 162 of 1910. Jany. 10th, 1911.

NGA THA KIN *v.* K.E.

Mr. H. M. Lütter, Government Prosecutor—for the Crown.

Penal Code 302. Murder—Age as a mitigating circumstance.

Nga Pyan v. *The Crown,* 1 L.B.R., 359, dissented from.

Kya Myin v. *Q.E.,* U.B.R., 1892—96, I, 209; *Nga Ku* v. *Q.E.,* U.B.R., 1897—01, I, 330; *Emperor* v. *Jasha Bewa,* 11 C.W.N., 904.

Appellant, Tha Kin, has been convicted under section 302, Indian Penal Code, and sentenced to death for the murder of Shwe Hmyin at Anaukkaing on the 26th August last. Not to mention Aung Tha and Shwe Zin, brothers of the deceased, no fewer than six eye-witnesses deposed in the Sessions Court that the Appellant thrust a harpoon through the body of the deceased as he lay on his face on the ground, pressed it home and held deceased down by it. One of these witnesses was a cousin of the Appellant, the others were not related either to the deceased or to the Appellant as far as the proceedings show. I agree with the learned Sessions Judge that there is no reason for disbelieving them. The Appellant says that they have one and all given false evidence against him because they disliked him, and because the real culprits have not been captured. This is quite incredible. There was a quarrel arising out of a cocoa-nut cutting gamble. Aung Tha began it by trying to take possession of the cocoa-nut, instead of leaving Ngwe Saing, Appellant's cousin, who was one of the *daings*, to settle the dispute by examining the cocoa-nut in day-light. Shwe Ka, Ngwe Saing's younger brother, responded by throwing a pestle at Aung Tha and breaking his arm. Then Ngwe Saing called for and armed himself with his *da* and with it knocked down Shwe Zin, who wanted to intervene, and then deceased Shwe Hmyin, who came to his brother's assistance. Appellant, in the meanwhile, joined in with the harpoon. First he stabbed Shwe Zin with it on the side, but as it happened the damage done was slight. He then proceeded to inflict the injury in question on deceased, who had, as already stated, been felled by a blow from Ngwe Saing's *da*. Ngwe Saing did not use the *da to cut*,—all the wounds he inflicted were contusions. It is possible that deceased and his relations were acting more vigorously than the witnesses represented, but Appellant completely failed to bring forward a single one of all the independent witnesses who were said to have been present to show that he was defending himself and his relations against a hostile attack. As already noted, Appellant's defence was that he did nothing at all. It must be held that the Sessions Court was right in convicting Appellant under section 302, Indian Penal Code, of murder. Deceased died on the 28th August 1910, in hospital. The stab wound was necessarily fatal. Among other internal organs it pierced the right auricle of the heart. The *post-mortem* examination revealed another fatal injury, *viz.*, a rupture of the spleen, for which the

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appellant was not responsible, but according to the medical evidence death was due to both.

The question of punishment remains. The learned Sessions Judge followed the Lower Burma case of *NgaPyan* v. *The Crown*,[1] where it was held that to refrain from confirming a sentence of death in such a case on account of the criminal's youth would be an act of pure mercy, and that the exercise of mercy was a prerogative of the Crown. In that case the accused was between 16 and 17 years of age, he silently brooded for a considerable time over chidings and abuse addressed to him by the man he subsequently murdered, and in the end his act was deliberate, previously meditated and done in cold blood, and was accompanied by great ferocity. In the present case the Appellant was also between 16 and 17, but there was no previous meditation and it cannot be said that Appellant acted in cold blood. The Sessions Judge, I think, omitted to observe that the Lower Burma decision was expressly limited by the words "in such a case." He also, as it would seem, overlooked the Upper Burma Ruling, *Kya Myin* v. *Q.E.*[2] The Courts in Upper Burma are bound by the Upper Burma Rulings. If the learned Judges in *Nga Pyan's* case intended to lay down as a general rule that youth is not a ground which a Court can properly take into consideration in determining the punishment to be awarded for a murder, I find myself unable to follow them. Stephen in his History of the Criminal Law, Volume II, page 87, says: "It is practically impossible to lay down an inflexible rule by which the same punishment must in every case be inflicted in respect of every crime falling within a given definition, because the degrees of moral guilt and public danger . . . . must of necessity vary. There must therefore be a discretion in all cases as to the punishment to be inflicted. This discretion must from the nature of the case be vested either in the Judge who tries the case or in the Executive Government, or in the two acting together." He goes on to explain that from the earliest period in the History of the English Law the discretion in misdemeanours at Common Law has been vested in the Judge, and that in recent times this discretion has been given to the Judge also in nearly all cases of felony, so that the cases which continued to be capital—practically murder and treason—supply the only instances worth noticing in which the Judge has no discretion. And he expresses the opinion that in capital cases the Judge should have discretion analogous to that which he has in cases not capital. The reasons which he gives for this opinion are that murder as well as other crimes has degrees, that the extreme punishment ought not to be carried out in all cases, and hence that it is necessary for the executive authority to exercise the power of pardon, whereas the grounds on which sentences of death in cases of murder are remitted are so well known that they might be specified by statute, and Judges thus enabled to pass a lesser sentence if

[1] 1 L.B.R., 359. [2] U.B.R., 1892—96, I, 209.

they are of opinion that there is any such ground existing in a given case. The framers of the Indian Penal Code gave full effect to these principles. They put it in the discretion of Judges even in cases of murder to consider mitigating circumstances in awarding punishment. Mr. Burgess in *Nga Ku* v. *Q.E.*[1] discussed the general principles on which the measure of punishment should be determined. Punishment should be made as moderate as is consistent with the object aimed at. The law indicates the gravity of the act by the maximum penalty, and the Courts have to judge whether the act committed falls short of the maximum degree of gravity, and, if so, by how much. Bentham says (Theory of Legislation translated by R. Hildreth, 1876, page 327): "The same punishment for the same offence ought not to be inflicted upon all delinquents. It is necessary to pay some regard to the circumstances which affect sensibility, and . . . . age, sex, rank, fortune and many other circumstances ought to modify punishments inflicted for the same offence." Where the Legislature leaves the apportionment of punishment to the discretion of the Judge, it will be for the Judge to observe these principles. In non-capital cases, age as well as other circumstances is regularly considered by Courts, and I am unable to see any reason why a different rule should be applied in cases of murder. The Calcutta High Court in *Emperor* v. *Jasha Bewa*[2] (1907) not long ago awarded the lesser penalty in a case of deliberate murder on the sole ground of the accused's youth. She was 16. I think I am correct in saying that youth is one of the recognised grounds on which the death sentence is remitted by the executive authorities in England. But when the discretion is vested in the Judge it is his duty to exercise it and not to compel the Executive Government to interfere by way of remission. This was evidently the view taken by Mr. Copleston in *Kya Myin's* case, and I am of opinion that it was justified on legal principles. The learned Judges of the Chief Court who decided *Nga Pyan* v. *The Crown* were perhaps influenced by what, in view of Sir James Stephen's remarks before quoted, must be regarded as the accidental circumstance that, owing to there being only one legal punishment for murder at present under the English law, it is of necessity left to the Executive Government in England to allow for mitigating circumstances.

I maintain the conviction and reduce the sentence to transportation for life.

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(1) U.B.R., 1897—01, I, 330. (2) 11 C.W.N., 904.

Criminal Revision No. 244 of 1911. May 30th.

Before the Hon'ble Mr. H. L. Eales, I.C.S.

ME THA *v.* NGA SAN E.

Mr. H. M. Lütter,—Government Prosecutor, on behalf of the Crown.

Section 488,—*Criminal Procedure—read with section* 103, *Evidence Act.*

In maintenance cases under section 488, Criminal Procedure Code, a mere denial by the Respondent that he has sufficient means to support his child is not necessarily proof of want of (sufficient means). In such cases the presumption is that an able-bodied man has sufficient means to support his child as well as himself, and the onus of proving the lack of sufficient means will ordinarily rest upon the Respondent who made the assertion.

Ma Ta Zin v. *Maung Taung Bo* (Criminal Revision No. 298 of 1903) (unpublished), *Mi E Thin* v. *Nga Tha Zan* (Criminal Revision No. 479 of 1907) (unpublished), *Q. E.* v. *Roshun Lall*, 4 All., High Court Reports, 123.

The present case was called for on the Court's own motion by my predecessor and the District Magistrate was asked to instruct the Government Prosecutor to appear for the Crown, and the Respondent was asked to show cause why the orders of the first class Headquarters Magistrate, Mônywa, refusing an application made by one Ma Me Tha under section 488, Criminal Procedure Code, on the ground that he (the Respondent) had not sufficient means to support his child, should not be set aside.

I have heard the Government Prosecutor and also Maung San E. The learned Government Prosecutor has drawn my attention to an unpublished order of this Court in Criminal Revision Case No. 298 of 1903 (Ma Ta Zin *v.* Maung Taung Bo*). That order which is worthy of reproduction is as follows:—

"There is no doubt that Respondent is the father of applicant's child, but the Magistrate has dismissed the case because Respondent has not sufficient means to maintain the child. Respondent is an able-bodied man and he cannot be allowed to escape his obligations on grounds of this nature. He can work and earn means to maintain his child. The Magistrate's order is set aside and he is directed to make such further enquiry as may be necessary, and to pass orders awarding a suitable maintenance for the child."

My attention is also drawn to the case of Mi E Thin *v.* Nga Tha Zan* (Criminal Revision Case No. 479 of 1907). In the course of his order my learned predecessor wrote as follows:—

"Respondent is an able-bodied man and he cannot be allowed to escape his obligation on the grounds of this nature (*i.e.*, that he has not sufficient means to maintain the child). He can work and earn means to maintain his child."

In both of these cases the orders of the Magistrate were set aside, and he was directed to hold further enquiry and dispose of the case according to law.

* Unpublished.

The question turns on the interpretation to be placed on the words "sufficient means." The learned Government Prosecutor quotes Ogilvie's English Dictionary, the definition of which runs as follows:—the medium or what is used to "effect an object; measure or measures adopted; agency; instrumentality (though plural in form generally used as singular; by *this means, a means* to an end); income, revenue, pecuniary resources (his *means* were large)."

The learned Government Prosecutor urges what has already been ruled by this Court, that any able-bodied man who is not prevented by any physical infirmity from working may be presumed to have sufficient means to support his child as well as himself. He also quotes Blackstone's Commentaries, Volume I, page 224, and Stephen's Commentaries, Volume II, page 308, to show that in English Law an obligation is laid on the father to support his children. In view of the wording of section 488, Criminal Procedure Code, it is not necessary to discuss what English Law on the subject is. It merely supports the obligation already imposed by that section.

He also draws attention to the rulings of the Allahabad High Court *Q. E.* v. *Roshun Lall* (1) where it was held that "the circumstance that the father of an illegitimate child is sixteen years old only, and still studying at school, is not by itself a sufficient reason for holding him excused from the necessity of providing for his illegitimate offspring.

The law requires that the person on whom the order of maintenance is issued must have sufficient means to support the child." In the course of his order Spankie, J., remarked as follows:—"The youth, too, was possibly more sinned against than sinning, and the woman most to blame. However this may be, the law requires that the person on whom the order is made, must have sufficient means to support his child. The Court therefore annuls the order, and directs the Assistant Magistrate to complete his enquiry by determining the point wherein his investigation has failed"

In the present case it appears to me that the first class Magistrate of Mônywa has not made a proper investigation. In Burma, where it is easy for any able-bodied man to obtain work sufficient to support his children, it may be presumed, till the contrary is shown, that he is able to support his child, and the onus lies upon him to show he has not sufficient means. The Respondent who appears before me seems to be an able-bodied man. He is only forty-three years of age and his assertion that his eyes are weak and that he is therefore unable to work properly, is a fact which, as he asserted it himself, he should under section 103 of the Evidence Act be called upon to substantiate. It is significant that he made no mention of his bad eye-sight (or weak sight) before the Magistrate who heard the case in Mônywa. At any rate this is a matter which can be

(1) 4 All., H.C.R. 123.

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attested by the expert evidence of the Civil Surgeon of the Station.

A mere denial by the man himself of sufficiency of means, when that man is an able-bodied man, is not conclusive proof of want of sufficient means.

The order of the first class Headquarters Magistrate, Monywa, is therefore set aside and he is ordered to hold a further investigation in the matter.

Civil Appeal No. 30 of 1911. June 21st.

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

NGA PAW E *v.* NGA SIN.

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

Mortgage—Transfer of property—41, 70, 78, 85, 237.

Where a mortagagee, knowing or having reason to know at the time of filing a mortgage suit that the property was sold to a third party, fails to join the purchaser as a Defendant in the suit :

Held—the mortgagee, by his own omission to join the purchaser a party in his suit, is estopped from denying that the purchaser has a right to the declaration that the decree in the mortgage suit is inoperative as against the purchaser regarding the mortgaged property.

Maung Ko v. *Maung Kyi and 2 others*, U.B.R., 1892—96, II, Mortgage, page 586.

Tha Kaing v. *Ma Htaik*, 3 L.B.R., 241.

The Madras Hindu Union Bank Limited v. *C. Venkatrangiah and others*, I.L.R., 12 Mad., 424.

Damodara v. *Somasundara and others*, I.L.R., 12 Mad., 429.

Jaganatha v. *Gangi Reddi and others*, I.L.R., 15 Mad., 303.

Kasturi v. *Venkatachalapathi*, I.L.R., 15 Mad., 412.

Gour's Law of Transfer in British India, page 954.

Amir Ali and Woodroffe's Evidence Act, 5th Edition, Notes to Section 116.

This is an appeal from the judgment and decree of the District Judge, Mandalay, in which the Respondent, Maung Sin, was the Plaintiff and the Appellant the Defendant.

The facts of the case are very fully set out in the judgment of the learned Judge of Mandalay. The judgment is very full, and has dealt *seriatim* with every point that was raised before him. The case was very fully argued by the learned Counsel on both sides.

On going over the lengthy proceedings in this case, I found that there was one point of grave importance which had been entirely overlooked hitherto by every one. The crucial point in this case is—Can the judgment and decree passed by the District Judge in favour of Paw E be upheld as establishing a right to sell the property in question. If it can be shown that the judgment and order is bad the case must perforce fail as against Maung Sin.

The learned Counsel for the Appellant fully saw this. In the course of his argument before me he said—

"He (Nga Sin) was in fact the representative of the deceased "Ma Myit, whose rights he had acquired by purchase. He it "was, who should have been Defendant in the suit. Was he not "bound to intervene? The rightful Defendant who should have "defended the suit was not Po Sa, nor Ma Myit nor Ma Myit's "heirs but Maung Sin, if only we (*i.e.*, Paw E, his client) had "known Nga Sin was the owner."

Under Order XXXIV, Rule 1 of the Civil Procedure Code, and section 85 of the Transfer of Property Act, Maung Sin ought of course to have been adjoined as a Defendant.

Paw E says he did not adjoin him as a Defendant because he was not aware of his having purchased the land and house. He stated on oath, in the Lower Court, that he "did not know of Maung Sin's having purchased the property till about 3 months" before Maung Sin brought the present suit, *i.e.*, till about the end of 1909 or beginning of 1910.

It is true that he also admitted before the Lower Court—

"I gave them permission to sell, but only on condition I was "paid at once. I said they could sell to Maung Sin."

On examining the files and papers in this voluminous record, I found that Maung Paw E, when he filed the suit against Po Sa before the District Court, Mandalay, on 7th January 1909, filed in the list of exhibits in proof of his claim (1) the mortgage deed between him and Ma Myit and Po Sa, (2) a certified copy of an extract from the official Town Lands register, dated 1st December 1908, showing that Maung Sin was the owner both of the land and of the house thereon, and (3) a plan of the land. In the face of this I cannot understand why Paw E, if he was really acting *bonâ fide*, did not adjoin Maung Sin as a Defendant, as he is obviously bound to do both under the provisions of section 85 of the Transfer of Property Act, which, although it is not yet extended to Upper Burma, I am bound to take into consideration, and still more so under Rule 1, Order XXXIV. The error appears to me to be most material. Indeed all that the learned Counsel for Maung Paw E has said on this point is obviously correct. How can the suit brought against Po Sa on the mortgage deed affect the property when the rights of the purchaser who obviously has at least the right of redemption are ignored? It seems to me that Maung Sin is bound to succeed in his suit, and that the Appellant-Defendant has no right under the decree obtained by him in suit No. 6 of 1909 to proceed against Maung Sin's right over the property, and that that decree in no wise affects Maung Sin's rights over that property, simply because on the face of it, Paw E has failed to comply with the plain and obviously necessary provisions of the law, in omitting to adjoin him as Defendant in the suit. It is quite clear that Maung Sin is entitled to the relief prayed for, unless the Appellant-Defendant can satisfactorily explain why he did not adjoin Maung Sin,

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or unless he can show that Maung Sin was well aware of it and condoned the omission.

I accordingly allowed the learned Advocate for the Appellant the opportunity of meeting and explaining, if possible, this new and hitherto unnoticed piece of evidence which *primâ facie* would seem to be fatal to his case.

The learned Advocate appeared at a further hearing, and he admitted that the document in question was filed by his client, but he urged (1) that his client was not aware that he Maung Sin mentioned in this document as owner, was the Maung Sin referred to by Ma Myit;

(2) that Maung Sin is a common Burmese name;

(3) that the Register is a Government register which is notoriously inaccurate;

(4) that even if Paw E is held responsible for the omission, his omission was afterwards condoned by the action of Maung Sin, and that Maung Sin is still estopped by his not taking action to have himself adjoined as Defendant.

Mr. Basu for the Respondent frankly admitted that he had not noticed the document in question which had been filed in the previous suit. He urged that the idea, that Paw E did not know, or could not have ascertained the identity of Maung Sin with the man Ma Myit had mentioned as a probable purchaser, was absurd, and even if the identity was not established still in law Appellant-Defendant was bound to adjoin Maung Sin whoever Maung Sin was.

As regards the alleged inaccuracy of the extract the best answer is, that it turns out to be accurate, and secondly, that as he Paw E himself filed it, it is not for him now to throw doubt on its accuracy, at any rate it should have "put Maung Paw E on enquiry," as, whoever the Maung Sin was, the owner ought to have been adjoined as Defendant to the suit under Rule 1, Order XXXIV.

Mr. Basu urged that in the circumstances his client knew nothing really of the case and how it was going on, as though he was called as a witness the case never came to trial, but was compromised, and instead of his claim for Rs. 800 being insisted on, Paw E was satisfied with a decree for Rs. 590. Hence Maung Sin had no chance of objecting till he heard the property was being sold.

I have heard the Counsel and perused the evidence and considered the matter.

It appears to me that Paw E must have known that Maung Sin had bought the property before he brought his suit. Difficult as it was to believe before this last fact came to light that he did not know of this sale, I think it cannot be accepted by any reasonable man that there is any real doubt in the matter now. If we compare the admission made by Paw E with his emphatic denial in paragraph 5 of his written statement, of the truth of the allegations made in paragraph 6 of the plaint, we are bound to

see that Paw E is a shifty, untruthful man. The Lower Court has not believed him and has given good grounds for disbelieving him. Looking at his emphatic denial in paragraph 5 aforesaid, looking at the fact that he was willing to accept a reduced sum of Rs. 500 principal, Rs. 60 costs and Rs. 30 interest as payment in full for his mortgage for Rs. 800, I am bound to say I do not believe Paw E when he says he knew nothing of the sale of the property to Maung Sin. Even if there were no other facts against him, *e.g.*, the rebuilding of the house by Maung Sin, he must have been "put on enquiry" by this very document which he himself filed. He at first emphatically denied he knew of the proposal to sell the property to Maung Sin, then he reluctantly admitted it, but said he granted leave conditionally. Why did he not admit this in his statement of defence? No reasonable man can believe, in the face of this, that Paw E was not put on enquiry when he got the extract from the Register.

I hold therefore that the suit filed by Paw E was filed by him well knowing at the time, or having good reason to know, that he should have adjoined Maung Sin, and hence by his own omission he is estopped from now denying that Maung Sin has a right to the relief prayed for.

But it is urged that this omission has been condoned by the failure of Maung Sin to ask to be adjoined as a defendant. Now in the first place, there is nothing to show that Maung Sin knew the nature of the suit brought by Paw E against Po Sa. He might well have thought that as he was not adjoined as a defendant he could not be touched. Plaintiff presumably knew his own business, he would have to identify the property, the registers would show that he Maung Sin was the purchaser. Why should he trouble? True he was called as a witness, but he explains that he understood from Po Sa that Plaintiff's case was a false one and if the case came to trial he could as a witness indicate his position and force Plaintiff to adjoin him. But the case was compromised. The proceedings show that for his Rs. 800 Paw E was willing to accept Rs. 500 as principal. Paw E must have had good reason to take Rs. 300 less than his original claim, for as I have pointed out, the Rs. 90 is made up of costs and interest. I see no reason therefore to doubt the truth of Maung Sin's statement that he knew nothing of the danger he was in. He states that Po Sa told him that the mortgage had been redeemed, and I see no reason to think Maung Sin was lying, for if the mortgage against the property were in existence, the plaintiff, if he wished to proceed against Maung Sin, would have to adjoin him as a defendant. I hold therefore that there was no omission or condonation on the part of Maung Sin proven, and that he is, on these grounds alone, entitled to the relief prayed for.

But this is not all. After considering all that the learned Counsel for the Appellant has said and given full weight to all he has urged, and after perusing the authorities he quotes, I am

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satisfied even without this preliminary matter of the nonjoinder of Maung Sin, that on the facts before him the learned Judge of the Lower Court has come to a right decision.

The only point whereon I differ from him is on his doubt whether Paw E did hand over the so-called title deeds. The learned Judge doubted if the copy of the judgment which Maung Sin produced as a title deed was the original and only one. Now if we look at the endorsement on the back of this copy of the judgment we shall find that it was applied for the very next day after Mr. Arnold, the then Additional Judge of Mandalay, passed his order, and the copy was delivered 6 days afterwards. We may take it that it must have been the original copy. Now this being the original copy, if Paw E ever did get a copy, this in all probability was the copy, for copies of lengthy judgments are an expensive luxury. It is not as if the copy produced by Maung Sin was obtained some months afterwards, as it would have had to be obtained if Paw E had stuck to his original copy if he had got one. I think that this little fact does further strengthen the case for Maung Sin and does weaken the case of Paw E, for if there was a copy of the judgment in existence there is far more probability that he did get it.

But it is needless to further discuss the evidence.

I have read and weighed the judgment of the Lower Court, and I can find no reason to dissent from the conclusions arrived at by it.

I accordingly uphold the decree passed by the Lower Court, and dismiss the appeal with costs. Appellant will pay Respondent's costs.

Criminal Revision No. 465 of 1911. September 14th.

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

AH TAT *v.* K.E.

Mr. *S. Mukerjee*—for Applicant.

Excise—49.

Held,—that while a conviction based merely on the evidence of accomplices is not necessarily unsound, the Court will ordinarily require that that evidence should be corroborated in some material particular.

Po Chit and one v. K.E., 6 L.B.R., 4.

The applicant was tried and convicted by the District Magistrate, Mônywa, of an offence under section 49 of the Excise Act, and sentenced to pay a fine of Rs. 200 or in default to undergo two months' rigorous imprisonment.

The applicant was represented by Mr. Mukerjee.

No objection was made to the form the sentence took or to the fact that two months was awarded in lieu of the payment of the fine. But it is clear that the maximum allowable in lieu of the fine is only one month under section 65 of the Indian Penal Code.

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The accused is the servant of the Licensee in charge of the *tari* shop in Excise Form XVIII at Thazi. A search was made in his shop by the Assistant Superintendent of Police and nothing was found therein on the 12th May 1911. It is alleged that the search was illegal, and nothing is stated in the record of the information being taken down in writing. On the other hand it must be recollected that these are licensed premises, and I hold that the search in question was legal under section 35 of the Excise Act.

The learned District Magistrate has stated that this has nothing whatever to do with the case. I entirely disagree with him. Had the search been illegal there might have been some temptation to the arresting officer to get up a case against the accused at any cost in order to protect himself. In the house were found ten full bottles bearing the label of Tennant's beer, and in the shop nine empty bottles bearing the same label were also found.

Foiled in their search the Police instituted enquiries in the village and, by means of the Headman, discovered three persons who stated that they had bought beer from the accused on payment of money. These three witnesses, So Ke, Shwe Pet and Po Su, were very carefully cross-examined on behalf of the accused, and they seem to have given their evidence straightforwardly and in a credible way. They produced four bottles which bear the Tennant's label in corroboration of their statements. The District Magistrate believed the evidence notwithstanding the fact that it was pointed out to him that the evidence was the evidence of accomplices. He has accepted as corroboration the fact that the men produced these bottles with the Tennant's label, and he finds that they are similar to those found in the accused's house. This I think may be accepted as corroboration.

The Advocate for the defence has pointed out that the bottles themselves are no corroboration, and that the men may have honestly bought the bottles when they bought *tari* from the applicant. Obviously there is nothing wrong in this. But it is highly improbable that a Chinaman would be such a fool as to sell *tari* in bottles bearing Tennant's labels. If he only sold *tari* he would have washed the labels off. The only point of keeping the label on would be to prove to the purchaser that the bottle contained Tennant's beer.

I do think that the production of these bottles is a distinct corroboration of the evidence of these witnesses.

Next it must be remembered that the search was made under the direction of an English Officer bearing the rank of an Assistant Superintendent of Police, and the enquiry was made immediately after the failure of the search, and that the production of the bottles therefore is all the more credible on account of the promptness with which the enquiry was made. The value of this corroboration depends very much on the way in which the

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bottles were produced. There is nothing to throw suspicion on the production of these bottles by the witnesses.

I must, however, point out that the learned District Magistrate has admitted as corroboration the hearsay evidence of the alleged sale of beer in this village at the time. This is mere hearsay and its admission merely tends to weaken the case for the prosecution, because it shows that the Magistrate attached value when forming his judgment to what is absolutely inadmissible as evidence.

He has also, I think, drawn an unwarrantably strong presumption from the mere finding of the full bottles in the Chinaman's house. Although the Chinaman was allowed by law to have more than the number of bottles found in his possession, yet the mere finding of the bottles raised the presumption in the Magistrate's mind that they were for sale. No such presumption can be drawn. Nevertheless I hold that there is sufficient corroboration in the circumstances of the enquiry and in the production of the bottles with the labels so promptly by the men who were called upon to prove their purchase at a moment's notice. These men were not witnesses sent by the Police, and I think it may be argued that their evidence is all the more credible on this account.

It has been pointed out in the judgment of the Chief Court of Lower Burma in *Po Chit and one* v. *K.E.** that a conviction may be upheld when it is based on the uncorroborated evidence of accomplices.

With this dictum I entirely agree, although a Court should ordinarily I think, especially in Excise cases, require corroboration.

I hold that in the present case the evidence produced by the prosecution regarding the purchase of the beer is honest and straightforward, and moreover it has been corroborated by the production of the bottles bearing the labels.

I see no reason to interfere with the conviction, and I dismiss the application. At the same time I alter the sentence which is illegal. I leave the fine unaltered, but I reduce the imprisonment in default of payment of the fine from 2 to 1 month.

Criminal Appeal No. 27 of 1911. July 4th.

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

NGA KAUNG NYEIN *v.* KING-EMPEROR.

Mr. *S. Mukerjee*,—Advocate for the Appellant. | Mr. *H. M. Lütter*, Government Prosecutor for the Crown.

Criminal Procedure—236, 237, 238.

Where an accused was sent up for trial under section 305, Indian Penal Code, charged under section 392 and convicted without the charge being changed, of an offence under section 458, Indian Penal Code, the Magistrate held that as the accused's defence was an *alibi* he was not therefore prejudiced by the conviction being under section 458 though he had not been charged thereunder.

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* 6 L.B.R., 4.

Held,—that this view cannot be received as being correct as the change in the charge did not come within the purview of sections 236-238, Code of Criminal Procedure.

Crown v. Nga Chit Pe, 1, L.B.R., 287, 288.

The appellant in this case was sent up by the Police together with two other men under section 395, Indian Penal Code. The two other men were discharged as the evidence against them was rightly found to be insufficient. The facts of the case have been set out very fully in the judgment of the District Magistrate and need only be briefly recapitulated here. On the 9th *lazan* Tazaungmon (9th November), the house of Po Kya was broken into and three men entered it. The house-owner, Po Kya, and his wife and niece identified one of the robbers as the first accused, Kaung Nyein. They had a good opportunity of seeing him as he carried a light, and Po Kya had known him for about a year before. Po Kya at once gave his name to the village officials, The evidence against the other two men was insufficient and they were rightly discharged. The District Magistrate charged Kaung Nyein under section 392, Indian Penal Code, with robbery and also with a previous conviction under section 382, Indian Penal Code. The accused pleaded not guilty and set up a very elaborate *alibi*. This *alibi* has been discussed at great length in the judgment of the Lower Court. The Magistrate has given various reasons for disbelieving it. I think he did right in believing the evidence of witness, Po Kya, as after all, even had accused gone to Letha village, it would not have prevented his taking part in the robbery at Nyaunggyingon, as it is only 12 miles away. The Magistrate had the witnesses for the *alibi* before him and he disbelieved them, and I see no good reason for disagreeing with his finding. But the Magistrate, during the case, ascertained that Po Kya's house had been broken into. He found the accused guilty under section 458, Indian Penal Code, with housebreaking by night after making preparations to cause hurt. He remarks that as the defence was an *alibi*, the accused could not have been prejudiced by this change of the section. However plausible this may seem, yet there can be no doubt but that this doctrine cannot be received as being correct, except in cases that fall within the purview of sections 236, 237 and 238, Criminal Procedure Code. It would be idle to urge that because a man sets up an *alibi* he is not prejudiced if the charge of grievous hurt is changed to murder. This dictum can only hold good when both offences are "*ejusdum generis.*" The learned Advocate for the Crown at first argued that the offences under sections 458 and 392 were really "*ejusdum generis*", and he quoted various rulings, none of which, however, are on all fours with the present case. He pointed out that according to sections 236 and 237, as the accused might have been charged in the alternative with either offence under section 236, he could under section 237 have been found guilty of the second offence, though he was charged only with the other. So far so good, but we

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cannot read sections 236 and 237 apart from 238. Section 238 lays down distinctly that though the greater includes the less, we cannot argue that the less includes the greater. The offence under section 458 includes theft and putting in fear of instant hurt or instant wrongful restraint, which together make up the offence of robbery, but it also includes another ingredient, namely, housebreaking. Therefore whereas the accused if he had been charged under section 458, could have been convicted of robbery under section 392, the reverse will not hold good, and a charge under robbery cannot include the offence of housebreaking by night. I think it is impossible to attach any other meaning to section 238 than the one which I attach to it. There can be no doubt but that the offence under section 458 is a graver offence than one under section 392, because the punishment under the former may extend to 14 years, whereas under section 392 the maximum penalty is 10 years when the robbery is committed in a house. I would draw the District Magistrate's attention to the penultimate paragraph in the judgment of the learned Chief Judge of the Chief Court of Lower Burma, in the case *Crown* v. *Nga Chit Pe*, which he will find at pages 287 and 288, 1 L.B.R., 1900-1902. The same view has been held in India, but it is not necessary to multiply rulings in so simple a matter as this. I cannot therefore uphold the conviction under section 458. I think the accused has committed robbery and punishable under section 392, Indian Penal Code, and find him guilty, and I alter the conviction to one under that section. I do not think the sentence of 5 years a whit too heavy, considering the accused had a previous conviction under section 382. I therefore uphold the sentence.

Criminal Revision No. 249 of 1911. October 3rd.

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

ALI MUDDIN *v.* MEAH JAN.

Mr. *S. Mukerjee*—for Applicant. | Mr. *Mitter*—for Respondent.
Mr. *H. M. Lütter*, Government Prosecutor—for the Crown.

Criminal Procedure—Powers of Appellate Court—423 (b) (2)—Penal Code—497, 504.

The Accused was prosecuted by the complainant under section 497 of the Indian Penal Code. The Lower Court held that adultery was not proven, but found the accused guilty of insult likely to provoke a breach of the peace under section 504 of the Indian Penal Code. On appeal the Sessions Judge considered that no offence under section 504 had been committed, but held that the finding of the Lower Court was equivalent to an acquittal under section 497 and refused to interfere though he was apparently of opinion that the accused had been wrongly acquitted under section 497.

Held,—that the Sessions Judge under section 423 of the Code of Criminal Procedure had power to deal with the case himself, and he could and should have exercised his power if he thought Appellant had committed adultery as the conviction under section 504, Indian Penal Code, and the acquittal under section 497 were based on exactly the same evidence. In an appeal a Sessions Judge if he thinks the Accused has been convicted under the

wrong section can alter the conviction in certain circumstances to the right section.

Appana v. *Mahalakshmi*, 8 Mad. Law Times, p. 313.
Sami Ayya v. *K.E.*, I.L.R., 26 Mad., 478.
Q.-E. v. *Jabanulla*, I L.R., 23 Cal., 975.
Shere Ali v. *Crown*, Punjab Record I of 1874.
Q.-E. v. *Madhub Chandar Giri Mohunt*, 21, W.R. Crl., p. 13.
Maung Sein v. *Maung Hmo*, U.B.R., 1897—01, I, p. 103.
Mi So v. *Mi Shwe Ma*, Crl. Revision No. 126 of 1910 (unpublished).
Nga Pwin v. *Po Min*, Crl. Revision No. 125 of 1908 (unpublished).
Nga Po Han and one v. *Nga Tha Le Ni*, U.B.R., 1897—01, I, 91.
Mi Hla So and one v. *Nga Than and one*, Crl. Revision No. 718 of 1910 (unpublished)
Nga Kan Gyi v. *Nga Po Tha*, Crl. Revision No. 339 of 1911 (unpublished).
Thandavan v. *Perianna*, I.L.R. 14 Mad. 363.
K.E., v. *Lukman Singh* I.L.R., 31 Cal., 710.
Q.E., v. *Jugdoonath*, I.L.R., 11 Cal., 293.

This is an application for revision of the orders passed by the Sessions Judge, Mandalay Division, in which he, after reversing the conviction of the accused under section 504, Indian Penal Code, refused to deal with the charge under section 497, Indian Penal Code.

The Applicant in this case, Ali Muddin, who was the complainant originally, prosecuted Meah Jan along with five other men under sections 497, 498, 500 and 109 of the Indian Penal Code, the first Accused, Meah Jan, with having committed adultery with his wife, Fatima, and the others with abetting the act of adultery by Meah Jan and also in the alternative with defamation.

The facts show an extraordinary phase of Mahomedan social life in Burma. Ali Muddin married Fatima who is now 44 years of age from 22 to 30 years ago. They are both Chittagonian Mahomedans. Some years ago Ali Muddin took a Burman wife. It would appear that Fatima, his wife, resented this and left him. It is stated that there was a *tilluk* but this was not proven. Ali Muddin fell out with a fellow countryman, Meah Jan, and there was, as is usual, a good deal of litigation between them. Whatever were his motives it is difficult to say, but eventually it would appear that Accused, Meah Jan, went in company with Fatima from Kamaing to Mogaung where the Accused, Meah Jan, was bringing a case against Ali Muddin. Meah Jan denied he took her himself till Abdul Aziz, who is Fatima's son-in-law, handed her over to Meah Jan to escort to Mogaung. While on the way there and back, there cannot be the slightest doubt but that Meah Jan had every opportunity of having connection with Fatima. They were in the boat alone for three nights and were left alone there, and it is urged that this is sufficient evidence to prove that adultery did take place. Nevertheless the Subdivisional Magistrate, Mr. Barnard, who wrote a long and carefully considered judgment, came to the conclusion, taking all the circumstances into consideration that adultery was not committed. He had the witnesses before him; Fatima appeared in Court; she is a woman of 44, which in the case of a native

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woman of her class, is the time when the youthful charms have usually departed. The Magistrate made no distinct order of acquittal but he states "after considering all the evidence, the "age of the woman, and the circumstances under which she went "to Mogaung, and the time she left Kamaing with the Accused, "*i.e.*, in broad daylight, I arrived at the opinion that sexual "intercourse was not in the mind of the Accused, Meah Jan, "when he took Fatima down with him to Mogaung, nor did he "commit it, and that therefore I could not convict him under the "charge of adultery which I had framed against him."

This as the Sessions Judge remarks is equivalent to an acquittal under section 497 of the Indian Penal Code, but instead of this the Subdivisional Magistrate found him guilty of insult under section 504, Indian Penal Code. In the special circumstances of the case I do not think that the conviction of insult likely to provoke a breach of the peace was so unsuitable as the Sessions Judge thought it, but there seems to be some doubt in the Sessions Judge's mind that Ali Muddin was present at Mogaung and, if he were not, obviously the charge of insult must fall through.

On the other hand it is a fact that flaunting about with another man's wife has led to innumerable duels in other countries besides India, and after all section 504, though it seems somewhat inadequate, is not so ridiculously out of place as the Sessions Judge thought.

The Sessions Judge was of opinion that the charge under section 497 was sustainable, and he called upon the Accused to show cause why the charge against him should not be retried.

The case was argued before him by Mr. Mitter, but no notice was sent to the other side whose defence was not heard. The Sessions Judge set aside the conviction under section 504 and found that practically Accused had been acquitted of adultery, and he did not think that he had any right to interfere with the acquittal.

Against this order he has applied to this Court. The case being one of some importance I asked the Government Prosecutor to appear in support of the finding of the Sessions Judge.

