BURMA LAW REPORTS

(1949) B.L.R

Containing cases determined by the

Supreme Court of the Union of Burma

BURMA LAW REPORTS

HIGH COURT

1949

Containing cases determined by the High Court at Rangoon

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NAMES OF THE JUDGES AND LAW OFFICERS OF THE UNION

SUPREME COURT

Hon'ble SIR BA U, Kt., M.A. (Cantab.), *Barrister-at-Law*, Chief Justice of the Union of Burma (on leave from 7th Nov. 1949 to 31st Dec. 1949).

Hon'ble U E MAUNG, M.A., LL.B. (Cantab.), *Barrister-at-Law*, Acting Chief Justice, from 7th Nov. 1949 to 31st Dec. 1949.

PUISNE JUDGES

Hon'ble MR. JUSTICE E MAUNG, M.A., LL.B. (Cantab.), *Barrister-at-Law.*

Hon'ble MR. JUSTICE KYAW MYINT, *Barrister-at-Law.*

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U CHAN TUN AUNG, B.A., B.L., *Barrister-at-Law.*

GOVERNMENT ADVOCATES

U CHOON FONG, B.A., B.L.

U TIN MAUNG, B.A., B.L.

U MYA THEIN, B.A., *Barrister-at-Law.*

U BA SEIN, B.A., B.L.

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enquiry into election disputes. Permission can also be granted to make counter charges or recriminations. Even if no counter charges are made if in the course of the enquiry it comes out that such irregularities or such illegal practices have been committed in the course of the election that the real intention of the electors has not been ascertained as to who should be their representative, the whole election should be set aside. The true meaning of s. 15 is that if the successful candidate was qualified at the time of the election and did not suffer from any disability as set out in s. 12 either before or after the election he or his agents have not during election committed any irregularities or illegal practices and there are no such irregularities in the election proceedings or illegal practices so as to stifle the real wishes of the electors, the election of the successful candidate must be confirmed If the successful candidate was not qualified at the time of election or suffered from any of the disabilities mentioned in s. 12, either before or after the election, or if either he or any of his agents committed any irregularities in the election proceedings or illegal practices, the election of the successful candidate must be set aside as being null and void and the candidate who received the next highest number of votes must be declared to have been duly elected. But if owing to irregularities in the election proceedings or illegal practices committed by the successful candidate or any other candidate or candidates or by any of their agents, the real wishes of the electors as to who should be their representative has not been ascertained, the whole election should be set aside and a report should be made to the President by the High Court through the Commissioner of the Corporation of Rangoon. The President can either appoint a fit person to fill the vacancy or direct the Commissioner to fix another date and hold a fresh election. Rule 2, Chapter I, Schedule I of the City of Rangoon Municipal Act in so far as it fixes the power of the President to appoint only 5 Councillors is *ultra vires* as being inconsistent with s. 7 of the Act, which gives the President power to nominate not more than one-fourth of the Councillors—that is—when the number of Councillors was 40, he could nominate up to 10. When the President exercises his power under s. 15 (4) his decision is an administrative one, over which, the Court has no control. But the President, when he has to give his decision on the rights and liabilities of the parties, is to act according to law and was amenable to the jurisdiction of the Court. The question whether the electoral right comes within the purview of s. 16 or 17 (*1*) of the Constitution of Burma is left open. *Jones* v. *Skinner*, (1835) 5 L.J. Chan. 87 at 90 ; *U Htwe*'s case, (1948) B.L.R. 541 ; *Gwan Kee*'s case, B.L R. (1949) S.C. 151.

CODE OF CIVIL PROCEDURE, SS. 24 AND 122—*Order 7, Rule 10—Rule 2 of the Original Side Rules of Procedure (Civil). Held :* The High Court has framed rules under s. 122 of the Code of Civil Procedure for regulating the procedure on the Original Side of the Court. These rules have preference over the rules of the Code of Civil Procedure in the Original Side of the High Court. Rule 21 of the Original Side Rules of Procedure (Civil) supersedes Order 7, Rule 10 of the Code of Civil Procedure. That where a suit is instituted rightly in a Court and the Court subsequently loses jurisdiction owing to the passing of a new Act,

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building and removed certain sheets of corrugated iron and as a consequence debris fell into the premises occupied by the tenants and some damage was caused to their foodstuff, crockery and furniture ; the owner, his son and the Contractor were then prosecuted by each tenant in two different cases and were convicted. It was contended that in view of the provisions of ss. 76 and 79 of the Penal Code the accused were not guilty. *Held :* That s. 76 applies to an act committed by reason of mistake of fact and not a mistake of law, by a person, who in good faith believes that he is bound by law to do it. S. 79 applies to an act done by a person who, by reason of a mistake of fact (not by mistake of law) in good faith believes himself justified by law in doing it. The distinction between ss. 76 and 79 is that in the former the person *bona fide* believes himself to be bound to do it and in the latter the *bona fide* believes himself to be justified by law in doing it. The distinction is between the real or supposed legal obligation and real or supposed justification in doing a particular act. Under both these sections there must be *bona fide* intention to advance the law. The party accused cannot allege generally that he had a good motive. He must allege specifically under s. 76 that he believed in good faith that he was bound to do it as he did, or under s. 79 that being empowered by law to the best of his judgment exerted in good faith. *Queen-Empress* v. *Nga Myat Tha and Nga Po Khin*, 1872—92) S.J.L.B. 164 ; *Niamat Khan and others* v. *The Empress*, (1883) P.R. Criminal 29 ; *Chaman Lal* v. *The Crown*, (1940) I.L.R. 21 Lah. 521 , *Emperor* v. *Ramlo and others*, A.I.R. (1918) Sind 69=19 C.L.J. 955 ; *U San Win* v. *U Hla*, A.I.R. (1931) Ran 83, referred to. If the owner was prosecuted for the act or acts of executing the repair, s. 76 would be a complete answer to such a charge. But the owner was bound by law to execute the repairs ; but his son, and the employee, did not believe themselves to be bound to commit the offence of Criminal Trespass and mischief. The owner had time before he instructed the Contractor to carry out the repairs, and he could have come to some arrangement with the tenants to carry out the same without causing any trespass or damage to them. In any case the accused were not under any mistake of fact. If there was any mistake—it was a mistake of law. The mistake could not have been made in good faith as the Appellant did not exercise due care and attention as required by s. 52 of the Penal Code. Dismantling of the roof of the building in actual physical possession of tenants without giving them reasonable opportunity to remove their properties, cannot be said to be an act done with due care and attention or in good faith. S. 235 of the Code of Criminal Procedure is permissive and permits a Court to try together more than one offence so connected together so as to form part of the same transaction. There is nothing in law to prevent a person who has committed more offences than one from being tried separately for each of the offences. Where a person, by his act, causes wrongful loss and damage to the properties in two separate premises, he can be convicted for two different offences and conviction for injury to one person cannot be a bar under s. 403 to conviction for the offence against the property of another. *Ganesh Sahu* v. *Emperor*, I.L.R. 50 Cal. 594, referred to. The opinion of Cunliffe J. in *Yeok Kuk* v. *King-Emperor*, I.L.R. 6 Ran. 386 regarding the definition of a distinct offence is too broad though on the facts of that case the case was correctly decided. The test is not whether the offences were connected, but whether they are distinct offences.

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informing him about the arrest, he is not justified in passing an order of detention for an indefinite period under s. 5A of the Act. In the justification of the Commissioner of Police he should state what, in his opinion, the person proposed to be detained had done, or was about to do, so as to constitute his being a menace to public peace and tranquillity. This information is necessary to enable the Court to consider whether the order of detention was justified in law or not. Allegations of the *détenue* being merely a permanent member of the Red Guards without further particulars does not justify an order for detention for an indefinite period under s. 5A of the Act.

PUBLIC ORDER (PRESERVATION) ACT, 1947, *s. 5 (1)—S. 5 (2) S. 7.* Maung Maung Khin was arrested by the Police Station Officer, Latter Street Police Station on the 7th October 1948 under s. 5 (*1*) and later under orders of the Deputy Commissioner of Police, Rangoon, to whom authority was delegated under s 7. The order challenged was that of the 8th October 1948 by the Deputy Commissioner of Police, Rangoon. *Held:* That the order of detention was on its face irregular as the *détenue* could not be detained beyond 6th December 1948 and the detention till the 7th December 1948 was irregular. What has to be justified is the original arrest under s. 5 (*1*) and the charges against the *détenue* of being in contact with the Burma Communist Party and of distributing leaflets and pamphlets issued by the said party and of possession of such a leaflet and some document was held in the circumstances not sufficient justification. The Burma Communist Party has not been declared an unlawful association and to be a member is not in itself justification for action being taken. To be a communist and to propagate communism by distributing literature would be acting within the lawful rights assured to a citizen, if he thereby commits no unlawful act or cause a breach of the peace or public disorder. Possession and retention of documents would not be a sufficient ground in law for action. As from the title of the leaflet the attack was against the AFPFL and not against the Government of the Union of Burma—it was within the powers of a citizen to criticize and attack political organization provided it is legitimate and not prohibited by law. *Held:* That the detention was therefore not in accordance with law.

PUBLIC ORDER (PRESERVATION) ACT, 1947—*S. 5A—Retrospective order validity—Order covering 70 persons being Communist labour leader is sufficient. Held:* A written order is necessary to justify detention under s. 5A of the Public Order (Preservation) Act, and an oral order is invalid. A written order with retrospective effect is illegal. Where an order covers 70 persons the probability of each individual case being considered is fairly remote. *Held further:* That the allegations against applicant's son Chit Sein that he fostered dissatisfaction and grievances among the workers to go on strike and acted as a courier during the Saw-mill strike in 1948 between the strikers' camp and the Burma Communist Party do not disclose any act to bring the *détenu* within the purview of s. 5A. To strike or induce others to strike provided no unlawful means are used and to carry messages are within the legitimate

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PUBLIC ORDER (PRESERVATION) ACT—*Exercise of discretion must be by the Officer making the order—Delegation of power to the Deputy Commissioner—Whether Additional Deputy Commissioner can exercise such power. Held :* The quasi-judicial act of directing the preventive detention of a Citizen for an indefinite period under Public Order (Preservation) Act is in exercise of the discretion of the Officer who makes the order. Where the Officer does not exercise his own discretion but acted automatically on the instructions of the Deputy Inspector-General of Police, his order is illegal. It is a matter for consideration whether powers delegated to the Deputy Commissioner under the Public Order (Preservation) Act, can be exercised by the Additional Deputy Commissioner.

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PUBLIC ORDER (PRESERVATION) ACT, 1947— *S. 5A (1), sub-clause* (a) *and sub-clause* (b)—*Constitution Act, s. 16.* In an order of detention under s. 5A of Public Order (Preservation) Act the Deputy Commissioner said that he had reason to suspect the *détenue* as likely to cause disturbance of public tranquillity and maintenance of law and order and passed an order that he (*détenue*) be detained under s. 5A (*1*) (*b*) of the Act. *Held :* That the order of detention actually passed is defective in law and is not in accordance with s. 5A (*1*) (*b*) of the Public Order (Preservation) Act and the continued detention under the defective order cannot be allowed. Officers entrusted with extensive powers to curtail the liberty of a citizen should exercise those serious responsibilities with care. The constitution has guaranteed the personal liberty of a citizen and under s. 16 such personal liberty of a citizen shall not be interfered with except in accordance with law. There must be circumstances justifying the action contemplated and the curtailment of liberty must be in due process of law. It is not enough that circumstances exist as contemplated. The detention must also be in the manner directed by the Act.

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PUBLIC ORDER (PRESERVATION) ACT—*S. 5A* (1) (b)—*Stages under proceedings for detention under ss. 5 and 5A of the Act—Police Officer to arrest and detain for 15 days—Then detention may be up to two months—Afterwards order under s. 5A can be taken. Held :* That under s. 5 (*1*) of the Act the Police Officer can arrest a person whom he suspects of having acted or about to act in a manner calculated to disturb or assist the disturbance of public tranquillity. On such suspicion the Police Officer may keep the person arrested under detention up to 15 days. This period of 15 days is permitted to enable the Police Officer who acts on reasonable suspicion to investigate into the matter further and satisfy himself whether his suspicion is well founded. The period of detention under this section can be extended to a period of altogether two months if there is a further order from the President or the officer authorized by the President under s. 7. The next stage would be arrived at on the expiry of two months or if the inquiry had been concluded earlier before the expiry of two months. If the inquiry discloses circumstances justifying action under s. 5A of the Act, then further detention for an indefinite period under this section can be made by an officer to whom the powers of the President are delegated under s. 7 of the Act. Action under s. 5A cannot be taken on mere suspicion.