Mr. S. Mukerjee (senior) appeared for the Applicant, Mr. Mitter for the Respondent, and Mr. Lütter for the Crown.

It was urged by the Applicant that this Court had repeatedly interfered in cases of this sort, and the learned counsel quoted several unreported cases in which the Court had held that this Court could interfere and had interfered and ordered a retrial, although no appeal had been filed by the Local Government and the time for appealing had not lapsed. The cases quoted by the learned Advocate for the Applicant are—

(1) *Mi Hla So, Nga Lu Gyi* v. *Nga Than and Maung Ngwe Pyaing.*

(1) J.C., U.B., Crl. Revision No. 718 of 1910 (unpublished).

(1) *Mi So* v. *Mi Shwe Ma.*
(2) *Nga Pwin* v. *Po Min.*

My learned predecessor has held that this power of interference under section 439 is one which can and should be exercised in Upper Burma. There is a ruling by Mr. Burgess, *Maung Sein* v. *Maung Hmo* (3), in which doubts were expressed whether a case can be taken up on revision so long as an appeal lies, and there are several cases quoted in which the High Courts in India have repeatedly held that the Courts will not ordinarily interfere. In a recent case (unreported) *Nga Kan Gyi* v. *Nga Po Tha* (4) the whole matter was argued before me.

In the case of *Thandavan* v. *Perianna* (5) the Madras High Court held that an appeal against an acquittal by way of revision is not contemplated by the Code, and it should, on public grounds, be discouraged. This extreme view has not been upheld by the other High Courts, but both Allahabad and Bombay have upheld that ordinarily the High Court will not exercise its powers of interference in such cases. It seems to me quite clear that the wording of section 439 does give this power to the High Courts, and my learned predecessors, Twomey and Shaw, J J., have both held the power exists, and have repeatedly exercised it, and it would seem that though not directly mentioned that this power can well be used in Upper Burma in view of the fact that the Upper Burma Criminal Justice Regulation has largely increased the powers of interference in ordinary appeal cases with regard to the enhancement of sentences.

The Advocate for the Applicant then drew attention to the facts. He has pointed out that it is not necessary now to prove actual acts of sexual intercourse in order to prove adultery. This view has been held in the case of *Q.E.* v. *Madhub Chandar Giri Mohunt* (6). He pointed out that in this present instance not only were there ample opportunities for sexual intercourse, but these opportunities had been created deliberately by the parties themselves, Meah Jan and Fatima.

On behalf of the Crown Mr. Lütter pointed out that under section 423 (*b*) (2) of the Code of Criminal Procedure, the Sessions Judge had ample power in the present case to have given force to his own opinions and to have convicted the Accused under section 497. He quoted a recent Ruling of the Madras High Court which is I find exactly on all fours with the present case, namely, the case of *Appana* v. *Mahalakshmi* (7). Here the High Court has clearly laid down that in the present case the Sessions Judge, if he finds the Accused not guilty on the one charge and he has been wrongly acquitted on another, may act under this

(1) J.C., U.B., Crl. Revision No. 126 of 1910 (unpublishd).
(2) J.C., U.B., Crl. Revision No. 125 of 1908 (unpublished).
(3) U.B., R., 1897—01, I, page 103.
(4) J C., U. B. Crl. Revision No. 339 of 1911.
(5) I.L., R. 14, Madras, page 363.
(6) W. R. Crl. Vol. 21, page 13.
(7) 8 Madras Law Times, page 313.

ALI MUDDIN v. MEAH JAN.

section and convict the Accused on the charge which he thinks has been proven, although an actual acquittal has been entered in the Lower Court. In the Madras case an acquittal was actually entered on the first charge. Mr. Lütter urged that the question whether the Court had power to take up the case in revision therefore did not arise in the present case, but that the Sessions Judge was able to have dealt with the case himself, and that the case should now be sent back to him for disposal according to law.

For the Respondent Mr. Mitter urged that in the various Rulings of the High Courts of India, *K.-E.* v. *Lukman Singh* (1), *Q.-E.* v. *Jugdoonath* (2), the High Courts had held that interference with acquittal is not called for, but all these cases quoted differ from the present one, because in them there was no conviction at all and the Accused was acquitted on all charges.

First as regards the question of the power to interfere on revision.

I entirely concur with the opinion of my learned predecessor in the case, *Po Han* and *Nga To* v. *Nga Tha Le Ni* and *Mi Tu* (3), in which it was held that "as a general rule, the High Court will not interfere with an order of acquittal, but it has the power to do so, and there can be no doubt that this power may be properly exercised in certain circumstances."

I agree, however, that in the present case this question does not arise, and that the Sessions Court had power under section 423 of the Code of Criminal Procedure read with section 13 of the Schedule of the Criminal Justice Regulation to interfere, as there was a conviction in the case and the Accused was convicted on the same set of facts on which he was acquitted on the other charge.

This I think is the crucial point of this case. If the acquittal on the one charge and the conviction on the other are based identically on the same facts, it appears to me that the Sessions Court in appeal has power to change the section and convict the Accused of the right offence.

Now to deal with the facts, I am bound to say after a careful perusal of the proceedings of the Lower Court I am not at all convinced that the Township Magistrate was not right in acquitting the Accused of the offence of adultery. It is very well to talk about opportunities for committing this offence, and to say that near relationship would not prevent incest. On the other hand there is good reason to believe that it was true that Fatima's son-in-law handed her over to the care of Meah Jan. I do not think it likely that a son-in-law would deliberately blacken his wife's face by encouraging his wife's mother to commit adultery. But the main fact which appears to me to render adultery exceedingly unlikely is that the Chittagonian woman in question

(1) I.L.R., 31, Cal., page 710.
(2) I.L.R., II, Cal., page 293.
(3) U.B.R., 1897–01, I, page 91.

was of the mature age, 44. I do not think that a native woman of 44 belonging to the class of the complainant's wife would be very attractive from a sexual point of view, and it must be recollected the Magistrate who has great experience of the country had Fatima before him when he passed the order and distinctly drew attention to her age. Moreover it is quite clear that this is not an ordinary case of adultery. The charge seems to me to be Ali Muddin's reply to the complaint made by Meah Jan.

In these circumstances I am not at all sure that there is any advantage to be gained by remanding the case to the Sessions Court, as I do think that there is good deal of force in the deliberate finding of the Magistrate that no adultery was committed or intended, and therefore refuse to interfere.

Criminal Revision No. 352 of 1911, October 25th.

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

NGA BA GYAW *v.* K.E.

Mr. *S. Mukerjee*—for Applicant.

Penal Code—322, 325—Criminal Procedure—367, 424.

Held,—that intent to cause grievous hurt may be presumed from the nature of the hurt caused and the circumstances under which it was caused. Drunkenness may be rightly taken into consideration when dealing with the motives or absence of motive to commit a certain crime when in a state of drunkenness.

Reasons for admitting a case to Revision—Sections 367 and 424, Criminal Procedure Code.

J. M— v. *K.-E.* I, U.B.R., 1910, p. 17 (distinguished).
Ram Lall Singh v. *Hari Charan Ahir*, I.L.R., 37 Cal., 104.
Jamail Mullick v. *Emperor*, I.L.R., 35 Cal., 138.
Sohoni's notes on the duty of an Appellate Court.

This is an application to revise the conviction and sentence of 6 months' rigorous imprisonment passed by the 1st Class Subdivisional Magistrate, Yamèthin, on the petitioner, Ba Gyaw, under section 325, Indian Penal Code.

The petitioner appealed to the Sessions Judge, Meiktila, who dismissed the appeal.

On reading the grounds of application and examining the judgment I admitted the application. When the case was called I heard Mr. S. Mukerjee on behalf of the applicant.

The grounds of application are (1) that the Lower Appellate Court did not apply its mind to the facts of the case, (2) that the evidence for the prosecution as regards the identification is untrustworthy and inadequate because the blow was struck through a half open door and therefore the blow might have been struck without the striker being seen. It was dark and difficult to distinguish faces, (3) that Tun Tha was the man who struck the blow and not Ba Gyaw, and as Tun Tha ran away, and Ba Gyaw did not run away, the probability is that Tun Tha was the striker, and not Ba Gyaw, (4) that in any case the presumption could not be raised that the striker intended to cause hurt, and the Lower

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Courts have disregarded section 322, Indian Penal Code. (5) Lastly that though drunkenness is no excuse yet it must be taken into consideration when the question of intention arises and is weighed by the Court, and that Ba Gyaw being drunk could not have intended to cause grievous hurt. The learned Counsel for the Applicant quoted the following rulings and books of reference :— *Ram Lall Singh* v. *Hari Charan Ahir* (1) and *Jamail Multick* v. *Emperor*, (2) and also Sohoni on the duties of an Appellate Court, section 424, Criminal Procedure Code. These rulings and Sohoni's notes under section 424 deal with the question of the admission of the application for revision under section 439, Criminal Procedure Code, by the Court. As I have already admitted the application after reading the somewhat laconic judgment of the Appellate Court, I need not consider these rulings any further, because I admitted the application and have considered the case on its merits.

The facts of the case are set out in the Subdivisional Magistrate's judgment. The accused is a well known man, a man of some importance, as he is the son of the Township Officer. He is a man of 25 years of age and is therefore a man of some mark and locality. It is not likely therefore that he would be easily mistaken for someone else. Moreover he had been drinking in the Chinaman's shop, and the grounds of application would tend to show that he had been drinking freely there. The Chinaman had already turned him out for brawling in his shop, and he would have had a good opportunity of seeing him. There was a light in the shop and the witnesses for the defence who were outside the shop admit this. The learned Counsel for the Applicant wishes me to believe that the blow might have been struck from outside the shop through the half open door without the striker being clearly seen. Now on this point it seems to me to be quite clear that it is much easier to see through a half open door than to strike a really severe blow through it. The medical evidence shows that the complainant received a very heavy blow and the shop door must have been wide open to allow such a blow to come home. The Chinaman says that the accused, Ba Gyaw, had one foot inside the door when the blow was struck. He was not struck from behind, and had every opportunity to see his assailant, He said distinctly that Tun Tha, when trying to strike him, struck the number on the door way. If a man is close enough to strike such an effective blow as that which felled compainant the man struck could see clearly who the striker was, the light inside the shop streaming through the door way would clearly show who the assailant was. So much for the possibility of mistake on the part of the witnesses for the prosecution.

As regards Tun Tha's absconding and Ba Gyaw braving it out, I attach little weight to this, because Ba Gyaw being the son of a well known local officer would have been mad to have run

(1) I.L.R., 37 Cal., 194.
(2) I.L.R., 35 Cal., 138.

away. He was evidently able to call a large number of witnesses to prove an *alibi*.

I will now turn to the evidence for the defence. It is impossible to read the evidence and the half-hearted way in which the *alibi* is set up, without distrusting the witnesses for the defence. I think the Magistrate is quite right in believing that Ba Gyaw was the man who struck the blow that felled the complainant and fractured his skull.

There can be no doubt from the medical evidence that grievous hurt was caused. The question is whether under section 322, Indian Penal Code, Ba Gyaw intended to cause or knew himself likely to cause grievous hurt when he struck the blow. It seems to me that there can be no doubt but that when a man hits another over the head with a stick hard enough to fracture his skull and endanger his life, that in the circumstances of the present case he must have either intended to cause grievous hurt or known that he was likely to cause it. All the circumstances point to the fact that Ba Gyaw was much enraged at being turned out of the shop and intended to revenge himself on the man who turned him out. It is idle to suppose that he did not intend to cause grievous hurt. He evidently did not strike in sport or fun, and I think that he must be presumed to have intended the consequences of his savage blow.

The last point is that he was drunk at the time and the learned Advocate quoted the leading case of *J.M.*--v.*K.-E.*(1) As a matter of fact the two cases are not on all fours. J.M.—in the course of a drunken frolic committed an act of technical robbery which one would ordinarily believe a man in his position never intended, nor did he know what he was doing. It is one thing to commit a robbery and quite another thing to knock an opponent down in a drunken brawl. The former is a more complex act and the motive for committing robbery may be absent as they were in J.M.—'s case, but a man may be what is termed "fighting drunk" and may be well held responsible if he chooses to brawl while he is drunk. I accordingly think the sentence under section 325, Indian Penal Code, *viz.*, 6 months' rigorous imprisonment, is not a whit too severe. Indeed, but for the reasons given by the Magistrate for not inflicting a more severe sentence I should have called upon the applicant to show cause against enhancement. I hesitate however to do this as the case has been up on appeal, and obviously this point must have occurred to the learned Sessions Judge when reading the proceedings, though he had not mentioned it in his somewhat laconic judgment.

The application is dismissed.

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(1) U.B. R., 1910, page 17.

Civil Revision No. 193 of 1911 March 20th 1912.

Before G. W. Shaw, Esq., C.S.I.

NGA PO GYI
NGA TON } *vs.* MI ON.

Mr. J. C. Chatterjee—for Applicants. | *Mr. Banerjee*—for Respondent.

Contract—26—57.

Where a Burmese Buddhist husband undertook to pay damages to his wife if he took a lesser wife and if he failed to live in her house, work and support her.

Held,—that as the contract consisted of two distinct promises for one and the same lawful consideration, though the final promise, *viz.*, not to take a lesser wife may have been illegal as being in contravention of section 26 of the Contract Act, yet the second promise, *viz.*, to live in the wife's house, work and support her was a good and lawful promise to which section 57 of the Contract Act applied and was accordingly enforceable.

Nga Ba vs. *Mi Ok*, U. B. R., 1902-03, II, B. L. Mar. 1, *Mi San Shwe* vs. *Po Thaik*, 8 B. L. R., 24, *Must Punu Bibi* vs. *Maulavi Faiz Baksh*, XXIII W. R., 66.

Plaintiff-Respondent sued for Rs. 100 as compensation for breach of contract. The Plaintiff-Respondent and the Defendant-Applicant, Po Gyi are wife and husband. Defendant-Applicant, Nga Ton is Po Gyi's father.

The alleged contract was one whereby Defendants-Applicants undertook to pay to Rs. 100 damages to Plaintiff-Respondent if Defendant-Applicant, Po Gyi, failed to live in her house and work and support her, and took a lesser wife.

The Courts below both found in favour of the Plaintiff-Respondent, and my predecessor, having decided that no second appeal lay, the case now comes before me as one for revision.

It is contended on behalf of the Defendants-Applicants that the promise was illegal because there was no consideration, that a Burmese Buddhist wife cannot maintain a suit for damages against her husband while the marriage subsists, that if taking a lesser wife meant forming an illicit union the contract would be immoral and opposed to public policy, and that if taking a lesser wife meant making a legal marriage, the contract was in contravention of section 26, Contract Act.

The Plaintiff's allegations were that Defendant-Applicant, Po Gyi, did not work or support her, but deserted her and, she understood, was looking about for a lesser wife, whereupon she took steps to divorce him, but refrained from persisting in a claim for divorce on Defendant-Applicant, Po Gyi, undertaking to live in her house and work and support her and not take a lesser wife, and on the Defendant-Applicant, Nga Ton, his father, guaranteeing the performance of his promise or standing security for him, and that Defendant-Applicant, Po Gyi, thereafter broke his promise in every way. Clearly there was good consideration, namely, Plaintiff-Respondent refraining from sueing for divorce ; and this

with respect to both Defendants-Applicants (section 127, Contract Act). *Nga Ba* vs. *Mi Ok* (1) is conclusive that a Burmese Buddhist wife can maintain a suit against her husband during the subsistence of the marriage.

There is nothing to show that "taking a lesser wife" meant doing anything immoral, and if it had meant this, a contract by which Defendant-Applicant, Po Gyi, bound himself under a penalty not to do the immoral thing could not have been an immoral contract.

These objections are therefore unsustainable.

The applicability of section 26 of the Contract Act is a much more difficult question, and it does not appear to have arisen before. There are no decisions in either Upper Burma or Lower Burma or apparently in India. Pollock observes that a contract by a Hindu or a Muhammadan not to take a second wife would seem to be within the section, although such a result was probably never contemplated by the legislature; but that apart from section 26 agreements of this class would apparently be void under section 23 as tending to defeat the provisions of Hindu or Muhammadan Law. The Buddhist law also recognises polygamy but not perhaps quite in the same way as the Hindu or Muhammadan Law.

The Lower Burma Case of *Mi San Shwe* vs. *Po Thaik* (or *Thin*) (2), a suit for divorce, dealt with an agreement in which the husband undertook not to take a lesser wife, and there was ill-treatment as in the present case besides the taking of the lesser wife.

That is a feature of the contract which has been practically overlooked by the Lower Courts, and also, in this Court by the learned Advocates on both sides. The situation was one of those referred to in paragraph 303 of the *Kinwun Mingyi's Digest*:—The wife complains of ill-treatment; the husband has deserted her; he does not work and support her and he is looking about for a second wife; the wife therefore asks for a divorce, but instead of insisting on getting this at once, she accepts the husband's undertaking to behave himself in future towards her, that is, to live with and to work for her and support her; and he gives security to this effect.

It is evident that an agreement of the kind is in consonance with the rules of the Buddhist Law. The additional stipulation about the second wife which was made in the Lower Burma case and in the present case was merely a part of the undertaking, and without it, the wife had a good cause of action. I do not think that this stipulation is contrary to the Buddhist Law. On this point I am disposed to concur with Mr. Justice Birks in the case above cited. The contract therefore is not in my opinion in contravention of section 23, Contract Act. With regard to section 26 it is first necessary to see whether section 24 applies. If it does, then Plaintiff-Respondent must fail in the event of the stipulation as to not taking a lesser wife being opposed to section 26.

(1) U. B. R., 1902-03, II, B. L., Mar. 1. | (2) 8, B. L. R. 24.

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Sections 24, 57 and 58 deal with parts of the same subject and the commentaries of Cunningham and Shephard and Pollock make it clear that "where several distinct promises are made for one and the same lawful consideration and one or more of them are such as the law will not enforce, that will not of itself prevent the rest from being enforceable". Pollock goes on: "The test is whether a distinct consideration which is wholly lawful can be found for the promise called in question. The general rule is that where you cannot sever the illegal from the legal part of the covenant the contract is altogether void, but where you can sever them.....you may reject the bad part and retain the good".

There is an old Bengal case, *Must Punu Bibi* vs. *Maulavi Faiz Bakhsh*, (1874) (1) not unlike the present case. There, a husband executed a bond by which he promised not to marry another wife or do anything without his wife's permission, and also to pay over all his earnings to her. It was held by Sir Richard Couch that section 24 did not apply, but that if any section of the Contract Act applied, it was section 57. He considered the promises not to do anything without the wife's permission as contrary to public policy, but the promise to pay over his earnings a lawful promise and capable of enforcement.

On this high authority, I am of opinion that the contract in the present case must be held to fall within section 57 rather than section 24.

The promises by which Defendant Applicant, Po Gyi, undertook to live in the Plaintiff-Respondent's house, to work, and support her, were good and lawful promises, and there is no reason why this part of the contract should not be enforced though the promise not to take a lesser wife may have been illegal as being in contravention of section 26.

It is therefore unnecessary for the purposes of the present case to decide whether in fact section 26 rendered the promise not to take a lesser wife invalid.

The application is dismissed with costs.

(1) XXIII, W. R., 66.

Privy Council.

(On appeal from the Court of the Judicial Commissioner, Upper Burma.)

Before Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

1. MI ME
2. MI THI
3. NGA KYAN BAW
4. MI PON
5. MI YON
6. NGA PO HEIN
7. NGA SO THEIN
8. MI YIN
9. MI TIN U
10. MI THEIN TIN
11. MI PWA SHIN

(DECEASED) BY THEIR LEGAL REPRESENTATIVE, THEIR MOTHER, MI ME.

vs. MI SHWE MA.

Buddhist Law Inheritance—Marriage.

In Burma polygamy is undoubtedly lawful, and it is not unlawful to marry the sister of a living wife. Marriage with a deceased wife's sister is looked upon as proper and even laudable.

In the case of a marriage between persons who have been married before, it is not usual to have any entertainment.

The arrangement of separate establishments for wives is a mere matter of convenience, and probably necessary for the sake of peace and quietness when each wife has a family of her own.

Eating out of the same pot is rather an outward and visible sign of social equality than a proof of marriage.

This was an appeal from a judgment of the Court of the Judicial Commissioner, Upper Burma, (*printed below.*)

The judgment of their Lordships of the Privy Council was delivered on the 25th January 1912 by—

Lord Macnaghten.—This is an appeal from a judgment of the Judicial Commissioner of Upper Burma reversing a decree of the District Court of Magwe.

The question on which the Courts differed relates to the status of the Plaintiff, Mi Shwe Ma. She claims to have been lawfully married to one Maung Aung Myat, deceased, and as his widow to be entitled to share equally in his estate with her elder sister, Mi Me, who had been married to him for many years before his connection with the younger sister.

In Burma, polygamy is undoubtedly lawful, and it is not unlawful to marry the sister of a living wife, though such a

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marriage is not considered quite respectable, while marriage with a deceased wife's sister is looked upon as proper and ever laudable.

The law relating to marriage in Burma is extremely lax No ceremony of any kind is essential. Mutual consent is all that is required. In the absence of direct proof consent may be inferred from the conduct of the parties or established by reputation. But when proof of marriage depends wholly or mainly on reputation, the circumstances of the case must be scrutinised with some caution, because the same word which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honourable terms. The lax notions prevalent among the lower classes on the subject seem to be generally deplored and condemned by their betters, and it may be that the difference of opinon between the two Courts is due in some measure to the fact that the District Judge was a native gentleman, an educated Burman, who naturally regarded with little favour if not with positive repugnance practices tolerated by the law of his country, but not in accordance with the standard of a higher civilisation. On the other hand the Judicial Commissioner was an Englishman of great experience, without any prejudice in favour of Western notions, whose only object seems to have been to administer the law truly and indifferently as he found it laid down in the *Dhammathats* and the rulings of his predecessors, and in Sir John Jardine's "Notes on Buddhist law" which seems to be the principal authority on the subject.

Both the learned Judges analyse the evidence with great care, though they regard it from different standpoints. The District Judge puts aside the testimony of some witnesses as unworthy of belief, while the Judicial Commissioner thinks there was no reason for discrediting them. Whether that particular testimony is accepted or not, there is very little contradiction in the evidence. There is abundance of evidence to the effect that Mi Shwe Ma was recognised as the wife of Maung Aung Myat. Mi Me herself says, "Plaintiff was known notoriously as Maung Aung Myat's wife." No one says that she occupied a dishonourable or an inferior position. Maung

Aung Myat was a *Twinzayo*, that is, an hereditary oil-well owner, and as such entitled to receive every year a certain number of oil-well sites in the oil-bearing district of Yenangyaung in Upper Burma. *Twinzayo* after *Twinzayo* comes forward on both sides to say that *Twinzayos* generally have two wives, and that Mi Shwe Ma was Maung Aung Myat's wife. Some of the witnesses may have used the word translated "wife" in a loose sense, but at least one witness on each side says that Maung Aung Myat and Mi Shwe Ma were "husband and wife," an expression which seems to convey the meaning that she was his wedded wife. Then it may be observed that one of the witnesses who says that Mi Shwe Ma was Maung Aung Myat's wife was not a Burman but a Mahommedan of some position, being the head clerk in the Burma Oil Company.

The points on which most reliance was placed on behalf of the Appellant seem capable of explanation. One point was that there was no entertainment given on Mi Shwe Ma's alleged marriage. When there is a marriage between persons who have not been married before, it seems to be usual to give an entertainment at which "pickled tea" is the principal feature, or at least the chief delicacy. There was no pickled tea at Mi Shwe Ma's wedding. But then it seems that, in the case of persons who have been married before, it is not usual to have these entertainments. Maung Aung Myat had five or six children grown up living with him, and Mi Shwe Ma was a widow with two children living. Then something was made of the fact that Mi Shwe Ma continued to live with her mother in her own house. But there is authority for saying that such an arrangement is a mere matter of convenience, and probably necessary for the sake of peace and quietness, when each wife has a family of her own. Great stress was laid on the fact that it was not clearly proved that Maung Aung Myat and Mi Shwe Ma messed together, or used to "eat out of the same pot." "Eating out of the same pot" seems rather to be an outward and visible sign of social equality than a proof of matrimony. A man united to a woman of lower degree raises her to his own social position by "eating out of the same pot." Here there is evidence that Maung Aung Myat took his meals with Mi Shwe Ma and her family when he visited her,

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It is difficult to see how there can be any question of social inferiority in the present case. Mi Me was Mi Shwe Ma's sister, and on perfectly good terms with her and the mother during Maung Aung Myat's life. As to Maung Aung Myat's business, he seems to have managed it himself. Sometimes one sister and sometimes the other, sometimes both, were seen with him when he visited his oil-wells, but apparently he kept the business in his own hands.

On the whole their Lordships are of opinion that the Appellants have not made out a sufficient case for disturbing the judgment of the Judicial Commissioner, and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Before G. W. Shaw, Esq., C.S.I.

Dated the 11th October 1909.

CIVIL APPEAL CASE NO. 126 OF 1909.

MI SHWE MA ... ... Appellant.

VERSUS

MI ME AND 10 OTHERS ... ... Respondents.

Appeal against the judgment and decree of the District Court, Magwe, passed in Civil Suit No. 6 of 1908, dated the 9th February 1909, in the matter of Mi Shwe Ma *v.* Mi Me and 10 others.

Advocate for Appellant—Mr. C. G. S. Pillay.
Advocates for Respondent—Messrs. Agabeg and Willes.
Read the memorandum of appeal.
Read also the proceedings in the case.
Heard Advocates.

JUDGMENT.

Plaintiff-Appellant sued for a half-share of the estate left by Nga Aung Myat (deceased). She claimed as his second wife and widow. Defendants-Respondents were his first or chief wife and his children by her. The defence was that Plaintiff-Appellant was not a wife but a concubine and as such not entitled to any share.

The District Court found on a preliminary issue that Plaintiff-Appellant was not entitled to inherit at all, being no more than a mistress, or if a wife, excluded from inheriting by

separate living, and by failure to attend on deceased during his illness or perform the funeral rites after his death.

The law has not been contested. It is contained in the *Dhammathats* as interpreted in judicial decisions:—

Mi Gywe v. *Mi Thi Da* (1891)[1] and *Mi Shwe Ma* v. *Mi Hlaing* (1893)[2] were the first cases in which the position of lesser wives and concubines was investigated. The first was followed in *Mi Hmon* v. *Paw Dun* (1899)[3] and both these were distinguished in *Mi U Byu* v. *Mi Hmyin* (1900).[4]

Mi Gywe's case was one of a lesser wife living separately and merely receiving the husband's visits. It was held that separation of residence affords no more than a presumption that the woman has not the status of one entitled to share in the inheritance, which can be rebutted by proof of the existence of a superior status; and that in that case the presumption was not rebutted. The husband was wealthy, but the woman accepted a divorce with a payment of Rs. 500. In Mi Shwe Ma's case the woman was an inmate of the house, having come to it with the chief wife as her friend or dependent, and the intimacy which she formed with the husband was disclosed through her pregnancy. She continued to live in the house till after the chief wife's death, when the husband married another woman, and before doing so gave her a *hlutsa* and turned her out, keeping his son by her to live with him as before. It was held that the position was inferior and the union either not a marriage at all, or a marriage of a loose and low kind; but that the son as son of a lesser wife or a free concubine was entitled to two-fifths. In that case there was no question of separate living. It is to be noted that the learned Judge, Mr. Burgess, was apparently of opinion that a second contemporaneous wife must of necessity be a lesser wife or concubine. But it was not necessary to determine that point.

In Mi Hmon's case the lesser wife lived separately—in a different village two miles off. The husband occasionally slept one, two, or three nights with her. Neither she nor her son, nor the son's children, ever had anything to do with the property, or ever lived at the husband's house, and when any of her family went there it was as strangers. It was held that the presumption arising from separate residence was not rebutted.

Mi U Byu's case was different. The husband lived sometimes with the chief wife and sometimes with the second or lesser wife; he always regarded and treated the latter as his wife; in the chief wife's absence for a year he lived entirely with the lesser wife.

It was held that the husband lived indifferently with both his wives, and that the status of the lesser wife was precisely the same as that of the chief wife. The principles enunciated in the

[1] U. B. R., 1892-96, II., 194.
[2] ——— 145 and 153.
[3] U. B. R., 1897-01, II, 138.
[4] ——— 1897-01, II, 160.

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cases of Mi Gywe *v.* Mi Thida and Mi Hmon *v.* Paw Dun were declared to be that a wife of a distinctly inferior class, who is in the position of a concubine and has a separate establishment, has no claim to inherit a share in her husband's estate, but that the mere fact that she lives in a house separate from that occupied by the husband merely raises a presumption, etc.

Mi Shwe Ma's case was not referred to at all. But I see no reason to suppose that it was overlooked. The important fact is that the suggestion put forward by Mr. Burgess was not accepted.

I think it follows from these decisions that Plaintiff-Appellant in the present case had to prove, in order to get any share in the inheritance, that her status was superior to that of a lesser wife or concubine, and that if she did so, she would be entitled to share on equal terms with the chief wife.

A lesser wife or concubine who lives with the husband gets two-fifths, but when she lives separately she gets nothing.

In two comparatively recent unpublished cases, a lesser wife or concubine who lived in the same house with the chief wife and the husband was given two-fifths on the authority of *Mi Sewe Ma's* case [*Mi Tun E* vs. *Mi. Ein Tha*[1] and *Mi Shwe Me* vs. *Kin Nu*[2]].

It remains to ascertain what the circumstances of the union in question in the present case were. I shall refer further on more particularly to certain points in dealing with the Lower Court's findings. Meanwhile it is convenient to set out what facts were in my opinion established by the evidence. They were as follows:—

Like many other *Twinnas*, Aung Myat had two wives, (1) first Defendant-Respondent, Mi Me, and (2) Plaintiff-Appellant, Mi Shwe Ma. First Defendant-Respondent was already married to him when he took to wife her younger sister, Plaintiff-Appellant, about 1244 or 1245 B. E. (two to three years before the annexation of Upper Burma). There was no ceremony, both parties being *Eindaungyi*. From that time onwards she was publicly known as his wife, as well as first Defendant-Respondent.

At first she lived at her mother's house, and Aung Myat used to visit her there and sleep there at times. During the disturbance that followed the annexation, Aung Myat and first Defendant-Respondent and Plaintiff-Appellant took to flight and lived together on an island for a month or two. After their return to Yenangyaung Plaintiff-Appellant lived with them at first Defendant-Respondent's house for some time. It is uncertain how long this lasted. The witnesses speaking from memory vary from one or two months to two years. On the occasion of a fire which seems to have burnt down the village or part of it, Aung Myat and first Defendant-Respondent and Plaintiff-Appellant

[1] Civil appeal No. 94 of 1905 (unpublished).
[2] Civil appeal No. 65 of 1907 (unpublished).

all lived together for two and a half months in a hut on a sand bank. Then Aung Myat built two new houses At one, first Defendant-Respondent and her seven children by Aung Myat lived. At the other Plaintiff-Appellant and her two sons by her previous marriage lived. Aung Myat habitually [ဆိုး] lived at first Defendant-Respondent's house, and had his meals and did his business there, and it was generally regarded as his place of residence. But if people did not find him there, they went to Plaintiff-Appellant's house where he received them. At times he stayed with Plaintiff-Appellant, *e.g.*, when he happened to have quarrelled with first Defendant-Respondent. Occasionally he had his meals there (with Plaintiff-Appellant). [Besides Plaintiff-Appellant herself (9 P.) Nga Pyo, 69, a *twinza*, and (13 P.) San Dun, 63, a goldsmith, say that Aung Myat "lived at both places, "lived and dined at Plaintiff-Appellant's house as well as first Defendant-Respondent's", and (11 P.) Aung Gyi, 62, a *Twinza* says that Aung Myat stayed with Plaintiff-Appellant when first Defendant-Respondent was angry and *vice versâ*. All these witnesses appear to be credible.]

When Plaintiff-Appellant's child by Aung Myat was ill, first Defendant-Respondent visited her and helped to nurse the child. Aung Myat on the same occasion had his meals there for 6 or 7 days. (This is first Defendant-Respondent's own account.) First Defendant-Respondent visited at Plaintiff-Appellant's house on other occasions.

Plaintiff-Appellant similarly visited at first Defendant-Respondent's house (*cf.* 4 D. Aung Zin, 52, a *Twinza*).

When Aung Myat had occasion to go to Rangoon on (oil-well) business he took first Defendant-Respondent on the first visit and Plaintiff-Appellant on the second. (First Defendant-Respondent's own account). At least once Plaintiff-Appellant went with Aung Myat to help him in choosing a well site. (First Defendant-Respondent's account).

On one occasion Aung Myat visited Shwezettaw Pagoda with Plaintiff-Appellant (leaving first Defendant-Respondent at home). On another he took both. On this trip he travelled in the same cart with first Defendant-Respondent, while Plaintiff-Appellant went in a separate cart. On at least two occasions Aung Myat lent money jointly with Plaintiff-Appellant (on Exhibits H and I).

Aung Myat used to keep fast at a *sayat* he had built, and both first Defendant-Respondent and Plaintiff-Appellant fasted with him on these occasions. (First Defendant-Respondent tries to make out that Plaintiff-Appellant was there independently like any outsider. But that is not what the witnesses say: *cf.* (8 P.) Mi Gywe, aged 71, a *Twinza*, and (9 P). Nga Pyo aged 69, a *Twinza*, and (11 P.) Aung Gyi, aged 62, a *Twinza*, all credible witnesses as far as can be seen).

Aung Myat gave Plaintiff-Appellant 3 oil-wells which she enjoyed the produce of during his life-time.

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First Defendant-Respondent's daughter and Plaintiff-Appellant on one occasion borrowed money from a Chetti for the purposes of Aung Myat's oil-well business. (First Defendant-Respondent's own account.)

First Defendant-Respondent's son, Kyan Baw, with his wife lived for a time at Plaintiff-Appellant's house. (First Defendant-Respondent's own account.)

Invitations to offerings used to issue in the names of Aung Myat and first Defendant-Respondent, and not in Plaintiff-Appellant's name. Aung Myat used to visit the oil-wells sometimes with first Defendant-Respondent, sometimes with Plaintiff-Appellant. (This rests on the evidence of five witnesses of whom three are *Twinzas*, and one a coolie who was employed by Aung Myat to dig a well): (10 P.) Lugyi, (13 P.) San Dun, (16 P.) Shwe Hlaing, (17 P.) Nga Sin, and (18 P.) Aung Myat. All these witnesses and especially the *Twinzas* are apparently credible.) Aung Myat paid *Thathameda* in the name of himself and first Defendant-Respondent, while Plaintiff-Appellant paid separately for herself and her sons.

Though she had had a quarrel with Aung Myat and was not on speaking terms with him, when he fell sick (her own account), Plaintiff-Appellant visited and attended on him during his last illness, and slept at first Defendant-Respondent's house (where Aung Myat was lying) at that time. (First Defendant-Respondent's own account; *cf.* also (11P.) Aung Gyi, who found both wives attending to Aung Myat). The funeral was paid for with money of Aung Myat's that first Defendant-Respondent had. Plaintiff-Appellant assisted at the funeral. Not only did she buy things for the offerings, as other relations and neighbours are said to have done, she and (6 P.) Mi Pu 69, a trader, say that she supervised the funeral arrangements with the assistance of elders. I see no reason to doubt the statement of (11 P.) Aung Gyi, 62, a *Twinza*, that first Defendant-Respondent was overwhelmed with grief, and that her son with witness consulted Plaintiff-Appellant as to the offerings for the funeral: and I think it shows that Plaintiff-Appellant did take part in the management of the funeral.

The witnesses for the Defendants-Respondents tell substantially the same story as those for the Plaintiff-Appellant. Only two of them (1 D.) Mi O, and (7 D.) Nga Nyein, who had special reasons for siding with Defendant-Respondent against Plaintiff-Appellant venture to make statements more unfavourable to Plaintiff-Appellant. Those statements deserve no consideration.

The learned Additional Judge of the District Court disbelieved the evidence as to Aung Myat having sent to demand Plaintiff-Appellant in marriage, and as to first Defendant-Respondent having consented. Although I am not prepared to concur with the Additional Judge about it, I have not touched upon this evidence. To my mind it is immaterial. No formal demand and no ceremony are necessary, or even usual, in the case of persons who have been married before. As to consent I am aware that

Mr. Burgess once suggested that the chief wife's consent is required. But it has not been satisfactorily shown that that is correct. There is no decision to that effect. In the present case, moreover, if the evidence of the ex-myoôk, Maung Maung Gyi, that first Defendant-Respondent told him that she had given Plaintiff-Appellant to her husband to prevent him from marrying some one else is not very convincing, there is, as far as my experience goes, no improbability in first Defendant-Respondent having acted in that way; and anyhow, it is abundantly clear from the admitted facts that, during a long course of years first Defendant-Respondent accepted the relations between Plaintiff-Appellant and Aung Myat without any sign of dissatisfaction.

The Additional Judge after referring to the loose way in which the word "wife" is used among the Burmese even in the *Dhammathats*, held that the point at issue must be determined by a consideration of the evidence as to the status, mode of living and eating, habits and other circumstances of Aung Myat and the Plaintiff-Appellant. That is the ordinary rule, and it is sufficient for the proper decision of this case.

The Additional Judge in the end came to the conclusion that Plaintiff-Appellant was only a *mistress*. He also held that, even if she was a wife, she was not entitled to inherit, because she was accommodated in a separate house (section 280, Kinwun Mingyi's Digest, Volume I) and because she did not attend to her husband during his illness [section 279 of the same Volume].