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SUPREME COURT.

MA THAN SINT (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON AND ONE (RESPONDENTS).*

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Press (Registration) Act—S, 5A (1) (b), Public Order (Preservation) Act, 1947—Publication in the newspaper—Party responsible—Object of the Act.

The *détenue* was alleged to be the editor of a paper and to be responsible for the publication of information about the arrival of Gurkha troops which was false and it was alleged that the effect of such publication would be to arouse ill-feeling against the Government.

Held : That under the Press (Registration) Act one U Than Tun's name is printed on every issue as Editor and not that of the *détenue*. If *détenue* was not the Editor the detention was not proper.

Held further : That assuming the report to be false and misleading it does not follow that the effect would be to prejudice public safety and the maintenance of public order. If the effect was to excite dissatisfaction towards the Government steps should be taken under s. 124A of the Penal Code. Public Order (Preservation) Act, 1947 was enacted in the interest of preventive justice and not for providing additional punishment for an act which would be penal under the law in force. The jurisdiction to order detention arises only where the authority empowered is satisfied that action is necessary with a view to prevent a person from acting in any manner prejudicial to public safety and for the maintenance of public order.

In the absence of both these elements the detention was unlawful.

Applicant in person.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—In these proceedings the applicant questions her brother's detention under the

* Criminal Misc. Application No. 58 of 1948.

† Before SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

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orders of the Commissioner of Police, Rangoon, dated the 12th August 1948 under section 5A (*1*) (*b*) of the Public Order (Preservation) Act, 1947.

The Commissioner of Police seeks to justify the detention on the ground that the applicant's brother, Maung Than Nyunt, being an editor of the *Guide Daily*, a Burmese Newspaper published at Rangoon, was responsible for the publication in the issue of the *Guide Daily* of the 12th August 1948 of a report "concerning the alleged arrival of 2,000 Gurkha troops and Government's request for foreign help to quell the insurrection, and that in consequence, about 50 planes and the 14th Army would arrive in Rangoon within a fortnight's time." The Commissioner of Police states that the report was completely false and that its effect would be to arouse ill-will and ill-feeling against the Government of the day and thereby lead to "serious political complication and disturbance of peace and tranquillity."

The applicant, in her original application which was supported by an affidavit, as also in her reply affidavit, claimed that her brother Maung Than Nyunt, though employed in the *Guide Daily* Press, was not the Editor of the Press. She claims further that one U Than Tun is the Editor of the *Guide Daily* and that this U Than Tun's name is printed on every issue of the *Guide Daily* as the Editor in compliance with section 5 (*1*) of the Press (Registration) Act.

The last allegation of the applicant has not been in any way controverted by the Commissioner of Police. We are therefore entitled to accept the assertion of the applicant that U Than Tun is the Editor of the *Guide Daily* and was held out as such under the Press (Registration) Act, though it is quite possible that Maung Than Nyunt held a subordinate position on the editorial staff of the said newspaper.

It is difficult to agree with the Commissioner of Police that, assuming the report taken exception to by him and appearing in the *Guide Daily* of the 12th August 1948 to be false and misleading, the effect of that report would be to prejudice public safety and the maintenance of public order. It may be, as the Commissioner of Police claims, that such a report would have the effect of exciting dissatisfaction towards the Government of the day. If that be so, the appropriate step to be taken by him would appear to be a prosecution under section 124A of the Penal Code.

We have repeatedly held that the Public Order (Preservation) Act was enacted in the interest of preventive justice and not for the purpose of providing additional punishment for an act which would be penal under any law in force. Moreover, as is clear from the wording of section 5A of the Public Order (Preservation) Act, the jurisdiction to order a detention under that section arises only where the authority empowered under that section is satisfied that it is necessary to take action "with a view to prevent" the person against whom action is to be taken under the Act "from acting in any manner prejudicial to public safety and the maintenance of public order." In other words, before action under section 5A of the Act can with justice be taken there must be materials from which it can be deduced, not merely that a certain person has committed a wrongful act but that that person, if left at liberty, would be likely to act in such a way as would be prejudicial to public safety or the maintenance of public order.

The return made by the Commissioner of Police does not, in our opinion, justify the detention of Maung Than Nyunt under the Public Order (Preservation) Act. In the first place, on the materials

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placed before us, it cannot be said that Maung Than Nyunt's responsibility for the publication of the report in question is, or can be said to be, established to any reasonable mind. In the second place, assuming Maung Than Nyunt's responsibility for the report, the appropriate step to be taken against him is clearly under the ordinary penal laws. There is nothing in the return to show that the Commissioner of Police could have entertained reasonable apprehension of threatened prejudice to public safety or the maintenance of public order.

Maung Than Nyunt who had been released on bail pending the disposal of this application is therefore discharged. His bail bond will be cancelled.

SUPREME COURT.

DAW AYE NYUNT (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON AND ONE (RESPONDENTS).*

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Public Order (Preservation) Act, 1947—S. 5A—Retrospective order validity—Order covering 70 persons being Communist labour leader is sufficient.

Held: A written order is necessary to justify detention under s. 5A of Public Order (Preservation) Act, and an oral order is invalid. A written order with retrospective effect is illegal.

Where an order covers 70 persons the probability of each individual case being considered is fairly remote.

Held further: That the allegations against applicant's son Chit Sein that he fostered dissatisfaction and grievances among the workers to go on strike and acted as a courier during the Saw-mill Strike in 1948 between the strikers camp and the Burma Communist Party do not disclose any act to bring the *détenu* within the purview of s. 5A. To strike or induce others to strike provided no unlawful means are used and to carry messages are within the legitimate rights of a citizen of the Union. The *détenue* did not do anything exceeding his lawful rights or do anything prohibited by law or anything which will be likely to endanger public safety or maintenance of public order.

Applicant in person.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—On the 16th November 1948, we directed the discharge of the applicant's son Chit Sein, stating then that we would give our reasons for that order in due course. This we now proceed to do.

The applicant's son was taken into custody and has been detained under the orders of the Commissioner

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* Criminal Misc. Application No. 48 of 1948.

† Before SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE MAUNG and MR. JUSTICE KYAW MYINT.

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of Police, Rangoon, since the 28th March 1948, in Rangoon Central Jail. The original order of detention on the 28th March 1948 appears to have been verbal. There is nothing in writing on the record to justify the detention between the 28th March 1948 and the 30th March 1948.

On the 30th March 1948, however, the Commissioner of Police made a written order, embracing in all 70 persons, wherein he directed that they be detained "until further orders with effect from the 28th March 1948." We have repeatedly held that a written order is necessary to justify a detention under section 5A of the Public Order (Preservation) Act, and, also, that a retrospective order, as in this case, is illegal.

Accordingly, on this ground alone the applicant's son is entitled to an order of release. But the matter does not end there.

As already noticed, the written order covers 70 persons. This in itself is not conclusive, but it does indicate that the probability of each of the persons covered by the warrant having his case considered individually is fairly remote. Moreover, when we turn to the reasons given by the Commissioner of Police in seeking to justify his order of detention, we find that they are not at all sufficient to justify an indefinite detention of a citizen. It is said, in the first place, that Chit Sein fostered dissatisfaction and grievances among the workers to go on strike under the command of Thakin Rajan and Thakin Tin Saw. It is also said that during the saw-mill strike in March 1948, Chit Sein acted as a courier between the strikers' camp and the headquarters of the Burma Communist Party.

These allegations, even with the additional information that Chit Sein was a labour leader of the Burma Communist Party, do not disclose any act on the part of Chit Sein to bring him within the purview of section

5A of the Public Order (Preservation) Act. To strike or to induce others to strike, provided no unlawful means are used, and to carry messages relating to the strike between one group and another are in themselves within the legitimate rights of a citizen of the Union. It is not alleged by the Commissioner of Police that, in acting as a courier between the strikers' camp and the headquarters of the Burma Communist Party, Chit Sein in any way exceeded his lawful rights, or that he did anything prohibited by law, or that he did anything which would be likely to endanger public safety or the maintenance of public order.

It is also said that the Commissioner of Police had grounds to believe that Chit Sein was responsible for the dissemination of inflamatory leaflets among the saw-mill workers intended to create dissatisfaction among the labourers and " to lead to armed insurrection in furtherance of the aims and objects of the Communist Party." These leaflets are not before us, and we have no means of knowing at all whether these leaflets do have the tendency charged to them. If the leaflets or some of them had been produced before us, and if they are such that a reasonable person can hold them to have the tendency to lead to armed insurrection, we would agree with the Commissioner of Police that on the merits a case is made out for the detention of Chit Sein under the Public Order (Preservation) Act. But in the absence of these material documents on the record it is impossible to support the findings of the Commissioner of Police.

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MA LONE (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON AND ONE (RESPONDENTS).*

Public Order (Preservation) Act, 1947—Ss. 5 and 5A—Length of detention—Law explained.

Held: Under sub-s. (*1*) of s. 5 any Police Officer of the type described can arrest without a warrant and commit him to custody for not more than 15 days under the first proviso to sub-s. (*2*). In the meantime he must submit his report to the President or any officer empowered to act on his behalf. Under sub-s. (*4*) the President or any officer empowered to act on his behalf can if empowered by any law other than the one in sub-s. (*4*) pass a final order relating to the detention, etc.; the only law in this behalf is contained in s. 5A. S. 5, clause (*4*), may be described as an enabling section and s. 5A as a penal section. If the Commissioner of Police intended to order the detention of the *détenue* for more than two months he can on receipt of the report from the arresting officer pass a final order straight away under s. 5A, clause (*b*).

In the present case the Commissioner passed an order of detention for an indefinite period under s. 5 (*4*). He could not do this and the *détenues* cannot be detained for more than two months. They must therefore be released.

Applicant in person.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

SIR BA U, C.J.—We regret to note that some of the Acts placed on the Statute Book in 1947 have been so badly drafted that they have given rise to such misunderstanding and confusion as to interfere with the due administration of justice. The sooner some of these Acts are amended, the better it will be for everybody concerned. The one now in question is the

* Criminal Misc. Application No. 41 of 1948.

† Before SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

Public Order (Preservation) Act, 1947, as amended by the amending Act, being Act No. XXVIII of 1947, and the amending Act, being Act No. LXXIX of 1947. It is a much misunderstood and much misused Act.

In exercise of the powers conferred by section 5 (*1*) of the said Act, U Than Sein, Police Station Officer, Thingangyun, arrested Kyaw Thein and eight of his cultivators, namely, Pu Gyi, Yan Aye, Maung Saw, Tin Aung, Tin Aye, Maung Khwe, Maung Thaung and Tun Thein, on the 16th September 1948. Then in exercise of the powers conferred by section 5 (*2*) he committed all the aforesaid persons to custody at the Rangoon Town Lock-up, and thereafter submitted a report to the Commissioner of Police, Rangoon Town. On receipt of the report the Commissioner of Police passed the following order :

"OFFICE OF THE COMMISSIONER OF POLICE, RANGOON.

I.B. ORDER No. 5017.

Dated the 17th September 1948.

Order under section 5 (*4*), Public Order (Preservation) Act, 1947.

WHEREAS being satisfied that KYAW THEIN son of U SEIN PO is acting in a manner prejudicial to public safety and maintenance of public order contrary to the provisions of the Public Order (Preservation) Act, 1947, I, U AUNG CHEIN, Commissioner of Police, Rangoon, hereby order that the said KYAW THEIN be detained under section 5 (*4*) of the Public Order (Preservation) Act, 1947, in any of the following places of custody, *viz* :—

(1) Rangoon Town Lock-up, Barr Street.
(2) Any Police Station or Out-post in the Rangoon City.
(3) The Rangoon Central Jail.
(4) The Insein Central Jail.
(5) The Insein Jail Annexe."

Similar orders were passed in respect of the other persons. On the same date, *i.e.* the 17th September,

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Hla Maung, another cultivator of Kyaw Thein, was arrested by U Ba Than, Police Station Officer, Port Police Station, Rangoon. We do not know whether the Commissioner of Police passed any order on Hla Maung as he did in the case of the other *détenues*. His order has not been placed before us. We would, however, assume that he did pass an order similar to those which he had passed on other *détenues*.

The question that arises now is whether these *détenues* can be kept under detention for more than two months. The answer to this question depends on what construction is to be put on section 5 (*4*) of the Public Order (Preservation) Act. In order to get a clear meaning of this section, it must be read together with sub-section (*1*) and sub-section (*2*) of section 5. Under sub-section (*1*), any police officer not below the rank of a Sub-Inspector of Police can arrest without a warrant any person whom he reasonably suspects of having committed, of committing, or about to commit any of the acts mentioned in sub-section (*1*) (*a*) and (*b*) and commit him to custody for not more than 15 days under the first proviso to sub-section (*2*). In the meantime, he must submit his report of the arrest to the President or any officer empowered by the President to act on his behalf. The officer so empowered by the President can order the detention of the *détenue* under the second proviso to the aforesaid sub-section for not more than two months.

Now, we must turn to sub-section (*4*) and see whether the detaining authority can order the detention of the *détenue* for more than two months as allowed by the second proviso to sub-section (*2*). This depends upon what construction is to be put on the following : ". . . the President may, in addition to making such orders subject to the second proviso to sub-section (*2*) as may appear to be necessary for the temporary

custody of any person arrested under this section, make, in exercise of any powers conferred upon the President by any law for the time in being force, such final order as to his detention, release, residence or any other matter concerning him as may appear to the President in the circumstances of the case to be reasonable or necessary." What it means is that the President or any officer empowered by the President to act on his behalf, if empowered by any law other than the one contained in sub-section (*4*), can pass a final order relating to the detention, release, residence or any other matter concerning the *détenue*.

The only law under which the President or any officer empowered by the President to act on his behalf can pass a final order relating to the detention, release, residence or any other matter concerning the *détenue* is the law contained in section 5A of the Public Order (Preservation) Act.

Section 5 (*4*) may be described as an enabling section, and section 5A may be described as a penal section, of the Public Order (Preservation) Act.

Therefore, what the Commissioner of Police should have done in the present case on receipt of the report from the arresting officer was, if he chose to do so, to order a temporary detention of the *détenue* for not more than two months in exercise of the power conferred by section 5 (*2*), proviso (ii), of the Public Order (Preservation) Act. And thereafter, he could pass a final order under section 5A (*b*). If he intended to order the detention of the *détenue* for more than two months and he did not choose to order a temporary detention only, he could, on receipt of a report from the arresting officer, pass a final order straightaway under section 5A (*b*) of the Public Order (Preservation) Act.

In the present case, what the Commissioner of Police did was to pass an order of detention of the

S.C. 1948

MA LONE v. THE COMMISSIONER OF POLICE, RANGOON AND ONE.

détenues for an indefinite period of time under section 5 (*4*), which he could not do. Such being the case, the *détenus* in this case cannot be detained for more than two months. The *détenues* must, therefore, be released as the period of their detention has already exceeded two months.

We accordingly, as the *détenues* are now on bail, direct their discharge forthwith, and direct the cancellation of their bail bonds. The order of detention as passed by the Commissioner of Police is set aside.

SUPREME COURT.

MA KHIN THAN (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON AND ONE (RESPONDENTS).*

†S.C. 1948

Dec. 1.

Public Order (Preservation) Act, 1947, s. 5 (1)—S. 5(2)—S. 7.

Maung Maung Khin was arrested by the Police Station Officer, Latter Street Police Station on the 7th October 1948 under s. 5 (*1*) and later under orders of the Deputy Commissioner of Police, Rangoon, to whom authority was delegated under s. 7. The order challenged was that of the 8th October 1948 by the Deputy Commissioner of Police, Rangoon.

Held : That the order of detention was on its face irregular as the *détenue* could not be detained beyond 6th December 1948 and the detention till the 7th December 1948 was irregular. What has to be justified is the original arrest under s. 5 (*1*) and the charges against the *détenue* of being in contact with the Burma Communist Party and of distributing leaflets and pamphlets issued by the said party and of possession of such a leaflet and some documents was held in the circumstances not sufficient justification. The Burma Communist Party has not been declared an unlawful association and to be a member is not in itself justification for action being taken.

To be a Communist and to propagate communism by distributing literature would be acting within the lawful rights assured to a citizen, if he thereby commits no unlawful act or cause a breach of the peace or public disorder. Possession and retention of documents would not be a sufficient ground in law for action. As from the title of the leaflet the attack was against the AFPFL and not against the Government of the Union of Burma—it was within the powers of a citizen to criticize and attack political organization provided it is legitimate and not prohibited by law.

Held : That the detention was therefore not in accordance with law.

Toe Sein for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The applicant's husband Maung Maung Khin was arrested by U Than Kyaw,

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* Criminal Misc. Application No. 70 of 1948.

† Before SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

S.C. 1948

MA KHIN THAN v. THE COMMISSIONER OF POLICE, RANGOON AND ONE.

Police Station Officer, Latter Street Police Station, Rangoon, on the 7th October 1948, acting under section 5 (*1*) of the Public Order (Preservation) Act, 1947. Maung Maung Khin has since that date been detained, first under the orders of U Than Kyaw and later under the orders of the Deputy Commissioner of Police, Rangoon. The Deputy Commissioner of Police, Rangoon, enjoys by delegation under section 7 of the Public Order (Preservation) Act the powers of the President under section 5 (*2*) of the Act.

The order of detention now in force and which is being challenged is that of the 8th October 1948, made by the Deputy Commissioner of Police, Rangoon, under section 5 (*2*) (ii), (*4*) and it purports to direct the detention of Maung Maung Khin in the Rangoon Central Jail till the 7th December 1948. Recently we have held that the total detention in exercise of powers under section 5 of the Act cannot exceed two months. Accordingly, if in this case we see no reason to interfere with the order of detention, the applicant's husband is due to be released on the 6th December 1948. In this respect there is an irregularity apparent on the face of the detention order in that it purported to authorize the detention till the 7th December 1948.

It is thus of little practical effect to the applicant's husband whether we direct his release to-day or not ; but the case involves points of general application and importance.

The detention being under section 5 of the Public Order (Preservation) Act what has to be justified, as we have on several occasions said, is the original arrest under section 5 (*1*) of the Act, and U Than Kyaw the Police Station Officer who effected the arrest of Maung Maung Khin, has sought to do this. In support of his action he has claimed firstly, " that Maung Maung Khin is in contact with the Burma Communist Party

and that his particular duty is to distribute copies of leaflets and pamphlets issued by the Communist Party in Sooratee Bazaar, Rangoon"; secondly, "that a copy of Communist printed leaflet entitled 'Communist and PYA must combine and attack the AFPFL' was found" in the possession of Maung Maung Khin when a search was made on him on the 6th October 1948; and lastly, that "when a raid was made on Maung Maung Khin's residence on the 8th October 1948 some documents relating to Burma Communist Party, *viz.* (*a*) a pamphlet on the speech given by Thakin Than Tun at the Pyinmana Congress, (*b*) a book on Communism and (*c*) a song urging the people to join in the rebellion to overthrow Government were found and seized."

It is not claimed on behalf of the respondents that the Burma Communist Party is or has been declared an unlawful association. Accordingly, to be a member of that organization is in itself a matter not justifying in action being taken. To disseminate propaganda on behalf of a certain organization again, is in itself not at all a matter for disapprobation. It is not claimed by U Than Kyaw that the literature said to be distributed by Maung Maung Khin was of such a character that it must necessarily be productive of breach of peace or public disorder. As we apprehend the Constitution of the Union, to be a Communist and to propagate Communism by distributing literature on the subject would be acts within the lawful rights assured to a citizen, so long as he thereby does nothing to commit an unlawful act or cause a breach of the peace or public disorder. In this case, as we have already said, there is no allegation that the literature distributed was of that class which would come within the prohibition of law.

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MA KHIN THAN v. THE COMMISSIONER OF POLICE, RANGOON AND ONE.

As regards the documents claimed by the police to have been seized either from the person or the residence of Maung Maung Khin, his wife, the applicant, has claimed that these were documents which, about the time they were seized, were being distributed in the area where they were living and that her husband came into possession of them in an innocent way and without any special knowledge of how they originated and of the doctrines inculcated in them. It may well be as the applicant has claimed. Assuming, however, that these documents were not casually received and retained by Maung Maung Khin, we still cannot see that their possession and retention would be a sufficient ground in law for action under the Public Order (Preservation) Act.

We have not before us the leaflet entitled "Communist and PYA must combine and attack the AFPFL"; but from the title of the leaflet it would appear that the attack was directed towards the AFPFL and not against the Government of the Union as such. The AFPFL is a political organization and the Communist Party and the PYA are other such organizations in the Union. It is of the essence of democratic government that one political organization is entitled to criticize and attack another political organization so long as such criticism and attack is legitimate and is not prohibited by law.

The three other documents which were seized at Maung Maung Khin's residence on the 8th October 1948 cannot also be regarded as sufficient foundation for action under the Public Order (Preservation) Act. The speech given by Thakin Than Tun at the Pyinmana Congress at a time when Thakin Than Tun was accepted as a law-abiding citizen of the Union and the record of which speech has not been proscribed by the Government, cannot also be the basis of any action

under the Act. The book on Communism is clearly not a matter needing any further discussion; its possession is perfectly innocuous.

The leaflet containing the song "urging the people to join in the rebellion" has been amplified by the applicant as being one containing the Cultivator's Song. It is a matter of notoriety and publicity—which we are therefore entitled to take judicial notice of—that in the language of politicians in these days "rebellion" (*tawhlan-ye*) does not necessarily mean much and no undue importance should, in our opinion, be attached to its use in political-literature apart from ancillary considerations.

The position then in this case comes to this. The acts charged against the applicant's husband are in themselves colourless and neutral. It may be that these acts together with other circumstances connected therewith would be of moment and amount to a danger to public safety and tranquillity; but of these circumstances we are told nothing. Accordingly, we must hold that on the materials before us the detention of Maung Maung Khin is not in accordance with law.

We therefore direct that Maung Maung Khin be released forthwith.

SUPREME COURT.

†S.C. 1948

Nov. 16.

U KYU (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON (RESPONDENT).*

Public Order (Preservation) Act, 1947—Alleged informer in connection with dacoity—Proper course to be taken by police.

The allegation for detention was that the *détenu* acted as informer in connection with a dacoity.

Held: Where offence under Penal Code is alleged, authorities should prepare a charge sheet and send up the accused for trial. Under such circumstances Public Order (Preservation) Act should not be resorted to.

Ba Sein (for Attorney-General) for the respondent.

The judgment of the Court was delivered by

SIR BA U, C.J.—This application must be allowed.

We regret to note that the Public Order (Preservation) Act, 1947, has been misused in connection with offences under the Penal Code, which the authorities concerned cannot in any way substantiate. The allegation for which the *détenu* was arrested and has been kept under detention is that he acted as an informer (*let-tauk*) in connection with the dacoity in the house of one Mr. Nanjee of Kamayut some months ago. If that be the allegation—and it is the allegation as stated by the Police Station Officer who effected the arrest—then we are clearly of the opinion that what the police authorities should have done was to prepare a charge sheet and send the man up for trial; but instead they have resorted to the Public Order (Preservation) Act, which should not have been done.

We accordingly direct the release of the applicant's son Maung Tun Kyi forthwith.

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* Criminal Misc. Application No. 49 of 1948.

† Before SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

SUPREME COURT.

MA THI AND TWO OTHERS (APPLICANTS)

v.

THE TAPUN VILLAGE AGRICULTURAL BOARD AND TWO OTHERS (RESPONDENTS).*

†S.C. 1948

Dec. 6.

Disposal of Tenancies Rules—Board deciding by a majority of the members—Interference when justified by a writ of certiorari—*Rule 10 (2).*

An order to the Tapun Village Agricultural Board allotting 13·53 acres to Respondents 2 and 3 was challenged by a writ of *certiorari* on the ground that the order was not made by the Board as a whole sitting together but by a majority and that the original tenants were entitled to continue to cultivate under Rule 10 (2).

Held : If the minority in a Board was not given an opportunity of attending the deliberations or expressing its views before the Board as a whole came to its decision the proceedings might have to be quashed. But when minority was not so deprived of the opportunity of attending and the records indicate that the dissentient members were present at the deliberations the mere fact that the minority disagreed with the view of the majority is no ground to hold that the order of the majority was invalid.