In coming to the first mentioned conclusion the Additional Judge apparently relied on the following considerations:—

(i) that Aung Myat's ordinary (or permanent) residence where he ate and slept and did his business was first Defendant-Respondent's house;

(ii) that the occasions of the disturbances and the fire were exceptional;

(iii) that (6 P.) Mi Pu, and (13 P.) San Dun, were not worthy of credit, and therefore it was not proved that Plaintiff-Appellant lived in the same house with first Defendant-Respondent and Aung Myat after the disturbances;

(iv) that Plaintiff Appellant travelled to Shwezettaw in a separate cart and ate out of a separate pot, when first Defendant-Respondent went;

(v) that a *zayat* where the fast was kept was open to the public, and it was not proved that Plaintiff-Appellant went with Aung Myat;

(vi) that invitations to religious offerings, etc., were issued in the name of Aung Myat and first Defendant-Respondent and never in the name of Plaintiff-Appellant;

(vii) that it was not proved that Plaintiff-Appellant assisted Aung Myat in the management of his oil-wells or other business or in the acquisition of property;

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(viii) that the gift of 3 oil-wells to Plaintiff-Appellant showed that she was not a wife entitled to inherit;

(ix) that it was not proved that Plaintiff-Appellant attended on Aung Myat in his illness;

(x) that *thathameda* was paid by Plaintiff-Appellant separately;

(xi) that on the authority of the late Chief Judge of the Chief Court, Lower Burma, in *Mi Wundi* vs. *Mi Kin*(1) when a Burmese woman cohabits with a man who, she knows, is already married, the presumption is that she is a mistress and not a wife;

(xii) that Plaintiff-Appellant in taking Aung Myat "stole" first Defendant-Respondent's "husband" and so committed a moral offence condemned generally among Burmans.

I have studied the evidence carefully, and I find myself unable to concur in the Additional Judge's view of it. He does not seem to me to have regarded it fairly. To begin with, the facts that Plaintiff-Appellant was first Defendant-Respondent's own sister and that her connection with Aung Myat lasted for 20 years, and was all through that time publicly known and looked upon as a marriage, were strongly in Plaintiff-Appellant's favour.

The opinion of Sir H. Adamson in the case quoted coming from such an authority very naturally impressed their Lordships of the Privy Council. But all the same I venture to doubt its correctness. On the face of it, it is a remarkable utterance with respect to a state of things in which polygamy is admittedly legal. It is based apparently on the prejudice which undoubtedly exists among Burmans, at least in Lower Burma, against a married man taking another wife. But surely that prejudice is directed against the taking of the second woman and not against a (second) wife as opposed to a concubine or a mistress. Then again is it not a mistake to use the word "mistress" at all?

The Buddhist Law speaks of wives and concubines. The feeling in favour of monogamy is so strong among English people that it is necessary to be on one's guard.

The "mistress" of Western Europe is a different thing from the concubine of the *Dhammathats*. To convert a wife or even a lawful concubine into a mistress, seems to be consistent neither with the Buddhist Law nor the cause of religion snd virtue. However, in this case, the burden of proof already lies on Plaintiff-Appellant by reason of her separate living: so that the citation of Mi Wundi's case is not very material.

The episodes of the disturbances and the fire must be considered along with all the other circumstances of the case. My opinion of them is that as far as they go they support the Plaintiff-Appellant's contention that she was a wife.

(1) 4 L. B. R., 175.

The learned Additional Judge was certainly wrong in holding that it was not proved that Plaintiff-Appellant lived for a time in first Defendant-Respondent's house with first Defendant-Respondent and Aung Myat after the disturbances. I greatly doubt whether he was right in thinking Mi Pu and San Dun unworthy of credit. Mi Pu admitted that she was a "*dokkita*", but she was 69 years of age,—a sufficient explanation in itself. When she said that Plaintiff-Appellant travelled to Shwezettaw in the same cart with first Defendant-Respondent and Aung Myat, she was no doubt wrong. But that is not a good ground for refusing to believe her at all. As to San Dun I cannot agree with the Additional Judge that he contradicted himself—and there is no apparent reason why he should not be believed. The Additional Judge very strangely overlooked the fact that one of Defendants-Respondents' own witnesses testified to Plaintiff-Appellant having lived with first Defendant-Respondent and Aung Myat at the time in question. This was [2 D.] Mi Kin, whose account, though it only puts the length of the stay at 1 or 2 months, places the matter, as it seems to me, beyond doubt.

That invitations were issued in the names of Aung Myat and first Defendant-Respondent, that *thathameda* was paid separately by Plaintiff-Appellant, that Plaintiff-Appellant travelled in a separate cart and ate out of a separate pot when first Defendant-Respondent went to Shwezettaw, in my opinion prove nothing. If we suppose two wives of equal rank living in different houses, these things are almost inevitable. The living and eating in a separate house has been accounted for long ago:—It is convenient and tends to prevent broils, as between the two wives Aung Myat would naturally go with first Defendant-Respondent, the elder and the chief wife. Here the Additional Judge apparently overlooked the visit which Plaintiff-Appellant made to Shwezettaw with Aung Myat when first Defendant-Respondent was not there: also the fact that Plaintiff-Appellant had (grown up) sons by a previous marriage who lived with her and for whom *thathameda* had to be paid.

The Additional Judge's view of the Plaintiff-Appellant's visits to the *zayat* does not do justice to the evidence of the witnesses already referred to in this connection. It also overlooks the statement of the second witness for the Defendants-Respondents, the same Mi Kin already mentioned, to the effect that she *found Plaintiff-Appellant at ceremonies and also at zayats with Aung Myat and first Defendant-Respondent.* Coming from a witness on Defendants' side, this statement is entitled to great weight.

As to whether Plaintiff-Appellant assisted Aung Myat in his business, there is the statement of the first witness for the Defendant, Mi O, who said that generally *Twinza's* wives do not assist in the management of the wells. [3 P.] Sulaiman, the Burma Oil Company's Head Clerk, gave evidence consistent with this, when he said that Aung Myat used to transact business

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himself. Then (4 D.) Aung Zin and (5 D.) Nga Wa said that they saw first Defendant-Respondent go on several occasions and supervise work at the wells, and that they did not see Plaintiff-Appellant do this. But as the first of these witnesses admitted, they did not live at Twingôn whereas (16 P.) Shwe Hlaing, (17 P.) Nga Sin and (18 P.) Aung Myat did. And on the other hand (6 D.) Tha Ku "Did not find first Defendant-Respondent doing oil-well business at home".

I do not repeat what is already noted above as to Plaintiff-Appellant having admittedly assisted in borrowing money for the oil-well business of Aung Myat, and as to her having accompanied Aung Myat on one occasion when he went to Rangoon on oil-well business while first Defendant-Respondent accompanied him on another occasion.

The reasonable conclusion surely is that as far as there was anything for a wife to do in the matter of the oil-wells, Plaintiff-Appellant did as much as first Defendant-Respondent.

Then as to the loans made by Plaintiff-Appellant and Aung Myat on Exhibits H and I, I am unable to agree with the Additional Judge. It is not correct to say that (12 P.) Yin Gale could not identify the document, Exhibit H. He said that *he wrote Exhibit H*; and that he did not remember whether the executants were present was not very material. He was an elderly man and might have forgotten. Again the fact that Plaintiff-Appellant sued alone on Exhibit I, does not show that it was not executed by Aung Myat.

As to the Plaintiff-Appellant's attendance on Aung Myat in his illness, I do not think the Additional Judge was at liberty to say that when (11 P.) Aung Gyi stated that he found Plaintiff-Appellant attending on Aung Myat he meant something else. The evidence of the witnesses for the defence, to whom the Additional Judge refers, does not in my opinion prove that Plaintiff-Appellant did not do her duty in this matter. (1 D.) Mi O said that out of four or five visits she paid, she found Plaintiff-Appellant on one occasion sitting by Aung Myat and (5 D.) Nga Wa that out of ten to fifteen visits he paid, he found Plaintiff-Appellant on one occasion, two days before Aung Myat died, sitting by him. The fact that (4 D.) Aung Zin made a single visit of an hour's duration during Aung Myat's illness and did not see Plaintiff-Appellant there then, goes for nothing. (7 D.) Nga Nyein the only witness who said that Plaintiff-Appellant did not attend on Aung Myat, was admittedly indebted to first Defendant-Respondent and cannot be implicitly credited on that account. Besides, there is nothing to show how he could have known that Plaintiff-Appellant did not attend.

The only one of the points which the Additional Judge took against Plaintiff-Appellant which has anything in it, is the fact that *Aung Myat gave her three wells*, and the question is whether that is sufficient to negative the inference suggested by

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all the circumstances in the case which tend to show that Plaintiff-Appellant had the status of a wife entitled to inherit.

On consideration, my opinion is that it is not sufficient. Aung Myat similarly gave wells to first Defendant-Respondent's children. It might have been a convenient method of arranging for Plaintiff-Appellant's maintenance during his life time.

The Additional Judge's remark that Plaintiff-Appellant "stole" first Defendant's "husband", &c., appears to me to beg the question. There is no prohibition in the Buddhist Law against a man marrying two sisters: and although there may be some popular prejudice against it, that is not sufficient to override the facts proved and admitted in the case, which show that Aung Myat did marry Plaintiff-Appellant. There is no evidence that he was considered by anybody to have committed a moral offence by doing so. The point is in fact irrelevant.

It is unnecessary to refer further to the Lower Court's finding that if Plaintiff-Appellant was a wife she was not entitled to inherit.

On the facts found as above noted, I am of opinion that Plaintiff-Appellant was satisfactorily proved to be a wife entitled to inherit, on an equal footing with first Defendant-Respondent. I set aside the Lower Court's decree and grant one to this effect. Defendants-Respondents will pay Plaintiff-Appellant's costs in this Court.

Before G. W. Shaw, Esq., C.S.I.

Criminal Revision No. 685 of 1911. March 14th, 1912.

NGA SAN MYIN *vs.* K. E.

Mr. *San Wa*—for Applicant. | Mr. *H. M. Lütter*—for the Crown.

Criminal Procedure—360.

It is the duty of a Judge or Magistrate to read over himself or have read in his presence and make necessary corrections in, the depositions of witnesses in the presence and hearing of the accused or his pleader.

Nga Paw U vs. *K.E.* U.B.R., 1907—09, I, Crl. Pro., 1; *Begu Singh* vs. *Emperor*, XI C.W.N., 568; *Kamachanadhan Chetty* vs. *K.E.*, I.L.R., 28 Mad., 308; *Mohendra Nath Misr* vs. *Emperor*, XII C.W.N., 848; *Jyotish Chandra Mukarji* vs. *Emperor*, I.L.R., 36 Cal., 95 and XIV C.W.N., 82.

The Applicant was a witness for the defence in a Criminal Regular case before the District Magistrate. He was examined on the 29th August 1911 and the District Magistrate pronounced judgment in the case on the same day. On the 18th of September following, the District Magistrate made an order under section 476, Criminal Procedure Code, directing the Applicant to be arrested and sent before a Subordinate Magistrate on a charge of giving false evidence under section 193, Indian Penal Code. Those proceedings are now stayed pending the result of this application.

It is contended that the Magistrate's order under section 476 was bad and ought to be set aside for two reasons; first because it was made twenty days after the conclusion of the case in which

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the alleged false evidence was given, and secondly because the Applicant's deposition was not read over to him in the presence of the accused or his advocate or, even in the presence of the Magistrate as required by section 360, Criminal Procedure Code, and was therefore inadmissible as evidence of the alleged false statement.

The subject of interference by the High Court in revision with an order passed under section 476, Criminal Procedure Code, and the circumstances under which such interference is proper were explained in *Nga Paw U vs. K. E.* (1)

On the first point raised by the Applicant, there has been some conflict of opinion. It is sufficient to refer to the full bench case of *Begu Singh* vs. *Emperor* (1907) (2) where it was held that an order under section 476, Criminal Procedure Code, should be made at, or soon after the conclusion of the Judicial proceeding referred to in the section. I do not think it necessary to go further into the question here, because I find that on the 1st of September the District Magistrate ordered some "preliminary enquiry" to be made by the Police with a view to proceedings under section 476, and the order in question was made after the receipt of the Police report. Although I do not think that section 476 contemplates a Police investigation, it cannot be said in the foregoing circumstances that the Magistrate only thought of proceeding against Applicant under the section after 20 days.

On the second point, the application is supported by an affidavit to the effect that the deposition was read over to the Applicant by the Bench Clerk in the verandah of the Court House and not in the presence of the Magistrate or the accused or his Advocate. And the Government Prosecutor who has been heard in support of the order admits that, according to information received from the Magistrate, the affidavit is correct adding however that Applicant and the Clerk were in view of the accused and his Advocate. He further admits that what section 360, Criminal Procedure Code, evidently requires is that the deposition should be read over in the hearing of the accused or his Advocate.

The practice followed in recording the Applicant's deposition, has been the subject of several High Court decisions, *e.g.*, *Kama chanadhan Chetty* vs. *K. E.* (1904) (3) *Mohendra Nath Misr* vs. *Emperor* (1908) (4); *Jyotish Chandra Mukurji* vs. *Emperor* (1909) (5) In all these cases, it meets with condemnation. Manifestly it is a gross infraction of the plain provisions of section 360, Criminal Procedure Code. It is the business of the Judge or Magistrate in Burma to record the statement of the witness, and it is therefore his business to correct any errors which may require correction. He cannot do this efficiently unless the deposition is read over in his presence and hearing. The section further

(1) U.B.R., 1907-09, I, Crl. Pro., 1. | (2) XI C.W.N., 568.
(3) I.L.R., 28 Mad., 308. | (4) XII Cal. W.N., 848
(5) I.L.R., 36 Cal., 95 and XIV, C.W.N., 82.

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requires that this shall be done in presence of the accused or his Pleader obviously with the view that the accused or his Pleader may have the opportunity of checking the correctness of the deposition. The reading over of the deposition is as important as the recording of it, and it is not permissible to hand over the business to a Clerk to carry out in a verandah or elsewhere while the Judge or Magistrate proceeds to examine another witness or do something else. Even if the verandah or other place were within hearing, the attention of the presiding officer and the accused and the advocate would be engaged on the business then before the Court, and they would not be in a position to notice what was read over or what corrections were made.

There is a further special reason why the practice in question cannot be allowed, namely, that section 91 of the Evidence Act, makes the record of a witness's statement the only evidence of that statement, and under section 80 of the same Act, it is admissible only if it was taken in accordance with law. It is from this point of view that the illegality of the practise arises in the present case.

In directing the Applicant's prosecution on the basis of a deposition recorded in the manner described, the District Magistrate clearly exercised an improper discretion.

The order passed under section 476 is set aside.

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

Civil Appeal No. 60 of 1911.

MI SAW MYIN, NGA PO SWE } *vs.* { MI SHWE THIN. MI SHWE TIN.

February 26th, 1912.

Mr. Burjorjee—for Appellants. | *Messrs. Chatterjee and S. Mukerjee*—for Respondents.

Buddhist Law—Inheritance.

Held,—following *Ma Min Tha* vs. *Ma Naw*, II, U. B. R., 1892—96, p. 581, that under Buddhist law on the death of a husband his widow succeeds to the estate with the exception of certain specified property and one-fourth of the estate which go to the eldest son and of certain specified property which goes to the eldest daughter, that with the exception of this portion the widow is at liberty to spend the whole of the estate, if she chooses to, and not merely for necessities, and that the texts of the *Dhammathats* on which the doctrine that the widow can only spend the estate for necessities is based, refer to the spending of the specified property set apart for the eldest daughter and not to the spending of the bulk of the estate.

Ma Taik and one vs. *Ma Myin and one*, U. B. R., 1897—01, II, page 193. *Ma Pon and two* vs. *Maung Po Chan and two*, U.B.R., 1897—01, II, p. 116. *Ma Nyo and 5* vs. *Ma Yauk*, IV, L.B.R. 256, *Ma Pe and one* vs. *Ma Thein Yin* IV, L. B. R. 287, *Ma On* vs. *Shwe O*, S. J. L. B., 378, *Ma Min Tha* vs. *Ma Naw*, U. B. R, 1892—96, II, 581, *Nga Shwe Yo* vs. *Mi San Byu and others*, S. J. L. B., 108, *Maung Po Lat* vs. *Mi Po Le*, S. J. L. B., 212.

The Plaintiff-Respondent Ma Shwe Thin is the daughter of Maung Tha Zin by his wife Ma Po. It has been suggested that her legitimacy has not been proved, but the Defendants-Appellants were not entitled to raise the point as they did not raise it in their written statement. In 1896 when Ma Shwe Thin was a

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child of about five, Maung Tha Zin, who lived with his wife Ma Po at Yenangyaung, went up to Mandalay to prosecute an appeal before this Court. He never returned; and died at Mandalay in 1263.

Before he went to Mandalay he mortgaged an oil-well to the Defendant-Appellant Ma Saw Myin's father, Maung Chit Po, for Rs. 2,500. After his death Ma Po executed a deed of sale of this well in favour of Ma Saw Myin who had succeeded to a portion of Maung Chit Po's estate on his death.

In 1910 the Plaintiff-Respondent Ma Shwe Thin brought a suit for redemption of the oil-well, alleging that Ma Po had been divorced from Maung Tha Zin before his death, that she therefore had no power whatever to alienate his property and the sale was void and the mortgage was still in existence and capable of being redeemed.

Six days later the Plaintiff-Respondent Ma Shwe Tin, brought another suit for redemption alleging that she was a daughter of Maung Tha Zin by his wife Ma Kyi, deceased, that she was entitled to a share of his estate and that therefore she too had a right to redeem.

The two suits were tried together.

The Defendants-Appellants denied that Ma Po had been divorced, and pleaded that she had power to sell the well for a legal necessity. They also pleaded that they had done everything possible to obtain a good title, and for this purpose had insisted upon Ma Po's obtaining a Succession Certificate and that the sale having been effected in good faith could not now be impeached. They also pleaded that a suit for redemption would not lie as long as the deed of sale was uncancelled, and that a suit for its cancellation would be barred by limitation. They denied that the Plaintiff-Respondent Ma Shwe Tin was Maung Tha Zin's daughter, and alleged that even if she were his daughter she was illegitimate, and that even if she were legitimate, she was not entitled to inherit.

The learned Additional Judge framed the following issues:—

1. Whether Ma Shwe Tin was the legitimate daughter of Maung Tha Zin?

2. Whether Ma Po had a right to sell the whole or any part of the well, and could pass a valid title thereto?

3. Whether Ma Po was divorced or not?

4. Whether the suit was time-barred?

He decided the first issue in the affirmative, and also the third. In dealing with the second issue, he went far astray owing to his failure to understand what a Succession Certificate is. A Succession Certificate is a certificate granted to a person entitled to succeed to the whole or part of the estate of to a deceased person to enable him to collect debts due to the deceased. It does not empower the holder to alienate any of the deceased's estate or to do anything except recover the debts due to the deceased. The certificate has been produced, and the only debt entered in

the schedule is the mortgage debt of Rs. 2,500. But that was a debt due by Maung Tha Zin, not *to* him. How the certificate came to be granted is not easy to see.

The learned Advocate for the Defendants-Appellants says that of course what Ma Po really required was letters-of-administration, and he contends that the District Court should have treated her application for a Succession Certificate as an application for letters-of-administration and granted her letters, and he has gone so far as to suggest that the Succession Certificate should be treated by this Court as letters-of-administration. It is unnecessary to do more than mention this extraordinary proposition.

The learned Additional Judge found that Ma Po, having been divorced, had no power to dispose of the well, and that the sale was void.

He found that the suit was within time, and granted a decree for redemption to the two Plaintiffs-Respondents jointly.

The Defendants-Appellants have now appealed on various grounds, and the Plaintiff-Respondent Ma Shwe Thin has appealed separately against the findings of the District Court that the Plaintiff-Respondent Ma Shwe Tin is Maung Tha Zin's legitimate daughter, and that she is entitled to redeem the well.

The line of argument taken on behalf of the Defendants-Appellants is that the divorce set up was not proved and was inconsistent with Ma Po's conduct, that she being Maung Tha Zin's widow had power to dispose of his estate for a legal necessity, that as there is no evidence to the contrary (the mortgage bond was not proved) it must be presumed that the mortgage was a simple one, because a simple mortgage is the ordinary form of mortgage; that the payment of the mortgage debt was thus a legal necessity; that as a matter of fact though the purchase money is stated in the deed of sale to be Rs. 2,500 the amount of the mortgage debt—a sum of Rs. 400 was paid in cash in addition. This is the main argument, but it is further urged that the Plaintiff-Respondent Ma Shwe Thin had failed to keep up filial relations with her father, and was therefore not entitled to inherit his estate.

In my opinion the line of argument taken up cannot succeed at all, because it is clear that no legal necessity was proved. In Upper Burma the usual form of mortgage is not simple but usufructuary, and if an exception be claimed in the case of mortgages of oil-wells, that exception should have been proved. Moreover, it is not suggested that any interest was provided for, and there is no evidence of any demand of the principal. Every thing points to the mortgage having been usufructuary, and the fourth paragraph of the Defendants-Appellants' written statement shows clearly that it was so.

There was therefore no necessity whatever to pay off the mortgage-debt, and the sale was clearly not for Ma Shwe Thin's benefit. As to the payment of Rs. 400, I would say that, apart from Mr. S. Mukerjee's objection that if such a payment were

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made there was a fraud committed on the Stamp Revenue and the Defendants-Appellants should not be allowed to rely upon their own fraud, the payment of this sum as part of the purchase money cannot be proved, as evidence of such payment would contradict the terms of the deed of sale. It is contended that payment of consideration can always be proved under Explanation 3 to section 91, Evidence Act. But that Explanation has no application, as the payment of Rs. 400 is not mentioned in the document. The document says that the well was sold for Rs. 2,500, and oral evidence to the effect that it was sold not for Rs. 2,500 but for Rs. 2,900 is clearly inadmissible under section 92, Evidence Act.

In reply to the second argument to the effect that the Plaintiff-Respondent Ma Shwe Thin was not entitled to inherit her father's estate because she had not maintained filial relations with him, Mr. Chatterjee has urged that Ma Shwe Thin was a small child when her father went to Mandalay and had no opportunity of exercising any choice in the matter, and Mr. S. Mukerjee on behalf of the Plaintiff-Respondent Ma Shwe Tin against whom the same argument has been adduced has cited *Ma Taik and one* vs. *Ma Myin and one*(1) in which it was held that the Buddhist Code does not give any meritorious value to mere living together or make the opposite state of things a reason for exclusion from inheritance. But in that case there was no divorce, and the question therefore was whether the child was excluded from inheritance as—to quote the *Dhammathats*—a "child like a dog", and it was held that mere absence of joint living was not sufficient to exclude: there must be proof of intentional neglect. It is, I think, established that where there has been a complete divorce, a daughter who goes to live with her mother and does not maintain filial relations with her father is not entitled to inherit the latter's estate on his death. It is not necessary to do more than cite *Ma Pon and two others* vs. *Maung Po Chan and two others* (2) in support of this rule. The last words of the heading to that ruling are important: "When there has been a division of property at the time of the divorce." If there is no division of property at the time of the divorce, the divorce is not complete.

Now, in the present case, it is not alleged that there was any formal divorce. Maung Tha Zin left Yenangyaung for Mandalay on legitimate business and never returned, and after leaving Yenangyaung he never had any communication with Ma Po. It is alleged that the separation, coupled with the neglect, gradually became desertion, and that after a time Ma Po became automatically divorced. It is also alleged that Ma Po took another husband before Maung Tha Zin's death, and that this fact evidenced her intention of putting an end to the marriage tie, which

(1) II, U. B. R., 1897—01, p. 193.
(2) II, U. B. R., 1897—01, p. 116.

she was entitled to do, and completed the divorce. The evidence that she took another husband before Maung Tha Zin's death is not very clear, but I do not think it is necessary to go into the point, because for the purposes of this case I think it is quite immaterial whether there was a divorce or not.

In the present case there was apparently no quarrel and no intentional desertion at first, and consequently the texts cited in section 312 of U Gaung's Digest do not apply. In sections 244 and 245 a large number of texts are cited, which lay down the number of years which a wife must wait, when her husband has gone on a journey, before she is entitled to take another husband. They do not agree, but shortly the rule may be stated thus: if the husband takes another wife during his absence, the first wife must wait till three years, otherwise she must wait a longer time, depending upon the purpose for which the journey was undertaken. Though in many texts it is laid down that if the wife takes another husband without waiting the requisite number of years she is to forfeit all the joint property, curiously enough, with the exception of the *Vicchedani*, none of the texts say what is to become of the joint property if the husband does not return. The text from the *Vicchedani*, runs as follows: "If the husband who has gone on a journey marries again, his former wife shall wait for him three years. If he does not return after the expiry of that period, let her take possession of all the property and free him from all conjugal obligations to her."

This seems to be the obvious rule, because the wife would be entitled to divorce owing to her husband's fault and would therefore be entitled to all the joint property. And it seems likely that the rule is not mentioned in the other *Dhammathats*, because as the joint property would naturally be left in the wife's possession or under her control, it was considered that the rule was so obvious that it was unnecessary to mention it.

Assuming then that Ma Po married again before Maung Tha Zin's death and that she thereby became divorced from him, the oil-well in suit became her property and not that of her daughter, and she had an absolute right to dispose of it, as she thought fit, and even if she had mortgaged it and not sold it, her daughter could have no right to redeem it during Ma Po's life-time.

As the Plaintiff-Respondent Ma Shwe Thin based her suit on her mother's divorce, the above finding is sufficient to dispose of her suit. But as it has been urged on behalf of the Defendants-Appellants and tacitly admitted on behalf of the Plaintiffs-Respondents that on the death of a husband, the widow has not an absolute right over the whole property but only a limited interest in it and that she cannot alienate it except for a legal necessity for the benefit of her children, I think it is necessary to point out, that though this view has been accepted in many cases in Lower Burma, the latest of which are *Ma Nyo and five others* vs. *Ma*

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Yauk (1) and *Ma Pe and Kyu Min* vs. *Ma Thein Yin* (2) in which the ruling *Ma On* vs. *Shwe O* (3) was followed and it was held that "a widow according to the Burmese Buddhist law of inheritance has an absolute interest in half of the property which had been jointly owned by her deceased husband and herself, and that in the remaining half she has only a life interest with power of selling it in case of necessity," it is opposed to the ruling of this Court in *Ma Min Tha* vs. *Ma Naw* (4) in which it was held that "the heir of a deceased husband under Buddhist law is his widow and not any of his children (except the eldest son in respect of a fourth of the estate) until the death of the widow, and the children have no such interest in the estate as is contemplated in section 91, Transfer of Property Act."

The Chief Court of Lower Burma has followed *Ma On* vs. *Shwe O* (3), and in that case the opinion of Mr. Jardine expressed in *Nga Shwe Yo* vs. *Mi San Byu and others* (5) on this particular point was accepted, but it seems to have escaped the notice of the Special Court that Mr. Jardine to a great extent resiled from this opinion in *Maung Po Lat* vs. *Mi Po Le* (6) in which he said: "Under the first issue it is necessary in deciding the present case, to allude to the doctrine in *Nga Shwe Yo's* case, that a widow may not, without the children's consent, unless for sufficent cause, alienate the joint property. Since then the Buddhist law has received great attention and new authorities are available. I would hesitate to apply that doctrine except very cautiously and to particular circumstances."

The text on which the doctrine is based is section 5 of the 10th Book of the *Manukyè Dhammathat* (Richardson's translation) which deals with the partition of the estate on the death of the father and runs: "Let the eldest son have the riding horse, etc.,..... Let the residue be divided into four parts, of which let the eldest son have one and the mother and younger children three. This is the law when the mother does not marry again. If the mother uses the property for necessary subsistence let her have the right to do so."

It was noticed that section 11 was apparently inconsistent with section 5, and an attempt was made to reconcile the two texts.

Since then a large number of texts have become available. Those most applicable to the present case are collected in section 31 of the Digest, which deals with the partition between mother and daughter on the death of the father.

The first text quoted is from the *Mano* and runs as follows:—

"The daughter shall get the bracelets, belt and ornaments given her before the death of the father and by both parents. She shall also get out of the estate one family of slaves,

(1) 4, L. B. R., 256.
(2) 4, L. B. R., 287.
(3) S. J. L. B., 378.
(4) II, U. B. R., 1892—96, 531.
(5) S. J. L. B., 108.
(6) S. J. L. B., 212.

one pair of bullocks and a fair portion of seed paddy and peas. The mother shall get the rest of the property. Although the daughter is the off-spring of the father, still it is the mother who has direct control over her. Should the mother exhaust the property during her lifetime, let it be so ; but if anything is left unexhausted the daughter shall get it."

The *Pyu Dhammathat* gives the same rule. So also the *Kaingza*. The *Myingun* says : " The mother shall get the rest of the property and on her death the daughter shall get what is left."

The *Dhammathat Kyaw* says: " The mother shall get the rest of the property animate and inanimate."

The *Dhamma* runs as follows :—

" The eldest daughter shall have one female slave, two milch-cows, one pair of buffaloes, one *pè* of land, and a quantity of Indian corn, paddy, millet, barley and sessamum sufficient for seed purposes. The mother and younger daughters shall get the rest of the property animate and inanimate. Should there be no such property as enumerated above but only gold and silver, payment must be made in silver according to the following valuation .....But the mother is at liberty to sell them and maintain herself if such a course is necessary."

Clearly in this passage it is to sell the special property reserved for the eldest daughter in case of necessity that power is given. The passage relating to selling in a case of necessity does not refer to the bulk of the property at all.

The *Manukyè* gives very much the same rule and ends thus : " Partition of each kind should be made only when there are three or four female slaves, ten each of buffaloes, bullocks and goats and 25 *pès* of land. The above is the mode of partition when the mother does not marry again. She is at liberty to exhaust (the property) when spent on necessaries. The word ' property ' does not occur in the original text."

With this must be compared the rule given in the same *Dhammathat* for partition between mother and son on the death of the father in section 30 of the Digest. It runs : " The son shall get his father's elephant, pony, cup, sword, wearing apparel and bearers of the goblet and betel-box. The mother shall get her wearing apparel, cups, ornaments and female slaves. The rest of the property shall be divided into four shares and the mother and younger children shall take three shares. This is the rule of partition when the mother does not marry again. If the property is exhausted by the mother, nothing shall be said about it."

It is to be observed that no mention is made of any necessity.

The *Kandaw Dhammathat* says : " The mother shall get the rest of the property. Although the daughter is the off-spring of the father, yet it is the mother, who controls her and brings her up from childhood. The daughter shall get on the death of the mother what is left unexhausted by her. "

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The *Vannadhamma* says : " Why should not the eldest daughter being like the eldest son an off-spring of the father get ¼ share of the inheritance? Because the daughter is entirely controlled by the mother and the property left unexhausted by the mother after use during her lifetime devolves on the daughter when the mother dies."

The *Rasi* says : " If the mother exhausts the property during her lifetime, let it be so."

Vinnicchaya says : " The rest of the property animate and inanimate shall be taken by the mother. Should the estate be large enough the mother ought to give the daughter a suitable share in addition." This is plainly a moral precept.

The *Manuvannana* says : "If the daughter lives with the mother she is not entitled to get any property although she is the offspring of her father. If the mother exhausts the property during her lifetime in her own use, or in maintaining her second husband or in performing works of merit, she commits no fault."

The rest of the texts quoted in section 31 of the *Digest* are to the same effect with the exception of the *Amwebon* and the *Kyannet*. Of these, the former after stating what particular property is to be given to the eldest daughter and that the rest is to go to the mother and younger daughters, says : " Partition should be made only when there are three or four female slaves, ten each of buffaloes, bullocks and goats and 25 *pès* of land. The above is the mode of partition, when the mother does not marry again. She is at liberty to exhaust the property when required for necessaries." The word " property " has been inserted by the translator.

It will be seen that this is the same rule as that given in the *Manukyè*, and the rule given by this *Dhammathat* for the partition between mother and son on the death of the father is also the same as that given by the *Manukyè*.

The last few lines of the text from the *Kyannet* are as follows in the English translation : " On the death of the mother the daughter is entitled to her property. *Let the mother have a life interest therein* ; and should she exhaust the property during her lifetime, let it be so ; the unexhausted portion, if any, shall be enjoyed by the daughter subsequently."

I venture the opinion that this translation is not accurate. The underlined passage in Burmese is as follows : အမိသတ်ရှည်သမျှစား ပါစေ။ The word စား means literally to " eat ", " corrode ", ' consume," and that it is not used in the special sense in which it is used in the expression ဖြုန်းစား is shown by the words which immediately follow, *viz.*, အဖိုးခံမြဲထုန်သော်ထုန်ပါစေ။ I would say that the next English equivalent of the word စား in this passage is " spend," and the translation should run " let the mother spend (the property) as long as she is alive, and if she spends it all, let her do so."

It will thus be seen that the only *Dhammathats* which lend any colour at all to the doctrine that the widow can only spend her deceased husband's property in a case of necessity are the *Dhamma*, the *Manukye* and the *Amwebon*, and that in each instance the passage is immediately preceded by a clause to the effect that if there is not a sufficient quantity of certain specified property, a portion of which should ordinarily be given to the eldest daughter on the death of her father, then this division is not to be made. The inference is irresistible that the clause in which necessity is referred to is governed by the clause, which immediately precedes it, and that the rule is as follows: "On the death of the father certain specified property is allotted to the eldest daughter and the remainder goes to the widow and is her absolute property, but that if there should remain insufficient property for the maintenance of the widow and younger children, were the eldest daughter to take her allotted share, then the widow is at liberty to spend even this specific property for the maintenance of herself and her children.

This interpretation is borne out by the texts which relate to partition between the mother and the eldest son on the death of the father. The eldest son gets certain specified property, the mother gets other specified property, one-fourth of the remainder goes to the son and the rest to the mother. Nothing whatever is said in any of the *Dhammathats* about the mother having the right to dispose of any property whatever in a case of necessity. The inference is that in this case the three-fourths share which goes to the widow is her absolute property to do what she will with, and that even in the case of necessity she has not a right to dispose of the specified property, which goes to the eldest son or the one-fourth share which is his portion. Why should this difference be made between the eldest son and the eldest daughter? The answer is given by many *Dhammathats*: The eldest son is obtained through the prayers of the parents and has helped in the acquisition of the property. The eldest daughter is completely under the control of her mother, whereas the eldest son is not.

In the present case the oil-well in dispute cannot possibly be brought into the category of property set apart for the eldest daughter, and I therefore hold that, assuming that Ma Po was not divorced from Maung Tha Zin, the oil-well became Ma Po's absolute property on his death unless he left other heirs besides Ma Po's daughter, and that on Maung Tha Zin's death the first Plaintiff-Respondent Ma Shwe Thin acquired nothing more than a contingent interest in the oil-well and that she lost this contingent interest on Ma Po's selling the well.

Therefore whether Ma Po was divorced or not, the Plaintiff-Respondent Ma Shwe Thin's suit was not maintainable.

With regard to the Plaintiff-Respondent Ma Shwe Tin's claim to redeem, very little need be said.

The Defendants-Appellants denied that she was Maung Tha Zin's daughter. It was therefore necessary for her to prove this.

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There is evidence of a somewhat dubious nature that Ma Kyi was Maung Tha Zin's wife before he married Ma Po and that he had a daughter by her and that that daughter was named Ma Shwe Tin. But there is absolutely no evidence whatever that the Plaintiff-Respondent Ma Shwe Tin is that daughter. Ma Kyi is dead and the witnesses who depose to her giving birth to a daughter begotten of Maung Tha Zin lost sight of that daughter when she was a few months old. I am practically asked to decide that Ma Shwe Tin is Maung Tha Zin's daughter on the statements of a few witnesses to the effect that she resembled him. That I decline to do. I was also asked by her Advocate to summon her and the Plaintiff-Respondent Ma Shwe Thin before me, so that I might note whether there was a family likeness, I declined. If I had done so and had not noticed any resemblance nothing would have been gained and if I had fancied that there was some or even a marked resemblance between the two, I should have declined to be guided by my fancy. For aught that appears to the contrary, Ma Shwe Tin may be an absolute imposter, who is using a possible resemblance to the Plaintiff-Respondent Ma Shwe Thin as a means of obtaining a share in an estate to which she has not a shadow of a claim.

I do not of course say that this is so, but there is not even the least particle of real evidence that Ma Shwe Tin is Maung Tha Zin's daughter, and therefore her suit must fail.

The decrees of the District Court are accordingly set aside and both suits are dismissed with all costs.

Before G. W. Shaw, Esq., C.S.I.

Criminal Revision No. 694 of 1911. March 21st, 1912.

MI NGWE v. MI CHIT.

Mr. S. Mukerjee—for applicant. | *Mr. F. C. Chatterjee*—for Respondent

Criminal Procedure—195.

Penal Code, 182—211.

Where a complaint was made with respect to an alleged false charge of theft made on information laid with the Police.

Held,—that the offence complained of fell under section 211, as well as under section 182 and therefore the sanction of the Police Officer was not required.

Government of Bengal v. *Gokul Chandar Chaudhri*, XXIV W.R., 41 ; *Puti Ram Ruidas* v. *Muhammad Kasim*, III C.W.N., 33 ; *Empress* v. *Jagat Chandar Mozumdar*, III C.W.N., 491.

It is admitted before me that Respondent, Mi Chit, on the 24th June last, laid information at the Police station, charging Applicant, Mi Ngwe, with theft of her jewellery. On the 30th July the Police reported that the information was false.