Held further : Under Rule 10, clause (2) of the Disposal of Tenancies Rules, 1948, the Board if it has sufficient ground to believe that the previous tenants would be unable to cultivate such lands may withdraw the lands from the occupation of such tenants. The applicant in this case is a salaried officer in the service of the Government and lives at a distance from the lands and his wife is a woman with small children, the conclusion of the Board that the applicant and his wife would not be able to cultivate such land was not unreasonable. The Supreme Court will not interfere with such findings of fact.

Ba Maung for the applicants.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Bench was delivered by

MR. JUSTICE E MAUNG.—This application must be dismissed.

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* Civil Misc. Application No. 43 of 1948.

† Before SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR JUSTICE KYAW MYINT.

S.C. 1948

MA THI AND TWO OTHERS v. THE TAPUN VILLAGE AGRICULTURAL BOARD AND TWO OTHERS.

The 2nd and 3rd applicants are husband and wife and the 1st applicant is a sister of the 2nd applicant.

It is not disputed that in the agricultural season 1947-48 the 2nd and 3rd applicants worked altogether 29·59 acres of paddy land, of which 16·06 acres belong to them; the other 13·53 acres, however, are owned by the 1st applicant and were worked by the 2nd and 3rd applicants as the 1st applicant's tenants.

For the agricultural season 1948-49 the 2nd and 3rd applicants were without any interference allowed to work 16·06 acres belonging to themselves, but the 13·53 acres belonging to the 1st applicant were allotted to the 2nd and 3rd respondents, in pursuance of the Disposal of Tenancies Rules, by the Tapun Village Agricultural Board. It is this order of the Board that we are asked to quash in these proceedings.

The first point taken before us on behalf of the applicants is that the allotment of the disputed area to the 2nd and 3rd respondents was not made by the Board as a whole sitting together but was made by a majority of the members of the Board, the dissentients not being present at the time the decision was made. It may well be that if the minority was never given an opportunity of attending the deliberations or expressing its views before the Board as a whole came to its decision, the proceedings would not be regular and might have to be quashed. But it is not clear from the affidavits of the three members of the Board, who did not sign the formal order allotting the disputed area to the 2nd and 3rd respondents, that they were deprived of the opportunity of attending the deliberations of the Board or of expressing their views. All that these three gentlemen claim is that they never agreed to the disputed area being allotted to the 2nd and 3rd respondents and that they recommended the 2nd and 3rd applicants be re-allotted the disputed area

for the agricultural season 1948-49. In fact, the proceedings of the Board—though they cannot be said to be as clear as we could have wished—indicate that the dissentient members were present at the deliberations of the Board and had recorded their dissent. Even in the reply affidavit of the 2nd applicant the following statement appears :—

"I may add that only the representatives of the . . . . . on the Village Agricultural Board suggested that my sister's lands be taken away from my wife and me. When the President and two other members of the Board opposed the suggestion, the ဖြေကြားသူတို့ representatives discontinued to come to the President's house (in which up to that time meetings of the Board were held) and continued the meetings at the *dak* bungalow with the President and the two aforesaid members. It was at the latter place that the order was passed. I do not know that the order was a written order till Thakin Ohn Myint produced it in this Court."

The second line of attack against the order of the Board is that under Rule 7 of the Disposal of Tenancies Rules, 1948, the 2nd and 3rd applicants, as being tenants who were in occupation of the agricultural land which they cultivated in the agricultural season 1947-48, were entitled to continue to cultivate the disputed land for the agricultural season 1948-49. But this argument overlooks Rule 10 (2) under which the Board, if it has sufficient grounds to believe that such tenants would be unable to cultivate such lands, may withdraw the lands from the occupation of such tenants. In this case it cannot be said that the grounds on which the Board claimed that it arrived at its conclusion are baseless. The Board states that the 2nd applicant is a salaried officer in the service of the Government and living at a distance from the paddy lands in dispute. It is true that his wife, the 3rd applicant, lives in the area where the paddy lands are

S.C. 1948

MA THI AND TWO OTHERS v. THE TAPUN VILLAGE AGRICULTURAL BOARD AND TWO OTHERS.

but the Board took the view—and in our opinion not unreasonably—that a woman with small children as the 3rd applicant is, would be unable to cultivate the disputed area in addition to the 16 odd acres which she is allowed to continue to hold in the agricultural season 1948-49.

In these circumstances the application fails and is rejected with costs. Advocate's fees two gold mohurs.

SUPREME COURT.

PAPPAMMAL (APPLICANT)

v.

THE TADACHAUNG VILLAGE AGRICULTURAL COMMITTEE AND EIGHT OTHERS (RESPONDENTS).*

† S.C. 1948

Dec. 6.

Application for writ of certiorari—*Rule 4, Disposal of Tenancies Rules, 1948—Meaning of expression "cultivated with his own hands"—Interference.*

Held: That the proviso to Rule 4 of Disposal of Tenancies Rules, 1948, gives discretion to the Village Agricultural Committee to grant a landholder more than 50 acres of land for his own cultivation. Where the Committee after taking into consideration all matters before it exercises that discretion in good faith, the Supreme Court cannot interfere with the exercise of such discretion by issuing a writ of *certiorari.*

Semble: To interpret the words "who cultivated agricultural lands in his own possession with his own hands as his principal means of subsistence" as used in proviso to Rule 4 of Disposal of Tenancies Rules, 1948, as embracing a person who has appointed an agent and who by that agent supervises the working of lands, seems to be a dangerous stretching of the words.

Hla Gyaw for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Bench was delivered by

MR. JUSTICE E MAUNG.—This application must be dismissed.

The applicant is the owner of 270 acres approximately of paddy land in Twante Township. Of these 270 acres, 160 acres are in the occupation of her own tenants. She now desires the order of the Tadachaung Village Agricultural Committee letting out 50·89 acres out of the remaining 110 acres to the 2nd to 9th respondents quashed by this Court in exercise of its powers under section 25 of the Constitution. It is admitted by her that she is allowed to remain in occupation of the other 60 acres or so.

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* Civil Misc. Application No. 39 of 1948.

† Before SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

S.C. 1948

PAPPAMMAL v. THE TADACHAUNG VILLAGE AGRICULTURAL COMMITTEE AND EIGHT OTHERS.

The applicant's case is based on the proviso to Rule 4 of the Disposal of Tenancies Rules, 1948, made by the President in exercise of the powers conferred under section 5 of the Disposal of Tenancies Act, 1948. She says that she has been and is a landholder who cultivated agricultural land in her possession with her own hands as her principal means of subsistence in the agricultural season 1947-48. She claims accordingly that the Agricultural Committee should have exercised in her favour the discretion invested in them by the proviso to Rule 4 and permitted her to cultivate for the year 1948-49, 100 acres of agricultural land out of the 270 belonging to her.

The respondent Committee questions her statement that she is a person who cultivated the agricultural land in her possession with her own hands as her principal means of subsistence in the agricultural season 1947-48. The Committee claims that the applicant is in fact an absentee landholder residing at present in India. It is said on behalf of the respondent Committee that the Committee did not interfere with the applicant's possession through her agent of nearly 60 acres out of the 270 acres as the Committee found that in that area there are standing some buildings belonging to the applicant and used for agricultural purposes, even though she would not be strictly entitled to these acres under the Disposal of Tenancies Act and the Rules thereunder.

It is to be noted that the application to the respondent Committee for permission to work the balance of 270 acres after allotment to her own tenants of 160 acres, was not made by the applicant herself ; at the time the application was made she was away in India. It was made on her behalf by a person who claimed to be her agent. The application before this Court is also not made by her personally ; it is made through another agent of hers and it is conceded by that agent that the

applicant is at present away in India. He, however, seeks to explain her absence in India as being a temporary visit to her relatives.

The learned counsel for the applicant seeks to interpret the words "who cultivated agricultural land in his possession with his own hands as his principal means of subsistence in the agricultural season 1947-48" in the proviso to Rule 4 of the Disposal of Tenancies Rules, 1948, as embracing a person who has appointed an agent and who by that agent is supervising the working of the land. It appears to us to be a dangerous stretching of the meaning of the words. However, it is not necessary to consider this point further in this case. It will suffice for the disposal of this case to bear in mind that the proviso to Rule 4 merely gives a discretion to the Agricultural Committee to grant to a landholder more than 50 acres which, under the main part of the rule, he or she is entitled as of right. If the applicant had also been denied the 60 acres of which the Committee allowed her to remain in possession, it may be that we would have to consider the question whether a person away in India working through an agent in Burma can be said to come within the meaning of the words "to cultivate with his own hands." In this case, however, it is only the exercise of the discretion vested in the Committee that is being challenged. No materials have been placed before us from which it can be reasonably held that the discretion has been exercised improperly or dishonestly. From the materials before us it is clear that the respondent Committee exercised the discretion vested in it in good faith and after taking into consideration all the materials placed before it.

The application therefore stands rejected with costs. The applicant will pay the costs of the respondent Committee. Advocate's fees five gold mohurs.

SUPREME COURT.

† S.C. 1948

Dec. 13.

U PO SU (APPLICANT)

v.

THE THAYAGON VILLAGE AGRICULTURAL COMMITTEE AND TWO OTHERS (REPONDENTS).*

Disposal of Tenancies Act, 1948, s. 3, proviso (a)—Disposal by the Committee to a member—Principles of natural justice—Writ of certiorari.

The applicant claimed he was a *bona fide* agriculturist who cultivated his lands with his own hands as his principal means of subsistence. The land was taken away and granted to a member of the Agricultural Committee which made the allotment.

Held : A person may be engaged in the cultivation of lands with his own hands as his principal means of subsistence even though he has the assistance of other labourers. Consequently the Agricultural Board exceeded its jurisdiction in taking away the land from his possession.

Held further : The allotment of one of the lands to a person who was a member of the Agricultural Committee is against the well established principle of natural justice that no man can be a judge in his own cause and the Supreme Court will quash such proceedings.

Thein Moung for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE KYAW MYINT.—We have heard learned counsel both in support of the application and on behalf of the respondents and it is clear that the rule *nisi* in this case must be made absolute.

The applicant is the owner of the two disputed pieces of land. His case is that, in addition to being the owner of these two pieces of land, he is an agriculturist who works these lands with his own hands as his principal means of subsistence and that, as his total holding does not exceed fifty acres, he is in any event

* Civil Misc. Application No. 46 of 1948.

† Before MR. JUSTICE E MAUNG, and MR. JUSTICE KYAW MYINT and U ON PE, J.

entitled under proviso (*a*) to section 3 of the Disposal of Tenancies Act, 1948, to continue in possession of the disputed pieces of land.

In paragraph 4 of his affidavit the applicant definitely states :

"I say that I am the *bona fide* agriculturist who cultivate his lands with his own hands as his principal means of subsistence."

To that allegation U Chit Tee, the President of the 1st respondent Board, replies :—

"With regard to paragraph 4, this deponent submits that U Po Su superintends the cultivation of his lands. He was allotted the areas in (*a*) and (*c*) specified in paragraph 1 of his affidavit, in accordance with Instruction 6 (*a*)."

It is clear therefore that the allegation of the applicant that he is a person engaged in the cultivation of the lands with his own hands as his principal means of subsistence stands unchallenged, for it is not necessary that a person working with his own hands should not have the assistance of other labourers. That being so it is clear that the 1st respondent Board exceeded its jurisdiction in taking away from the applicant the disputed areas and allotting them to the 2nd and 3rd respondents.

Further, the allotment of one of the two pieces of land was made to a person who was a member of the Agricultural Committee which made the allotment. It is a well established principle of natural justice that no man can be a judge in his own cause. On that ground also the proceedings of the 1st respondent Committee are vitiated.

The application is allowed. The proceedings of the Thayagon Village Agricultural Committee allotting the disputed pieces of land to the 2nd and 3rd respondents are quashed with costs. Advocate's fees five gold mohurs.

SUPREME COURT.

†S.C. 1948

Dec 13.

MA HLA YI (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON AND ONE (RESPONDENTS). *

Public Order (Preservation) Act, 1947—S. 5A, Clause (4).

Held: That the order of detention under s. 5A is not as in the case of an order under s. 5 (4) automatic on the original arrest under s. 5 (1) by the Police Officer being reported. The legality of the original arrest is to be justified before the court under s. 5 but under s. 5A what has to be justified is the sufficiency of grounds of the subsequent order of detention and not the legality of the original arrest. As the Commissioner of Police did not mention what he found on further enquiry in respect of the detenu to justify action under s. 5A the detention was unexplained and was not justified.

Applicant in person.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE KYAW MYINT.—The detention of Maung Tun, the applicant's husband, was ordered by the Commissioner of Police, Rangoon, on the 1st September 1948 under section 5A of the Public Order (Preservation) Act. The Commissioner of Police in paragraph 4 of his affidavit states :

" I say that as soon as the said Police Officer arrested the said Maung Tun a report was sent to me forthwith about his arrest, and I say that on receipt of the said report and upon further enquiry by me I am thoroughly satisfied that the said Maung Tun should be detained with a view to prevent him from acting in a manner calculated to disturb public peace and tranquillity and

* Criminal Misc. Application No. 114 of 1948.

† Before MR. JUSTICE E MAUNG, and MR. JUSTICE KYAW MYINT and U ON PE, J.

accordingly under sub-section (*1*) (*b*) of section 5A of the Public Order (Preservation) Act, 1947, I ordered the detention of the said person in the Rangoon Central Jail."

We have on several occasions stated from this place that, where the order is made under section 5A of the Public Order (Preservation) Act, the actual order of detention made by the authority empowered to act under that section has to be justified. The order of detention under section 5A is not, as in the case of an order of detention under section 5 (*4*) of the Act, automatic on the original arrest under section 5 (*1*) by the Police Officer being reported. In the case of section 5 what should be justified before this Court is the legality of the original arrest; but in detentions under section 5A what has to be justified is not the legality of the original arrest but the sufficiency of the subsequent order of detention. The Commissioner of Police has not told us in this case what he has found on further enquiry Maung Tun has done or was about to do to justify action under section 5A of the Act. The said detention therefore remains unexplained.

The detenue Maung Tun will therefore be forthwith released.

SUPREME COURT.

†S.C. 1948

Dec. 13.

MA THAUNG KYI (APPLICANT)

v.

THE DEPUTY COMMISSIONER, HANTHAWADDY AND ONE (RESPONDENTS). *

Public Order Preservation (Amendment) Act, 1947—S. 5A 1 (b).

The District Superintendent of Police, Hanthawaddy, sent a report containing 28 names to the Deputy Commissioner, Hanthawaddy, and mentioned that they were arrested in connection with country-wide Burma Communists Party activities prevailing in the District. On this report the Deputy Commissioner passed an order "Put up order under s. 5A (*1*), sub-clause (*b*) of POPA (Public Order Preservation Act).

Held: That the case of each of the persons was not considered and there were no materials on which the Deputy Commissioner could have come to a judicial finding required by law.

Held further: That the Deputy Commissioner could not delegate his functions in this respect of coming to a definite conclusion to the District Superintendent of Police and merely pass a "rubber stamp" order.

Applicant in person.

Ba Sein (Government Advocate) for the Respondents.

The judgment of the Court was delivered by

MR. JUSTICE KYAW MYINT.—The learned Government Advocate has kindly placed before us the proceedings in which orders directing the detention of the applicant's husband Maung Maung Gyi and 27 other persons were passed. It is clear from these proceedings, read together with the materials on the record before us, that on the 15th April 1948 some 28 persons were arrested at various places in Pegu, Kayan and Twante Townships. These 28 persons have their names listed

* Criminal Misc. Application No. 93 of 1948.

† Before MR. JUSTICE E MAUNG, and MR. JUSTICE KYAW MYINT and U ON PE, J.

in one report by the District Superintendent of Police, Hanthawaddy, to the Deputy Commissioner, Hanthawaddy. The report reads as follows :

"The following are arrested in connection with the unholy country-wide BCP activities now prevailing in this district. They are reported to be active members of BCP, leaders and sympathisers of Red Guards and Peasants Union sponsored by BCP. In fact acting in the manner prejudicial to the public safety and maintenance of public order. In view of the present political situation they may be detained until further orders under section 5A (*1*) (*b*) POPA (Amendment) Act, 1947."

On this report the following note was made by the Deputy Commissioner :

"Put up order under section 5A (*1*) (*b*), POPA."

It is clear from these materials that the Deputy Commissioner did not consider the case of each of the persons proposed to be taken into custody by the District Superintendent of Police on its merits. In fact, there were no materials on which the Deputy Commissioner could have come to a judicial finding that the detention of each of these persons was necessary in the interest of public safety and the maintenance of public order.

We have repeatedly stated that an order under section 5A of the Public Order (Preservation) Act can be made only where on the facts of each case the officer authorizing the detention has come to a definite conclusion required under the Act. It is not for the Deputy Commissioner to delegate his functions in this respect to the District Superintendent of Police and merely pass what is sometimes described as a "rubber-stamp" order.

The applicant's husband Maung Maung Gyi therefore will be forthwith released.

SUPREME COURT.

† S.C. 1948

Dec. 16.

DAW NGWE THAN (APPLICANT)

v.

THE KALOKWIN VILLAGE AGRICULTURAL BOARD AND TWO OTHERS (RESPONDENTS).*

Disposal of Tenancy Act, 1948 and Rules—Writ of certiorari*—Powers when exercised—Findings of fact.*

Held: That directions in the nature of *certiorari* do not provide means of appealing against the proper exercise of discretionary power entrusted by the Statute to the Board. Nor do they provide for appeal against findings of fact where the Board had adequate materials and applied its mind fairly to such materials.

Ba Maung for the applicant.

Respondents 1 and 3 in person.

Respondent No. 2 absent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—This application relates to approximately 3 acres of paddy land in Phaye *Kwin*, Kyangin Township, Henzada District.

The applicant, who is the owner of about 60 acres of paddy land, has been for the last ten years working 4 acres herself, the rest having been leased to tenants. In the year 1947-48 she extended her personal working to 7 acres. The 7 acres include the 4 acres which she had been working previously and 3 acres which she had, prior to the year 1947-48, leased to the 2nd respondent.

For the agricultural season 1948-49 it seems that the applicant desired to resume some more of the lands

* Civil Misc. Application No. 51 of 1948.

† Before SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

from her tenants. Instead the 1st respondent Board allotted the 3 acres, which for the year 1947-48 the applicant had resumed from the 2nd respondent, back to the 2nd respondent.

The application for directions in the nature of *certiorari* proceeds to state that being aggrieved with the order of the 1st respondent Board the applicant preferred an appeal to the Township Board and that the Township Board tried to make the members of the Village Board reconsider their decision but that ultimately the members of the Village Board (1st respondent) decided to adhere to their original order allotting the 3 acres to the 2nd respondent. Subsequently, an appeal was preferred to the District Board which, according to the applicant, did not succeed in making the members of the 1st respondent Board change their minds.

The sole question for consideration in this case is whether the applicant can be said to be a person who cultivates land "with his own hands as his principal means of subsistence". If she falls within that class of persons she is entitled as of right to remain in possession of 50 acres of paddy land belonging to herself. If not, the Board was acting within its jurisdiction in allotting the 3 acres in dispute to the 2nd respondent.

Before us it has been claimed in argument by U Ba Maung for the applicant that his client clearly is of that class of persons, as 53 acres or so of paddy lands which she had leased to other persons and from which she would be getting the standard rent, cannot be said to be her principal means of subsistence under the conditions now obtaining in the Union. That may very well be so : but the application and the affidavit nowhere state that the applicant has to rely on the 7 acres (that is to say the 4 acres which she is

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actually working and the 3 acres in dispute) by her personal cultivation as her principal means of subsistence.

Directions in the nature of *certiorari* do not provide means of appealing against the proper exercise of discretionary power which has been entrusted by statute to the Board, and also do not provide means of appealing against the findings of facts where the decision on such facts has been entrusted to the Board, provided the Board had before it adequate materials and applied its mind fairly to such materials.

In this case it cannot be said that the Board did not act honestly or did not have before it all relevant materials from which it could have come to a conclusion whether the applicant falls within the class of persons entitled to claim to work 50 acres of paddy land or not. The Board has found against the applicant and we can find no reason to interfere with that finding.

The application will therefore stand dismissed with costs. Advocate's fees two gold mohurs.

SUPREME COURT.

PAKIYA AMMAL (APPLICANT)

v.

THE DEPUTY COMMISSIONER, HANTHAWADDY AND ONE (RESPONDENTS).*

† S.C. 1948

Dec. 24.

Public Order Preservation Act—S. 5A (1) (b)*—Stages under proceedings for detention under ss. 5 and 5A of the Act—Police Officer to arrest and detain for 15 days—Then detention may be up to two months—Afterwards order under s. 5A can be taken.*

Held : That under s. 5 (*1*) of the Act the Police Officer can arrest a person whom he suspects of having acted or is about to act in a manner calculated to disturb or assist the disturbance of public tranquillity. On such suspicion the Police Officer may keep the person arrested under detention up to 15 days. This period of 15 days is permitted to enable the Police Officer who acts on reasonable suspicion to investigate into the matter further and satisfy himself whether his suspicion is well founded. The period of detention under this section can be extended to a period of altogether two months if there is a further order from the President or the officer authorized by the President under s. 7.

The next stage would be arrived at on the expiry of two months or if the inquiry had been concluded earlier before the expiry of two months. If the inquiry discloses circumstances justifying action under s. 5A of the Act, then further detention for an indefinite period under this section can be made by an officer to whom the powers of the President are delegated under s. 7 of the Act.

Action under s. 5A cannot be taken on mere suspicion. The officer has to be satisfied that with a view to preventing the person arrested from acting in any manner prejudicial to public safety and maintenance of public order it is necessary to direct the detention of such person.

The order of detention which may be justified under s. 5 is not necessarily justified under s. 5A (*1*) (*b*). The fact that a man is an active member of the Burma Communist Party and Leader of Red Guards and an influential member of the Indian Community, and also influenced the strike of the Indian Employees of the Burma Oil Company, are not sufficient to justify detention under s. 5A (*1*) (*b*).

Applicant in person.

Ba Sein (Government Advocate) for the respondents.

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* Criminal Misc. Application No. 109 of 1948.

† Before SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

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The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The detention order in this case made by the Deputy Commissioner of Hanthawaddy on the 14th June 1948 under section 5A (*1*) (*b*) of the Public Order (Preservation) Act—leaving out the irrelevant details—reads :

"Whereas . . . . . have reason to suspect that Suppaya son of Koweinda an active member of (BCP), Leader and Sympathiser of Red Guards, Mingalun, Syriam, is likely to cause a disturbance of public tranquillity and maintenance of law and order, I hereby direct that he be detained . . . . . until further orders with effect from the 17th June 1948 at Tharrawaddy Jail."

The learned Deputy Commissioner apparently has not distinguished between the two stages in proceedings for detention under the Public Order (Preservation) Act. Under section 5 (*1*) of the Act it is open to the Police Officer to arrest a person whom he suspects of having acted or of acting or about to act in any manner calculated to disturb or to assist the disturbance of public tranquillity. On such suspicion and following the arrest the Police Officer may keep the person arrested in detention for a period not exceeding 15 days. Clearly this period of 15 days was permitted to enable the Police Officer, who acted on reasonable suspicion, to investigate into the matter further and satisfy himself whether his suspicion was founded on tangible materials or not. This period of detention can be extended to a period of altogether two months if the Police Officer can obtain further orders in that behalf from the President or from such other officer as the President may under section 7 of the Act appoint for that purpose.

The next stage would be arrived at on the expiry of the two months or, if the enquiry had been concluded

earlier, before the expiry of two months. If the enquiry discloses circumstances justifying action under section 5A of the Act, then further detention for an indefinite period under this section can be made by an officer to whom the powers of the President are delegated under section 7 of the Act. When action under section 5A is to be taken it is not mere suspicion that would justify it. What has to be borne in mind by the officer acting under this section is that he has to be satisfied with respect to the person proposed to be detained indefinitely that " with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order it is necessary " to direct his detention. It is obvious from a comparison of the wording of section 5 and section 5A of the Act that different considerations arise under the two sections.

In this case the order of detention purported to have been made under section 5A (*1*) (*b*) of the Act may, on the face of it, be justified if made under section 5 but is not certainly justified under section 5A. On that ground alone the detenu Suppaya is entitled to an order of release from this Court.