On the 3rd August, the Applicant made a complaint to the Senior Magistrate, praying that process might issue against Respondent on charges under sections 182 and 211, Indian Penal Code, with respect to the information. The Senior

Magistrate transferred this complaint to the Additional Magistrate for disposal.

On the 10th August, Respondent made a complaint to the Senior Magistrate identical with her previous information to the Police. The Senior Magistrate transferred this complaint also to the Additional Magistrate for disposal. The Additional Magistrate postponed proceedings on the Applicant's complaint and enquired into the Respondent's complaint. In the end, on the 25th September he discharged the Applicant and classified the case as false, and reported that as he had come to this conclusion, he thought it unfair to the Respondent, that he should enquire into the Applicant's complaint.

The District Magistrate held that either a complaint from the Police authorities or their sanction was necessary to a prosecution under section 182, Indian Penal Code, and therefore the Magistrate could not proceed unless the Applicant applied for and obtained the necessary sanction. The Additional Magistrate thereupon discharged the Respondent.

Applicant comes here in revision on the ground that no sanction was required to a prosecution under section 211, Indian Penal Code, with respect to the information which Respondent laid at the Police station on the 24th June. It is only necessary to read section 195, Criminal Procedure Code, to see that this objection must be sustained. But there have been several rulings to this effect of which the following may be mentioned:—

Government of Bengal v. *Gokul Chandar Chaudhri*, 1875[1] *Puti Ram Ruidas* v. *Muhammad Kasim* (1895)[2] and *Empress* v. *Jagat Chandar Mozumdar* (1899) [3].

Intentionally making a false charge of theft against some one in an information laid at a Police station no doubt comes within section 182, but it does more. It also comes within section 211 and is therefore a very much more serious case, than the cases given in the illustrations to section 182, in which the information does not amount to an offence under section 211. The ordinary rule is that where a given set of facts constitutes an offence under more than one section of the Indian Penal Code proceedings should be with respect to the more serious offence.

Hence in the present case, it was for the Additional Magistrate on receiving Applicant's complaint to proceed on the more serious charge, that is, on the charge falling under section 211, and, as no sanction was necessary to such proceedings, the Respondent was improperly discharged.

The learned Advocate for the Respondent before me has attempted to argue that as the Respondent repeated her information in her complaint to the Magistrate of the 10th August, the alleged false charge should be considered to have been one made to a Magistrate and therefore to require sanction

(1) XXIV W. R., 41. (2) III C. W. N., 33.
(3) III C.W.N., 491.

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under section 195 (1) (*b*). But I am of opinion that this contention is not sustainable. A man may make a false charge on more than one occasion, and if he does so, he is responsible for what he did on each occasion.

Under section 437, Criminal Procedure Code, I direct that the District Magistrate by himself, or by some subordinate Magistrate, make further enquiry into the complaint of the Applicant on which the Respondent was discharged.

The Additional Magistrate's report of the 25th September was a proper one to make, and the District Magistrate should not direct the Additional Magistrate to make the further enquiry now ordered.

Criminal Revision No. 245 of 1912.

May 21st 1912.

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

ABDUL RAHMAN v K.-E.

Mr. R. C. J. Swinhoe, for Applicant. | *Mr. H. M. Lutter,* for the Crown.

Penal Code—363.

Where a female minor went to the house of a mutual friend and had sexual intercourse with the accused, she having previously had sexual intercourse with the accused in the presence and with the consent of her guardian, her mother, in her mother's house.

Held—that the accused could not be convicted of kidnapping as there was no taking of the minor; and even if there was a constructive taking, as the mother was proved to have connived at the seduction of her daughter, there is reason to believe the subsequent taking was effected with her consent.

Nga Shwe Thwe vs. K.-E., U.B.R. 1907—09, I, Penal Code, I.

K.-E. vs. Asgar Ali, U.B.R. 1907—09, I, Penal Code, 27.

Ratan Lal's Law of Crimes, Primell's case (1858), 1 Foster and Finlayson, page 50.

The accused, Abdul Rahman, was convicted under section 363 of the Indian Penal Code and sentenced to one year's rigorous imprisonment and to pay a fine of Rs. 350, in default of which to undergo a further term of rigorous imprisonment for six months. The fine, if realized, to be paid as compensation under section 545 (1) (*b*), Criminal Procedure Code, to the complainant.

The accused appealed to the Sessions Judge, and the conviction and sentence were upheld. From this order, on the 7th March 1912 the applicant, through his advocate, Mr. Swinhoe, applied for revision.

My learned predecessor at once ordered the release of the accused on bail on two sureties of Rs. 75 each, and ordered the District Magistrate to instruct the Government Prosecutor to appear in support of the conviction and sentence, and fixed the hearing of the case for the 16th of May. On that day, Mr. Swinhoe appeared for the applicant and Mr. Lutter for the Crown.

I have heard the learned advocates on both sides. The evidence recorded before the District Magistrate and the judgments of both the Courts were read and I reserved orders.

This is an extraordinary case. The complainant apparently was the girl's brother, H. S., and not the mother. The mother, on her own statement, is a woman who has led a very sordid and chequered life. She is of Portugese and Chinese extraction, and was born at Macao She became the mistress of a German and subsequently, she says, she married him. After the death of the German she married a Muhammadan and became a Muhammadan, and she has still a child with her, the issue of that marriage. Subsequently she left the Muhammadan and described herself as a Protestant, but it is somewhat extraordinary to find that the woman is described by her daughter, as being still a Muhammadan. The daughter, the girl who is alleged to being kidnapped, is a girl of 16 years of age, and it is not denied that she was under sixteen at the time of the alleged kidnapping. There is also a son, a boy of 18. The mother is dependent on her son for her livelihood, and at the time of the occurrence, the boy was earning a precarious livelihood as a sort of assistant in a coffee shop kept by the accused.

It is not denied by the prosecution that after this woman and her family came up to Meiktila, they became practically dependent on the accused, because he gave the boy work in the shop and the mother was dependent upon him. The mother is evidently a thoroughly untrustworthy witness. She denies that she ever married a Muhammadan or became a Muhammadan, but in this she is contradicted by her own daughter. The mother and her family were living in a house which the accused provided for them. The accused apparently is a boy of 18, the son of a respectable man * * * who holds a good position, and who appears to have acted in a very sensible manner.

The girl has made two statements, and the Court apparently has accepted the second as correct. She at first said that she went away from her mother's house to the house of a gharrywalla in company with the accused because he enticed her to do so. She apparently stayed there two days, and then was taken back by the accused's father to her mother. She stated she was again enticed away by the accused. There are many facts and circumstances even in the first account she gave which make it very difficult to believe that the girl and her mother were acting straightforwardly. The case for the prosecution was that the complainant was an innocent Christian Eurasian widow with a young daughter who has been abominably seduced and ruined by a young Muhammadan scoundrel, and this was the justification for the finding and heavy sentence passed by the Court upon the accused. But on cross-examination this theory of the prosecution falls utterly to pieces. The girl's second story which was told, be it noted, after the evidence of the medical witness had been recorded, discloses a most disgusting and sordid state of affairs. It appears that it was taken as an aggravation of the offence of kidnapping that the accused not only seduced the girl, but gave her a venereal disease. The girl was accordingly examined by a

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native Civil Assistant Surgeon, and his evidence, which apparently is put forward as true by the prosecution, throws a fresh and very unfavourable light on the case for the prosecution. The girl, it is said, was first kidnapped by the accused on the 18th of September, but the medical evidence shows that from the state of her private parts she must have been seduced two or three weeks before the date of her kidnapping. The learned Counsel for the defence points out that this evidence is very important. The girl was suffering from gonorrhœa, and she could not at the date of her examination by the Civil Assistant Surgeon have had the gonorrhœa for more than two weeks. Evidently the man who seduced her was not the man who gave her gonorrhœa. But the more important even than this is the fact that after this evidence had been recorded, the girl changed her statement. It was no longer possible to urge that she had been seduced for the first time when the accused, as she says, took her away. She now turns round and says that not only did she have connection with the accused more than once in her own house, but that her mother actually saw her in the act. If this be true, and this is the case for the prosecution, the whole aspect of the case is changed. Looking to the fact that the mother is dependent on her son, and through him the whole family is supported by the accused, and looking to the statements made by the girl, it is impossible to deny that, if the mother actually saw her daughter having connection with the accused in her own house before the alleged kidnapping, there is only too good a ground to believe that the mother connived at the seduction of her daughter by the accused in her own house. If this be true, what then becomes of the case for the prosecution? In Ratan Lal's Law of crimes under the question whether the taking was with or without the consent of such guardian, the case of Primell (1) is quoted. It was there ruled that "where a mother had by her conduct coun-"tenanced the daughter in a lax course of life, by permitting her "to go out alone at night and to dance at public houses, and "she was taken away for a day by the accused, it was held that "the act of the accused could not be said to have happened "against her will." The present case of course is ever so much stronger than Primell's case, and there are other circumstances which further weaken the case for the prosecution.

It is not denied by the Public Prosecutor before me that the mother knew of the loss of her girl on the night of the 18th of September, and that she had good reason to believe, on her own showing and the evidence of the girl, that the girl had gone away with the accused. She did not however take any immediate steps to rescue the girl, and it was not till the following evening that her son lodged a complaint with the Police.

Even if it be proven that the accused did entice the girl away that night, there is I think good reason to suspect that

(1) Primell's case (1858) 1 Foster and Finlayson, page 50.

the mother, by her previous conduct, abetted the seduction of her daughter and so led up to the enticing, and if so, there could of course have been no taking away without her consent. But even if the mother did not consent to the girl leaving her house, it can be urged with great force that she, by her conduct, led the accused to believe that she would not object to the girl going to have connection with him at another man's house. It is urged that even if I accept the case for the prosecution, which was accepted by the lower Courts, that the girl was taken away by the accused, a conviction would not stand in the face of the admitted misconduct of the mother in allowing her daughter to be seduced in her presence by the accused, and that she gave the accused reasonable ground to believe that she would not object to the girl going to meet him at the gharrywalla's house. But it is urged by the learned Counsel for the defence that even if there were no connivance by the mother the present case can be distinguished from the case of *Asgar Ali* (1) and from any other case which has come up before this Court, in which there has been a conviction. The girl on her own showing, at her re-examination, admitted that she went of her own accord to the gharrywalla's house and there, it is stated, the accused met her and she had sexual intercourse with him. In *Asgar Ali's* case the girl went to the accused's house and he yielding to her solicitations, took her off to another place. Had he not yielded, there would have been no taking, hence accused was guilty. Here the element of taking away the girl is entirely absent. The girl had gone to the gharrywalla's house before with her mother and once alone. Her going to this house alone therefore was no taking of her out of her mother's guardianship. But it is urged that the accused kept her and this is held to be equivalent to kidnapping.

The learned Sessions Judge has found everything in favour of the accused, except that he prevented her return to her mother, and this the Judge considers is sufficient taking. It seems to me that the Courts below in their eagerness to do justice had been somewhat puzzled by the rulings quoted to them and have failed to grasp the real bearing of the orders passed in *Asgar Ali's* and *Shwe Thwe's* (2) cases. Is there any evidence to show that the man really did prevent the girl going back to her mother if she wished to do so? for it is practically admitted by the Sessions Judge that this is the only part of the case proven against him. The girl not only went to the gharrywalla's house, and she not only states that she was not prevented from returning, but when her brother and a soldier came to look for her she herself states she hid herself. I do not see how the denial that she was there, made by the accused, can be construed into a prevention of the girl's returning. On the contrary, the learned advocate for the Crown himself admitted that there is no evidence on the record to prove this.

(1) U. B. R. 1907-09, I Penal Code, 27.
(2) U. B. R. 1907-09, I Penal Code, 1.

ABDUL RAHMAN v. K.-E.

alleged prevention of her returning. The present case differs very considerably from *Asgar Ali's* case in the following particulars:—

Firstly, in the present case the accused, previous to the alleged offence, had seduced the girl on more than one occasion in the mother's house and even in the mother's presence. Secondly, the girl left her mother's house of her own accord, but did not go to the accused's house but to the house of a mutual friend, the gharrywalla, where she had been before on two occasions. Thirdly, that the accused did not take her away from the house, and apparently she was taken back by the accused's father to her mother two days afterwards. The two cases are entirely different. In the present case, all that is proven is that the accused went and had connection with the girl at the gharrywalla's house and she stayed there, and when her brother came to look for her, the girl hid and the accused denied her being there and eventually the girl returned to her mother's house.

I think the facts clearly show that there was no taking of the girl, and even if there were a constructive taking, it was effected with the connivance of the mother, and that it was therefore not done without her consent, and that no charge is sustainable under section 363 of the Indian Penal Code.

There was however a second taking. The Courts below have not gone into this matter, but it appears to me that if the charge falls through on the first taking, *a fortiori* it is even more hopeless to expect a conviction on a second charge.

The learned Government Prosecutor who appeared for the Crown found himself unable to support the conviction.

It appears to me for the reasons above stated, that this is not a case of kidnapping from a lawful guardianship.

I therefore set aside the conviction and sentence and direct that the accused be acquitted of the charge brought against him, and as far as this case is concerned he is released.

The fine if paid will be refunded to the accused.

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

Civil 2nd Appeal No. 217 of 1910. May 17th 1912.

U THONDAYA BY HIS AGENT NGA PO CHOK *v.*

1. NGA NI.
2. MI SHWE BWIN.
3. NGA PEIN.
4. MI ME BYU.
5. MI E MYAING.
6. MI NET TE.
7. MI PWA YON.
8. MI GYAN BON.
9. MI THE HMYIN.
10. MI E MYAING, MINOR BY HER GUARDIAN NGA ME NYO, LEGAL REPRESENTATIVE OF DECEASED NGA PO SAING.
11. MI NET TE.
12. NGA KAT TA.
13. MI PWA YON.
14. NGA SEIK.
15. MI GYAN BON.
16. NGA KAN BAW.
17. MI THE HMYIN.
18. NGA BA.

Messrs. J. C. Chatterjee and S. Mukerjee,—for Appellant.

Mr. C. G. S. Pillay,—for Respondents.

Civil Procedure—O. VIII r. 2.

Although a case must be decided on the pleadings and not on what transpires in the case, yet to non-suit a person because there is not sufficient legal advice to draw up the pleadings as fully and carefully as they might be would obviously involve great hardship on litigants, and hence, where a Court of First Instance framed only one issue on the pleadings, but that issue was of such a broad nature as to cover not only the question referred to in the pleadings but also another question which had been indirectly raised.

Held,—that there was nothing illegal in the Appellate Court taking into consideration, when deciding the case, the question which was indirectly raised though not specifically referred to in the pleadings.

Christensen vs. *Suthi*, 5—L. B. R., 76, *Mi Than* vs. *Mi Pwa Hlaing*, Civil appeal No. 133 of 1908 (unpublished). *Mi Pwa Se* vs. *Mi Tin Nyo*, U B. R., II, 1902-03 Bud. Law-Gift.—1. *Nga Myat Thin* vs. *Nga Mye* and one. U. B. R., II, 1907-09, Execution, Signing, 1.

Mylapore Iyasawmy Vyapoory Moodliar vs. *Yeo Kay* and others, I. L. R., 14 Cal., 801.

Appellant U Thondaya, through his agent, Maung Po Chok, in Civil Regular Case No. 4 of 1910 of the Subdivisional Court, Myingyan, sued Maung Ni and 18 other Defendants for possession of 191 palm trees valued at Rs. 1,000, which, for the purpose of suit, was valued at Rs. 600, and obtained a decree for three-fifths of the 191 trees. The plaint is not very clearly drawn up, but, from the statement made by Maung Po Chok before the drawing up of issues, it would appear that the Plaintiff, Pongyi,

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only claims three-fifths of the trees valued at Rs. 600. The Defendants traversed the statements of the Plaintiff. They aver that the palm trees were not the property of Maung Pyaung to dispose of, as he had already disposed of them, that some were planted by them, and that the gift to the Pongyi was invalid being contrary to the Burmese Law, and the gift was a death-bed gift.

When Maung Pyaung died, which he did 8, 9 or 10 days after the gift to Pongyi U Thondaya, he left four surviving children, Maung San Nyein, Ma Hla Ya, Maung Ni and Maung Pein. Maung Ni and Maung Pein are the first and third Defendants-Respondents. San Nyein is the eldest son of Maung Pyaung. U Thondaya is the son of Maung San Nyein, and Maung Po Chok, U Thondaya's agent, is another son of San Nyein. Maung Pyaung was 78 years old when he died, and he appears to have died after having gone out to cut timber for a *Pongyi Kyaung* he intended to erect. There appears to have been bad blood between Maung Pyaung and his son, Maung Pein, and there appears to have been a division in the family.

The Court of First Instance fixed only one issue, a very comprehensive one, "Is the deed of gift executed by Maung Pyaung valid or otherwise?" He found that the gift was valid and gave a decree accordingly. It is noticeable, however, that the Plaintiff did not sue for the whole of the gift, but only for so much as he alleged he had obtained possession of before Maung Pyaung's death. The defendants appealed to the District Court of Myingyan. The learned District Judge considered that the Lower Court might have gone more thoroughly into the case and fixed more issues. He has written a very careful judgment, and he found that the gift was not a death-bed gift, that it was properly executed, but that it was invalidated on account of its being executed under undue influence, and he accordingly reversed the finding and decree of the Lower Court and dismissed the Plaintiff's suit with costs. Against this decree, the present appeal has been lodged under section 13 of the Upper Burma Civil Courts Regulation.

The Advocate for the Appellant denied that there was any undue influence. He urged that the deed of gift was executed publicly in the presence of 40 witnesses on a stamped document which had been duly registered, that some of the donor's nearest relations including his eldest son and grandson were present and acquiesced in the gift, that the donor although he was in possession of his faculties did not sign his name, but the fact that he did not sign his name is quite immaterial as he held the pen, and he did not die till 8, 9 or 10 days after this, and that he died in consequence of his going out to cut timber for the *Pongyi Kyaung* he intended to build, that there had been a previous division of the property among the five children and this property which was not divided was the sixth share the old man, Maung Pyaung, had kept for himself, that he had every right to do

what he liked with his share, and it was not as if the other heirs had been entirely excluded. He finally urged that the learned Judge was entirely wrong in deciding the case on an issue which had never been raised in the Court of First Instance or pleaded by the Respondents themselves. He drew attention to the ruling of Lower Burma where Fox, C. J., and Irwin, J., ruled in the case of *Christensen* vs. *Suthi* (1) that "the determination in a cause must be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made." The Advocate for the Respondents quoted the case of *Mi Than* vs. *Mi Pwa Hlaing* (2), an unpublished ruling of this Court, and also the case of *Mi Pwa Se* vs. *Mi Tin Nyo* (3). He urged that the Lower Court was quite right in going into this matter of undue influence as he was justified under Order XLI, Rule 22, Civil Procedure Code. He then proceeded to discuss the points which the Lower Appellate Court had given against him. He urged that the gift in question was a gift *in extremis* and was invalid as a death-bed gift, and quoted sections 79 and 75, Kinwun Mingyi's Digest. He also urged that the document was not properly signed, and that this is relevant to show that the donor, Maung Pyaung, was infirm and under undue influence.

As regards the signing of the document, looking at the case of *Nga Myat Thin* vs. *Nga Mye and one*, (4) I can find no reason to hold that Maung Pyaung did not duly execute the document. The only question really therefore to decide is, first whether the Lower Appellate Court was right in going into the question of undue influence which it is alleged was not raised in the Court of First Instance or in the grounds of appeal before it; secondly, if the Lower Court was right in so doing, was there any real undue influence or not? There are many rulings on the question of the legality of the course adopted by the learned District Judge. It has been undoubtedly held by the Privy Council that the decision of a case must be decided on the pleadings not on what transpires in the case, and the learned Counsel drew attention to the case of *Mylapore Iyasawmy Vyapoory Moodliar* vs. *Yeo Kay and others* (5) decided on appeal from the decree of the Recorder of Rangoon. It must be recollected that the circumstances that obtain in a small petty Township Court in a newly acquired Province, where English methods and English law have not been introduced long, are obviously not the same as those which obtain in Calcutta or Rangoon where English methods and English law have been long established. To non-suit a person merely because there is not sufficient legal advice to draw up the pleadings as fully and carefully as they might be would obviously involve great hardship on litigants. Of course,

(1) 5 L. B. R., page 76.
(2) Civil Appeal No. 133 of 1908 (unpublished).
(3) U. B. R. 1902-03, Bud. Law Gift, p. 1.
(4) U. B. R., 1907-09, II, Execution, Signing, p. 1.
(5) I. L. R., XIV, Cal., p. 801.

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the Appellate Court must be careful to see that inconsistent defences are not trumped up during the progress of the case. This would merely lead to fraud. Turning to *Christensen's* case above quoted, it is quite clear there that the Lower Court erred in finding for the Plaintiff on facts which he himself had already contradicted. The present case I think is not on all fours with any of the cases quoted. The very mistake which the learned Judge accused the Court of First Instance of making, namely, fixing only one issue whether the gift was valid or not is, I think, in the present case sufficient justification for his acting in the way which the learned Counsel for the Appellant says is erroneous. The Court of First Instance fixed a broad issue, an issue which covered not only the validity of the gift as the gift *inter vivos* or a death-bed gift, but which included obviously the possibility of its being made under undue influence. Now, there would be nothing inconsistent in the Lower Court, when it was going into the question whether the gift was or was not a death-bed gift, if it went into the question whether that gift was made under pressure of the eldest son who, it is alleged, had acquired a preponderant influence over his father. There is nothing inconsistent with this view; in fact, it is a suggestion which would naturally arise in the minds of those who read Maung Gyi's evidence, the first witness for the defence. It may be that Maung Gyi is not speaking the truth. These are questions of fact which will be dealt with hereafter. But the facts remain that there was a division between the sons of Maung Pyaung, and Maung Pyaung was on bad terms with Maung Pein and on good terms with his eldest son. I do not think therefore, following the order in the case of *Christensen* above cited, that there is anything inconsistent with the pleadings of the Defendants in the issue raised and settled in the Lower Appellate Court. Moreover, the fact that the Court of First Instance had only fixed one issue, and that a very comprehensive one, is an additional justification for the Appellate Court acting as it did. Indeed it may be said that the issue framed by the Court of First Instance includes the issue decided by the District Judge. I therefore hold that the Lower Court was right in raising and settling the issue of undue influence as it did. It now remains to settle whether as a matter of fact there was any undue influence.

I have carefully examined the evidence and gone into the facts of the case, and I am bound to say that though I hold in the circumstances of the case, that the onus of proving there was no undue influence does lie upon the Plaintiff, yet the facts as set out by him more than rebut the presumption against him. I have myself had some experience with Burmans in the last 32 years, and I know that it is not at all an uncommon thing for a Burman in the old generation to be far more stiffnecked and independent than those in the present day. Maung Pyaung was an old man and had been ill, but he was able, after he made the gift, to go out in

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the jungle to cut timber. I have agreed in the finding that the gift was not a death-bed gift, and that Maung Pyaung was in full possession of his mental faculties.

Secondly, that the gift itself is not in any way extraordinary, but it is quite a common thing amongst Burmans to make gifts of money for religious purposes.

Next the gift was made perfectly openly and with all the usual formalities, namely, libation of water, presence of *pongyis* and necessary formalities of the Contract Act. The witnesses state that the old man was in full possession of his faculties. It is true that Maung Gyi, the first witness for the defence, was a dissentient. He objected because he thought the other heirs had not been consulted. The absence of the other heirs was noted by the *pongyi* who presided at the ceremony, U Wazaya, but it must be recollected that there was bad blood between the brothers, Maung San Nyein and Maung Pein, and in a case of this sort their fellow villagers would obviously be tempted to take sides. Maung Gyi thought that Maung Pein was badly treated. The real question is, was this a hole in the corner transaction or was it done openly, and was it one where the other heirs were able to come forward and object? If they thought that it was undue influence, why did they not come and object? It is true that Maung Pein says that he knew nothing about the gift until afterwards, but considering that Maung Gyi the man who helped to prepare the deed was his friend, it seems to me untrue that Maung Pein had not the means of knowing what was going on in the village. Village life in Burma is carried on under such conditions as to render it impossible that any such public ceremony or *ahlu*, as the giving away by an old man to a *pongyi* of part of his property, could be carried out openly, as this one was, without the other heirs knowing about it. Maung Pein was on bad terms with his father. The mere fact that he was on bad terms with his father coupled with the fact that the old man had already divided the main part of his property among his children, makes me disinclined to believe that there was any undue influence in the case.

The property was made over as ၅၀၀၀ and as such it has passed out of San Nyein's possession. If we are to allow that there was undue influence in the present case, it will be very difficult hereafter to resist the same plea in any case in which an old man gives away part of his property for religious purposes, if by chance, he dies within a short time after the making of the gift.

For these reasons, although I hold that the Lower Appellate Court was acting rightly in considering the issue whether there was any undue influence, yet as I hold that there was no undue influence used, I allow the second appeal and restore the finding of the Court of First Instance with costs in all Courts.

Civil Revision No. 149 of 1911. June 5th, 1912.

Before H. L. Eales, Esquire, C.S.I.

NGA PO YIN *v.* MI SHAN NU AND MI ME.

Mr. S. Mukerjee—for applicant. | *Mr. J. N. Basu*—for respondents.

Limitation 25.

In computing the period of limitation in a suit brought on a promissory note, the note in question having been executed on 7th May 1907.

Held—that the period of limitation should be computed from the expiration of the day on which the note was made, and that the 3 years expired at 12 midnight on 7th May 1910.

Tara Chand Ghose vs. *Munshi Abdul Ali*, B.L.R., VIII. 24. Mitra's Commentaries on the Indian Limitation Act, V Edition, page 769, notes under section 255.

This is an application for revision of the judgment in appeal of the District Court, Meiktila, in Civil Appeal Case No. 53 of 1911, whereby the judgment and decree of the Township Court, Meiktila, passed in Civil Regular Suit No. 165 of 1910, dated the 30th March 1911, was reversed.

The suit was brought on a promissory note dated the 12th *lasok* of *Kason* 1269 corresponding with the 7th May 1907, and the suit was instituted on the 9th May 1910. The Court of First Instance admitted the suit and found for the Plaintiff on the amount sued for and costs. In appeal the question of limitation was not raised by the Appellant, but the Additional District Judge found that the case was time barred.

Mr. S. Mukerjee appeared for the Applicant, and Mr. Basu for the Respondent.

Mr. Mukerjee pointed out first that the suit was instituted on 9th May 1910, which was a Monday. He urged that according to the ruling at page 769 of Mitra's Commentaries on the Indian Limitation Act, 5th Edition, it has been held "in computing a calendar month or year it is sufficient to go from one day in one month or year to the numerically corresponding day in the next, and to exclude from the computation the day from which the month or the year is calculated." He further points out that it has been held repeatedly that the day on which the note is executed is excluded, and the period of computation runs from the next day, and if this ruling were right, his client was entitled to file the suit on the 8th of May 1910, and that being a Sunday, he was entitled to do so on the 9th. The suit is therefore not time barred.

The learned counsel for the Respondent urged that the period of limitation really ended on the 6th as the 365th day ended on that day. This is I think wrong.

If Mitra's commentary is right, then it would seem that the suit could be instituted on the 8th of May 1910 and the suit is not time barred. There can be no doubt that following the case of *Tara Chand Ghose* vs. *Munshi Abdul Ali* (1)

(1) Bengal Law Reports, Vol. VIII, 24.

the date on which the note is executed must be excluded, and the period of limitation begins to run from the 8th May 1907, but it seems to me that the learned counsel for the Applicant is wrong and the period of limitation actually ended at midnight of the 7th. Notwithstanding what has been stated in the commentary, it is clear that the wording there is opposed to the law and also opposed to the finding of the learned Judges in the case quoted. In that case the promissory note was executed on 14th November 1867, and Phear J. remarks: "It has been decided in very many cases that when the period is limited from the date or from the day of date it does not commence to run until the day has expired. I think therefore that in the present case the period of limitation did not commence to run until midnight between the 14th and 15th November 1867. The suit was brought on the 14th November 1870, and was therefore brought *on the last day* of the period of three years which commenced at midnight between the 14th and 15th of November 1867; in other words it was brought within the period of three years prescribed by the clause of the Limitation Act to which I have referred."

That is to say, that on the morning of the 15th of November the learned Judge would have held that the suit was time barred. This is exactly the view I hold myself, although it seems to be opposed to the ruling in Mitra's Commentaries.

The first year of limitation would run from 0-1 a.m. on the 8th of May 1907 to 12 p.m. on the 7th of May 1908; this would conclude the first calendar year. The second calendar year would run in the same way from 0-1 a.m. on the 8th of May 1908 to 12 p.m. on the 7th of May 1909; and the third calendar year from 0-1 a.m. on the 8th of May 1909 to 12 p.m. on the 7th of May 1910. The suit therefore, according to Justice Phear's ruling, would have been barred on the morning of the 8th.

I think I am bound to follow Justice Phear's ruling, agreeing as it does with the exact wording of the law in preference to the somewhat loose directions given in Mitra's Commentary.

As this is the only point in dispute, the application must be dismissed with costs.

Criminal Revision No. 574 of 1912. September 17th, 1912

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

K.E. *v.* NGA SAN WEIN AND MI SHET.

Mr. H. M. Lutter—for the Crown.

Criminal Procedure—403 (4).

Held,—that though as a general rule the High Court will not interfere with an order of acquittal, yet in cases where the Court has acquitted the accused on their mere denial without examining any of the witnesses for the prosecution, though they were ready to be examined, it is very proper to interfere in revision and direct a new trial.

Nga Po Han and one v. *Nga Tha Le Ni and one*—Upper Burma Rulings, 1897—01, I, 91.

This case has been sent up by the District Magistrate, Kyaukse, and the grounds are fully set out in the accompanying order drawn up by him.

When sending the case up to me, the District Magistrate called upon the Respondent to show cause why the acquittal should not be set aside and a retrial ordered. I have read their defence, and I have had the advantage of hearing the Government Prosecutor. It has already been laid down by my learned predecessor in the case of *Po Han and Nga To* v. *Nga Tha Le Ni and Mi To* (1) that as a general rule the High Court will not interfere with an order of acquittal, but it has the power to do so, and there can be no doubt that this power may be properly exercised in particular cases, and that where a trial has been held without jurisdiction, it appears to be very proper that an order for revision should direct a new trial. The present case is not on all fours with the case quoted. Here there is no question of jurisdiction raised. The only question is, whether or no the procedure of the Magistrate was so irregular and so illegal as to cause a failure of justice. The proceedings show that the Magistrate convicted ten of the accused on their own admission. As regards the two other accused, the Respondents in this case, who were sent up under section 10 of the Gambling Act because they denied they committed the offence, the Magistrate, though it would appear there were witnesses ready in attendance for the prosecution, acquitted them on the ground that he did not think that the evidence against them was forthcoming. This reason is a thoroughly illogical and unsatisfactory one. It was the duty of the Magistrate to see if there was any evidence, and if there was any, to see if it was sufficient to give him grounds for forming an opinion. In which case even if his decision was wrong there would be no ground for ordering a fresh trial. But to pass orders without even calling the witnesses for the prosecution, to convict some of the accused on their own admissions, and to let the others off, simply because they

(1) Upper Burma Rulings, 1897—01, I, p. 91.

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denied the charge, without calling any evidence at all, does not seem to me to be in consonance with the plain directions of the Criminal Procedure Code. For these reasons I think that there may have been a miscarriage of justice brought about by the irregularity and the illegality of the Magistrate's procedure.

I therefore set aside the acquittal as against these two Respondents, and order that the case be retried.

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

Criminal Appeal No. 82 of 1912. July 25th.

NGA PO TEIN *v.* K.E.

Mr. *H. M. Lutter, Government Prosecutor*,—for the Crown.

Criminal Procedure—350.

The District Magistrate began a trial against the accused and he examined all the witnesses for the prosecution except one, namely the complainant, and charged the accused. The accused called no witnesses, and the Magistrate adjourned the case in order that the complainant, who could not be examined on the date fixed, as she was in childbirth, might be examined. In the meantime the District Magistrate was transferred, and his successor took the remaining witness and proceeded with the enquiry. There is nothing on the record to show that the District Magistrate who took over the case asked the accused if he wished to have the witnesses recalled and the evidence reheard. No objection was made on appeal by the accused on this ground.

Held,—That in the circumstances of the case, the omission to ask the accused if he wished to call the witnesses was not a refusal to call them, and that it does not necessarily follow that his omission to ask the accused whether he wished to exercise his right reserved by proviso (*a*) to section 350, Criminal Procedure Code, does constitute a material irregularity which would necessarily invalidate the proceedings, unless it can be shown from the proceedings that the accused has been materially prejudiced thereby or a failure of justice occasioned by the omission.

Q.E. v. *Nga Po Min and 3 others*, U.B.R., 1897-01, I, 87.

Amir Khan v. *Emperor*, Punjab Record, Vol. XXXVIII (1903), 8.

This is an appeal by one Po Tein, against the conviction and sentence of five years' rigorous imprisonment passed upon him by the District Magistrate, Minbu, under section 392-75 of the Indian Penal Code.

Appellant was unrepresented, and Mr. Lutter appeared for the Crown.

The proceedings show that the complainant, one Mi Se Po, went out on the 8th June 1911 to pick mushrooms, and when she had got a little way from the village, she was set upon by a man who took her two earrings from her, threatening her with violence if she called out. As soon as the accused left her, Mi Se Po ran to her village and met Maung Nyun and Kya Zan and complained to them what had happened. The two men went with her and she pointed out a man. They called out to this man to stop, but he went on, and so they ran after and caught him

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up. What followed is only possible in a country like Burma where crimes such as these are not uncommon. Instead of immediately arresting the accused, they parleyed with him, and tried to get back the property, and while Mi Se Po and Tha Zan went away a little to the side, Maung Nyun spoke to the man. He said he had thrown away the earrings and offered to look for them. While this was going on, another man, Tha Su, came up. The three then, as the earrings could not be found, made some attempt to arrest the man, but he ran off. That evening, a further search was made, and one of the earrings was found at the scene of the alleged robbery. The accused was not arrested at the time, and it was not till November that he was arrested at Pakôkku.

The evidence against the accused depends upon the identification by the complainant who had never seen him before, and by the witnesses, Maung Nyun, Kya Zan and Tha Su. The two former of these three men said they had both known him slightly before, while the 3rd witness, Tha Su, states that he had known the accused all his life.

All four identified the accused as the man whom the complainant charged with having committed the robbery, and it is noticeable that the woman, in her report to the Police, mentioned Po Tein's name, and said that she knew it because that was the name by which the other witnesses had called him.

In his grounds of appeal, the Appellant states that he could not have committed the robbery as he was elsewhere in the Yaw country, and he complains that the District Magistrate did not call his witnesses. Before the District Magistrate, when he was charged, he called no witnesses for the defence, and merely stated that if he were guilty, he ought to have been arrested at once.

There are two points to be considered in this case. I find that the District Magistrate, Mr. Christie, who took all the witnesses, except the complainant, Mi Se Po, adjourned the case in order that Mi Se Po might be examined, because she could not appear on the day when the case was called, as she was in childbirth at the time. However, he charged the accused because he obviously considered that the evidence was sufficient to support the charge, and he fixed the case for hearing on the 10th of April. In the meantime he was transferred and succeeded by Captain Lord. Captain Lord examined Mi Se Po and passed orders in the case. There is nothing on the record to show that he either asked the accused if he wished to recall the witnesses or whether the accused asked them to be recalled. It is on the record that accused, when charged by Mr. Christie, stated to Mr. Christie that he did not wish the witnesses to be recalled, but this I think should not have deterred Captain Lord from acting under section 350, Criminal Procedure Code.

The accused has not made this a ground of appeal, and therefore there is no reason to believe that he asked that the witnesses

for the prosecution, whom Mr. Christie had heard, might be recalled, or that Captain Lord refused to recall them. As the accused was not represented by a Counsel, it is probable that he did not know his rights under section 350, and therefore did not exercise them. There is no leading case in Upper Burma which is on all fours with the present case. The only case that I can find is that of *Queen-Empress* v. *Po Min and three others* (1). In that case it was laid down that it is "the duty of the Magistrate as a matter of practice in these cases to warn the accused and to record in the proceedings the fact that they have been so informed." But *Po Min's* case is not on all fours with the present case, because it was held that section 350 did not apply, for in *Po Min's* case the proceedings, and not the Magistrate, were transferred.

The learned Government Prosecutor urged that the accused had had a perfectly fair trial, and that there was no material irregularity or failure of justice in the present case such as would justify the case being quashed and a retrial ordered. He has quoted a recent case of the Punjab High Court, *Amir Khan* v. *Emperor* (2), which is exactly on all fours with the present case, and where it was held that where there was no demand or refusal but only an omission to enquire from the accused whether he wished to exercise the right reserved by proviso (*a*) to section 350, the accused had not been materially prejudiced, nor was a failure of justice occasioned by the omission, but that the error was one which was curable under section 537 of the Criminal Procedure Code.

I have carefully considered the matter, and I have gone over the evidence, and I am of opinion that there is no reason to believe that the accused was really materially prejudiced by the omission of the Magistrate to ask him whether he wished to exercise his privilege under section 350 (*a*), Criminal Procedure Code. Section 350 confers the right on the accused person to demand, and does not actually prescribe that the Magistrate shall ask the accused.