On the merits as disclosed in the affidavit filed before us by U Sein Maung, Deputy Commissioner, Hanthawaddy, also, the order of detention does not appear to be justified. Apart from stating that the detenu was an active member of the Burma Communist Party and was the leader of Red Guards in Mingalun, Syriam and an influential member of the Indian Community and as such influenced the Indian employees of the B.O.C. to go on strike, it is not alleged that as a member of the Burma Communist Party he acted or was acting in any manner prejudicial to the public safety or the maintenance of public order. It is not also claimed that Suppaya in inciting

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or influencing the Indian employees of the B.O.C. to go on strike used unlawful means. It must be remembered that to organize labour and to go on strike without using illegal means are rights which the Constitution has recognized.

Suppaya who is now before us on bail is therefore discharged. His bail bond will be cancelled.

SUPREME COURT.

MA AHMAR (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON AND ONE (RESPONDENTS).*

† S.C. 1948

Dec. 24.

Public Order Preservation Act—S. 5 (1) *and 5A* (1) (b).

Held : When orders are made under the Public Order Preservation Act, the Commissioner of Police should give individual attention to each case and when one order is passed for detention of 11 persons it is probable that such individual attention has not been given.

When the Commissioner of Police has no other materials before him besides the report of the Police Officer informing him about the arrest, he is not justified in passing an order of detention for an indefinite period under s. 5A of the Act.

In the justification of the Commissioner of Police he should state what, in his opinion, the person proposed to be detained had done, or was about to do, so as to constitute his being a menace to public peace and tranquillity. This information is necessary to enable the Court to consider whether the order of detention was justified in law or not. Allegations of the detenue being merely a permanent member of the Red Guards without further particulars does not justify an order for detention for an indefinite period under s. 5A of the Act.

Applicant in person.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The detenue Maung Hla Aung, who was working as a clerk in the Burma Railways, was taken into custody on the 22nd April 1948 by U Khin Maung, Station Officer of Pazundaung Police Station. The arrest was made under section 5 (*1*) of the Public Order (Preservation) Act. Having directed the detention of Maung Hla Aung for 15 days under section 5 (*2*) of the Act the Police Officer made a

* Criminal Misc. Application No. 129 of 1948.

† Before SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

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report to the Commissioner of Police for further orders. On the 26th April 1948 the Commissioner of Police passed an order under section 5A (*1*) (*b*) of the Act. That order embraces 11 persons altogether of whom one was arrested on the 31st March 1948 and the rest between the 12th and 24th April 1948. Two batches of three persons were arrested on the same dates.

Prima facie therefore it is difficult to believe that when the Commissioner of Police on the 26th April 1948 passed the order he did for the detention of these 11 persons, he gave individual attention to each case, as he should have. On top of that the Commissioner of Police, when he was asked to justify the detention of Maung Hla Aung in this case, says in paragraph 4 of his affidavit:

> "I say that as soon as the said Police Officer arrested the said Maung Hla Aung a report was sent to me forthwith about his arrest, and I say that on receipt of the said report, I am thoroughly satisfied that the said Maung Hla Aung should be detained with a view to prevent him from acting in a manner calculated to disturb public peace and tranquillity . . . . ."

Two observations have to be made here. The Commissioner of Police does not tell us that he had before him any material, other than a report of the arrest of Maung Hla Aung, from which to be satisfied that action under section 5A of the Public Order (Preservation) Act was necessary. The report of the Police Officer, a copy of which has been filed on behalf of the respondents, is very bald. It reads as follows:

> "I beg to report that I have arrested Hla Aung son of U Ba Thein in pursuance of sub-section (*1*) of section 5 of POPA, 1947, on this day the 22nd April, 1948."

If this is the only report on which the Commissioner of Police acted we must say that he acted without sufficient materials to justify action.

Secondly, as we have so often observed about the form of the justification attempted by the Commissioner of Police, he does not tell us what in his opinion the person proposed to be detained had done or was about to do so as to constitute his being at large a menace to public peace or tranquillity. To enable us to judge whether the order of detention was justified or not in law it is necessary that we should be enlightened on this point.

Even if we travel beyond the justification attempted by the Commissioner of Police and try to read into it that made by the Police Officer for the original arrest, we cannot see that he had sufficient grounds for action under section 5A of the Public Order (Preservation) Act. The Police Officer claims that he had reason to suspect or believe that Hla Aung, in addition to being one of the prominent leaders of the Red Guard Burma Communist Party, Pazundaung Circle, "was one of the distributors of copies of a Burma Communist Party leaflet entitled 'Murderer Thakin Nu's Fascist Government' in Taunglonbyan, Pazundaung and Botataung areas. The leaflet contains most misleading and mischievous allegations with particular reference to two labour leaders who were said to have been killed during the round-up of the strikers on the 28th March, 1948."

Accepting these allegations as established, it is difficult to see how action under section 5A of the Public Order (Preservation) Act is justified in law. Being a prominent member of the Red Guard without any further allegation of subversive activities, actual or imminent, does not justify indefinite detention. For the dissemination of what may amount to seditious statements in the leaflets the remedy appears to be quite plain and provided for by the Penal Code.

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For these reasons it is impossible to uphold the order of detention of Maung Hla Aung, the applicant's husband. Maung Hla Aung who is present before us on bail is therefore discharged. His bail bond will be cancelled.

SUPREME COURT.

MA AYE SAING (APPLICANT)

v.

THE DEPUTY COMMISSIONER, HANTHAWADDY AND ONE (RESPONDENTS).*

†S.C. 1949

Jan. 17.

Public Order (Preservation) Act, 1947—S. 5A (1), sub-clause (a) and sub-clause (b)—Constitution Act, s. 16.

In an order of detention under s. 5A of Public Order (Preservation) Act the Deputy Commissioner said that he had reason to suspect the detenu as likely to cause disturbance of public tranquillity and maintenance of law and order and passed an order that he (detenu) be detained under s. 5A (*1*) (*b*) of the Act.

Held : That the order of detention actually passed is defective in law and is not in accordance with s. 5A (*1*) (*b*) of the Public Order (Preservation) Act and the continued detention under the defective order cannot be allowed.

Officers entrusted with extensive powers to curtail the liberty of a citizen should exercise those serious responsibilities with care. The constitution has guaranteed the personal liberty of a citizen and under s. 16 such personal liberty of a citizen shall not be interfered with except in accordance with law. There must be circumstances justifying the action contemplated and the curtailment of liberty must be in due process of law. It is not enough that circumstances exist as contemplated. The detention must also be in the manner directed by the Act.

Tun Sein for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—We cannot too strongly impress upon those officers who are entrusted with extensive powers to curtail the liberty of a citizen of the Union that their responsibilities, corresponding to

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* Criminal Misc. Application No. 180 of 1948.

Present : MR. JUSTICE E MAUNG, Senior Judge, MR. JUSTICE KYAW MYINT, Judge of Supreme Court and U BO GYI, J.

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those powers, are very high and serious indeed. The Constitution of the Union has guaranteed the personal liberty of a citizen, and it is directed in section 16 of the Constitution that such personal liberty shall not be interfered with save in accordance with law. In other words before any interference with the personal liberty is attempted there must be present circumstances such as under the law in force in the Union justify the action contemplated. Further, the curtailment must be in due process of law. It is not enough that there exist the circumstances contemplated by the legal enactment ; the detention must be made in a manner directed by that enactment.

In this case it may very well be, as the learned Deputy Commissioner, Hanthawaddy, claims in his affidavit, that he had good reasons to be satisfied that the detenu, Maung Chit, was a fit and proper person, under section 5A of the Public Order (Preservation) Act, to be detained for an indefinite period. On this aspect of the case it is not necessary for us to come to any decision, and we refrain from considering the merits. But when—assuming everything in favour of the Deputy Commissioner—the Deputy Commissioner, Hanthawaddy, had been satisfied that this case was a fit one for action under section 5A of the Act, and proceeded to pass his orders in writing, he stated that he had reason " to suspect that Maung Chit son of U Po Sein, an active member of (B.C.P.) leader and sympathiser of Red Guards, Pagandaung, Syriam, is likely to cause a disturbance of public tranquillity and maintenance of law and order ", and therefore directed the detention, under section 5A (*1*) (*b*) of the Public Order (Preservation) Act, of the said Maung Chit. The Deputy Commissioner ignored the clear provisions of section 5A (*1*) (*b*) of the Act, so far as the due process of the law in directing the detention is concerned.

Whatever the merits may have been, the order of detention actually passed is defective in law, and we cannot allow the continued detention of Maung Chit in jail under this defective order. Maung Chit, accordingly, will be released forthwith.

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SUPREME COURT.

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April 4.

A.S.P.S.K.R. KARUPPAN CHETTYAR AND ONE (APPELLANTS)

v.

A. CHOKKALINGAM CHETTIAR (RESPONDENT).*

Hindu law—Hindu Joint Family business—Money borrowed for—Subsequent partition—Effect of—One case set up in the plaint—New case in appeal.

Held: According to Hindu law if a joint family incurs trade debts and that family is subsequently dissolved, the liability for debts continue against the former co-parceners severally unless there is a discharge either by payment or by novation or release.

Subramania Ayyar v. *Sabapathy Aiyar*, I.L.R. 51 Mad. 361; *Bankey Lal and others* v. *Durga Prasad*, I.L.R. 53 All. 863, followed.

When sued by the creditor, it was incumbent on the debtor to plead such discharge and prove the same. The question whether a creditor of two or more persons has released one of them and converted the others into his sole debtors by what is called novation is a question of intention. To succeed on this ground the debtor has to prove conduct inconsistent with the continuance of his liability from which conduct an agreement to release him may be inferred.

Rouse v. *Bradford Banking Company*, L.R. (1892) (2 Ch.) 32 at p. 53' followed.

A party should be allowed to win or lose on a case set out in his pleading and it is not the function of a trial or an appellate court to make out a case different from the one set out in pleadings.

Shivabasava Kom Amingavda v. *Sangappa Bin Amingavda*, 31 I.A. 154 at p. 159; *Sreemutty Dossee and others* v. *Ranee Lalunmonee and others*, 12 Moore's Indian Appeals 470 at p. 475; *Mohummad Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer and others*, 11 Moore's Indian Appeals 468 at p. 473; *Mussumat Chand Kour and others* v. *Partab Singh and others*, 15 I.A. 156 at p. 157, followed.

What particulars are to be stated in the plaint depends on the facts of each case but it is absolutely essential that the pleading in order that it may not be embarassing to the defendants should state those facts which would put the defendants on their guard and tell them what case they have to meet when the case comes up for trial.

Phillips v. *Phillips*, L.R. (1878) 4 Q.B.D. 127 at p. 139, followed.

Where the defendant knew what the case was that he had to meet and raised a defence but failed to prove the same the appellate court was justified in giving a decree on the basis of the case and facts set up by the defendant in his defence.

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* Civil Appeal No. 2 of 1948.

† Before the Hon'ble SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

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A.S.P.S.K.R. KARUPPAN CHETTYAR AND ONE v. A. CHOKKALINGAM CHETTIAR.

P. K. Basu for the appellants.

Horrocks for the respondent.

The judgment of the Court was delivered by

SIR BA U, C.J.—This appeal arises out of a suit filed by the respondent, A. Chokkalingam Chettiar, against the two appellants, A.S.P.S.K.R. Karuppan and Avudiappa Chettyars, and Karuppan's father, Subramanian Chettiar, who died during the pendency of the suit in the trial Court. The 2nd appellant, Avudiappa, is the son of the 1st appellant Karuppan. All the three defendants, Subramanian, Karuppan and Avudiappa, were members of a joint undivided Hindu family. They carried on business as bankers and money-lenders under the firm name and style of A.S.P.S. at Rangoon. Some time prior to 1926 the plaintiff had some money with the defendants' firm on two separate accounts. One was a Thavanai account and the other was a Nadappu account. We are no longer concerned with the Nadappu account in this appeal. The only account with which we are concerned is the Thavanai account.

The plaintiff, Chokkalingam, had over Rs. 5,000 at the credit of his Thavanai account in the books of the defendants' firm at the end of 1925. In 1926 the status of the joint Hindu family of the three defendants was severed, and the joint-family properties were divided among them. The Rangoon business fell to the share of the deceased Subramanian. The plaintiff knew of the severance of the status of the joint Hindu family of the three defendants and the partition of the joint-family properties, and he also knew that the Rangoon business fell to the share of Subramanian. In spite of that he continued to keep his Thavanai and Nadappu accounts with the A.S.P.S. firm of Rangoon. In 1932 he filed the present suit, claiming Rs. 7,873-15-0 as

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being due on the 11th March 1931 as principal on his Thavani account from the three defendants as co-parceners of a joint Hindu family. He also claimed interest at one anna over and above the Rangoon Chettiars' Thavanai rate, amounting to Rs. 860-6-0 from the 11th March 1931 to the 10th July 1932.

The defence of the deceased Subramanian was that the plaintiff knew of the severance of the status of a joint Hindu family of himself and the other two defendants, followed by the partition of the joint-family properties among themselves and that the Rangoon business of the firm fell to his (Subramanian's) share. The further defence of Subramanian was that after the severance of the joint Hindu family and the partition of the family properties, the monies belonging to the plaintiff were at his (plaintiff's) direction and, with his consent, knowledge and acquiescence, continued to be kept in deposit with his firm of A.S.P.S. at Rangoon. The 1st defendant accordingly admitted that he alone was liable for the amount sued for.

The present two appellants, Karuppan and Avudiappa, set up the same defence as the deceased Subramanian, and pleaded that they were not liable.

So far as the severance of the family status was concerned, the plaintiff, through his counsel, admitted for the purpose of the present case, that there was a severance as alleged. The learned trial Judge therefore directed himself mainly to the consideration of the question whether the partition effected after the severance of the family status was a real one or not. And the learned Judge held that the partition was a real and effective one, and that the plaintiff knew of the said partition.

The next question that arose out of this finding was whether the two appellants still remained liable for the

amount standing at the credit of the plaintiff's Thavanai account with A.S.P.S. Firm of Rangoon in spite of the severance of the joint Hindu family and the partition of the family properties. On this question the learned Judge made the following observations :

" He (plaintiff) knew that the 1st defendant alone was carrying on the business of A.S.P.S. of Rangoon, and when he could have withdrawn the whole of his moneys he chose instead to allow such moneys to remain in deposit in the business. * * * * Therefore there is substantial foundation for the defence that the plaintiff's moneys in deposit with A.S.P.S. Rangoon were at his direction and with his consent, knowledge and acquiescence kept with the concern after the plaintiff knew that the deceased 1st defendant alone would be liable for repayment. In a sense it was a novation, but one which the plaintiff himself was responsible in bringing about."

On appeal the learned Judges of the appellate Court observed :

" It is clear that the learned trial Judge did not really consider whether the 2nd defendant had been discharged by conduct from which an agreement to release him might be inferred. He stressed the fact that the partition was a genuine one and that the plaintiff knowing of it still chose to keep his moneys with A.S.P.S. at Rangoon : and concluded that this is ' in a sense ' novation. * * * But the question appears to me not to be whether those jointly liable to the plaintiff made a *bona fide* agreement that one of them alone should pay him all; it is rather whether the plaintiff by his conduct must be held to have discharged the old contract and released the respondents from liability. "

The learned Judges then set aside the decree of the trial Court as against the appellants and decreed the suit as against them also, after winding up the judgment as follows :

" The real question here therefore is whether after the partition in 1926 the plaintiff exonerated and discharged the 2nd and 3rd defendants ; or whether, continuing to deal with

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A.S.P.S.K.R. KARUPAAN CHETTAYAR AND ONE v. A. CHOKKALINGAM CHETTIAR.

the 1st defendant, he nevertheless held them to their continuing liability under the original Thavanai agreement. * * * * *

The fact that the plaintiff was fully aware of the partition between the 1st and 2nd defendants does not with respect appear to me to warrant the importance given to it by the learned trial Judge. Though novation was not pleaded, I am satisfied that if it had been pleaded it would have been impossible for them to show (as they attempted to show in this Court) that there were any sufficient evidence of a novation having taken place. On this issue the learned Judge appears to me to have misdirected himself. The vital question was whether the plaintiff assented to a new contract so far as the Thavanai account was concerned which restricted the liability to the 1st defendant alone ; it is not enough to say that he stood by and did anything, * * * * *. The fact that they chose to effect a partition of the joint family in no way releases them."

We respectfully agree with the views thus expressed by the learned Judges of the appellate Court.

According to the personal law applicable to the parties to this suit, what is clear is that if a joint Hindu family incurs trade debts and is subsequently dissolved, as in this case, the liability for the debts continues against the former co-parceners severally unless there is a discharge either by payment or novation [*Subramania Ayyar* v. *Sabapathy Aiyar* (1) and *Bankey Lal and others* v. *Durga Prasad* (2)]. Therefore, the liability of the two defendant-appellants to the plaintiff-respondent would still continue in spite of the dissolution of their joint Hindu family and the partition of their family properties if the plaintiff-respondent did not agree to release them. It may be that the two defendant-appellants and the deceased Subramanian Chettiar agreed among themselves at the time of the partition of their joint family properties that the monies due to the plaintiff-respondent on his Thavanai account should be paid by Subramanian Chettiar alone. But

(1) I.L.R. 51 Mad. 361. (2) I.L.R. 53 All. 863.

the question is whether the plaintiff-respondent agreed to this arrangement and agreed to accept Subramanian Chettiar alone as his debtor for payment of monies due to him on his Thavanai account. Without the consent of the plaintiff-respondent there could be no valid substitution of a new contract for the old one as contended. Sections 44 and 62 of the Contract Act are quite clear on this point.

It is, therefore, incumbent on the defendant-appellants, not only to plead that the plaintiff-respondent agreed to release them from their liability and accept the deceased Subramanian Chettiar as his sole debtor after the partition of their family properties, but must prove it also. Further, they could have raised an alternative plea, if they wanted to, as provided by Order VIII, Rule 2, of the Code of Civil Procedure, that though they were not released from their liability by the plaintiff-respondent, his claim as against them was barred by time. They did not, however, raise this plea.

But now, what was pleaded by the defendant-appellants was "that the monies belonging to the plaintiff were at the direction of and with the consent, knowledge and acquiescence of the plaintiff, continued to be kept in deposit with the A.S.P.S. Firm of Rangoon, which belonged absolutely to the 1st defendant". What this plea amounts to is that the plaintiff knew of the partition of the family properties among the three defendants, and that the Rangoon business fell to the share of the 1st defendant, Subramanian Chettiar, but in spite of that he continued to keep his monies in the firm of the 1st defendant. This is not pleading the substitution of one contract for another. If this plea means anything at all, it means, at the most, a plea of estoppel by conduct. But then, on the facts of the case, this plea will be of no avail to the defendant-appellants.

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On the other hand, if it is intended by this plea that an inference should be drawn from the conduct of the plaintiff that he agreed to look to the deceased Subramanian Chettiar alone for repayment of the family debt, then in reply we might quote what Lindley, L.J., said in *Rouse* v. *Bradford Banking Company* (1), the Lord Justice said :

> " First as to novation. The question whether a creditor of two or more persons has released one of them and converted the others into his sole debtors by what is called novation is a question of intention, and an intention to look to them for payment, especially when requested to do so by their co-debtor is quite consistent with an intention to look to them as mere matter of convenience without releasing him. To succeed on this ground what the plaintiff has to prove is conduct inconsistent with a continuance of his liability, from which conduct an agreement to release him may be inferred. "

In the present case, as pointed out by the learned Judges of the appellate Court, it was the defendant-appellants who must prove the conduct of the plaintiff-respondent, from which an inference to release them from liability to him might be inferred. The fact that the plaintiff-respondent continued to keep his Thavanai account with the A.S.P.S. Firm at Rangoon even after it had been allotted to the deceased Subramanian Chettiar as his share, does not carry the case of the defendant-appellants much further in that it is equally consistent with the intention to look to Subramanian Chettiar for payment as a mere matter of convenience without releasing the appellants from their liability. Exhibit 2 C (2), which is an extract from the statement of accounts taken from the books of the deceased Subramanian Chettiar, cannot be made use of, as it was never put to the plaintiff-respondent in the course of

(1) L.R. (1892) (2 Ch.) 32 at p. 53.

his cross examination. If it had been put to him, the plaintiff-respondent might have been in a position to explain it.

In view of all these circumstances, what the learned counsel for the appellants submits strenuously is that the plaintiff-respondent should either win or lose on the case as set out in his plaint, but not on a case which he has made out only in the appellate Court. According to the learned counsel for the appellants, the case as set out in the plaint is that the two appellants and the deceased Subramanian Chettiar were members of a joint undivided Hindu family on the 11th March 1931, that on that date he had monies amounting to Rs. 7,837-15-0 in his Thavanai account in the books of A.S.P.S. Firm at Rangoon of the two appellants and the deceased Subramanian, and that, therefore, the two appellants and the deceased were liable to pay to him the said amount and the interest due thereon at Thavanai rate. The learned counsel, therefore, contends that once it is proved that the two appellants and the deceased were not members of a joint undivided Hindu family on the 11th March 1931, but that the family was dissolved as long ago as 1926, followed by a partition of the family properties, the suit as against the appellants should be dismissed, as was rightly dismissed by the trial Court. But the case as made out by the appellate Court was that the suit of the plaintiff, as framed, was a suit for recovery of a debt due by the appellants and the deceased Subramanian before the dissolution of their joint family and the partition of their family properties.

We agree that a party should be allowed to win or lose only on a case as set out in his pleadings. It is not the function of a trial or an appellate Court to make out a case different from the one as set out by a party in his pleadings and decide the suit thereon :

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Shivabasava Koin Amingavda v. *Sangappa Bin Amingavda* (1) ; *Sreemutty Dossee and others* v. *Ranee Lalunmonee and others* (2) ; *Mohummad Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer and others* (3) ; *Mussummat Chand Kour and others* v. *Partal Singh and others* (4)].

But, then, what must be stated by a plaintiff in his plaint in order to constitute a cause of action against the defendant ? As observed by Cotton, L.J., in *Phillips* v. *Phillips* (5), " what particulars are to be stated must depend upon the facts of each case. But * * * * it is absolutely essential that the pleadings, not to be embarrassing to the defendants, should state those facts which would put the defendants on their guard and tell them what they have to meet when the case comes on for trial. "

If we now examine the plaint in the light of these observations, what do we find ?

Paragraph 2 of the plaint states :

" That for several years past and up to date the relationship between the plaintiff as a constituent and the defendants' firm of A.S.P.S. as Bankers was and is subsisting, the plaintiff's moneys being held by the defendants' firm as Bankers according to the customs among Chettiar community on Thavanai and Nadappu accounts bearing interest accordingly. "

Paragraph 3 states :

" That at Rangoon on the 28th day of the month of Masi of the year Pramodutha corresponding to 11th March 1931 the plaintiff had and has still to the credit of his Thavanai account in the books of the defendants' firm and due and owing by the defendants' firm to the plaintiff the sum of Rs. 7,873-15-0 for principal bearing interest at one anna over and above Rangoon Chettiars' Thavanai rate. "

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(1) 31 I.A. 154 at p. 159.
(2) 12 Moore's I.A. 470 at p. 475.
(3) 11 Moore's I.A. 468 at p. 473.
(4) 15 I.A. 156 at p. 157.
(5) L.R. (1878) 4 Q.B.D. 127 at p. 139.

In our opinion, what these two paragraphs mean is that for several years prior to the date of the institution of the suit the plaintiff had been dealing with the defendants' firm as a constituent and the bankers, and that on the 11th March 1931 the amount due to him was Rs. 7,873-15-0.

The fact that the plaintiff had been dealing with the defendants as a constituent and bankers prior to the date of the dissolution of the defendants' family was not in dispute. Not only was it not in dispute, but it was in a way admitted by the defendant-appellants by their written statement that at the time of the dissolution of the family and the partition of the family properties a certain amount of money was due to the plaintiff by the defendants' family.

Therefore, taking the pleadings as a whole, the suit, as rightly held by the appellate Court, was a suit for recovery of what has been termed by the appellate Court "a pre-partition debt", and the defendant-appellants knew that that was the case against them, and that they must meet it. Reading their pleadings it is quite obvious that they endeavoured to meet it but failed to raise appropriate defences such as novation and limitation.

In this view of the case, it is unnecessary to go into the question as to what is meant by a Thavanai account; and whether the claim of the plaintiff-respondent as against the appellant is barred by time.

But the plaintiff-respondent is not entitled to get interest at a rate higher than the Thavanai rate which is a contract rate. To that extent the decree of the Lower Appellate Court will be modified and we accordingly modify it by granting a decree for the principal sum of Rs. 7,873-15-0 together with interest at Thavanai rate from the 11th March 1931 up to the date of realization. As the plaintiff-respondent has won substantially, he will get the costs of the appeal.