I think that in these circumstances, the omission of the Magistrate did not necessarily prejudice the accused. I do not think myself that it would have been at all likely that the witnesses would have varied their statements, or that any further cross-examination would have shaken their evidence. That being so, I consider that the proceedings are not necessarily invalidated, and I proceed to try the appeal on its merits.

I have read the evidence, and the strangeness of the story told by the prosecution is, I think, proof that it is a true one. That the villagers instead of arresting the accused at once should parley with him and attempt to get back the earrings, is by no

(1) U.B.R., 1897-01, I, 87.

(2) Punjab Record, Vol. XXXVIII (1903), p. 8.

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means unlikely, yet it is not a story which would have been put forward in a concocted case.

I believe that the identification of the accused is correct, and that the accused did rob Mi Se Po.

As regards the allegation made in appeal that the witnesses for the defence were not called, I think that, as he told Mr. Christie he did not wish to call any witnesses, it need not be considered. It would have been in any case very difficult for him to prove an *alibi*, considering that he got into trouble when he went to the Yaw country.

I therefore uphold the conviction, and in the circumstances the sentence is by no means heavy, and I dismiss the appeal.

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

Criminal Revision No. 550 of 1912. October 22nd.

NGA PO SHEIN
NGA PO HAN
NGA PO SAN
} *v.* K. E.

Mr. *J. N. Basu*—for Applicants.
Mr. *H. M. Lütter*—for the Crown.
Criminal Procedure,—353, 537.

Held—that all evidence for the prosecution and defence shall be taken in the presence of the accused, or when his personal attendance is dispensed with, in the presence of his pleader.

Held also—that failure to comply with the provisions of section 353, Code of Criminal Procedure, is not curable by section 537, even though such failure has led to no miscarriage of justice.

Q. E. vs. Gotiram, Ratanlal's unreported cases of the High Court of Bombay, page 325.

The three applicants, Po Shein, Po Han and Po San applied for revision to this Court under section 439, Criminal Procedure Code, against the Appellate order of the District Magistrate, Shwebo, confirming the conviction and sentence passed by the second class Magistrate, Wetlet, under section 323, as against Po Shein and under section $\frac{323}{109}$ as against Po Han and Po San.

The grounds for the application are first that the Court below should have applied the provisions of section 562, Criminal Procedure Code, and that in any case the sentences passed are unduly severe and that a smaller fine would have met the requirements of justice.

I heard the learned Advocate on behalf of applicants and sent for and perused the proceedings. I found that there was another accused, Maung Po Zon, and it would appear that he was not present during the whole of the trial. Nevertheless he has been convicted with the three others who now apply for revision. As there appears to be grave doubt with regard to the validity of the Magistrate's proceedings I have admitted the application. I let the applicants out on bail and directed that the Government Pro-

secutor should appear to argue the case on behalf of the Crown. On the date fixed Mr. Basu appeared for the applicants and Mr. Lütter for the Crown.

The facts of the case are as follows:—

The complainant, Maung Po Ni, prosecuted the four accused before the 2nd class Magistrate, Wetlet, on May 3rd. The case fixed for hearing was taken up and part heard and adjourned to June 7th on which day the accused were charged and the case fixed for hearing on July 3rd. On that day the first accused Po Zon, although he had named one witness for the defence never appeared. The Magistrate nevertheless proceeded to hear his witness and other witnesses for the defence. The first accused's witness knew nothing about the case. The Magistrate found all four accused guilty—1st and 2nd accused, Po Zon and Po Shein under section 323 and the two others under section $\frac{323}{109}$ and he sentenced Po Shein to 4 months' rigorous imprisonment and Po Han and Po San to three months' rigorous imprisonment each. He held that the 1st accused admitted having kicked the complainant, and he held that 2nd accused had also committed a brutal assault, while he considered that 3rd and 4th accused as they held complainant while the others kicked and struck him were equally guilty. He found that the assault was made simply because the complainant refused to gamble with them, and he sentenced them, Po Shein to four months and Po Han and Po San to three months' rigorous imprisonment apiece.

The 2nd, 3rd and 4th accused appealed to the District Magistrate who dismissed the appeal and refused to interfere with the sentence. Against this order 2nd, 3rd and 4th accused have applied for revision to this Court. The first accused having absconded during the trial and not having been arrested on the warrant issued for arrest has not of course made any appearance either in appeal or revision. It appears however necessary to take notice of the action of the Court in the case of the 1st accused, and I will deal with this case after disposing of the present application.

The learned Advocate for the accused does not attempt to aver that the irregularity as regards the 1st accused, Po Zon, in any way effects the legality of the proceedings as regards the three other applicants. He urges that the three men should have been dealt with under section 562, Criminal Procedure Code, and treated as first offenders, and if their offence is considered too serious for this the punishment awarded is in any case far too severe. I have carefully considered all that the learned Advocate has to say on their behalf. I find that Po Shein is 20, Po San 43 and Po Han 31 years of age. Po Shein took a prominent part in the assault on complainant and struck the blow which cut the complainant's cheek inside his mouth. The other two accused held the unfortunate man while the others beat and kicked him and struck him with their knees. The assault altogether was cowardly and brutal,

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and the motive for the assault, namely, that complainant would not gamble with them, shows that the offence had no justification on the score of any sudden heat of passion or provocation. Crimes of violence are very common in Burma, and I am not prepared to say that the offence, if committed, has been too severely punished. I see no good reason for interference therefore either with the convictions or sentences, and I therefore dismiss the application so far as the three men P'o Han, Po Shein and Po San are concerned.

The learned Advocate for the defence very kindly consented to argue the case of the remaining accused, and he drew my attention to the case of Q. E. *vs.* Gotiram, (Ratanlal's unreported cases of High Court, Bombay, page 325). But this case is not on all fours with the present one, as in that case no witnesses were examined, and the High Court directed that the Magistrate was not to pronounce judgment but to give accused opportunity of hearing the witnesses for the prosecution and examining them. It will be seen that in the present case accused was present when all the witnesses for the prosecution were examined and only disappeared when his own witness was called.

Mr. Lütter who appeared for the Crown at first was of opinion that section 205 might apply, and if not section 366, subsection 2. He urged that if these two sections did not apply that as the case was a very simple one and it was the action of the accused himself which was the cause of his not being present when the case was called, and as he has not appeared or objected, the irregularity or illegality has led to no failure of justice and might be held to be curable under section 537, Criminal Procedure Code. I have carefully considered the matter and am of opinion that neither of the two sections 205 or 366 (2) can be held to apply to the case. It appears to me that section 353 is the section which applies, and the wording of this section is clear and peremptory. The trial in question was one held in Chapter 22 of the Criminal Procedure Code, and it is there laid down that all evidence shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader. It is clear that his presence was not dispensed with by the Court, and as it is clearly laid down that all evidence shall be taken, this can only mean that the evidence for the defence as well as for the prosecution is included in those words.

I do not think therefore that this is an irregularity or illegality which can be cured under section 537, while it is clear that in the present case no miscarriage of justice has taken place, yet to allow such a proceeding to stand merely because there has been no failure of justice occasioned thereby might, I think, lead to calamitous results in other cases. There are certain irregularities which may be curable and some which are incurable, and I think that this irregularity is one which cannot be cured under section 537, even though in the present case it has led to no miscarriage of justice.

I direct that the conviction so far as accused Po Zon is con-

cerned be set aside, and that in the case of Po Zon's arrest the case will proceed against him as if it had been stayed when it should have been stayed on his failure to appear before the Court.

If the other accused, the present applicants, have not served the full term of their sentences, they will be rearrested and committed to jail by the warrant of the Township Magistrate, Wetlet, to serve the unexpired portion of their sentences.

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

Criminal Appeal No. 171 of 1912. October 17th.

NGA PO THAW *v.* K. E.

Mr. *W. Calogreedy*—for the Appellant.

Criminal Procedure—4 (*h*), 199.

The accused was convicted under section 376, Indian Penal Code, but from the evidence it was proved that the offence committed was one of adultery.

Held—that as no complaint of adultery was made by the husband to the Magistrate, the Court could not take cognizance of the offence of adultery.

Emp. v. Kallu, I.L.R., 5 All., 233.

Appellant, Po Thaw, Headman of Lezabin village, has been tried and convicted by the District Magistrate, Yamèthin, under section 376, Indian Penal Code, for having ravished one Mi Pyu, and was sentenced to undergo five years' rigorous imprisonment.

I have read the grounds of appeal. I have heard the learned Advocate for the Appellant and read the whole of the proceedings.

The learned District Magistrate has written a very carefully-considered and on the whole well-balanced judgment. The case, as he points out, is an exceedingly difficult one, and he has, I think, tried to consider every point in favour of the Appellant as well as those against him ; but it appears to me that he has omitted to consider a few very important and significant facts which apparently escaped notice when the case was argued before him. He has quoted in his judgment as follows :—"The important "point for consideration, and which I have not lost sight of all "through, is the possibility or probability that the complainant and "her witnesses, knowing in their own hearts of the adultery, deter-"mined to make up the story of rape and tell it to the husband "on his return and so save complainant's face and leave him to "report the rape." Now it has occurred to me that this leaving of the husband to report the rape perhaps is a crucial point of the whole case. It was not raised by the learned advocate for the appellant, but it occurred to me on reading the judgment of the learned District Magistrate and the evidence of Ma Sabè. It must be remembered that rape is an offence not so much against the husband as against the person of the woman ravished. Knowing the independent character of Burmese women, there is no necessity whatsoever, if the case is a true one, to wait till the

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husband's return. If the case were a true one, she would have gone off and complained at once, and this alone to my mind in the peculiar circumstances of the case throws great suspicion on the case for the prosecution as regards the genuineness of the woman's complaint.

Secondly, we have the fact that the husband asked his mother, Ma Sabè, to watch the house while he was away. The reason she gives is, that she was to look out for robbers and thieves(သူခိုးသူဓားတိ), but this does not appear to me to be probably the real reason. If there were any real valuables left behind, the husband after the Burmese fashion would secrete them in a hole in the ground, and on the face of it, it seems ridiculous to ask an old woman of 51 to keep watch in the house for the sake of preserving the valuables in it. If he really wanted any one to look after his valuables and to keep off thieves and robbers, he would ask some man of his acquaintance and not his mother.

Moreover, Ma Sabè's action to my mind shows that she suspected her daughter-in-law, and clearly proves that it was not a thief that she was looking for. Had it been a thief, she obviously would have given the alarm at once and called out သူခိုး. I do not think that the full significance of Ma Sabè's conduct has been fully understood.

Lastly, we have the fact that the police enquiry showed that Ma Pyu did not back up her husband's statements. The learned District Magistrate has carefully considered this. He points out very clearly that Ma Pyu's conduct is illogical, and he thinks it is inconceivable for a woman to complain of rape to her husband and then go back and tell a different story to the police. It seems to me that the learned Magistrate has perhaps been misled in this matter, because, what would appear illogical and inconceivable to him may not appear so to a Burmese woman. It is a common place that women are illogical. This may or may not be true, but I do not think that it is really at all unlikely in the circumstances of this case that the woman did go back on her statement which she made to the police, especially as it is clear that she never went to the police herself till her husband came back. I think the learned Magistrate has indicated the explanation of the whole case; Ma Pyu's hands were forced by her being caught in the act of adultery. Her unaccountable neglect to make any report to the police shows she was reluctant to complain till her husband came. She was bound in the circumstances to tell her husband that she was ravished; otherwise he probably would have beaten her and might have killed her. That she complained to her husband that she had been raped is therefore only natural, but it is a different matter to go to the police-station and have her statement taken down in writing, and to know that she will have to go into Court and repeat her statements on oath, and it is therefore quite conceivable that a woman might very easily have hesitated to

have told the police what she told her husband, especially if her story were untrue.

The learned Magistrate has stated that he thinks it is unlikely that the woman, six months gone in pregnancy, would allow another man to have connection with her, especially when that man is not her husband, but it is not a physical impossibility by any means, and I do not think that this matter would weigh very much in the mind of a woman who is willing otherwise to commit adultery. She says that she never woke up till she found the man was actually upon her, and yet she did not think that the man was her husband but merely a bad man trying to have connection with her. This itself is not very credible. She never screamed out at once which a woman would naturally do, and she does not say that she was actually threatened till after she questioned the man. The first thing a woman would do is to scream out and not to ask questions.

I think the learned Magistrate has no doubt been influenced by the view which he took of contradictions in the Police report, a view which I think is an incorrect one. The case is one by no means free from doubt.

On the whole I am inclined to believe that the charge of rape is untrue. I do not therefore think that the conviction is sound, and I think it must be set aside.

With regard to the question whether the accused can be tried and convicted on this evidence of having committed adultery, it must be recollected that a charge of adultery can only be brought under section 199, Criminal Procedure Code, on the complaint of the husband. The definition of complaint is found in section 4 (*h*), Criminal Procedure Code. It is an allegation made orally or in writing to a Magistrate, with a view to his taking action. No such complaint of adultery has been made to a Magistrate and, strictly speaking, therefore under section 199, the Court cannot take cognizance of the offence of adultery, nor is this a mere quibble of law because Straight, J., pointed out in the case of *Emp.* v. *Kallu* (1) " that it does not follow that because a husband may wish to punish a person who has committed rape upon his wife, that is, who has had connection with her against her consent, he would desire to continue proceedings when it turns out that she has been a willing and consenting party to the act."

There are other rulings besides the one I have quoted, and I think that in the circumstances of the case, even without these rulings, I should not be inclined to forestall the act of the husband in this matter.

The conviction and sentence are set aside, and it is directed that the appellant, Po Thaw, be acquitted of the charge brought against him, and so far as this case is concerned, be released.

(1) I.L.R., 5 All., 233.

Criminal Revision No. 663 of 1912. November 27th.

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

NGA PO TOK *v.* K. E.

Mr. *J. C. Chatterjee*—for the Applicant.

Mr. *R. G. Aiyangar*—for Mr. *H. M. Lütter* for the Crown.

Evidence—30, 114.

Housebreaking and theft, and receiving the property stolen at that theft are distinct offences under section 30 of the Evidence Act, and the confession of one co-accused cannot be taken into consideration as against the other.

This is an application to revise the conviction and sentence passed by the Headquarters Magistrate, Mogôk, on one Po Tok, on the 22nd August 1912 under section 457 of the Indian Penal Code, in summary trial No. 155 of 1912.

The grounds for the application are very brief and to the point. It is urged that there has been a serious error of law made by the Magistrate in taking into consideration as against one Po Tok the confession of Nga Yeik, who was being tried under section 411 along with the aforesaid Po Tok, when Po Tok was being tried under section 457, Indian Penal Code. The learned advocate urges that only in the case of people who have been jointly tried for the same offence can the confession of one be taken into consideration as against the other. He also urged that there was no other evidence against the accused, Po Tok, which, apart from Nga Yeik's confession, would justify a conviction.

Lastly, he pointed out that considering the offence was committed on the 26th April 1912 and the case was not taken up by the Police till the 6th August 1912, and according to Nga Yeik's statement the accused, Po Tok, did not bring the clothes to him till one and a half months before he made his statement in Court on the 22nd August 1912, it would appear that the property was not traced to Po Tok's possession till two and a half months after the alleged housebreaking was committed, and the possession was not sufficiently recent to justify the presumption that the man in possession was the actual thief and housebreaker.

Mr. Aiyangar, who appeared for the Crown and argued the case on behalf of the Government Prosecutor who was ill, admitted that strictly speaking the confession of Nga Yeik could not be taken into consideration against the accused as they were not tried for the same offence. I hold that this view of law is correct, and there has been a serious error in the Magistrate taking the statement of the co-accused, Nga Yeik, into consideration against Po Tok. But the learned Advocate urges that there is other evidence against Po Tok, namely, Tun Aung's statement and that the conviction based on Tun Aung's evidence is not necessarily unsound, and he urges that this present case being an application for revision and not an appeal, the Court cannot deal with the question of the credibility of the witnesses. But it appears to me that in this present case, the Magistrate has based his conviction

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on the confession of Nga Yeik, and merely looked upon Tun Aung as useful in corroborating Nga Yeik, and it is quite possible that the Magistrate would never have found the accused guilty on Tun Aung's statement alone. Even if Tun Aung were a credible witness, it may be that he was not so well able as Nga Yeik to state positively that the property in question was actually the property brought by Po Tok. Moreover, it must be recollected that Nga Yeik's confession went a good deal further than this. Nga Yeik stated that Po Tok, two or three days after he had handed the things over, and not at the time of the handing over, admitted to him that he stole the property from the dhoby.

There are other reasons which make me look upon the case with a certain amount of suspicion, but it will not be necessary to discuss these, as it seems to me quite clear that the conviction, which is based on Nga Yeik's statement, is unsound.

The conviction and sentence are set aside, and the accused will be set at liberty. His bail bond will be cancelled.

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

Criminal Revision No. 89 of 1913. January 24th.

K.-E. *vs.* IGNATIO REIS.

Criminal Procedure—110, 514 (5).
Gambling—10, 17.

The extent of the liability of the parties to a bond under section 110, Code of Criminal Procedure.

Held—that a bond executed under the provisions of section 17, Gambling Act, read with section 110, Code of Criminal Procedure, is a bond with a single penalty.

Held also—that a Magistrate directing the payment of money due thereon may remit any portion of the full amount under section 514 (5), Code of Criminal Procedure. But such remission is an extinction of the liability of the parties to it for the amount remitted. The bond is forfeited and there is an end of it.

K.-E. vs. *Nga Thein Ga*, U.B.R., 1904—06, I, Crl. Pro., 13.
K.-E. vs. *Nga Kaung and 2*, U.B.R., 1904—06, I., Crl. Pro., 31.
Nathu vs. *Empress*, P.R. XXIV, Crl. J., XI.
Q.-E. vs. *Nga E*, U.B.R., 1897—01, I, Crl. Pro., 20.
Q.-E. vs. *Nga Hla* and *Q.-E.* vs. *Nga Hla and 3 others*, U.B.R., 1897—01, Crl. Pro., 26 and 117.

One Ignatio Reis was ordered under section 17, Gambling Act, on 17th May 1911 in Criminal Miscellaneous Case No. 31 of 1911 of the Subdivisional Magistrate, Sagaing, to execute a bond in Rs. 200 to be of good behaviour for a term of three years with two sureties jointly and severally liable in the like amount. Security was furnished, and a bond executed. On the 9th December 1912 this person was convicted under section 10 of the Gambling Act, and sentenced to pay a fine of Rs. 10 or to suffer one week's rigorous imprisonment. He was therefore called upon, as were his sureties, to make good the amount of the bond. Ignatio Reis was eventually called upon to pay Rs. 100, and apparently each of the sureties was called upon to pay the same

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amount. The sureties accordingly paid Rs. 100 each. Ignatio Reis failed to pay the Rs. 100 as ordered, and has been committed to jail for six months under section 514, Code of Criminal Procedure. The Subdivisional Magistrate, who first dealt with the proceedings displayed some familiarity with the rulings of this Court, and it is extraordinary that he should have failed to appreciate their meaning. The case of *K.-E.* vs. *Nga Thein Ga* (1) states clearly that the Magistrate should order the principal and the sureties to pay the penalty named in the bond. The meaning of that ruling was further explained in the case of *K.-E.* vs. *Nga Kaung and* 2 (2) a few pages further on in the same volume. There is only one bond, and the sureties to it are jointly and severally liable for the amount fixed in it. The Magistrate has a discretion under section 514 (5) to remit any portion of the penalty, but the penalty is only one, the exact amount of it should be stated, and the parties to the bond should be called on to pay that amount. If the Magistrate thinks it desirable, he may call on the principal first to pay the amount, but if he fails or refuses to do so, he should not take any action against him until he has called upon the sureties to make good the amount and they have failed to do so. It is not for the Magistrate to say how much each surety shall pay, both may pay a part or one may pay the full amount. If the amount which the Magistrate directs shall be forfeited is not paid in full, he may then proceed against one or all the parties to the bond under section 514, Code of Criminal Procedure. It is true that section 514, Code of Criminal Procedure, does not require the Magistrate to proceed against all the parties to a bond, and circumstances may arise where it would be impossible or inconvenient to do so, *e.g.*, where one of the sureties has disappeared; but ordinarily, as stated above, the sureties should be called upon to make good the amount which the Magistrate orders to be forfeited if it is not paid by the principal, and the usual practice should be to require the principal and sureties together to pay the amount to be forfeited. In this case the two sureties have paid Rs. 100 each. It was apparently the Magistrate's intention to require the full amount Rs. 300 to be paid. He however ordered one of the sureties to pay Rs. 100 only, and on payment of this, ordered the bond to be cancelled. A further sum of Rs. 100 was subsequently recovered from the other surety. This was irregular, but the money has been paid, and no interference is called for. It is true that the Respondent, Ignatio Reis, was only fined Rs. 10 in the case in which his conviction has led to a forfeiture of Rs. 200 by his sureties, but from the evidence on which the order for security was based, it is shown that he was a professional gambler who earned his living by unlawful gaming in trains and steamers, and I do not think, under the circumstances, that the penalty was excessive. On the other hand, it is clearly unnecessary to require the payment

(1) U.B.R., 1904—06, Vol. I, Crl. Pro., p. 13. (2) U.B.R., 1904—06, Vol. I, Crl. Pro., p. 31.

of the balance of Rs. 100 which would, if paid at all, evidently be paid by the sureties.

For the reasons given, the warrant committing Ignatio Reis to jail for six months for failure to pay Rs. 100 must be cancelled, and he must be released.

But this is not all. Upon payment of the forfeited sum, one of the sureties asked that his bond should be cancelled. This was not in effect done as the bond is on the record uncancelled, but there is an order directing that it should be cancelled. The "Accused," meaning Ignatio Reis, was called on to furnish fresh security, and on his failing to do so, was ordered by the Sessions Judge to be committed to jail for the unexpired portion of the term of three years. This order, it appears to me, cannot be sustained.

The Subdivisional Magistrate, in his order of the 3rd May submitting the record to the District Magistrate, appears to have seen the difficulty, but was not willing to act on his own responsibility and take no further action against the respondent.

A bond executed under the provisions of section 17, Gambling Act, read with section 110, Code of Criminal Procedure, is a bond with a single penalty. As already noted, a Magistrate in directing the payment of money due thereon may remit any portion of the full amount under section 514 (5), Code of Criminal Procedure. But such a remission is clearly an extinction of the liability of the parties to it for the amount remitted. The bond is forfeited, and there is an end of it—*Nathu* vs. *The Empress* (1). The words of the undertaking are clear, that the sureties are liable as well as the principal "in case of $\frac{\text{his}}{\text{my}}$ making default." The bond was therefore extinct as soon as the penalty due upon default was exacted, and there could be no cancellation of a bond which had ceased to be of force. The Burma rulings quoted above may appear to give some authority for the view that the bond remained in force after the penalty under it had been exacted, but I am clearly of opinion that this view is incorrect. I think it is clear that the view expressed in the cases of *Q.-E.* vs. *Nga E* (2) and *Q.-E.* vs. *Nga Hla* and *Q.-E.* vs. *Nga Hla* and 3, (3) is correct. There is certainly no other bond among those prescribed under the Criminal Procedure Code which remains in force after it has been forfeited. The object of the proceedngs under section 110, Code of Criminal Procedure, or section 17, Gambling Act, is to prevent the person proceeded against committing offences. The Magistrate is authorized to require a sufficient sum as security and suitable sureties to afford some guarantee that this object will be effected, and the sureties are no doubt expected to exert themselves to see that the conditions of the bond are complied with so long as it remains in force. But if the guarantee is found to have been inadequate, it does not follow that a

(1) P.R., Vol. XXIV, Crl. J., XI. (2) U. B. R. ,1897—01, I, Crl. Pro., p. 20. (3) U.B.R., 1897—01, I, Crl. Pro., pp. 26 and 117.

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fresh guarantee must at once be given, or in default the person concerned must be committed to jail. An habitual thief against whom an order is made under section 110, Criminal Procedure Code, is given the opportunity to furnish sureties for his good behaviour for a definite time. If no one is willing to furnish security, he is committed to jail, but otherwise he remains at large and is given an opportunity of behaving honestly with the knowledge that if he does not, he and his sureties will be heavily fined for any, but not for every, offence of which he may be convicted before the expiry of the term of the bond. If he fails to take advantage of this opportunity, he and his sureties must take the consequences; the guarantee has failed and the matter is at an end. If it is desired to proceed further against him, this must be by fresh proceedings. The recommittal of a person to jail upon the cancellation of a bond under section 126 (3), Code of Criminal Procedure, is clearly on a different footing, and the object of the provisions of that section is to protect the surety who finds that he is unable to control the principal for whom he has given security. If it had been the object of the legislature to require that a person against whom an order had been made under section 110, Code of Criminal Procedure, should be recommitted to jail upon the forfeiture of his bond, it is hardly conceivable that this would not have been plainly stated.

The order of the Sessions Judge directing that Ignatio Reis shall be recommitted to jail is set aside, and the warrant must be recalled and cancelled.

Criminal Revision No. 782 of 1912.

January 30th, 1913.

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

KING-EMPEROR *vs.* NGA PO KAN.

Mr. *R. G. Aiyangar* for Mr. *H. M. Lütter* for the Crown.

Burma Vaccination Act—I of 1909, 4—7.

The Vaccination Act XIII of 1880.

Where the parents of children under 14 years of age were convicted under section 7 of the Burma Vaccination Act, I of 1909, for having failed to comply with the direction of a Vaccination officer to produce their children for vaccination.

Held—that section 4 was the only section applicable, and this only applied if the children were under the age of 6 months and had been exposed to certain possibilities of infection. Section 7 of the Act refers to inmates of lodging houses and persons living under other special conditions and does not apply to children.

If it is desired to apply the provisions of section 4, it is necessary to comply with the provisions of Act XIII of 1880 as laid down in section 4(2).

Mashidi Khan and one vs. *The Rangoon Municipality*, 4, L. B. R., p. 300.

I am afraid I am unable to understand either the procedure of the Vaccination officer, the Municipal President or that of the trying Magistrate, and the views of the District Magistrate do not appear to be quite correct. The ten cases may be dealt with together.

Apparently a Vaccination officer directed the parents of certain children to produce their children for vaccination. When this was not done, he made a report to the President of the Municipality, asking for the prosecution of the parents under section 7 of the Vaccination Act No. II. What is meant by Act No. II is not clear : possibly Burma Act No. I of 1909 is meant. The President appears to have sanctioned the prosecution, and a copy of this report and order was sent to the Magistrate in each case, who proceeded to summon the accused persons under " section 3 of the Vaccination Act." Why section 3, or which Vaccination Act, is not stated, and the proceedings indifferently show the offence complained of to be one under section 3 of the Vaccination Act, section 7 of the Vaccination Act and no section of any Act. The District Magistrate says the Magistrate who tried the cases had no power to take cognizance under section 190 (1)(*c*). But on the authority of the ruling quoted by him (1) the omission to examine the complainant is cured by section 537, Code of Criminal Procedure, and is not in these cases a good ground for interference, though I agree with the District Magistrate that it is evidence of slovenly procedure which is, I regret to say, only too apparent throughout. The conviction in every case has been under section 7 of the Vaccination Act.

In each case it would appear that the person who was not vaccinated was a child, and, it may be presumed, was under the age of 14. The only section therefore of Burma Act I of 1909 which was applicable was section 4, and this only applied if the child was under the age of 6 months and had been exposed to certain possibilities of infection. For children over the age of 6 months there are certain provisions of the law, among them those contained in sections 9 and 17 of the Vaccination Act, XIII of 1880, which declare the conditions under which vaccination can be enforced. For unprotected persons who are defined in section 3(*b*), Burma Act I of 1909, and who are over 14 years of age, there are other provisions, one of which is contained in section 7 of that Act, which refers to inmates of lodging houses, and persons living under other special conditions which presumably did not exist in these cases, as there is no mention of them. If it is desired to make use of section 4 of Burma Act I of 1909, the second paragraph must be complied with, and no summary procedure is possible. Section 13 (*1*) did not apply in these cases.

It is the business of Magistrates to apply the law as contained in Acts, Regulations and the like, and that they may be able to do so, they should read and endeavour to understand them.

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

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(1) Mashidi Khan and one *vs.* The Rangoon Municipality, 4 L. B. R., p. 300.

Civil 2nd Appeal No. 29 of 1912. January 24th, 1913.

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

NGA TOK MI NGWE } *vs.* { NGA E GYAN. NGA SHWE YAW. NGA PAW.

Mr. *J. C. Chatterjee* for Appellants | Mr. *S. Mukerjee* for Respondents.

Limitation—115, 116, 120, 132.
Transfer of property—68 (*b*) (*c*).

Held—that where a mortgagee's right to sue for his money is a right arising from a contract between the parties, Article 115 or 116, Schedule I, Limitation Act, applies; but when it is an equitable and not a contractual right, the article which applies is 120.

Nga Shwe Dok vs. *Ma Le*, U. B. R., 1897—01, II, 578.
Unichaman vs. *Ahmed Kutti Kayi and others*, I. L. R., 21 Mad., 242.
Kallar Roy vs. *Ganga Pershad Singh*, I. L. R., 33 Cal., 998.
Rivaz on Limitation, 6th Edition, p. 315.

Plaintiffs-appellants sued to recover Rs. 2,000 from the defendants-respondents, being the total amount of advances secured from time to time upon mortgages. The mortgaged property was a canal and certain paddy land. The defendants-respondents were not themselves the persons who had taken all the advances, some had taken some, and the others were descendants of persons who had taken them. The Court of First Instance gave plaintiffs-appellants a decree for Rs. 1,900. The Lower Appellate Court modified the decree, reducing the amounts payable and apportioning them among the parties. The plaintiffs now appeal. Upon the hearing of this appeal the defendants-respondents raise the question of limitation. This question was clearly raised in paragraph 3 of the written statement filed by the 1st, 2nd, 3rd and 5th defendants. No issue was framed upon it, and it was not referred to again, nor was the question raised in the first appeal; but the law is clear that it is the duty of this Court to take the matter into consideration, and if the suit was barred, to dismiss it—section 3 of the Limitation Act. The plaint stated clearly the date on which the canal in question was taken from the possession of the plaintiffs-appellants as *Kason* 1269 B. E., corresponding to April-May 1907. The suit was filed on the 13th May 1911. If therefore the suit was barred by limitation, it is clear that it was barred on the face of the plaint.

It has been laid down in the case of *Maung Shwe Dok* vs. *Ma Le*, (1) that a usufructuary mortgagee has an equitable right to sue for his mortgage money, when his security is wholly or partially destroyed: and it was held in that case that the period of limitation was six years under Article 120, Schedule I of the Limitation Act, from the date when the right to sue accrued, and the right to sue was held to have accrued when the security was destroyed.

(1) U. B. R., 1897—01, II, 518.

Although the Transfer of Property Act is not in force in Upper Burma, it was held in that case that the mortgagee was in justice, equity and good conscience, entitled to the benefit of the principle underlying section 68 of that Act, and the last portion of that section was referred to as applicable.

But in the present case the facts appear to be clearly distinguishable from those in *Maung Shwe Dok* vs. *Ma Le*. There the security was destroyed apparently by the action of the river, which overwhelmed the land and destroyed it. In the present case, the canal is not shown to have been injured in any way. It has been taken over by Government, and the right of the mortgagee is that described as arising in the case contained in section 68 (*c*), Transfer of Property Act, *i.e.*, where the mortgagee being entitled to possession of the property the mortgagor fails to secure the possession thereof to him without disturbance by the mortgagor or any other person: no default or wrongful act on the part of the mortgagor, as described in section 68 (*b*), is required as a condition necessary for the right described in section 68 (*c*) to accrue to the mortgagee.

Now, in this case the plaintiffs-appellants rely on a document, Exhibit E, by which the defendants-respondents or their ancestors agreed to a further charge of Rs. 500 upon the canal in question, together with certain specified land. They undertook to repay the full amount borrowed to date upon these properties, and they further agreed to pay all the moneys due to the plaintiffs-appellants in the event of any interference on the part of coheirs, strangers, Government or previous owners. There was therefore not merely an equitable right to relief under section 68, Transfer of Property Act, but there was an express contract in writing, and it was on this the plaintiff relied. It is not disputed that Government has taken possession of the canal, which would seem to have formed the most valuable part of the mortgaged property. There can be no doubt that the plaintiffs-appellants were entitled to bring a suit for their money, but I do not consider that Article 120, Schedule II, Limitation Act, applies. That article prescribes the limitation in the case of a suit for which no period of limitation is provided elsewhere in the schedule. It appears to me that Articles 115 and 116 are clearly applicable, according as the contract is not or is in writing registered, and that in the present case the contract not having been registered, the former article applies and the period of limitation is three years. Article 132 clearly cannot apply, as the suit is not "to raise money charged on immovable property out of that property (1)." The case of *Unichaman* vs. *Ahmed Kutti Kayi and others* (2) may be referred to as also that of *Kallar Roy* vs. *Ganga Pershad Singh* (3). Briefly stated it would appear that where a mortgagee's right to sue for his money is a right arising from a contract between the

(1) Rivaz on Limitation, 6th Edition, p. 315.
(2) I. L. R., 21, Mad., p. 242.
(3) —— 33, Cal., 998.

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parties, Articles 115 and 116, Schedule I, Limitation Act, apply, but when it is an equitable and not a contractual right the article which applies is 120.

The cause of action in this case clearly arose not later than April-May 1907, while the suit was not filed till May 1911. The suit must therefore be dismissed, and the appellants must pay respondents' costs in all Courts. I may add that the finding of the Courts below was clearly unjust to the parties upon the merits. The defendants who jointly signed the agreements sued on were jointly and severally liable for any money found due by them thereon, while those who were sued as legal representatives of the executants were similarly liable in their representative character, *i.e.* to the extent of the property of those executants in their possession.

Civil Revision No. 14 of 1913. March 17th.

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

NGA THA WIN, AGENT OF MI YA KUN. } *vs.* { NGA SAN, AGENT OF MI PWA MI.

Mr. R. C. J. Swinhoe for Applicant. | *Mr. C. G. S. Pillay* for Respondent.

Penal Code—193.

Criminal Procedure—195.

Held—that an order sanctioning a prosecution under section 193, Indian Penal Code, should not leave the person against whom the order is made in doubt as to the charge which he will be expected to meet.

As a general rule proceedings with a view to the prosecution of a witness for giving false evidence should not be taken, until a conclusion has been come to by the Magistrate or Judge conducting the trial in which the false evidence is supposed to be given upon the evidence given therein.

Held also—that in an enquiry preliminary to the granting of sanction to prosecute a witness for giving false evidence, although the respondent is not upon his trial on a criminal charge, yet he is in the position of a person accused of committing an offence, and therefore his examination should not be on oath nor should he be cross-examined.

Bulwant Singh vs. *Umed Singh*, I.L.R., 18 All., 203.
Nga Paw U vs. *K.-E.*, U. B. R., 1907—09, Crl. Pro., 1.
Swaminadhan's Code of Crl. Pro., p. 361, Note 1.

The Additional Judge of the District Court having granted sanction to prosecute the respondent upon the application of the present applicant upon charges under sections 193 and 476, Indian Penal Code, the Divisional Judge in appeal revoked this sanction and the applicant now applies to this Court for a revision of the order of the Divisional Judge.

The Divisional Judge has pointed out that section 476, Indian Penal Code, which refers to the counterfeiting of a mark used for the purpose of authenticating a document was not applicable to the circumstances of the case. This appears to be correct. The respondent was apparently accused of having forged a document, an offence punishable under section 467, Indian Penal

Code. If there had been a simple and obvious clerical error, I think it would have been competent for this Court to correct it, but it does not appear that this was the case. Throughout the proceedings section 476 was referred to and not section 467. The Judge found that section 471 of the Indian Penal Code, which was also referred to in the application for sanction, was not applicable. Even assuming that section 476 was throughout a clerical error for section 467, it is clear that no sanction is necessary under section 195, Code of Criminal Procedure, for a prosecution under either section 467 or section 476, Indian Penal Code. Sanction therefore was superfluous and unnecessary, and this part of the order need not be further referred to

The Divisional Judge revoked the sanction granted to prosecute the respondent under section 193, Indian Penal Code, partly on the merits, as he thought it possible that there had been no deliberate perjury, and partly because the order of the Additional Judge did not state specifically what false evidence was given or fabricated. Section 195, sub-section (*4*), which is quoted as the authority for requiring the false evidence to be specifically stated in the order of sanction, does not however appear to me to justify this view. It lays down that the sanction may be in general terms and "shall, so far as practicable, specify the Court or other place in which and the occasion on which the offence was committed." Nor do there appear to be any rulings of this Court which justify the view taken by the Divisional Judge, and it is not difficult to imagine circumstances in which a sanction might be a perfectly proper sanction without setting out the actual words in which it is alleged the offence was committed.

It has been held that an application for sanction must set out in detail the statements alleged to be false(1), and it is clearly right that this should be so.

But there is a long series of rulings of the Indian Courts, and it is certainly in accordance with the requirements of justice that the order of sanction should not be a vague order leaving the accused in doubt as to the charge which he will be expected to meet, and in the case of a long deposition containing statements alleged to be false, it is particularly desirable that some indication should be given of the portions of the deposition so alleged to be false(2). In the present case the deposition of the respondent fills ten pages in the copy filed, but the particular part of the desposition which is alleged to be false is not set out in the order of sanction. The respondent was examined on oath by the Judge in the course of this enquiry, and the Judge has found that he has made false statements in that examination. I think it would be impossible for any one to gather exactly from the order of the Additional Judge what the charge against respondent was. He is supposed to have forged a document in the interests of his

(1) 18 All., 203.
(2) Swaminadhan's Code of Crl. Pro., 1910, p. 361, Note 1.

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wife who was defendant in the suit in respect of which these proceedings have been taken, and to have given false evidence to support the forgery. But it seems clear that the document must have been written long before he married this wife and at a time when he cannot have had, or have expected to have, any interest in the property in suit. The order of the District Judge is confused and involved, and it is impossible to ascertain exactly what it is that he considered the respondent had done.

But apart from this, the procedure of the judge appears to have been open to grave objection. Upon receipt of the application for sanction he issued notice to the respondent to show cause, and upon the respondent appearing in Court he placed him upon oath and allowed him to be cross-examined as to his previous statements. It was pointed out in *Nga Paw U* vs. *K.-E.* (1) that it is opposed to the spirit of the law that a person accused of an offence should be called upon to make a statement on oath. Further the examination of the respondent and the other witnesses who were examined in the enquiry, took place while the civil suit in which the offence is said to have been committed was being tried, the order of sanction bearing the same date as the judgment disposing of the suit. I think it may be taken as a general rule that proceedings with a view to the prosecution of a witness for giving false evidence should not be taken until a conclusion has been come to by the magistrate or judge conducting the trial in which the false evidence is supposed to be given, upon the evidence given therein. Any other course is clearly open to serious objections. It is the duty of a judge trying a civil suit, for example, to consider the evidence as a whole, and if each of the parties is to be at liberty to apply for sanction to the prosecution of witnesses, and if enquiries were to be conducted upon each application simultaneously with the trial of the suit, it is difficult to see what limit could be set to the confusion which would arise and the amount of prejudice which would be imported. A party would be at liberty in that case by merely filing an application for sanction to prosecute a hostile witness to embarrass seriously his opponent's case.

The judge appears to have treated the enquiry preliminary to the granting of sanction as if it were a civil suit itself between the applicant and respondent, and has not merely allowed the respondent to be examined and cross-examined upon oath, but has required the respondent to pay the costs of the enquiry. It is clear that although the respondent is not upon his trial upon a criminal charge, in being required to show cause why he should not be criminally prosecuted he is in the position of a person accused of committing an offence. His examination therefore should not be on oath, nor should he be cross-examined, but any questions put to him should be put with the object of enabling him to explain the circumstances which appear to require explanation.

(1) U. B. R., 1907—09, Crl. Pro., p. 1.

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Nor should the respondent be required to pay the applicant's costs. Though the enquiry is held by the judge in his capacity as such, when the offence is committed in a Civil Court, the enquiry is for the purposes of section 195, Code of Criminal Procedure, and there is no authority for granting costs.

I decline to interfere with the order of the Divisional Judge. The order of the Additional Judge of the District Court requiring the respondent to pay the applicant's costs is set aside.

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

Criminal Revision 73 of 1913. May 15th.

NGA PO HAN *vs.* K. E.

Mr. *S. Mukerji*—for Applicant.

Criminal Procedure,—367, 424.

Section 424 read with section 367, Code of Criminal Procedure, requires the judgment in appeal to state the points for determination, the decision thereon and the reasons for the decision. Where the Appellate Court arrives at a different decision from that of the trying Magistrate as to the facts the judgment should indicate the reasons for arriving at that decision.

The applicant was convicted by the Township Magistrate, of the theft of certain property by house-breaking, not because any of the property was found in his possession, but because a single witness said he saw him near complainant's house about the time the offence was committed, and because his co-accused stated that he was the culprit, and that he, the co-accused, had been given the stolen property by the applicant.

The Sessions Judge on appeal found that it had been conclusively proved that part of the stolen property was found in appellant's house, and he was implicated by the confession of his co-accused. The solitary remark "I can see no reason to suspect the evidence as regards the finding of the property" does not in the circumstances appear to be a sufficient compliance with the provisions of the Code of Criminal Procedure as to what a judgment should contain. Section 424 read with section 367, Code of Criminal Procedure, requires the judgment in appeal to state the points for determination, the decision thereon and the reasons for the decision. The trying Magistrate went very carefully into the circumstances attending the search and the finding of the property, and recorded a definite decision that the applicant could not be held responsible for the property found. It is clear that, if the view taken by the Magistrate was correct, the conviction was extremely doubtful and the judgment of the Appellate Court should have shown some appreciation of this fact, and some reasons for coming to a different decision. The Magistrate believed that one Maung Se, to whom some of the stolen property belonged, who was related to the complainant, and more distantly to the 1st accused, had been to the applicant's house shortly before the search and while the applicant was

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in Police custody, and it is clear that his doing so was not satisfactorily accounted for and was, in the circumstances, extremely suspicious. The stolen property moreover was found not by any of the searching party in the first instance. While the searchers were inside the house, the complainant, who was outside, called out that a bundle had fallen down, and on going to the spot a bundle containing the stolen property was found. It was said to have fallen from a rickety and dilapidated *Kela*, or swinging door, an unlikely place, as the Magistrate pointed out, on which to keep small articles of jewellery. I agree with the Magistrate that there was good reason for supposing that these articles were planted.

Apart from the finding of these articles the conviction cannot be sustained on the other evidence. The conviction and sentence are set aside and the applicant is acquitted.

Criminal Appeals 17, 18, 19, 20, 21, 22 & 23 of 1913. May 20th.

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

K.E. *v.* NGA PO THA AND 9 OTHERS.

Evidence—30, 114 (*b*), 133.
Joint trial—What constitutes a—.
Effect of confession being taken into consideration against a co-accused.

Q. E. v. *Chinna Pavuchi and others*, I. L. R., 23 Mad., 151.
Q. E. v. *Pahuji and one*, I. L. R., 19 Bom., 195.
Empress v. *Ashootosh Chuckerbutty*, I. L. R., 4 Cal., 483.
Nga Po Mya v. *Q.E.*, S. J., L. B., 1872—1892, I., p. 358.
Emperor v. *Kehri*, I. L. R., 29 All., 434.

Of eight accused who have been convicted in these proceedings seven have appealed. The appeals may be dealt with together. Those of Nga Tôk Paw, Nga Po Tha, Nga Po Zôn and Ma Chit can be briefly disposed of. Dacoited property was found in the possession of the first two very shortly after the dacoity. The third man, Nga Po Zôn, was arrested and his wife was seen to leave the house immediately ; an attempt was made to stop her, but she persisted and was followed, and three articles which have been identified as part of the dacoited property were dropped by her. There can be no doubt that the Sessions Judge was justified in holding that this property was in possession of Maung Po Zôn, and that Ma Chit attempted to conceal or dispose of it. There is other evidence connecting these persons with the dacoity : for instance, a khaki coat was found hanging in Po Tha's house, and one of the dacoits was shown to be wearing a khaki coat at the time of the dacoity. There is evidence that the three men were absent from their houses at the time of the dacoity, and there is the evidence of Po Hte, Maung Than, Maung Pa and Maung Po Tha that they were at the house of accused, Po Aung, the day before the dacoity and took Po Aung to the dacoited village. The latter evidence will be commented on again ; as corroboration of the case against these

accused there is no reason why it should not be believed. And finally there is the confession of Maung Po Aung which I shall hold may be taken into consideration against his co-accused and which implicates the three men. The Sessions Judge has examined the defence evidence carefully, and I agree with him that it is impossible to accept it as proved that these men were able to account for their movements at the time of the dacoity. The sentences were appropriate and the appeals are dismissed in the case of Nga Tôk Paw, Nga Po Tha, Nga Po Zôn and Ma Chit.

The case of the other appellants is on a different footing. No dacoited property was found in their possession. The accused Nga Po Aung made a full confession which he adhered to throughout, and there is no reason to suppose it is untrue. He pleaded guilty in the Court of Session, and the first question which appears to arise is whether he was being jointly tried with the other accused who did not plead guilty, so that his confession could be taken into consideration against them under section 30, Evidence Act. The decision of this question appears to depend upon whether the Sessions Judge accepted the plea of guilty or not, and the test to be applied would seem to be whether in fact the trial proceeded as against the accused who had pleaded guilty as if he had not done so, *i.e.*, whether, for instance, he cross-examined or was given the opportunity of cross-examining the witnesses, whether he was examined himself (and in a case where there are assessors whether their opinion was taken as to his guilt). The cases of *Q. E.* v. *Chinna Pavuchi and others* (1) and *Q. E.* v. *Pahuji and another* (2) may be referred to. In the former case it was pointed out that when an accused person who has pleaded guilty is left in the dock merely to see what the evidence will show as against him, though the Court intends ultimately to convict him upon the plea of guilty, it would not be fair to allow his confession to be considered as against his co-accused, for that, in effect, would be to comply with the forms of justice while violating it in substance.

In the present case the accused, Nga Po Aung, did not as a fact cross-examine any of the witnesses. He was however examined at the end of the prosecution case, and was asked whether he wished to call any witnesses, and declined to do so. I am inclined to think that it may be taken that in this case the Sessions Judge preferred not to act upon the plea of guilty, but proceeded to take the evidence just as if the plea had been one of not guilty, ultimately deciding the case upon the whole evidence including the accused's plea. If that is so, there can be no doubt that the trial was a joint trial within the meaning of section 30 of the Evidence Act.

The next question is whether the confession of the accused, Nga Po Aung, together with the evidence of the witnesses was sufficient to justify the conviction of the three appellants.

(1) I.L.R. 23 Mad., 151. (2) I.L.R. 19 Bom., 195.

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There appears to be some difference of opinion as to the meaning to be given to the words " may take into consideration " in section 30, Evidence Act. That the confession, where it is admissible, is " evidence " in the case is not open to doubt—*Empress* v. *Ashootosh Chuckerbutty* (3). But it is not the evidence of a witness, and there is a marked difference of opinion as to the value which should be placed on it. In the case of *Nga Po Mya* v. *Q.E.* (4), as in the Calcutta case quoted, the view appears to be taken that the confession of an accused person must be assumed to be of less probative value as against a co-accused than the evidence of such an accused examined as a witness. Section 133 of the Evidence Act expressly provides that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, but illustration (*b*) to section 114 of the same Act and the general practice of the Courts indicate that, at least as a general rule, the testimony of an accomplice requires corroboration. Whether the difference between the two kinds of evidence is such as to justify the remarks in the case of *Empress* v. *Ashootosh Chuckerbutty* that " a confession by prisoner A, which involves the guilt of prisoner B, is of itself, unsupported by other testimony, evidence of the weakest possible kind against B," and again that a " confession will not legally suffice when corroborated by other facts of which evidence is offered, unless those facts are such that, if believed to exist, they would of themselves suffice to support a conviction, " or whether the view taken in *Emperor* v. *Kehri* (5) is correct, it is not perhaps necessary to venture an opinion. The fact that an accused person who makes a confession is not on oath and is not subject to cross-examination must be taken into consideration, and, even admitting that a confessing prisoner " has brought himself within the penalty of the law, and the further fact that the statement is made in the presence and hearing of the co-accused," I think it must be conceded that ordinarily a confession does not, and should not, carry the same weight as the evidence of the same accused would carry if he were examined as a witness.

The general rule would seem to be that each case must be considered on its merits, and that the Court must decide, after the most careful consideration of the effects of a confession coupled with the other evidence on the record, whether the degree of proof referred to in section 3 of the Evidence Act has been reached or not.

Applying these principles to the present case, it appears that the convictions of the remaining three appellants rest upon the confession of Nga Po Aung, coupled with the evidence of four witnesses. The statements of Maung San E and Maung Pye in Court that they thought some of the dacoits resembled these appellants are clearly of no value.

(3) I.L.R., 4 Cal., 483. (4) S. J., L. B., 1872—1892, I, p. 388.
(5) I. L. R., 29 All., 434.

Nga Po Aung when he first confessed knew only the name of one of his fellow dacoits, Nga Po Tha. There is no admissible evidence as to why the other accused were arrested, and the fact that some of them were found to have dacoited property in their possession, is no evidence of the truth of his confession as against the other accused. It is not shown that he identified the appellants at any formal parade and, as far as the identity of these appellants is concerned, his confession is not, I think, of very great value.

It is supposed to be corroborated by the evidence of Maung Pa, and Maung Po Tha, 11th and 12th prosecution witnesses. But these two persons did not know any of the accused before. They saw them for a few minutes only in Maung Than's house, and, though they profess to have picked them out at an identification parade, Maung Pa said in Court "I cannot say the six accused before the Court are the men I saw," and Maung Po Tha said that the five men identified by him were not mixed up with other men. Maung Pa's evidence before the committing Magistrate shows that his identification was valueless, and it was discarded by that Magistrate. The two witnesses who do definitely identify the appellants are Maung Than and Maung Po Hte. They are father and son, and Maung Than is Nga Po Aung's father-in-law. They all live together. To their house, on the morning before the dacoity, came all the six dacoits, and were fed. Nga Po Aung says he did not want to go with the men, but Maung Than told him to do so. After the dacoity the men came back and apparently hid in the bed of a stream close by, while Maung Po Aung went to the house and got a meal cooked for them, which he and Maung Po Hte carried to them. Nga Po Aung showed the booty which he had got at the dacoity to Maung Po Hte, and told Maung Than of his having got it, before the police came on the scene. Maung Than was not asked whether he knew the men before or why he fed them: there was in fact no effective cross-examination of either this witness or Maung Po Hte. I have very little doubt that they knew perfectly well of the contemplated dacoity, and actively assisted the dacoits—before the dacoity by feeding them and, afterwards, by harbouring and feeding them. The evidence against the three appellants is then reduced to this—that Nga Po Aung, who did not know them before, in his confession said after their arrest that they were concerned, and that his father-in-law and brother-in-law, who were accomplices, said they were of the party which went away with Nga Po Aung and afterwards returned with him. I do not think it would be safe to convict on this evidence. It is clearly possible that names may have been substituted for those of the actual dacoits. The evidence of Maung Pa and Maung Po Tha is, as noted above, so weak as to be practically useless: the only evidence which remains is that of accomplices and, as against the appellants, I do not think it can be trusted. The appeals of Nga Kyaw Din, Nga Taung Gyi and Nga Po Nge are allowed, the convictions are set aside and they are acquitted.

Civil Revision No. 158 of 1911. June 16th, 1913.

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

MI SAW ME *v.* { NGA NYAN HLAING. NGA PO PYAING.

Mr. *S. Mukerjee*—for Applicant.

Mr. *F. C. Chatterjee*—for Respondents.

Nature of suit that may be brought under section 79, Probate and Administration Act.

Pointed out,—that a person bringing a suit under section 79, Probate and Administration Act, cannot sue merely to recover the loss which he has himself sustained owing to the maladministration of the estate, but must sue as trustee for all persons interested in the estate.

One Ma Pin Go obtained letters-of-administration to the estate of her son and daughter-in-law and executed a bond in favour of the District Judge for the due administration of the estate. The Defendants Respondents executed that bond as sureties.

The Plaintiff-Applicant having obtained a decree against the estate proceeded to execute it, but only obtained partial satisfaction. She then applied to the District Judge for a summary order directing the Defendants-Respondents as sureties to pay the balance.

Instead of at once rejecting this application, which I am surprised to find was signed by a pleader, the District Judge held an enquiry and came to the conclusion that there had been a breach of the conditions of the bond and directed the Plaintiff-Applicant to bring a suit on the bond. The Plaintiff-Applicant then brought a suit against the Defendants-Respondents for the balance of the decretal amount still due to her without making Ma Pin Go a Defendant and without filing the bond or even alleging that it had been assigned to her. The Township Judge in whose Court the suit was brought accepted a copy of the bond instead of the original and treated the District Judge's order on the Miscellaneous Application as an assignment and proceeded with the suit. He found that there had been a breach of the conditions of the bond and granted Plaintiff-Applicant a decree.

On appeal the learned Additional Judge held that there had been no assignment of the bond and that the suit was not maintainable. He accordingly reversed the decree and dismissed the suit.

The Plaintiff-Applicant has now applied for revision to this Court.

It is clear that the Township Judge has but a hazy notion of the procedure to be adopted in cases of this sort and of the nature of the suit that may be brought after the assignment of a bond under section 79, Probate and Administration Act.

I have examined the administration proceedings and find that the original bond is filed in them and that it has not been

assigned. As the learned Advocate for the Respondents has pointed out, the assignment of a bond under section 79, Probate and Administration Act, is not a merely formal act. It can only be done on application by petition and on the Court's being satisfied that there has been a breach of the conditions of the bond, and then it is to be done on such terms as to security, payment into Court and so on as the Court may think fit, and of course there must be a legal assignment of the bond under the signature of the Judge. In the present case there was no application for an assignment. The District Judge does not appear to have applied his mind to the provisions of section 79, Probate and Administration Act, at all and there was no assignment.

By executing the bond the Defendants-Respondents rendered themselves liable to the District Judge for the breach of any condition of the bond, but until that bond is legally assigned they are liable to no one else.

Then again, as I have said above, the Township Judge is clearly ignorant of the nature of the suit which an assignee of such a bond is entitled to bring. He cannot sue merely to recover the loss which he himself has suffered from the maladministration of the estate. He has to sue in a representative character as the trustee of all persons interested in the estate to recover the full amount of wastage.

The suit was utterly bad and was rightly dismissed by the Lower Appellate Court.

The application is dismissed with costs.

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

Civil Second Appeal No. 110 of 1912. June 12th 1913.

MI EIN ZI *v.* MI NI AND ONE.

Mr. *J. C. Chatterjee*—for Appellant.

Mr. *A. C. Mukerjee*—for Respondents.

Limitation—5-17—22.

Civil Procedure—Order XXII.

An amendment that would deprive a party of the defence of Limitation should not be allowed.

Thakur Rajhmalhji vs. *Shah Lal*, I. L. R., 19 All., 330.

Mallikajuna vs. *Pullagga and others*, I. L. R., 16 Mad., 319.

Alagappa Chetty vs. *Vellian Chetty and another*, I. L. R., 18 Mad., 33.

Originally the Plaintiff-Appellant sued one Ma Naw Za for the possession of some land and won her suit. Ma Naw Za appealed but died before the appeal was disposed of and her legal representatives were brought on to the record and continued the appeal and were successful. Then on the 23rd April 1912

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the present appeal was filed in this Court, the name of the Respondent being given as Ma Naw Za. The appeal was not admitted at once, but on the 24th June 1912 after the Plaintiff-Appellant's Advocate had been heard, the 10th December 1912 was fixed for the hearing. On the 17th July 1912 the Plaintiff-Appellant through her Advocate filed an application, in which it was stated that the Respondent, Ma Naw Za, had died, the date of her death not being mentioned, and that Ma Ni and Maung Tun Myin were her legal representatives, for these persons to be substituted as Respondents for Ma Naw Za. Notices were then issued to these persons that objections would be heard on the 10th December 1912 and on that date objections were made and a date was fixed for their hearing and they have now been heard.

It is urged on behalf of the legal representatives of Ma Naw Za that there is no proper appeal before this Court as Ma Naw Za died before the appeal was filed and that therefore her legal representatives cannot be substituted for her. On the other hand it is urged on behalf of the Plaintiff-Appellant that there has been merely a misdescription of the real Respondent and that an error of this sort may be rectified. It has also been argued that if such an error may not be rectified an Appellant will be at a loss what to do, if he is unable to discover who are the legal representatives of a deceased person, against whom he would have had a right of appeal but for his death, within the period allowed by law for filing the appeal.

It is clear that there is here no question of abatement. Order XXII of the 1st Schedule of the Civil Procedure Code does not apply at all. The appeal was preferred against a person who was already dead and therefore there could be no substitution of parties, there never has been a Respondent in this appeal. In many cases an appeal is looked upon as a continuation of a suit and is included in the term, and similarly a second appeal may be in certain instances considered a continuation of the suit or of the first appeal. But I do not think that because Ma Naw Za's legal representatives were brought on to the record of the Lower Appellate Court they can therefore be considered to have been by implication made Respondents in this appeal. If that contention were maintainable—and I understand that it has been actually made—the legal representatives of a deceased litigant could not feel safe for a very considerable time. Unknown to them an appeal might be filed and from one cause or another drag on for a year or two without being heard, and then when perhaps the legal representatives had lost the means of successfully fighting the appeal they might be called upon to resist it. Section 22 of the Limitation Act does not apply to appeals and therefore would be no safeguard in such a case.

The learned Advocate for the Plaintiff-Appellant has urged that the error should be rectified, because otherwise an injustice will be done owing to the law of limitation. But it is precisely because a rectification of the error would deprive the legal repre-

sentatives of the benefit which has accrued to them from the law of limitation that the rectification asked for cannot be permitted.

If the Plaintiff-Appellant could plead good cause for the mistake, her proper course would be to file a fresh appeal against Ma Naw Za's legal representatives and claim exemption from limitation under section 5, Limitation Act. In the present case it seems very doubtful whether she could plead good cause, but it is not necessary to consider the point as it does not arise. The only way in which the error made could be corrected in these proceedings would be by an amendment of the memorandum of appeal. Amendments have been allowed when there has been a misdescription of parties *e.g.* in *Thakur Rajhmalhji* vs. *Shah Lal* (1) a suit had been brought in the name of an idol, and on appeal the manager of the temple was substituted, but where such an amendment would debar a party from pleading limitation an amendment will not be allowed. Thus in *Mallikajuna* vs. *Pullagga and others* (2) the suit was brought against persons who were already dead. The suit was dismissed. The Plaintiff appealed and sought leave to amend the plaint by substituting for the names of the dead men those of their legal representatives as against whom the suit would then have been barred by limitation. It was held that the amendment should not be allowed as the proposed Defendants would be likely to be precluded from pleading limitation. Again in *Alagappa Chetty* vs. *Vellian Chetty and another* (3) the suit was brought in the name of one only of several partners, and it was held that the suit was not maintainable in the absence from the record of the other partners, and further that by reason of the fact that the amendment might deprive the Defendants of the defence of limitation and of the other circumstances in the case the Plaintiff should not be allowed on appeal to amend the plaint by bringing his partners on to the record. These cases are not absolutely similar to the present one because in them the mistake was made in the first Court, but they are nevertheless good authority for holding that an amendment that would deprive a party of the defence of limitation should not be allowed. It is to be noted that an amendment of this kind in a Court of first instance would by virtue of section 22, Limitation Act, not affect limitation.

It has been asked what an Appellant is to do if he is unable to discover the names of the legal representatives of a person against whom he had a right of appeal and who has died before the appeal was presented. Such a case is not specifically provided for in the Limitation Act though provision is made in section 17 in the case of suits and applications, but no doubt if the Appellant had used reasonable diligence in endeavouring to discover who the legal representatives were, the facts would be held to be sufficient cause under section 5, Limitation Act.

(1) I. L. R., 19 All., 330. (2) I. L. R., 16 Mad., 319.
(3) I. L. R., 18 Mad., 33

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I am therefore of opinion that an amendment should not be allowed and that the appeal must fail as there is no Respondent before the Court.

Permission to substitute the names of her legal representatives for Ma Naw Za is therefore refused and the appeal is accordingly dismissed.

The Plaintiff-Appellant will pay the costs incurred by the legal representatives. Advocates' fee one gold mohur.

Civil 2nd Appeal No. 50 of 1912. July 16th, 1913.

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

NGA YA BAW AND ONE *v.* NGA BYA.

Mr. *S. Mukerjee*—for Appellants.

Mr. *C. G. S. Pillay*—for Respondent.

Mortgage.

Held,—that when one co-heir mortgages undivided ancestral property a suit by another co-heir to compel partition of the mortgage-money is—in the absence of any agreement for partition—not maintainable.

Harmukhgauri v. *Harisukprasad*, I.L.R., VII Bom., 191.
Mauchlal v. *Shivlal*, I.L.R., VIII Bom., 426.
Ramdin v. *Kalha Pershad*, 12 I.A., 12.

The Plaintiff-Respondent sued the Defendants-Appellants to compel them to give him a share of money received by them on the mortgage of two pieces of land, which they alleged were undivided ancestral property in which they had a right to share. The mortgage-money on one piece of land was received in 1902 and on the other in 1909.

The Defendants-Appellants contended that the Plaintiff-Respondent had enjoyed no benefit from the lands for the last 30 or 40 years and that the suit was barred by limitation.

Part of the Plaintiff-Respondent's case was that the Defendants-Appellants had given him Rs. 75 in 1271 in part payment of his share, and the Courts below held that as the Defendants-Appellants admitted having given the Plaintiff-Respondent a sum of Rs. 50 to enable him to go to Lower Burma the burden was on them to prove that this Rs. 50 was not paid as part payment of a share of the mortgage-money, that they had not discharged the burden and that this payment saved limitation. They agreed in decreeing a share of the mortgage-money to the Plaintiff-Respondent, but differed as to the amount the several Defendants should pay.

The Courts below of course erred in throwing the burden of proof upon the Defendants-Appellants. If Plaintiff-Respondent wished the Court to believe that the Defendants-Appellants had paid him Rs. 75 or Rs. 50 as part of his share of the mortgage-money it was for him to prove that it was paid as such.

They also went wrong in assuming that such a payment would save limitation. In the first place the sum for which

Plaintiff-Respondent was suing was not a debt and therefore section 20, Limitation Act, had no application at all. In the next place, if Plaintiff-Respondent had been suing for a debt, payment of part of the principal would not affect limitation unless the fact of the payment appeared in the Defendants-Appellants' handwriting. Finally the part payment of the principal of a debt cannot revive the debt once it has become time-barred.

The next questions to consider are whether the suit was maintainable, and, if so, under what Article of the 1st Schedule of the Limitation Act it falls.

For the Defendants-Appellants, it is urged that if the suit be maintainable at all the limitation is either three years, Article 62, or else six years under Article 120.

For the Plaintiff-Respondent it is suggested that the suit was to enforce payment of money charged on immoveable property, and that the limitation is twelve years under Article 132.

I think it is clear, however, that this Article has no application. It appears to me to provide for cases brought by the person who has the charge. For instance, if a simple mortgagee paid Government Revenue on the mortgaged property in order to prevent its being sold by auction, he would have a charge on the property for the amount paid and he could sue the mortgagor to enforce payment, and his suit would fall under Article 132.

It was held in *Harmukhgauri* v. *Harisukprasad* (1) and in *Mauchlal* v. *Shivlal* (2) that this Article did not apply to a suit by one co-sharer in a vatan against another co-sharer who has received the Plaintiff's share. Further it was held by the Privy Council in *Ramdin* v. *Kalha Pershad* (3) that this Article only applies in suits to enforce payment of money out of property on which it is charged.

So that I think it is clear that if the Plaintiff-Respondent had any right to share in the mortgage-money received by the Defendants-Appellants in 1902 that right has become time-barred.

But further I do not think the suit was maintainable at all. On what is the suit based? Not on Contract nor on Tort. I do not see how the Plaintiff-Respondent's right to share in the land, if he has one, can possibly give him a right to compel the Defendants-Appellants to give him a share of the mortgage-money. In the absence of any allegation of an agreement between the parties, the presumption is that the Defendants-Appellants mortgaged whatever interest they themselves had in the lands and the mortgage-money is their property. By mortgaging their interests in the lands they did not deprive the Plaintiff-Respondent of his, if he has any. His remains as it was before and he can sue to recover it, but the mortgage-money which is charged on the Defendants-Appellants' own interest

(1) I.L.R., VII Bom., 191. | (2) I.L.R., VIII Bom., 426.
(3) 12 I.A., 12.

NGA YA BAW *v.* NGA BYA.

clearly belongs to them and they are not bound to give any portion of it to the Plaintiff-Respondent. I am of opinion that the suit was not maintainable, and accordingly the decrees of the Courts below are set aside and the suit is dismissed with costs in all three Courts.

Criminal Revision No. 568 of 1913. 15th August.

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

K.E. *v.* NGA KYAUK LON AND SIX OTHERS.

Criminal Procedure— 133.

Held,—that inoculating children upon an outbreak of small-pox by their parents did not amount to a trade or occupation which is injurious to health, and consequently the order to stop the practice under section 133 of the Code of Criminal Procedure was an illegal order.

The order of the District Magistrate is not a legal order. The Respondents were six persons who were reported to have inoculated and admitted inoculating their children upon an outbreak of small-pox. They have been ordered to stop this practice under section 133 of the Code of Criminal Procedure. The only part of section 133 which could possibly apply is that which refers to the prohibition of any trade or occupation which is injurious to health. These persons cannot clearly be said to be carrying on a trade or to be engaged in an occupation. The order is set aside.

In any case the joint proceeding against six persons does not appear to have been justified.

Criminal Revision No. 569 of 1913. 15th August.

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

K.E. *v.* NGA NYO AND TEN OTHERS.

Village Act—19 (1).

To convict under section 19 (1) of the Village Act, 1907, it is necessary to show that the accused had built their houses without the permission of the Deputy Commissioner and after the 1st of January 1908.

The conviction under section 19 (1) of the Village Act is not justified by the evidence. It was necessary to show that the accused had built their houses without the permission of the Deputy Commissioner and later than the year 1908 in which year the present Village Act came into force. The old Village Regulation did not contain any provisions corresponding to the terms of section 18 of the present Village Act. The Magistrate states that the houses have been in existence, he thinks, eight or nine years.

The convictions and sentences are set aside and the fines must be refunded. If the prosecution can prove that an offence has been committed there may be a new trial, but the accused should be tried separately.

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

Civil Appeal No. 221 of 1912. September 5th 1913.

NGA SEIK *vs.* NGA PU.

Mr. *S. Mukerje*—for Appellant.
Mr. *C. G. S. Pillay*— for Respondent.

Civil Procedure—XXI, rule 63.
Court Fees—Schedule II, Articles 17 (1).
Evidence—33, 145.

In a suit to alter or set aside a summary decision or Order of a Civil Court not established by Letters Patent the proper Court-Fee is that prescribed by sub-section 1 of Article 17 of Schedule II of the Court Fees Act.

Such a suit should be decided on the evidence tendered and taken in the Regular suit and not upon any evidence taken in the summary case.

R. M. L. M. Subramaniam Chetty vs. *Maung Maung Pe*, U. B. R., 1897—01, II, 355.
Phul Kumari vs. *Ghamshyam Misra*, I. L. R., 35 Cal., 202.

Maung Pu having obtained a decree for Rs. 157-8-0 against one Maung Nyo attached certain firewood in execution of the decree. In Miscellaneous proceedings Maung Seik applied for removal of the attachment on the ground that the firewood belonged to him, but his application was dismissed. He then filed a Civil Regular suit in the District Court asking for a declaration that the firewood under attachment belonged to him. This suit was dismissed and he now appeals.

The plaint was originally stamped with a Court Fee stamp of the value of Rs. 10, but the Judge on the authority of *R. M. L. M. Subramaniam Chetty* vs. *Maung Maung Pe* (1) required the plaintiff to affix stamps according to the value of the property in suit.

The first ground of appeal is that this order was wrong. The matter has been set at rest by the case of *Phul Kumari* vs. *Ghamshyam Misra* (2) in which it was held by their Lordships of the Privy Council that a suit under section 283 of the Code of Civil Procedure of 1882, corresponding to Order XXI, Rule 63 of the Code of Civil Procedure, 1908, was a suit in which the proper Court Fee was that prescribed by sub-section 1 of Article 17 of Schedule II of the Court Fees Act, namely, Rs. 10 for "a suit to alter or set aside a summary decision or order of a Civil Court not established by Letters Patent." This ruling is binding on all Courts in Upper Burma and must be followed.

The second ground of appeal is that the Lower Court has acted contrary to law in using the miscellaneous proceedings against the appellant without having recourse to the procedure laid down in the law of Evidence, and the fourth ground is that the Lower Court has erred in overlooking that a regular suit under Order XXI, Rule 61 (which is apparently a mistake for Rule 63) should be decided on the evidence actually before it.

There can be no doubt that a Judge is bound in cases of this description to find the facts upon the evidence tendered and taken

(1) U. B. R., 1897—01, II, 355. (2) I. L. R., 35 Cal., 202.

NGA SEIK *vs.* NGA PU.

in the regular suit and not upon any evidence taken in the summary case. The evidence taken in the summary case is no doubt admissible upon the conditions and for the purposes described in the Evidence Act, *e.g.* under section 33 previous evidence is relevant under certain circumstances, where, for instance, the person who gave the evidence in the previous proceedings is dead and cannot be found; or again under section 145 a witness may be contradicted, under certain conditions, by previous statements made by him and reduced to writing. In the present case the depositions of the plaintiff-appellant and the judgment-debtor in the miscellaneous case have been filed upon the record and are shown as having been admitted by the plaintiff. The object of filing these depositions is not clear, but apparently it was to obtain an admission from the plaintiff that the firewood was in the possession of the judgment-debtor at the time that it was attached. The admission of this evidence was irregular. The proper course was to examine the parties or their Advocates and ascertain from that examination what their case was.

The third ground of appeal is that the learned District Judge was influenced by the appellant's statement in the miscellaneous case and has failed to give due consideration to the facts on the record. And the last ground is that the finding is against the weight of evidence.

As to this, however, I am unable to see that the District Judge was influenced by anything except the evidence actually given and recorded in the regular suit. The plaintiff's case apparently was that he had bought the firewood and kept it in charge of the judgment-debtor and though his advocate is recorded to have admitted that the firewood was in the physical possession of Maung Nyo, the Judge has added "but on Maung Seik's account." There can, I think, be no doubt from a perusal of the record either as to what the plaintiff's case was or what he was able to prove. I am not prepared to hold that the District Judge was wrong in his finding.

It is in evidence (see the statements of plaintiff's 1st and 2nd witnesses, Maung Ka and Maung Bo Le) that it is not usual for any one without experience of the firewood business to deal in fuel as the plaintiff claims to have done.

It is also clear that the plaintiff left the judgment-debtor to dispose of the fuel for six months. Nothing has been paid to the plaintiff on account of sales, and no accounts have been submitted.

Maung Nyo, the judgment-debtor, was, as found by the District Judge, the ostensible owner, and although there is some evidence that the plaintiff found the money for the purchase, it is anything but satisfactory, and the actual payments would seem to have been made by the judgment-debtor either alone or in company with the plaintiff.

I think the District Judge was justified in finding that the plaintiff has failed to prove that the firewood belonged to him, and this appeal is therefore dismissed with costs.

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

Civil 2nd Appeal No. 273 of 1912. September 15th, 1913.

NGA PO THIN *v.* U THI HLA.

Mr. *J. C. Chatterjee*—for Appellant.

Mr. *San Wa*—for Respondent.

Buddhist Law—Ecclesiastical.

Civil Procedure—9.

In a dispute between a Buddhist layman and a monk relating to land on which a monastery stands a Civil Court has jurisdiction to try the suit on its merits; and the proper basis for the decision of the suit should be the texts of the Vinaya so far as they can properly be applied.

Semble.—A monastery dedicated to an individual Buddhist monk does not become his absolute property and he can only claim exclusive rights over it for 12 years at most.

Held,—That a gift by a monk whether to a layman or to another monk of a monastery or of a site for a monastery, whether it has been dedicated to him personally or not is invalid.

U Te Za and one v. *U Pyinnya*, U.B.R., 1892—95, II, 59.
U Thatdama and one v. *U Meda and one*, U.B.R., 1897—01, II, 42.
U Teik Ka and two others v. *Nga Tin Byu*, U.B.R., 1910, II, 78.
Maung Hmôn and one v. *U Cho and one*, U.B.R., 1892—96, II, 397.
Maung On Gaing v. *U Pandisa*, P.J., L.B., 614.
Maung Talôk and one v. *Ma Kun and two others*, U.B.R., 1892—96, II, 78.
Rhys Davids and Oldenberg's Translation of Vinaya texts.

JUDGMENT.

This is a case of very considerable difficulty as it involves questions of the Buddhist Ecclesiastical law.

Section 9 of the Civil Procedure Code lays down that the Civil Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. And in the explanation to that section a suit in which the right to property is contested is declared to be a suit of a civil nature notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

In *U Te Za and another* v. *U Pyinnya* (1) which was a suit between Buddhist monks relating to a *kyaung-taik* it was held that according to the custom in force before the annexation—such disputes were decided by the Ecclesiastical authorities, that the *Hlutdaw* never interfered with such decisions but on the contrary lent its aid to enforce them, that the rights which the Ecclesiastical authorities had acquired remained to them after the annexation and that the Civil Courts should adopt the same practice as the *Hlutdaw* had followed.

(1) U.B.R., 1892—96, II, page 59.

NGA PO THIN v. U THI HLA.

In *U Thatdama and U Wilatha* v. *U Meda and U Myizu* (1) it was held that not only should the Civil Courts be bound by the decisions of the Ecclesiastical authorities in matters within their competence but they should also abstain from deciding points which fall within the sphere of ecclesiastical jurisdiction. In these two cases all the parties were Buddhist monks.

U Teik Ka and two others v. *Nga Tin Byu* (2) was a case in which a layman had brought a dispute between him and three monks before the Thathanabaing, and having obtained an order in his favour applied to the Civil Court to enforce it. It was contended in that case that as the Plaintiff was a layman the Ecclesiastical authorities had no jurisdiction. But it was held that as the Thathanabaing's order was a pronouncement on the religious duties of monks towards the descendants of a *taga* and was directed against subordinate ecclesiastics, it was an order within the Thathanabaing's competence and should be enforced.

This is clearly not an authority for holding that in a dispute between a layman and a monk the ordinary jurisdiction of the Civil Courts is ousted and a layman-Plaintiff must submit to the jurisdiction of the Ecclesiastical authorities. In the present case the Plaintiff who is a layman did not do so but brought a suit in a Civil Court for trial on the merits, the Defendant-Respondent who is a monk raised no objection to the jurisdiction of the Civil Courts, and though the property in suit was admittedly at any rate one religious property I am of opinion that the Township Court had jurisdiction to try the suit on the merits.

The Plaintiff-Appellant's case is that the land in suit on which a monastery stands was the *poggalika* property of a monk, U Ariza, that a monk, U Pandawa, who was U Ariza's pupil obtained it as a *withathagaha* gift and had subsequently given it to him. He sued for possession.

The Defendant-Respondent, U Thi Hla, who is living in the monastery standing on the land raised two inconsistent defences, namely, (1) that he and U Pandawa took the land and *kyaung* as a *withathagaha* gift jointly and that U Pandawa subsequently made a gift of his interest to Defendant-Respondent and (2) that on the death of U Ariza the property reverted to the original donor who again gave it to the Defendant-Respondent as his *poggalika* property.

The Township Judge found in Plaintiff-Appellant's favour and gave him a decree.

The Lower Appellate Court found on the authority of *Maung Hmôn and another* v. *U Cho and another* (3) that a monk can dispose of his *poggalika* property during his life-time, but that if he fails to do so it reverts to the donor who can select a successor, but that if he fails to do so it becomes *thingika* property, but he went on and found that the land in suit had become *thingika* and

(1) U.B.R., 1897—01, II, page 42.
(2) U.B.R., 1910, I, page 78.
(3) U.B.R., 1892—96, II, page 397.

therefore could not be the subject of a gift. He accordingly set aside the decree of the 1st Court and dismissed the suit.

The learned Additional Judge obviously quoted a ruling without referring to it. The ruling cited by him has no bearing on the point at all. Possibly he referred to Tha Gywe's Treatise on Buddhist Law, page 239, and quoted the ruling he did by mistake for *Maung On Gaing* v. *U Pandisa* (1) quoted a few lines lower down on the same page.

The first thing to consider is the principle on which the case should be decided. If the Dhammathats be referred to it will be found that they are hopelessly contradictory and they are also inconsistent with the rules in the Vinaya. Thus in Volume I, U Gaung's Digest, page 464, the compiler says: "The rules laid down in the old Dhammathats are inconsistent with those in the Vinaya and an attempt has been made in the present treatise to reconcile them, and readers are requested to exercise their own discretion in their application of the rules."

The rule laid down in *Maung On Gaing* v. *U Pandisa* referred to by the Lower Appellate Court is contained in section 410:

"Property (including a monastery) given to a specified *rahan* shall on the death of the original donee revert to the donor who shall be at liberty to again give it away as a charitable gift to whomsoever he likes."

But the rule given in section 405 is diametrically the opposite: "If a deceased *rahan* did not transfer his *poggalika* monastery to anyone it shall become *sanghika* property . . . . . .

"The donor has no voice in the selection of a successor to the original donee, the right to select being exercised by the members of the order."

Again in section 399 a gift made by a *rahan* to take effect after his death is declared to be invalid, whilst in section 404 the gift of a *poggalika* monastery made by a dying *rahan* is declared to be valid.

The questions which arise for decision in this case are such as would be better decided by the Ecclesiastical authorities, but as I have found that the Civil Courts have jurisdiction to try this case, those questions must be decided, and I think the proper basis for the decision should be the texts of the Vinaya so far as they can properly be applied.

It might be objected that the Vinaya is at least 300 years older than the Christian era, that law is progressive and that it would be as absurd to apply the rules contained in the Vinaya to modern conditions as to apply the law of mortgage contained in Leviticus to a dispute between Christians. But the cases are widely different. Christians do not profess to be bound in their disputes about property by either the Old or the New Testament.

(1) P.J., L.B., 614.

NGA PO THIN v. U THI HLA.

Whereas though no doubt the strict rules contained in the Vinaya are departed from by many monks, there are other monks who try to conform to them as well as the times will permit, and all monks profess to be bound by them, and when a case of this nature is brought before the Ecclesiastical authorities for decision it is in accordance with texts from the Vinaya that they decide it [*vide U Te Za and another* v. *U Pyinnya* (1)].

Now the questions for decision are—

(1) Can a monastery or land be the subject of a *poggalika* gift?

(2) If so, is the recipient monk competent to give it away either to another monk or to anyone else?

(3) Was there a valid *withathagâha* gift from U Ariza to U Pandawa?

(4) Was there a valid gift from U Pandawa to the Plaintiff-Appellant?

If the Plaintiff-Appellant is to succeed all these points must be decided in his favour.

In *Maung Talôk and another* v. *Ma Kun and two others* (2) the Lower Appellate Court held that "looking to the accepted precepts of the Buddhist religion, it seemed evident that *pôngyis* could not own *poggalika* property, and at most could only have a usufruct in such things as gardens, etc., for the purpose of obtaining by means of their produce those few things lawful to be possessed." It was held, however, by this Court that whatever may have been the primitive rules of Buddhism, Buddhist monks at the present day do and may possess property. But the authorities on which that decision was based were the Dhammathats, which are not the authorities on which the Ecclesiastical authorities themselves decide these matters.

No doubt the proposition that a monastery cannot be *poggalika* property will sound novel, but nevertheless I have been unable to find any authority in the Vinaya—and I have spent a very considerable amount of time in the quest—for the opposite proposition, though some of the Dhammathats assume that a monastery can be *poggalika* property and in *Maung On Gaing* v. *U Pandisa* and in other cases the Courts have followed these Dhammathats.

It would appear that originally the monks lived in the woods and forests and caves and anywhere where they could get shelter, as buildings had not been expressly allowed them, and when a rich man offered to build some dwelling houses for certain monks they refused lest they should commit a sin. The matter was referred to the Buddha and he said: "I allow you, O *Bhikkus*, abodes of five kinds—*viharas*, *addhagogas*, storied buildings, attics and caves". A *Vihara* is clearly used over and over again in the Vinaya as equivalent for what is now known as a

(1) U.B.R., 1892—96, II, page 59.
(2) U.B.R., 1892—96, II, page 78.

kyaung. The rich man thereupon built sixty *viharas* and asked the Buddha what he was to do with them. The latter replied: "Then, O householder, dedicate these sixty dwelling places to the *sangha* of the four directions, whether now present or hereafter to arrive." This story is given in the Kullavagga, Book VI, Chapter I, sections 2, 3 and 4, and clearly indicates that at the beginning, at any rate, dwellings dedicated as monasteries were to form the common property of the whole body of Buddhist monks.

It is perhaps worthy of note that apparently the first if not the only mention in the Vinaya of a garden (*aranna*) given as a religious offering was dedicated to "the fraternity of *Bhikkus* with the Buddha at its head" (Mahavagga, Book I, Chapter 22, section 18).

When the people knew that monasteries were permitted they began to build with zeal, and a poor tailor who wished to gain merit in this way, but had not the necessary skill, on finding that his building kept tumbling down before it was completed complained that whereas the monks taught others, no one taught him or helped him to build. When the Buddha heard of this he said: "I permit you, O *Bhikkus*, to give new buildings in course of erection in charge to a *Bhikku* who shall superintend the work" (Kullavagga, Book VI, Chapter V). Next we find that this permission was taken advantage of by monks who wished to defeat what I consider was the plain rule, *viz*. that a monastery was not to be considered the property of an individual monk, and buildings which were practically completed and required nothing but a little plaster or the socket for a bolt were given in charge to individual monks and the charge was assigned for 20 or 30 years or for life. The stricter monks objected and the Buddha was informed, and he forbade the practice and fixed as the limit of time during which a *Bhikku* might superintend the building of a *vihara* as 12 years (Kullavagga, Book VI, Chapter 17, section 1).

It is true that it is possible to read these passages as having reference only to monasteries dedicated as *sanghika* property, but on the other hand they are perfectly consistent with the proposition that monasteries cannot be other than *sanghika* property. But section 3 of the same Chapter seems to me to make the matter clearer. The question for the decision of the Buddha was what was to be done in case a monk in charge of building operations left the place or became incompetent by leaving the priesthood or otherwise, and he decided thus: "In case that occurs, O *Bhikkus*, as soon as he has taken charge, or before the building has been completed, let the office be given to another lest there should be loss to the *sangha*. In case the building has been completed, O *Bhikkus*, if he then leaves the place, it (the office and its privileges) is still his—if he then returns to the world or dies or admits that he is a *samanera* or that he has abandoned the precepts, or that he has been guilty of an extreme

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offence, the *sangha* becomes the owner." In their notes to this passage Messrs. Rhys Davids and Hermann Oldenberg, from whose translation of the Vinaya these texts have been quoted, say that what is meant is that the monk in charge loses his special privileges, such as his lien on the best sleeping places, etc.

This passage appears to me to include buildings dedicated to an individual monk because if a *sanghika kyaung* only were referred to, it is difficult to see how any loss could be caused to the *sangha* owing to the owner's abandoning it. Reading these passages together it seems to me that a monk could act as owner of a monastery whether dedicated to him personally by the *kyaungtaga* or allotted to him by other monks for 12 years at most. But whether this be so or not I think it is clear from other texts which I shall now refer to that a monk cannot according to the Vinaya give away to an individual, either monk or layman, a monastery dedicated to him personally.

The proposition that a monk can dispose of property received as a *poggalika* gift as he thinks fit appears to rest on a saying of the Buddha recorded in the Kullavagga, Book X, Chapter 15, section I: "I allow you, O *Bhikkus*, to give away that which was given to special individuals." But this saying must be taken with the context. The story runs that the people gave food to the *Bhikkus* and the *Bhikkus* gave it to the *Bhikkunis* (or nuns). The people murmured, saying "How can their reverences give away to others what was given for them to have—as if we did not know how to make gifts." When the Buddha heard of this he said: "A *Bhikku*, O *Bhikkus*, is not to give away to others what was given for them themselves to have. Whosoever does so shall be guilty of a *dukkata*." Clearly this is the general rule but an exception was allowed.

"Now at that time the *Bhikkus* had come into the possession of some food. They told this matter to the Blessed One.

"I allow you, O *Bhikkus*, to give it to the *sangha*."

Too much came into their possession. They told this matter to the Blessed One.

"I allow you, O *Bhikkus*, to give away that which was given to special individuals." "I allow food that has been stored up to be enjoyed by *Bhikkunis* after they have had it given over to them by the *Bhikkus*."

This is an authority for the giving away of such a thing as food by a monk to whom it has been given as a *poggalika* gift to another monk or to a nun, but it is very far from being an authority for the proposition that a monk to whom individually a monastery or land has been given can give the same away to a layman. But there are other texts which I think are conclusive.

The Kullavagga, Book VI, Chapter 15, relates how certain monks were constantly worried by other monks from distant places claiming sleeping accommodation in their monastery, and how they tried to remedy matters by handing over all the sleeping accommodation to one of their number as his own property.

This would of course be converting *sanghika* property into *poggalika* property which is obviously against the rules (for an exception, however, *vide* Mahavagga, Book VIII, Chapter 24, section 4), but when the Buddha heard of it he went much further than forbidding this, he said: "These five things, O *Bhikkus*, are untransferable; and are not to be disposed of either by the *sangha*, or by a *gana* (a group of monks) or by *a single individual*. And what are the five? A park (*aranna*) or the site for a park . . . A *vihara* or site for a *vihara*—this is the second untransferable thing, that cannot be disposed of by the *sangha* or by a *gana* or by an individual. If it be disposed of such disposal is void and whosoever disposed of it is guilty of a *thullakkaya* . . ." This passage is repeated in Chapter 16, section 2, with the word "divide" in place of the word "transfer," on the occasion of some monks dividing all the sleeping accommodation in a monastery amongst themselves, and it clearly has reference to the different kinds of religious gifts that may be made, mentioned in Mahavagga, Book VIII, Chapter 32, of which three only may be mentioned, *viz.*, a gift to the *sangha*, a gift to a specified number of monks (a *gana*) and a gift to an individual monk.

The distinction between such property as a monastery or land and the few requisites of a monk is again made clear by the Buddha's directions as to the disposal of a monk's property after his death given in the Mahavagga, Book VIII, Chapter 27, section 5. Now at that time a certain *Bhikku* who was possessed of much property and of a plentiful supply of a *Bhikku's* requisites completed his time.

They told this matter to the Blessed One.

"On the death of a *Bhikku*, O *Bhikkus*, the *sangha* becomes the owner of his bowl and of his robes. But now, those who wait upon the sick are of much service. I prescribe, O *Bhikkus*, that the set of robes and the bowl are to be assigned by the *sangha* to them who have waited upon the sick. And whatever little property and small supply of a *Bhikku's* requisites there may be (*lahubhan*), that is to be divided by the *sangha* that are present there; but whatever large quantity of property and large supply of a *Bhikku's* requisites there may be (*garubhan*), that is not to be given away and not to be apportioned but to belong to the *sangha* of the four directions, those who have come in and those who have not."

Thus I think it is extremely probable that the Buddha refused to allow a monk to own a monastery for more than 12 years and considered it the property of the general body of monks throughout the world, whatever the intention of the donor may have been, and that it is quite certain that he forbade the giving away of a monastery whether it has been dedicated to an individual or not.

It thus becomes unnecessary to consider the alleged *withathagaha* gift, but I will add that even if it had reference to such

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poggalika property as a monk can dispose of in his life-time the appropriation would have been invalid.

A *withathagaha* gift is described in the Mahavagga, Book VIII, Chapter 19, and in section 400 of U Gaung's Digest, but in the latter the rules are somewhat different.

If a monk takes the property of another monk and appropriates it to his own use the appropriation is valid and is called a *withathagaha* gift provided (according to the Vinaya) five conditions are fulfilled, *viz.* (1) the monks must be intimate; (2) they must have associated together; (3) they must have spoken about the property; (4) the owner must be alive when the property is taken; and (5) the taker must know that the owner would be pleased at the taking.

It was in connection with a linen cloth deposited with one monk by another and appropriated by the former that the Buddha pronounced this rule, which is clearly a sensible one and refers to property of little value, because if an intimate friend appropriated property of large value he could not be sure that the owner would be pleased.

In the present case when U Ariza was dying and was lying insensible, some of the monks living in the *kyaung* told U Pandawa to take the *kyaung* and land as a *withathagaha* gift so as to prevent its becoming *sanghika* property. They frankly admit this. There was thus an endeavour to evade the rules by which they were bound by a pharisaical attempt to adhere to the letter of the law whilst breaking it in spirit. But as a matter of fact they also broke the letter of the law. Three and possibly four of the necessary conditions were fulfilled, but as U Ariza was on the point of death and insensible he was incapable of being either glad or sorry at the appropriation, which, by the way, was one in name only, and if U Ariza had not been on his deathbed and insensible there is no reason to suppose that he would have been pleased at being deprived of his *kyaung* and land. The Plaintiff-Appellant's suit thus fails completely and the appeal is accordingly dismissed with costs.

Before Sir George W. Shaw, Kt., C. S. I.

Civil Appeal No. 352 of 1913. December 19th.

SAYYID MUHAMMAD NUR *vs.* KO LAW PAN.

Mr. S. Vasudavan for *Mr. Chatterjee*—for Appellant.
Mr. J. N. Basu—for Respondent.

Limitation – Schedule I—174.

Civil Procedure—47, Schedule I, Order XXI, Rule 2.

Held,—Azizan *vs.* Matuk Lal Sahu,* and Deno Bandhu Nandi *vs.* Hari Moti Dasi,**—No authority for permitting a judgment-debtor in execution proceedings to prove in contravention of Order XXI, Rule 2 an adjustment out of Court if such adjustment has not been certified and he has not applied within the time allowed by Article 174, Schedule I, Limitation Act, to have it certified.

* *Azizan* vs. *Matuk Lal Sahu*, I. L. R., 21 Cal., 437.

** *Deno Bandhu Nandi* vs. *Hari Moti Dasi*, I.L.R., 31 Cal., 480.

The Rulings explained—

Manurath Singh vs. *Raj Kumari*, U.B.R., 1907—09, II, Civil Procedure 31.

Nga Sa Gyi vs. *Ye Ban*, U. B. R., 1904—06, II, Civil Procedure 36.

P. K. Sanyal vs. *K. D. Sanyal*, I. L. R., 19 Cal., 683.

This is an appeal against an order of the District Court made in execution on the 22nd September last, deciding that respondent was entitled to prove, in execution proceedings, that there had been an adjustment out of Court which had not been recorded as certified, and this, although the time allowed for an application under Article 174, Schedule I, Limitation Act, had expired. The learned Judge thought from his own interpretation of the Civil Procedure Code, section 47 and Schedule I, Order XXI, Rule 2, that he could not in execution recognise an adjustment out of Court which had not been recorded as certified, and that it would therefore be otiose to inquire into the alleged adjustment, but felt himself bound to allow the judgment-debtor to prove payment and fraud on the authority of *Azizan* vs. *Matuk Lal Sahu* (1893) (1) and *Deno Bandhu Nandi* vs. *Hari Moti Dasi* (1903) (2). I think that he misunderstood the effect of these decisions. They both had to deal with a subsequent regular suit. In regard to such a suit the case of *Manurath Singh* vs. *Raj Kumari* (1909) (3), furnishes useful information. The authorities were all referred to there, and an attempt was made to explain the apparent conflict to be found in them. *Nga Sa Gyi* vs. *Ye Ban* (4) is also in point. To construe the Calcutta decisions above cited in the way the District Court has done would be to nullify the plain provisions of Order XXI, Rule 2 (3), and therefore that construction cannot be accepted as correct.

(1) I.L.R., 21 Cal., 437. | (2) I. L. R., 31 Cal., 480.
(3) U.B.R., 1907—09 II, Civil Procedure 31.
(4) U.B.R., 1904—06, II, Civil Procedure 36.

SAYYID MUHAMMAD NUR v. KO LAW PAN.

The cases in which those decisions were passed were regular suits instituted while the execution proceedings were still pending. They sought to stay or interfere with the execution. They were therefore held to be barred by section 244 of the Code of Civil Procedure, 1882 (corresponding to section 47 of the present Code). The Privy Council decision *P. K. Sanyal* vs. *K. D. Sanyal* (5) relied on by Sir F. Maclean in the second case, was passed in a regular suit,—brought to set aside a sale in execution, *i.e.*, to interfere with execution. Here we have to do with execution proceedings. The judgment-debtor had not applied within time under Article 174, Schedule I, Limitation Act, applications which he had sent by post could not be regarded. He merely represented in the course of the execution proceedings that there had been an adjustment out of Court. The Court executing the decree was prevented by Order XXI, Rule 2, from recognising an adjustment out of Court which had not been recorded as certified, and it cannot enquire into the judgment-debtor's allegations with respect to such an adjustment ; the decree must be executed as if no such adjustment had been effected. When a decree has been fully executed, section 47 of the present Civil Procedure Code ceases to apply, as explained in *Nga Sa Gyi's* case (above cited), and there is nothing to prevent a judgment-debtor then, if he so desires, from instituting a regular suit on the ground of fraud or negligence where, by reason of the decree-holder's failure through fraud or negligence to certify adjustment, the judgment-debtor has had to pay a second time. But that stage has not been reached here yet. That is not the present situation. This view of the matter I think reconciles the various texts and explains the Rulings in question. It also appears to me to be in accordance with reason and justice.

It has been contended on behalf of respondent that he was not aware that any decree had been passed, that the adjustment was effected, as far as he was aware, while the suit was pending, and that appellant withdrew (or undertook to withdraw) the suit, as compromised. Respondent was duly served with notice in the suit, and it was heard and decided *ex parte* in his absence because he failed to enter an appearance. No application by the plaintiff was made withdrawing the suit, and decree was passed on the 23rd September 1912, the day before the alleged letter was written by plaintiff-appellant agreeing to accept Rs. 3,600 in full satisfaction. That letter also mentions "costs". I do not think that it is open to respondent to say in the execution proceedings that he did not know of the decree.

The order in question is set aside. Respondent will pay the costs of this application (2 gold mohurs).

(5) I. L. R., 19 Cal., 683.

Circular Memorandum No. 1 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Mandalay, the 8th February 1910.

Altered or forged Currency Notes, when they have been impounded by a Court or Magistrate and are no longer required for the purpose of the proceedings, should be forwarded to the Commissioner of Paper Currency, and not destroyed or disposed of locally.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 2 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

TO

ALL CIVIL COURTS IN UPPER BURMA.

Mandalay, the 8th February 1910.

Attention is invited to O. V, r. 28, of the Code of Civil Procedure, 1908, which provides that summons for service against a soldier shall be sent only to his Commanding Officer.

It is necessary to point out—

(1) that this only applies to soldiers in India;

(2) that since the words "an Officer or" in section 468 of the Civil Procedure Code of 1882 (XIV of 1882) were repealed by the Cantonment Act (XIII of 1889), neither section 468 of the old Code nor O. V, r. 28, of the new Code applies to Officers;

(3) that Courts must not send summonses to the India Office or other authority in England for service on an Officer or soldier.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 3 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL CIVIL COURTS IN UPPER BURMA.

Mandalay, the 18th February 1910.

With the previous sanction of the Local Government, Civil Register No. IV (Register of Witnesses) is abolished with effect from the 1st January 1910. All references to this Register are cancelled in the Upper Burma Courts Manual.

It is now requested that copies in Burmese of the scale of expenses payable to witnesses should be pasted on stout boards and hung up in the verandahs of Civil Courts and in the waiting sheds for witnesses attached to such Courts. There should be a heading in bold letters "Notice to witnesses in Civil Cases," and the words "No expenses of witnesses will be included in the costs allowed in decrees unless they are paid through the Bailiff," also in bold letters, should be added at the foot of the rules. The Judge should satisfy himself that the attention of the witnesses is drawn to these notices.

By order,

ED. MILLAR,
Registrar.

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Circular Memorandum No. 4 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

THE DIVISIONAL AND DISTRICT JUDGES,
UPPER BURMA.

Mandalay, the 26th February 1910.

The attention of District Judges is called to the provisions of section 277 of the Indian Succession Act, and section 98 of the Probate and Administration Act, which require executors and administrators to file inventories within six months, and accounts within one year, from grants, unless the Court which granted the probate or letters has extended the time.

If an inventory and accounts are not filed within the above times respectively, or within such further time as the Court may have allowed, the Judge should of his own motion pass an order requiring the executor or administrator to file an inventory or accounts as the case may be, and cause such order to be served on the executor or administrator. If this order is not obeyed, proceedings may be instituted before a Magistrate for the prosecution of the offender under section 176 of the Indian Penal Code. The probate or letters of administration may also be revoked under section 234 of the Indian Succession Act, or section 50 of the Probate and Administration Act, as the case may be.

Upon the filing of an inventory the Judge should at once give notice by letter to the Collector of the date on which it was filed.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 5 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

THE DIVISIONAL AND DISTRICT JUDGES,
UPPER BURMA.

Mandalay, the 12th March 1910.

It is hereby notified that the following Muhammadan festivals in the year 1910 will fall on the dates shown against each :—

Muharram.—On the 22nd and 23rd January (Sunday), but if the moon be visible on the 12th January, then on the 21st and 22nd January.

Fatiha-i-duwazhdaham.—On the 25th March, but if the moon be visible on the 12th March, then on the 24th March.

Id-ul-Fitr.—On the 6th October, but if the moon be visible on the 4th October, then on the 5th October.

Id-uz-zuha.—On the 13th December, but if the moon be visible on the 2nd December, then on the 12th December.

By order,

ED. MILLAR,
Registrar.

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Circular Memorandum No. 6 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

SESSIONS JUDGES AND DISTRICT MAGISTRATES,
UPPER BURMA.

Mandalay, the 21st March 1910.

In supersession of the orders contained in paragraph 336 of the Upper Burma Courts Manual, it is directed that in future the reports of the conviction, by Criminal Courts, of reservists of the Indian Army who are sentenced to transportation or to imprisonment for any term exceeding three months, should be sent by the Courts passing the sentences to the Adjutant-General in India instead of to the Officers Commanding Reserve Centres.

The Courts Manual is being amended accordingly.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 7 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

THE SESSIONS JUDGES AND MAGISTRATES
IN UPPER BURMA.

Mandalay, the 25th April 1910.

It has been found that the habit of drinking intoxicating liquors among Burmans is increasing and that it leads to the commission of violent crimes. It is therefore directed that whenever a case occurs in which liquor has been the cause of a crime or has contributed to its commission, the Magistrate shall bring it to the notice of the Superintendent of Excise.

By order,

ED. MILLAR,
Registrar.

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Circular Memorandum No. 8 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

THE SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Mandalay, the 2nd July 1910.

It is directed that when a prisoner is sentenced to imprisonment for a period exceeding a month, and no descriptive roll has been sent up by the police, a descriptive roll shall be prepared by the Prosecuting Inspector or Sub-Inspector or, where there is no such officer, by the Head clerk and shall be attached to the warrant.

Two forms are prescribed, *viz.*, U.B. $\frac{\text{Judicial}}{\text{Crl. 89 (a)}}$ and U.B. $\frac{\text{Judicial}}{\text{Crl. 89 (b)}}$, the first on white paper for prisoners convicted of the first offence, and the other on yellow paper for prisoners who have been previously convicted.

By order,

ED. MILLAR,
Registrar

Circular Memorandum No. 9 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES,
UPPER BURMA.

Mandalay, the 2nd July 1910.

The attention of all Sessions Judges and Magistrates is invited to the annexed extract of so much of Government of India, Home Department (Judicial), Notification No. 350, dated the 8th March 1910, as relates to Upper Burma.

By order,

ED. MILLAR,
Registrar.

Government of India, Home Department (Judicial), Notification No. 350, dated the 8th March 1910.

In pursuance of section 5, clause (*b*), of the Whipping Act, 1909 (IV of 1909), the Governor-General in Council is pleased to specify offences under the laws mentioned in the schedule hereto annexed, being offences punishable under the said laws with imprisonment, as offences for the abetment or commission of or attempt to commit which juvenile offenders may be punished with whipping in accordance with the provisions of the said section.

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The Schedule.

* * * * *

2. The Police Act, 1861 (V of 1861), section 34.

* * * * *

6. The Cattle Trespass Act, 1871 (I of 1871), section 24.

* * * * *

9. The Opium Act, 1878 (I of 1878), section 9.

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11. The Indian Arms Act, 1878 (XI of 1878), sections 16, 20, 22 and 23.

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14. The Indian Telegraphs Act, 1885 (XIII of 1885), sections 24 and 25.

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20. The Indian Railways Act, 1890 (IX of 1890), sections 126, 127, 128 and 129.

21. The Prevention of Cruelty to Animals Act, 1890 (XI of 1890), sections 3, 4 and 5.

22. The Prisons Act, 1894 (IX of 1894), section 42.

23. The Excise Act, 1896 (XII of 1896), sections 45, 46, 48, 49 and 51.

* * * * *

25. Reformatory Schools Act, 1897 (VIII of 1897), sections 27 and 28.

26. The Indian Post Office Act, 1898 (VI of 1898), sections 61, 62 and 68.

27. The Cantonment Code, 1899, section 66.

28. The Burma Gambling Act, 1899 (Burma Act I of 1899), sections 10, 11, 12 and 13.

* * * * *

32. The Burma Forest Act, 1902 (Burma Act IVof 1902), section 55, clause (*b*).

33. The Indian Electricity Act, 1903 (III of 1903), section 39, sub-section (2).

34. The Ancient Monuments Preservation Act, 1904 (VII of 1904), section 16.

Circular Memorandum No. 10 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL SESSIONS JUDGES AND MAGISTRATES,
UPPER BURMA.

Mandalay, the 2nd July 1910.

The Local Government having approved of the abolition of the duplicate form of the Charge Sheet for communicating to the Police the result of each case, and the adoption in its stead, by the Police, of a new form, a copy of which is appended below, it is directed that Courts and Magistrates make use of this form in future instead of the duplicate charge sheet, and return the same to the Police on the conclusion of the trial.

By order,

ED. MILLAR,
Registrar.

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BURMA POLICE.

FORM SHOWING RESULT OF TRIAL AND ORDER OF COURT.

District *Charge Sheet No.* *Date*

Police Station *First Information Report No.* *Date*

1. Name and address of accused ...	
2. In custody or on bail	
3. With or without sureties	
4. Court and Court Number of case ...	
5. Date of receipt of case by Court ...	
6. Result of trial and crime established ...	
7. Classification of accused (habitual or non-habitual).	
8. Order of Court, if convicted criminal is to be kept under surveillance.	
9. Order of Court on each absconding offender, if warrant to issue or not.	
10. Order of Court regarding property taken possession of by the Police.	
11. Classification of case (in case of acquittal or discharge).	

Date *Signature of Magistrate.*

Circular Memorandum No. 11 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES IN UPPER BURMA.

Mandalay, the 26th July 1910.

It having been brought to notice that in a considerable number of cases submitted for the orders of the Local Government under section 466 or section 471 of the Code of Criminal Procedure, 1898, the medical history sheet for lunatics prescribed by Judicial Department Circular No. 98 of 1898 is not countersigned by the Magistrate or Judge, with the result that the cases have to be returned to the Court from which they were received for the omission to be supplied, and there is consequent delay in the issue of orders by the Local Government. Judges and Magistrates are requested to see that Medical History Sheets are invariably countersigned before the proceedings are submitted to the Local Government.

By order,

ED. MILLAR,
Registrar.

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Circular Memorandum No. 12 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL MAGISTRATES IN UPPER BURMA.

Mandalay, the 26th July 1910.

The attention of Magistrates is drawn to the necessity for preventing fraud by passing adequate sentences in cases that come before them under section 63, Stamp Act, when the offence is proved.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 13 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL JUDGES AND MAGISTRATES
IN UPPER BURMA.

Mandalay, the 1st August 1910.

In consequence of a recent case of embezzlement by a Bailiff the following supplementary rules are issued, which should be read in connection with those laid down in paragraph 851, Upper Burma Courts Manual:—

The monthly check of the Bailiff's Registers with the registers of all Courts at headquarters will also include a check with the Treasury Register (No. T. F. 108).

At out-stations where there is more than one officer exercising Judicial powers, the officer senior in rank should check once a month the Deputy Bailiff's Registers containing money entries of the other officer or officers and with T. F. No. 108, where it is kept, and with the Cash-book. At out-stations where there is only one officer exercising Judicial functions, he should make the same check once a month. Inspecting Officers should make the checks above-mentioned.

By order,

ED. MILLAR,
Registrar.

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Circular Memorandum No. 14 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL DISTRICT JUDGES,
UPPER BURMA.

Mandalay, the 15th August 1910.

Attention is invited to the necessity of serving and returning promptly notices issued by this Court.

It is pointed out that much inconvenience is caused by the failure to serve and return notices in time.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 15 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL JUDGES IN UPPER BURMA.

Mandalay, the 30th September 1910.

The attention of all Judges is invited to the following instructions which are to be followed in cases where application is made to attach the property of a judgment-debtor who is an agriculturist.

As the judgment-debtor may suffer considerable hardship through ignorance of the law, Judges must satisfy themselves before issuing an order of attachment against property mentioned in clauses (*a*), (*b*) and (*c*) of the proviso to section 60, sub-section (*1*), Code of Civil Procedure, that the property sought to be attached does not fall within the exemption. Thus when the judgment-debtor is an agriculturist and the decree-holder applies for execution of the decree by attachment of the judgment-debtor's implements of husbandry or cattle or seed grain, the Judge should, before issuing an attachment order, make enquiry from the decree-holder as to the number of implements or cattle or the amount of seed grain in the judgment-debtor's possession which he wishes attached, and he should also enquire how much land the judgment-debtor cultivates. He should consider how many implements and cattle and how much seed grain a cultivator would require for cultivating properly the amount of land held by him, and should issue an order for attachment in Form No. U.B. $\frac{\text{Judicial}}{\text{Civil 80A}}$, if at all, only against any surplus alleged to be in the possession of the judgment-debtor.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 16 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Mandalay, the 29th November 1910.

The attention of Magistrates acting under Act XXXVI of 1858 is drawn to Judicial Department Circular No. 31 of 1898 (Local Government Circulars, 1888—1908, Vol. II, page 422).

The difficulty of accommodation still exists, and Magistrates are requested to comply strictly with these instructions.

By order,

ED. MILLAR,
Registrar.

212

Circular Memorandum No. 17 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL MAGISTRATES IN UPPER BURMA.

Mandalay, the 20th December 1910.

In prosecutions under the Excise Act with respect to cocaine, a report from the Chemical Examiner or other expert evidence should be put on the record. Cases have occurred in Lower Burma where Sulphate of Magnesium and other drugs have been supposed to be cocaine.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 1 of 1911.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND
DISTRICT MAGISTRATES, UPPER BURMA.

Mandalay, the 7th February 1911.

In the schedule appended to Government of India, Home Department (Judicial) Notification No. 350, dated the 8th March 1910, and reproduced in Circular Memorandum No. 9 of 1910, dated the 2nd July 1910, of the Court of the Judicial Commissioner, Upper Burma, *for* item "33, The Indian Electricity Act, 1903 (III of 1903), section 39, sub-section 2" *substitute* "33, The Indian Electricity Act, 1910 (IX of 1910), section 40."

By order,
ED. MILLAR,
Registrar.

214

Circular Memorandum No. 2 of 1911.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Mandalay, the 24th February 1911.

It has been brought to notice that juvenile prisoners are, at the present time, being sent direct to the Jail at Meiktila, by Courts convicting them, the Magistrates concerned quoting paragraph 350 (*a*), Upper Burma Courts Manual, as their authority. A juvenile prisoner who is eligible for confinement in the Meiktila Jail should be sent by the sentencing Court to the Jail to which adult prisoners are sent on conviction, and not direct to the Meiktila Jail.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 3 of 1911.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL DIVISIONAL AND DISTRICT JUDGES
IN UPPER BURMA.

Mandalay, the 24th March 1911.

In continuation of Circular Memorandum No. 6 of 1907 of this Court it is directed that to enable soldiers of the Indian Army serving in the stations noted in the margin to appear themselves or to appoint a representative to appear on their behalf on the date fixed for the hearing of suits to which they are parties, the minimum period noted against each of the stations named in the margin from the date of posting the summons or notice should be allowed by Subordinate Civil Courts.

1.	All stations on the Persian Gulf, except Tabriz ...	4 months.
2.	Tabriz	5 months.
3.	Somaliland	3 months.
4.	Uganda	
5.	Nyassaland	4 months.
6.	Ceylon	2 months.
7.	Andaman Islands ...	
8.	Aden	

By order,

ED. MILLAR,
Registrar.

216

Circular Memorandum No. 4 of 1911.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

THE DIVISIONAL AND DISTRICT JUDGES
IN UPPER BURMA.

Mandalay, the 28th March 1911.

Attention is invited to Local Government Judicial Department Notification No. 33, dated the 20th February 1911, published in Part I of the *Burma Gazette*, dated the 25th February 1911, and to this Court's Notification No. 3, dated the 10th February 1911, which appeared in Part IV of the same Gazette, dated 18th February 1911, publishing revised rules for the maintenance and custody, while under attachment, of livestock and other moveable property, and for the fees payable for such maintenance and custody.

The new rules have the force of law with effect from the 18th February 1911, and will be incorporated in the Upper Burma Courts Manual in due course.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 5 of 1911 not printed.

Circular Memorandum No. 6 of 1911.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL CIVIL COURTS IN UPPER BURMA.

Dated Mandalay, the 26th June 1911.

Under the instructions of the Government of India, orders having been passed by the Baroda Durbar permitting tentatively for a period of six years from the 18th July 1908, execution by their Courts of decrees passed by Civil Courts of British India, subordinate Courts are instructed when an application is made for execution of a decree in the Bareda State, to transmit direct to the particular local Court of the Baroda State, within the limits of whose jurisdiction execution is sought, all decrees concerned. The decree-holder should at the same time be instructed to apply direct to the Baroda Court concerned for execution of his decree.

A list of the Courts in the Baroda State is appended here to.

By order,

ED. MILLAR,
Registrar.

218

ACCOMPANIMENT TO GOVERNMENT RESOLUTION, POLITICAL DEPARTMENT, NO. 5339, DATED THE 12TH AUGUST 1910.

List of the District Courts in the Baroda State and of the Courts subordinate to each District Court.

Serial No.	Name of Court.	Location.		Area of jurisdiction.	Remarks.
		Locality.	District.		
1	2	3	4	5	9
1	Barado Prant Nyayadhishi.	Baroda ...	Baroda ...	Baroda District ...	The Prant Nyayadhishi is the District Court. When it is known in which Mahal (Taluka) of the District the person to be summoned resides, the summons should be sent direct to that Mahal Nyayadhishi.
2	Baroda City Munsiff Court.	Do. ...	Do. ...	Baroda City, Baroda Taluka and Waghodia Taluka.	
3	Petlad Mahal Nyayadhishi.	Petlad ...	Do. ...	Petlad Taluka and Bhadran Peta Mahal.	
4	Dabhoi Mahal Nyayadhishi.	Dabhoi ...	Do. ...	Dabhoi Taluka.	
5	Sunkheda Mahal Nyayadhishi.	Sunkheda	Do. ...	Sunkheda Taluka.	
6	Sinore Mahal Nyayadhishi.	Sinore ...	Do. ...	Sinore Taluka.	
7	Padra Mahal Nyayadhishi.	Padra ...	Do. ...	Padra Taluka.	
8	Karjan Mahal Nyayadhishi.	Karjan ...	Do. ...	Karjan Taluka and Baroda Mahal.	
9	Savli Mahal Nyayadhishi.	Savli ...	Do. ...	Savli Taluka.	
10	Chandod Vahliwatdar's Nyayadhishi.	Chandod in Baroda.	Do. ...	Chandod.	
11	Tilakwada Diwani Kamdar's Court.	Tilakwada in Baroda.	Do. ...	Tilakwada Peta Mahal.	
12	Kadi Prant Nyayadhishi.	Mehsana	Kadi ...	Kadi District ...	The Prant Nyayadhishi is the District Court. When it is known in which Mahal (Taluka) of the District the person to be summoned resides, the summons should be sent direct to that Mahal Nyayadhishi.
13	Pattan Mahal Nyayadhishi	Pattan ...	Do. ...	Pattan Taluka and Harij Peta Mahal.	
14	Sidhpur Mahal Nyayadhishi.	Sidhpur ...	Do. ...	Sidhpur Taluka.	
15	Visnagar Mahal Nyayadhishi.	Visnagar	Do. ...	Visnagar Taluka and Wadnagar Peta Mahal and Kheralu Taluka.	
16	Kadi, Mahal Nyayadhishi.	Kadi ..	Do. ...	Kadi Taluka.	
17	Kalol Mahal Nyayadhishi.	Kalol ...	Do. ...	Kalol Taluka.	
18	Mehsana Mahal Nyayadhishi.	Mehsana	Do. ...	Mehsana Taluka.	
19	Vijapur Mahal Nyayadhishi.	Vijapur ...	Do. ...	Vijapur Taluka.	
20	Dehegam Mahal Nyayadhishi.	Dehegam	Do. ...	Dehegam Taluka and Attarsumba Peta Mahal.	
21	Chanasma Mahal Nyayadhishi.	Chanasma	Do. ...	Chanasma Taluka.	

ACCOMPANIMENT TO GOVERNMENT RESOLUTION, POLITICAL DEPARTMENT, NO. 5339, DATED THE 12TH AUGUST 1910.

List of the District Courts in the Baroda State and of the Courts subordinate to each District Court—concluded.

Serial No.	Name of Court.	Location.		Area of jurisdiction.	Remarks.
		Locality.	District.		
1	2	3	4	5	6
22	Mandwa Nyayadhishi*	Mandwa ...	Kadi ...	Villages in the jurisdiction of the Hia of Mandwa.	* Mandwa is situated on the Vetrak River, and these villages adjoin it in the Baroda Englave that is bounded by the Vatrak River on the West and by the Mahikanta and the Kapadvanj and Pranjit Tehsils on the remaining sides.
23	Navsari Prant Nyayadhishi.	Navsari ...	Navsari ...	Navsari District ...	The Prant Nyayadhishi is the District Court. When it is known in which Mahal (Taluka) of the District the person to be summoned resides, the summons should be sent direct to that Mahal Nyayadhishi.
24	Kathore Mahal Nyayadhishi.	Kathore ...	Do. ...	Kathore, Velachha and Kamrej Talukas and Wakal Peta Mahal.	
25	Vyara Mahal Nyayadhishi.	Vyara ...	Do. ...	Vyara, Palsana, Mahuva and Songad Talukas.	
26	Vajpur Diwani Kamdar's Nyayadhishi.	Vajpur ...	Do. ...	Vajpur Peta Mahal.	
27	Malangdeo Diwani Kamdar's Nyayadhishi.	Malangdeo	Do. ...	Malangdeo Peta Mahal	
28	Salher Diwani Kamdar's Nyayadhishi.	Salher ...	Do. ...	Salher Peta Mahal.	
29	Umarpada Diwani Kamdar's Nyayadhishi.	Umarpada	Do. ...	Umarpada Peta Mahal.	
30	Amreli Prant Nyayadhishi.	Amreli ...	Do. ...	Amreli District ...	The Prant Nyayadhishi is the District Court. When it is known in which Mahal (Taluka) of the District the person to be summoned resides, the summons should be sent direct to that Mahal Nyayadhishi.
31	Dhari Mahal Nyayadhishi.	Dhari ...	Do. ...	Dhari Taluka.	
32	Kodinar Mahal Nyayadhishi.	Kodinar ...	Do. ...	Kodinar Taluka.	
33	Okhamandal Mahal Nyayadhishi.	Dwarka ...	Do. ..	Okhamandal Taluka.	
3	Bet Diwani Kamdar's Nyayadhishi.	Bet ...	Do. ...	Bet Shankhodhar.	
35	Ratanpur Diwani Kamdar's Nyayadhishi.	Ratanpur	Do. ...	Ratanpur Peta Mahal.	
36	Bhimkatta Diwani Kamdar's Nyayadhishi.	Bhimkatta	Do. ...	Bhimkatta Peta Mahal.	
37	Khambha Diwani Kamdar's Nyayadhishi.	Khambha	Do. ...	Khambha Peta Mahal.	

IN THE COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

Circular Memorandum No. 7 of 1910.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

SESSIONS JUDGES AND MAGISTRATES
IN UPPER BURMA.

Dated Mandalay, the 6th July 1911.

The Officiating Judicial Commissioner regrets to notice that many of the Subordinate Magistrates most frequently display either total ignorance or an utter disregard of the provisions of law which govern the procedure relating to the joinder of charges or of persons, and which are contained in sections 233 to 235 of the Code of Criminal Procedure. Attention is invited to paragraph 234 of the Upper Burma Courts Manual, and to the rulings cited in the footnote thereto, which show how misjoinder altogether invalidates the proceedings. The Officiating Judicial Commissioner ventures to express a hope that in future Subordinate Magistrates will exercise more care in dealing with cases in which there is a joinder of charges or of persons and that, especially in cases of the latter class, they will record in a clear manner their reasons for considering the joinder covered by the provisions of section 239, Code of Criminal Procedure.

By order,

ED. MILLAR,
Registrar.

222

Circular Memorandum No. 8 of 1911.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL MAGISTRATES IN UPPER BURMA

Dated Mandalay, the 27th July 1911.

In a case where some persons were accused under sections 11 and 12 of the Gambling Act and subsequently acquitted, the record was submitted to the Judicial Commissioner, Upper Burma, with the following remarks:—

"These proceedings form a very good example of the common error of taking action on a Police Report in a non-cognizable case, as a matter of course, and without any enquiry into the evidence producible to prove the offence reported. After summoning the accused and hearing evidence the Township Magistrate acquits the accused remarking 'the informer is a notorious jail-bird of Bèmè and it would be quite unsafe to convict the accused on his evidence corroborated solely by the statements of his relations and by no other independent evidence'. All this the Township Magistrate could and should have ascertained before he issued process. Magistrates in this Division appear to imagine that since section 190 (1) (*b*), Criminal Procedure Code, has been held to include all kinds of Police Reports in King-Emperor *vs.* Nga Thaung, U.B.R., 1904—1906, I, Criminal Procedure 24, that they have nothing to do but to take action on a Police Report as a matter of course. This is not so. The above Ruling followed and quoted with approval the Lower Burma Ruling, II, page 146, King-Emperor *vs.* Nga Po Thin. In this judgment the learned Chief Justice remarks:—

> 'At the same time, I would warn all Magistrates that process should not be issued on the Report of a Police officer lightly, as of course, or without due consideration. The Magistrate should consider whether the Report discloses reasonable grounds for the issue of process and a reasonable probability that the offence has been committed. Unless the Magistrate is fully satisfied on these points, process should not be issued.'

These instructions must be carefully followed. If a Magistrate is not satisfied that a Police Report discloses reasonable grounds for the issue of process, he should either decline to issue process or refer the matter to the Police for enquiry under section 155 (2), Criminal Procedure Code. In considering such reports, the instructions in paragraph 190, Upper Burma Courts Manual, should be kept in mind."

These remarks are thoroughly justified, and are commended to the notice of all Magistrates in Upper Burma.

By order,

ED. MILLAR,
Registrar.

IN THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.

Circular Memorandum No. 9 of 1911.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 22nd September 1911.

The Officiating Judicial Commissioner having reason to believe that Judges do not thoroughly understand the procedure to be adopted in cases relating to the attachment of the property of a judgment-debtor who is an agriculturalist, directs the issue of the following instructions as a supplement to those issued in this Court's Circular Memorandum No. 15 of 1910.

The Judge should note that the implements of husbandry cannot be attached, and until he has satisfied himself by making enquiry of the decree-holder and the judgment-debtor or otherwise as to the number of implements or cattle or the amount of seed grain in the judgment-debtor's possession, which the decree holder wishes to attach, and until he has ascertained how much land the judgment-debtor cultivates, he should not issue any order of attachment against the property mentioned in clauses (*a*), (*b*) and (*c*) of the proviso to section 60, sub-section (1) of the Code of Civil Procedure. The Court must satisfy itself on these points when applications are made for attachment and not defer the enquiry until the judgment-debtor is summoned, for example, to settle the terms of the proclamation of sale.

It should be noted that the holding of an enquiry after issue of an attachment order almost necessarily tends to stultify the provisions of the Code in favour of agriculturalists.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 10 of 1911.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES
IN UPPER BURMA.

Dated 20th October 1911.

The Local Government having approved of a new Form $\frac{\text{Police}}{125\text{A}}$ in place of the Form prescribed in this Court's Circular No. 10 of 1910, and in which Magistrates may communicate to the Police the result of each case sent up for trial, the Judicial Commissioner, Upper Burma, directs that the new form now prescribed, and of which a copy is hereto appended, be made use of by Magistrates at once. The additional necessary entries should be made in the stock of forms prescribed by Circular No. 10 of 1910 by hand until they are exhausted and the new form printed.

By order,
ED. MILLAR,
Registrar.

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POLICE 125A

BURMA POLICE.

District.....*Charge Sheet No*.....*Date*.....
ဒိစထြိတ် စွဲချက်နံပါတ် နေ့စွဲ
Police Station.....*First Information Report No*.....*Date*.....
ပုထိုဝ်ဌာနခ ပဌမသတင်းပေးချက်အစီရင်ခံစာနံပါတ် နေ့စွဲ

1. Name and address of accused ... ...
၁။ ။တရားခံ၏အမည်။အလုပ်အကိုင်နှင့်နေရပ် ...
2. In custody or on bail ... ...
၂။ ။အချုပ်နှင့်။သို့မဟုတ်ခံဝန်သူနှင့်ထားမထား။...
3. With or without sureties ... ...
၃။ ။ခံဝန်သူရှိမရှိ ... ...
4. Section and Law under which sent for trial ...
၄။ ။စစ်ဆေးစီရင်ရန်တင်ပို့သည့်ပုဒ်မနှင့်ဥပဒေ ...
5. Value of property recovered ... ...
၅။ ။ပြန်ရသည့်ပစ္စည်းတန်ဘိုး ... ...
6. Court and Court Number of case ...
၆။ ။ရုံးအမည်နှင့်ရုံးအမှုနံပါတ် ... ...
7. Date of receipt of Case by Court ...
၇။ ။ရုံးတွင်အမှုရသည့်နေ့စွဲ ... ...
8. Result of trial and crime established ...
၈။ ။စစ်ဆေး ပြီးနောက် ချမှတ်သည့် စီရင်ချက်နှင့် ထင်ရှားစီရင်သည့်ပြစ်မှု။
9. Classification of accused (habitual or non-habitual).
၉။ ။တရားခံ အမျိုးအစားခွဲခြားပုံ (ပြစ်မှုအခြေကျ။ ထွန်တတ်သည်။ သို့မဟုတ်ထရံတခါ ကျူး ထွန်တတ်သည်။)

10. Order of Court if convicted criminal is to be kept under surveillance.
၁၀။ ။အပြစ်ပေး ခံရသည့် တရားခံကို အဖြဲ စောင့်ရှောက်ရမည်ဖြစ်ခဲ့ထျင်ရုံးမင်းအမိန့်။
11. Order of Court on each absconding offender, if warrant to issue or not.
၁၁။ ။ထွက်ပြေးတိမ်းရှောင်နေသည့်ပြစ်မှုကျူးထွန် သောသူအတွက် ဝါရမ်းထုတ်သင့်မထုတ်သင့် ရုံးမင်းအမိန့်။
12. Order of Court regarding property taken possession of by the police.
၁၂။ ။ပုထိုဝ်အရောရှိတို့သိမ်းထားသည့် ပစ္စည်းနှင့်စပ် ထျင်း၍ချမှတ်သည့်ရုံးမင်းအမိန့်။
13. Classification of case (in case of acquittal or discharge).
၁၃။ ။အမှုအမျိုးအမည်ခွဲခြားပုံ။ (တရားသေ။ ထို့မ ထုတ်တရားရှင်တ္ဘတ်သည့်အခါ ရေးသားရ မည်။)

Date.....
နေ့စွဲ

Signature of Magistrate.
ရာဇဝတ်တရားသူကြီးထက်မှတ်။

Circular Memorandum No. 11 of 1911.

To

ALL SESSIONS JUDGES AND MAGISTRATES,
UPPER BURMA.

Dated Mandalay, 20th October 1911.

In all cases in which strictures are passed upon the conduct of the Police by any Court, whether in a judgment or separate note, a copy of the judgment or separate note should be sent at once to the District Magistrate concerned.

By order,
ED. MILLAR,
Registrar.

228

Circular Memorandum No. 12 of 1911.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL DISTRICT JUDGES IN UPPER BURMA.

Dated Mandalay, the 28th November 1911.

At the instance of the Government of Burma the Judicial Commissioner directs that column 13 of Judicial Statement No. 12 (Civil) appended to the Civil Justice Report is intended to show the amount of creditors' claims satisfied during the year, whether they were admitted during or prior to the year under review; and that similarly columns 14 and 15 refer to the gross amount of insolvents' assets realized and disbursed during the year, with reference not only to claims admitted during that year but also to those admitted in previous years.

The District Judges' attention is specially invited to the above instructions with reference to the compilation of the statement referred to above.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 1 of 1912.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

To

ALL DISTRICT MAGISTRATES,
UPPER BURMA.

Mandalay, the 30th January 1912.

It has come to notice that in appeals the Police record of evidence is not now forwarded along with the proceedings. In Sessions cases this is particularly inconvenient.

District Magistrates are requested in future, when they receive notice of the admission of a Criminal appeal from a judgment of the Sessions Court, to cause the Police Case Diary and record of witnesses, statements as recorded during the Investigation to be submitted to this Court.

By order,

E. D. MILLAR,
Registrar.

Circular Memorandum No. 2 of 1912.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

THE SESSIONS JUDGES
AND DISTRICT MAGISTRATES,
UPPER BURMA.

Dated Mandalay, the 26th July 1912.

The Lieutenant-Governor has been pleased to sanction the inclusion of gharry hire, incurred by Assistant Surgeons and Sub-Assistant Surgeons, under their travelling expenses when attending Court as witnesses in criminal cases.

The first footnote on page 360, Upper Burma Courts Manual, should accordingly be read as if the words "Assistant Surgeons and Sub-Assistant Surgeons" had been substituted for the words "Hospital Assistants."

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 3 of 1912.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

THE DIVISIONAL
AND DISTRICT JUDGES,
UPPER BURMA.

Dated Mandalay, the 15th October 1912.

Mr. C. G. Pillay and Maung Tha Gywe, *Barrister-at-Law.*

In cases in which it is desired by a Court outside the Mandalay District to have the evidence taken on commission of a person exempted from personal attendance at Court, who is resident in Mandalay, the Judicial Commissioner, Upper Burma, directs that the Court issuing the commission may, if it sees fit, cause such commission to be executed by either of the Advocates noted in the margin who are prepared to undertake such commission.

Paragraph 723, Upper Burma Courts Manual, will be modified accordingly.

For the fee payable to the Advocate so appointed see paragraph 723, Upper Burma Courts Manual.

By order,

ED. MILLAR,
Registrar.

234

Circular Memorandum No. 4 of 1912.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

TO

THE DIVISIONAL

AND DISTRICT JUDGES,

UPPER BURMA.

Dated Mandalay, the 15th October 1912.

It being intimated by the Government of India that no steps can be taken to secure the presence, as witnesses before Courts in India, of persons living in Afghanistan, the Courts are hereby informed that it is useless to issue summonses for attendance before British Indian Courts to persons residing in Afghanistan.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 5 of 1912.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

THE SESSIONS JUDGES

AND DISTRICT MAGISTRATES,

UPPER BURMA.

Dated Mandalay, the 22nd October 1912.

The procedure detailed in paragraph 830A, Upper Burma Courts Manual (issued with the 4th List of Corrections) shall be followed in the case of fines recovered under section 113, Indian Railways Act, 1890, *but no part of the fine* recovered under that section shall be credited to Government.

This change involves the substitution of "to" for "and" between the figures "112" and "114" in the first instruction to Bailff's Register II as amended by the IVth List of Corrections to the Upper Burma Courts Manual.

Guard-book action will be taken accordingly, and the instruction to Bailiff's Register II published in the Manual will also be corrected in due course.

By order,

ED. MILLAR,

Registrar.

236.

Circular Memorandum No. 6 of 1912.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

THE SESSIONS JUDGES

AND DISTRICT MAGISTRATES,

UPPER BURMA.

Dated Mandalay, the 22nd October 1912.

Attention is invited to Judicial Department Circular No. 37 of 1912, and especially to paragraph 3 thereof. The officiating Judicial Commissioner accordingly directs that the powers given by the Circular, which apply only to murder cases under section 302 or 303 of the Indian Penal Code, are not to be exercised for the benefit of persons who have sufficient means to provide for their own defence, and that the object to be kept in view is not to enable a prisoner to evolve a defence, whatever the circumstances of the case may be, but only to give a prisoner legal aid to make his defence clear when the nature of the defence disclosed is such that the interests of justice demand that he should have such aid.

2. The words and figures "No. 31, dated the 20th April 1912," in paragraph 295A, Upper Burma Courts Manual, page 78, should be *read* as "No. 37, dated the 7th August 1912."

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 7 of 1912.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES AND MAGISTRATES,
UPPER BURMA.

Dated Mandalay, the 3rd January 1913.

As it has been brought to the Judicial Commissioner's notice that Criminal Proceedings were in several cases destroyed contrary to the rules laid down in paragraph 936 of the Upper Burma Courts Manual, the Judicial Commissioner makes the following rule for the guidance of Magistrates and Record-keepers.

The concluding sub-paragraph of paragraph 475 will be deleted and the following will be substituted in its stead.

Rule.

The original warrant is sent under paragraph 480 of the Jail Manual to the District Magistrate of the district in which the Court which issued the warrant is situated. Where the record is in the Record-room the warrant will be sent to the Record-keeper to be filed in the case concerned.

Where it is still in the Court which issued the warrant, the latter will be forwarded to that Court. Any request about intimating the death of a prisoner to his relatives will be transmitted to the Court of issue in any case.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 1 of 1913.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL SESSIONS JUDGES
AND DISTRICT MAGISTRATES
IN UPPER BURMA.

Dated Mandalay, the 1st February 1913.

With the sanction of the Local Government the Judicial Commissioner, Upper Burma, directs that sub-paragraph 2 of paragraph 511 of the Upper Burma Courts Manual should be read as if the words "except offences punishable under the Burma Municipal Act" were added after the words "Criminal Offences".

In accordance with the above direction a correction slip to the Upper Burma Courts Manual will duly issue.

By order,

ED. MILLAR,
Registrar.

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Circular Memorandum No. 2 of 1913

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

TO

ALL DIVISIONAL AND DISTRICT JUDGES,
UPPER BURMA.

Dated Mandalay, the 18th February 1913.

The attention of the presiding officers of all Courts in Upper Burma is invited to the rules contained in Judicial Department Notification No. 174, dated the 18th November 1912, to be known as the "Process Fees Rules, 1912."

These rules take the place of the rules contained in paragraphs 862, 865 and 866, Upper Burma Courts Manual, and have also the effect of modifying certain other paragraphs. The necessary corrections are being issued, but in the meantime the following changes should be noted.

The appointment of officers with the title of Deputy Bailiffs has become obsolete. In future all officers charged with performing the duties of a Bailiff will be known as "Bailiffs."

The Judge of each District Court should now proceed to comply with Rule 5 of the rules. Where the District Magistrate is also the sole Judge of the District Court, this duty rests with him. Where there is an additional Judge of the District Court, but the District Magistrate is also District Judge, the latter officer should perform the duties imposed upon the Judge of the District Court. Where the District Magistrate is not also District Judge, as in the case of Mandalay, application should be made to the Judicial Commissioner, as Senior Judge, to invest the District Magistrate with the powers of a District Judge under Rule 2 (*c*), and the separate establishments, if any, should be amalgamated,

The appointment of bailiffs and process-servers should be made in accordance with Rule 13. The last sentence of that rule should be specially noted, and if it is desired to vary existing appointments, in any way, under Rule 14 (*1*) or (*2*), application should be made to the Senior Judge for sanction.

Under Rule 8 every bailiff is required to give security in such amount as may be fixed by the Judge of the Divisional Court. The

Judge should now fix the amount which should be that at present fixed, unless for reasons to be reported to the Senior Judge, he desires to alter it.

The number of processes which one process-server is expected to serve in a year has been raised from 1,800 to 2,000 in the case of Mandalay Town and from 600 to 700 elsewhere.

The Divisional Judge is required by Rule 11 to fix annually the number of permanent process-servers for each subordinate Court, with reference to the number of processes issued. Instructions are being issued in a revised paragraph 863, Upper Burma Courts Manual, on the subject. Where the Divisional Judge proposes to reduce the number of process-servers or to make no change, no report will be required from him annually, but where he proposes to increase the number, he will be required to give his reasons to the Senior Judge for approval. There will, in future, be a triennial revision of the establishment by the Senior Judge, and instructions on the subject will be issued in the revised paragraph 863.

The quarterly report of temporary process-servers employed required by Rule XII (*a*), paragraph 862, Upper Burma Courts Manual, is no longer required, but the employment of such process-servers will be subject to the existence of budget provision, and if the budget provisions is exhausted, the application for a further allotment must set forth the reasons for the increase.

The division of civil and revenue courts into grades has been abandoned and the scale of process fees simplified. The new scale should be notified as required by Rule 19, and Judges and Magistrates should see that the change is understood.

Attention is invited to Rule 22 (*a*) (*a*) which requires watching fees to be paid in cash, and not as heretofore in stamps.

By order,

ED. MILLAR,
Registrar.

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Circular Memorandum No. 3 of 1913.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

To

ALL MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 18th February 1913.

The following instructions are issued for the guidance of Magistrates :—

Payment of expenses to indigent persons to enable them to return home after sentences of whipping have been inflicted at outstations where there is no jail.

Magistrates may at their discretion pay to indigent persons, in order to enable them to return home after sentences of whipping have been inflicted upon them at outstations where there is no jail, the railway or steamer fare by the lowest class or, in the case of a road journey, subsistence allowance at the rate of three annas per diem allowing 18 miles as a day's journey. If the steamer journey takes more than one day, subsistence allowance at the above rate may be given in addition to the steamer fare.

All such payments should be debited to the budget grant for contingencies of the Court concerned.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 4 of 1913.

FROM

THE REGISTRAR,
COURT OF JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL JUDGES AND MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 26th February 1913.

The Government of India have intimated that while the use of the word "Native" as a synonym for "Indian" has been generally discarded of late years in official correspondence, reports and returns, they nevertheless consider it desirable that a definite direction to this effect should be conveyed to all officers of Government. In certain contexts it is impossible to avoid the use of the word "Native", *e.g.*, in the phrases "Native States", "Statutory Native of India", and no reasonable objection can be taken to its use in such circumstances; but it should not be used otherwise as a substitute for "Indian".

2. The Judicial Commissioner accordingly directs that the word "Indian" or "Burmese", as the case may be, shall be used instead of the word "Native" in all official papers whenever the sense desired can be equally clearly conveyed by the use of either of these terms.

By order,

ED. MILLAR,
Registrar.

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Circular Memorandum No. 5 of 1913.

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FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL JUDGES AND MAGISTRATES.

Dated Mandalay, the 15th March 1913.

The Government of India have intimated that it has been recently brought to their notice that the term "Catholic" has been used in an official communication as synonymous with "Roman Catholic." As the claim of the Church of Rome to exclusive catholicity and to the exclusive right to be styled "The Catholic Church" is disputed on historical and other grounds by other Churches, the Governor-General in Council desires that such loose phraseology may be carefully avoided in the future, and that in all official communications the Roman Communion and its authorities may be addressed and described as "Roman Catholic."

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 6 of 1913.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

THE SESSIONS JUDGES AND MAGISTRATES,
UPPER BURMA,

Dated the 10th April 1913.

The Judicial Commissioner, Upper Burma, has noticed that there is a want of uniformity in entering up column 8 of the $\frac{\text{Monthly}}{\text{Weekly}}$ Criminal Judicial Statement (Form No. U.B. $\frac{\text{Judicial}}{\text{Criminal 29}}$), with reference to cases in which column 4 shows two or more penal sections. In some $\frac{\text{Monthly}}{\text{Weekly}}$ Statements, the particular section under which the sentence is passed is shown, whereas in others this information is not given.

It is therefore directed that in column 8 of this statement, the particular law and section under which the accused was convicted and the sentence passed, should always be specified.

The instructions to this statement under *column 9* Remark (*f*) will be altered as follows :—

"(*f*) In all convictions for theft, or for any offence in which wrongful gain or loss of property has resulted, the value of the property, cattle and boat-thefts being distinguished from other thefts."

Paragraph 984, Upper Burma Courts Manual, and the Guard-book of Forms, Part I (Criminal) will be altered accordingly.

By order,
ED. MILLAR,
Registrar.

2A86

Circular Memorandum No. 7 of 1913.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

TO

THE SESSIONS JUDGES AND MAGISTRATES.

IN UPPER BURMA.

Dated Mandalay, the 10th May 1913.

As it has been brought to notice that there is a divergence of practice in the Courts in Upper Burma in the payment of expenses to Assistant Surgeons, Sub-Assistant Surgeons, and Commissioned Medical Officers or Civil Surgeons who attend Courts at the instance of private individuals to give evidence of a professional character, whether in Civil or Criminal cases, the Judicial Commissioner *suggests* the following rates as suitable for the "special allowances according to circumstances" referred to in paragraph III (5) of Judicial Department Notification No. 182, dated the 12th May 1892 (reproduced at page 359, Upper Burma Courts Manual):—

	Rs.
Civil Surgeons and Commissioned Medical Officers	16 a day.
Assistant Surgeons	5 a day.
Sub-Assistant Surgeons	3 a day.

Courts will still use their discretion in interpreting the circumstances referred to in the passage quoted above.

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 8 of 1913.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL MAGISTRATES IN UPPER BURMA.

Dated, Mandalay, the 17th June 1913.

Instances having occurred where some Committing Magistrates have been found to have included in the list of witnesses submitted with the committal records to Sessions Courts the names of all the witnesses examined by them, irrespective of the irrelevancy or superfluity of the evidence some witnesses were able to give with respect to the charge, and in consequence a large proportion of the witnesses sent up were not examined by the Public Prosecutor, and the State was put to unnecessary expense by having had to pay the expenses of such witnesses, the Officiating Judicial Commissioner issues the following instructions for the guidance of Committing Magistrates in preparing the list of witnesses referred to above.

(1) If any witness for the prosecution can give no relevant evidence, or is wholly superfluous, the Public Prosecutor or officer in charge of the case should be asked whether he wants the witness, and unless he gives a good reason, the witness should be excluded from the list.

(2) If any witness for the defence has no relevant evidence to give the accused should be asked whether he wants him ; if the accused does not want him, or if the witness seems to be named for the purpose of vexation or delay, or of defeating the ends of justice, he should be excluded from the list, unless the accused deposits his expenses (section 216).

The above instructions will be incorporated in the Upper Burma Courts Manual as paragraph 201A, in due course.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 9 of 1913.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

THE DIVISIONAL AND SESSIONS JUDGES
AND DISTRICT MAGISTRATES,
UPPER BURMA.

Dated Mandalay, the 22nd July 1913.

Attention is invited to Judicial Department Notifications Nos. 59 62, and 63, dated the 5th May 1913 (*Burma Gazette*, Part I, pages 268 to 272), issued by the Local Government under the provisions of sections 3 (6), 70 and 91 (1), clause (*a*) of the Indian Lunacy Act, IV of 1912, and to Local Government Judicial Department Circular No. 18 of 1913.

Such paragraphs in the Courts Manual as are affected by the above notifications will be amended in due course, but the Officiating Judicial Commissioner issues the following instructions for the guidance of officers concerned.

All Magistrates of the first class have been empowered to perform the functions of a Magistrate under the Act. Ordinarily, at the headquarters of a Subdivision or District, the Subdivisional Magistrate shall perform the duties required of him under the Act, and in his absence, a first class Magistrate, specified by the District Magistrate in a Standing Order, shall undertake these duties. At the headquarters of a Township, the first class Magistrate who shall usually deal with matters arising out of the provisions of the Act shall be declared by the District Magistrate.

Forms.

Form 5 "Reception Order under sections 14, 15 and 17" prescribed in Schedule I of the Act will be substituted for form U. B. $\frac{\text{Judicial}}{\text{Criminal 142}}$, and forms B and D—"Letter to Civil Surgeon, etc., section 14", and "Order of Detention for Observation, section 16", respectively, prescribed in Judicial Department Notification No. 63, dated the 5th May 1913, will be substituted for forms U. B. $\frac{\text{Judicial}}{\text{Criminal 91 and 143}}$ in the Upper Burma Guard Book of forms.

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Forms 1, 2, 4, 6, 7 and 8 in Schedule I will not be printed. Form 3 will be brought on the Medical Guard Book. Form A, the new "Medical History Sheet of Lunatics" and forms C, E and F prescribed in Notification. No 63, cited above, will be brought on to the Guard Book of Medical Forms and may be obtained on indent in the usual manner.

Till such time as the new forms are available from the Government Press, officers dealing with matters under the provisions of this Act will use manuscript forms. Special attention is invited to the new Medical History Sheet and to the instructions appended at foot thereof. It shall be used in all cases in which—

(i) a Magistrate (sections 14 and 15) or District Court (section 25), orders a lunatic to be received into an Asylum;

(ii) a Magistrate or Court applies for the orders of the Local Government under section 466, or section 471 of the Code of Criminal Procedure, 1898; or

(iii) the orders of the Local Government are applied for under section 30 (1) of the Prisoners Act, 1900.

Attention is also drawn to the following notifications, *viz.*—

(1) Judicial Department Notification No. 64, dated the 5th May 1913, which contains rules for the detention of alleged lunatics;

(2) Judicial Department Notification No. 65, dated the 5th May 1913, which contains rules for the confinement, care, treatment and discharge of criminal lunatics;

(3) Judicial Department Notification No. 68, dated the 5th May 1913, which contains rules for the despatch of civil lunatics to the Asylum; and

(4) Judicial Department Notification No. 69, dated the 5th May 1913, prescribing the Lunatic Asylum at Rangoon as an Asylum to which lunatics from any part of Burma or any class of lunatics shall be sent.

This office Circular Memorandum No. 1 of 1908 is hereby cancelled.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 10 of 1913.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL JUDGES AND MAGISTRATES IN UPPER BURMA.

Dated Mandalay, the 2nd September 1913.

The Judicial Commissioner, Upper Burma, prescribes the following procedure for crediting the receipts on account of fines and sale-proceeds under the Cattle Trespass Act, 1871, and copying fees realized under the copying rules:—

PROCEDURE.

Receipts on account of fines and sale-proceeds under the Cattle Trespass Act, 1871, should not be entered in Bailiff's Register I, which is a Judicial Register, and relates only to the receipts and payments of Courts. Receipts under the Cattle Trespass Act are accounted for in the "Register of Unclaimed Cattle" maintained by Township Officers under the orders in Financial Department Notification No. 73, dated the 11th December 1902.

Copying fees realized under the Copying Rules (paragraph 967) should on receipt by the Bailiff be entered in his Register I and credited at once into the Treasury.

Such fees if to be credited to the head "Law and Justice" will be paid into the Treasury direct by the Bailiff by means of the duplicate chalan prescribed in Article 6 of the Burma Treasury Manual, and if to be credited to Land Revenue, will be paid through the *Akunwun* by means of the triplicate chalan prescribed in Article 7 of the Burma Treasury Manual.

By order,

ED. MILLAR,
Registrar.

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Circular Memorandum No. 11 of 1913.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, 9th September 1913.

The attention of all Judges is drawn to Judicial Department Notification No. 116, dated the 4th August 1913 (page 485 of the *Burma Gazette*, Part I, dated the 9th August 1913), by which unhusked rice to the extent of one-half the gross produce of his holding at the last harvest or 50 Government standard baskets, which ever may be less, are in the case of any agriculturist, exempted from liability to attachment or sale in execution of a decree.

All Judges should read the *Burma Gazette* and should take note of notifications published therein. On a recent tour of inspection, the Judicial Commissioner found that in some cases Judges did not see the Gazette and that in others where they did, they failed to take notice of matters contained in it affecting the administration of justice.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 12 of 1913.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL JUDGES OF CIVIL COURTS IN
UPPER BURMA.

Dated Mandalay, the 30th October 1913.

With a view to securing the proper enforcement of the provisions of sections 60 and 61, Rule 11 of Order XX and Rule 12 of Order XXXVIII of the Code of Civil Procedure, and in order to afford the necessary protection to small landholders and tenants in Upper Burma, the Judicial Commissioner lays down the following directions for the guidance of officers in dealing with applications for the attachment of property of a judgment-debtor who is an agriculturist.

In the first place it is necessary that Judges should be familiar with the provisions of the law for the protection of agriculturists; in the second it is essential that they should be placed in possession of the facts on which action under these provisions must be based. The former end can best be attained by special enquiry on the part of officers engaged in the inspection of subordinate Courts as to how far the provisions are understood by their Judges and applied in actual practice. It is requested therefore that inspecting officers will in future note in their inspections the result of their enquiries in this respect.

The latter object can be achieved by requiring a decree-holder desirous of attaching the property of an agriculturist judgment-debtor to detail in his application for execution the items which he has excluded on the ground that they are exempted by law from liability to attachment, and the Judicial Commissioner directs that Judges shall require this information to be given in future in applications for execution of decrees.

It is also desirable that Judges should ascertain by enquiry when a defendant appears in Court that he is fully cognizant of the provisions of Rule 12 of Order XXXVIII of the Code of Civil Procedure, while every judgment-debtor who appears in Court should be questioned regarding the liability to attachment of property in respect of which a warrant has been issued.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 13 of 1913.

FROM

THE REGISTRAR,

COURT OF THE JUDICIAL COMMISSIONER,

UPPER BURMA,

To

ALL JUDGES AND MAGISTRATES.

Dated Mandalay, the 19th November 1913.

The Local Government have ordered that every Muhammadan employee of the Court, who may ask for it, shall be granted leave for such period not exceeding two hours, as may be necessary and at such time as may be locally desired, to say his Juma prayers on Fridays —on the understanding that he shall make up the time by working extra hours later.

The Judicial Commissioner accordingly directs that the following shall be inserted in the Courts Manual, as paragraph 13A:—

"13A. Every Muhammadan employee of the Court, who may ask for it, shall be granted leave for such period not exceeding two hours, as may be necessary and at such time as may be locally desired, to say his Juma prayers on Fridays—on the understanding that he shall make up the time by working extra hours later."

By order,

ED. MILLAR,

Registrar.

Circular Memorandum No. 14 of 1913.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL JUDGES AND MAGISTRATES IN
UPPER BURMA.

Dated Mandalay, the 19th November 1913.

It having been brought to the notice of the Judicial Commissioner that the instruction contained in the penultimate sentence of the 4th instruction to Bailiff's Register No. I is not complied with by certain outstation Courts in Upper Burma, the officiating Judicial Commissioner directs that, in future, the Bailiffs of each Court shall prepare at the beginning of each year a list of all lapsed deposits and send it to the District Treasury to be checked with the register of deposits and repayments and returned to the Bailiff, who will take this as his authority for his entries of lapses in column 22 of Bailiff's Register No. I.

The Accountant-General, Burma, who has been consulted on the subject, has agreed to the check by the District Treasury.

A note to the above effect will be added to the 4th instruction to Bailiff's Register No. I, and will be included in the 6th list of corrections to the Upper Burma Courts Manual.

By order,

ED. MILLAR,
Registrar.

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Circular Memorandum No. 15 of 1913

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA,

TO

ALL MAGISTRATES AND JUDGES IN UPPER BURMA.

Dated Mandalay, the 27th Novembe 1913.

With reference to Circular Memorandum No. 2 of 1907 of this Court, Magistrates and Judges are hereby informed that the practice of publishing annually the dates on which Muhammadan festivals fall has now been discontinued, and in future subordinate courts should obtain the necessary information by making enquiries each year locally beforehand.

By order,

ED. MILLAR,
Registrar.

Circular Memorandum No. 16 of 1913.

FROM

THE REGISTRAR,
COURT OF THE JUDICIAL COMMISSIONER,
UPPER BURMA.

TO

ALL JUDGES IN UPPER BURMA.

Dated Mandalay, the 29th December 1913.

The attention of all Judges is invited to General Department Notifications Nos. 337 and 343, dated the 4th December 1913, published on page 799 of the *Burma Gazette*, Part I, dated the 6th December 1913. By the former notification the previous notification of 1908, excluding Upper Burma from the operation of the Indian Registration Act, 1908, is cancelled with effect from the 1st January 1914, and thereby, with the exception of the districts and tracts of country mentioned in General Department Notification No. 343 of the same date, the provisions of the Indian Registration Act, 1908, will come into force in Upper Burma with effect from the 1st January 1914.

The Judicial Commissioner desires that District Judges will see that no delay is allowed to occur in supplying subordinate courts with a copy each of the Act for reference.

By order,
ED. MILLAR,
Registrar.

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