SUPREME COURT.

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April 4.

V.E.R.M. KRISHNAN CHETTYAR (APPELLANT)

v.

M.M.K. SUBBIAH CHETTYAR (RESPONDENT).*

Meaning of the word "enemy"—Term used for two different purposes—Decree transferred to Burma for execution—Agent given the power to realize the decree and receive money—Whether such agency determined by occupation of Burma by the Japanese—Defence of Burma Rules, Rule 98 (1)—S. 13 (3) Burma Laws Act—Ss. 23 and 56 Contract Act.

Held : The word "enemy" is used for different purposes in different senses. For the purpose of commercial and other intercourse residence and not "alienage" determines the enemy character of the person affected. With such persons as are resident in territories occupied by the forces of the enemy, commercial and other intercourse are prohibited and for the purpose of such prohibition these persons irrespective of their political allegiance are to be deemed enemies, though they may not in fact be alien enemies for political purposes.

Under S. 13 (*3*) of Burma Laws Act question for decision in courts of Burma except in the case of personal law is to be decided in accordance with any enactment for the time being in force and in the absence of such enactment the decision shall be according to justice, equity and good conscience. A contract of agency in order to be void must be brought within the provisions of Ss. 23 and 56 of the Contract Act.

Rule 98 (1), Proviso (*b*) of the Defence of Burma Rules made under the Defence of Burma Act, 1940, has expressly exempted from prohibition against commercial or other dealings with the enemy, the receipt from an enemy of a sum of money due in respect of a transaction under which all obligation on the part of the person receiving payment has been performed before the commencement of the act. As in this case the decree was obtained before the Defence of Burma Act had been enacted and transferred to Burma the principal could have received the money even after Japanese occupation and, therefore the agent also could receive the same.

Here the contract of agency was made in India and it was clearly to be performed in Burma where the debt was to be collected and therefore the principle of *lex loci solutionis* would apply.

Benorium & Co. v. *Debono*, (1924) A.C. 514 ; *Adelaide Electric Supply Company, Limited* v. *Prudential Assurance Company, Limited*, (1934) A.C. 122 followed.

The larger question of the effect in general of war on contracts of agency when the line of war divides the principal from the agent left open.

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* Civil Appeal No. 5 of 1948.

† Before the Hon'ble SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

Sovfracht v. *Gebr Van Udens Scheepvaart en Agentuur Maatschappit*, 1943) A.C. 203 ; *Rodriguez* v. *Speyer Brothers*, (1919) A.C. 59 ; *Sylvester's* case, (1703) 7 Moo. 150, referred to.

P. K. Basu for the appellant.

P. B. Sen for the respondent.

Dr. Ba Han as *amicus curiæ*.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The appellant obtained in the Chief Court of Pudukkottai a decree for Rs. 43,132-9-6 with costs and subsequent interest against the respondent's father. This decree was transferred for execution to the District Court of Bassein in 1937, and proceedings in execution were taken in Civil Execution Case No. 7 of 1937 of the District Court of Bassein. The appellant never at any time resided in Burma, and to facilitate the proceedings in execution he appointed one Annamalai Chettiar his agent for the single purpose of collecting the amount outstanding under the decree which had been transferred for execution to the District Court of Bassein in Civil Execution No. 7 of 1937 of that Court.

For one reason or another the execution proceedings dragged on, without the decree being satisfied in full, till the 7th February 1942, when it was agreed between the appellant's agent and the agent of the respondent's father that the respondent's father should pay a sum of Rs. 4,205-0-3 with interest on the said amount at Rs. 6 *per cent per annum* from the 29th August 1941 till the date of realization, together with the costs of the execution proceedings.

On the 14th September 1944, Chocklingam Chettiar, who to that date had been acting on behalf of the

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respondent's father, paid and Annamalai Chettiar on behalf of the appellant received a sum of Rs. 5,180-4-0 only, purporting to be in full satisfaction of the amount due on that date under the agreement of the 7th February 1942. It appears that the payment was made in Japanese military notes ; but nothing turns on the medium of payment, if otherwise, the payment was binding on the appellant. Section 4 of the Japanese Currency (Evaluation) Act, 1947 (Act XXXVI of 1947) operates to effect a full discharge as if the payment had been in lawful currency of the land.

Bassein, where the payment was made, remained in the occupation of the invading Japanese forces from some time in the early part of 1942 till some time in the early part of 1945. On the 4th November 1946, the appellant, through his present agent, who is other than Annamalai Chettiar who received payment in 1944, made an application for reconstruction of the proceedings in Civil Execution No. 7 of 1937 of the District Court of Bassein. His application was granted, and on the 13th February 1947 the respondent, his father being by then dead, made an application to record the adjustment of the decree in terms of the payment of the 14th November 1944 of the sum of Rs. 5,180-4-0 to Annamalai Chettiar.

To this application for adjustment of the decree the appellant raised two objections, of which we are only concerned in this appeal with the objection that, because of the line-of-war separating the appellant from Annamalai Chettiar, on Bassein being occupied by the invading Japanese forces, the authority of Annamalai Chettiar to act on behalf of the appellant and to bind the appellant by such acts terminated. The appellant's objection was rejected by the District Court of Bassein, and his appeal against the order of the District Court of Bassein was dismissed by the

High Court, and it is against the judgment of the High Court that this appeal is preferred to this Court under section 6 of the Union Judiciary Act.

In the High Court, as also before us, the appellant's case is that the relation of principal and agent between himself and Annamalai Chettiar came to an end the moment Bassein was occupied by the invading enemy forces. In support of this claim various authorities were canvassed before this Court, and these authorities have been discussed *in extenso* in the judgments of the Chief Justice of the High Court and San Maung J.

The larger question whether on the line-of-war dividing the principal from his agent the relation of principal and agent would normally come to an end by operation of law is no doubt one of great importance, but it does not arise in this case.

Section 13, sub-section (3), of the Burma Laws Act, provides that, where a question for decision before the Courts in Burma does not relate to succession, inheritance, marriage or caste, or any religious usage or institution in the case of Buddhists, Mohamedan and Hindus, or is not covered by any enactment for the time being in force, the decision shall be according to justice, equity and good conscience. Guidance, therefore, in the matter of contracts will have to be sought, in the first instance, in the Contract Act. The relevant provisions of the Contract Act are sections 23 and 56.

Section 56 of the Contract Act, leaving out matters not relevant to the present appeal, reads—

> " A contract to do an act which, after the contract is made, becomes . . . . . by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes . . . . . unlawful."

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Section 23, again, reads—

"The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or

involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy."

Much legal learning has been expended, both in the High Court and at the Bar before us, on the question of public policy. It has been strenuously contended on behalf of the appellant that any dealing across the line-of-war must be illegal. Reliance is placed on certain observations in *Sovfracht* v. *Gebr Van Udens Scheepvaart en Agentuur Maatschappit* (1) for the proposition that such communication would in all cases, and apart altogether from the facts in each case, fall within the interdiction of law. On the other hand, reliance was placed on the observations in the earlier case of *Rodriguez* v. *Speyer Brothers* (2) for the contrary view that the interdiction of intercourse across the line-of-war is not to be treated as a crystallised proposition which is so definite that it must be applied without reference to whether a particular case involves real mischief, to guard against which the rule of public policy was originally introduced. The question whether the rule against intercourse across the line-of-war is a rigid rule of law or a flexible rule of public policy is one, no doubt, of considerable but, as far as this case is concerned, academic interest.

Proviso (*b*) to Rule 98 (1) of the Defence of Burma Rules, made under the Defence of Burma Act, 1940, has expressly exempted from the prohibition against

(1) (1943) A.C. 203. (2) (1919) A.C. 59.

commercial or other dealings with the enemy, the receipt of " payment from an enemy of a sum of money due in respect of a transaction under which all obligations on the part of the person receiving payment had been performed before the commencement of the Act ". Assuming, for the appellant cannot possibly put his case higher, that the agent in 1942 to 1945 of the respondent's father could, for the purposes of the Defence of Burma Act and the Rules thereunder, rightly be deemed an enemy, the proviso to Rule 98 (1) expressly permits the receipt of payment from such a person in the circumstances obtaining in this case. The obligations on the part of the appellant had been performed, and his claim under the transaction wherein he performed these obligations had crystallised into a decree before the Defence of Burma Act was enacted.

If, therefore, it would not be an illegal act for the appellant in person to receive payment under the decree, if such payment or receipt had been physically possible, in spite of the person making the payment becoming technically an enemy, it is difficult to see how the contract of agency would be adversely affected by war breaking out and the agent remaining in enemy occupied territory. The grant of authority as an agent in this case was, as has been said above, for the single purpose of realizing the dues under the decree of 1934. Section 23 of the Contract Act renders a contract illegal only if either the consideration or the object of the contract is against any provision of law or would defeat any provision of law. The nature of the consideration is not of any relevancy in this case, and the object of the contract of agency and the grant of authority under it is one which the law has expressly made exempt from the prohibition of intercourse with the enemy.

It is not necessary to examine closely the provisions of the Defence of India Act. It is enough to notice

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that the Indian Act and the English Trading with the Enemy Act of 1939 have in them provisions similar to proviso (*b*) to Defence of Burma Rule 98 (1). This fact, however, is strictly not relevant. For though the contract of agency was made in India (and validly made at the time), it was clearly to be performed in Burma, where the debt was to be collected by the agent In such circumstances, *Benorium & Co.* v. *Debono* (1) and *Adelaide Electric Supply Company, Limited* v. *Prudential Assurance Company, Limited* (2) are clear and sufficient authorities for the proposition that the law of Burma as the *lex loci solutionis* applies to the determination of the question whether the contract by supervening circumstances becomes abrogated.

With respect, it seems to us that much of the difficulties in this case, both in the High Court and at the Bar before us, had their origin in the confusion between different definitions for different purposes of the term "alien enemies". For the purpose of commercial and other intercourse, residence, and not alienage, determines the enemy character of the person affected. With such persons as are resident in territories occupied by the forces of the enemy, commercial and other intercourse are prohibited, and for the purpose of such prohibition these persons, irrespective of their political allegiance, are to be deemed enemies. They may not, in fact, be "alien enemies" in the strictly accurate sense of the term. The confusion arises from this new definition of "alien enemies" for the purpose of the rule against commercial and other intercourse being erroneously assumed to be a definition for all purposes.

An alien enemy not under protection, in these days, may or may not be a human wolf with no rights and

(1) (1924) A.C. 514. (2) (1934) A.C. 122

whom anyone may wrong with impunity [cp. *Sylvester*'s case (1)]. But the disabilities of an alien enemy, strictly so called, do not extend to the technical "alien enemy". Consequently, the payment made in 1944 on behalf of the respondent's father was not in law a mere nothing; it was expressly made lawful to receive payment from "an enemy"; and the contract of agency for the single purpose of obtaining such payment is not abrogated by the supervening prohibition of commercial and other intercourse in general with the enemy.

It is to be regretted that the facts in the present appeal are not such as would justify us in considering the larger question of the effect in general of war on contracts of agency when the line-of-war divides the principal from the agent; but we cannot depart from the salutary practice of confining the decision to such questions as are necessary for the determination of the matter before the Court.

The result is that the appeal fails and is dismissed with costs. Advocates' fees 30 gold mohurs.

(1) (1703) 7 Moo. 150.

SUPREME COURT.

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April 4.

R.M.M.R.M. PERICHIAPPA CHETTYAR (APPELLANT)

v.

KO KYAW THAN (RESPONDENT).*

S. 189 of Contract Act—Agency or agent of necessity in English law—English Common Law on the subject.

Held: According to English Common Law agency of necessity arises by operation of law and the agent's authority to bind his principal is not derived from the principal.

Previous contractual authority whether general or restricted is not an essential feature of the status of an agent of necessity. Under s. 189 of Contract Act when an agent acts, he acts outside the term of employment and power is granted by the law to a person who was acting not as an agent *ex contractu* so far as a particular transaction was concerned. Status and not contract is the determining factor in both cases, of agent acting outside the authority in the power granted and of an agent of necessity.

Where an agent expressly prohibited from disposing of his principal's property, disposed of the wreckage of a steam boat which had been sunk by the British Government at the time of evacuation and there was a concurrent finding of facts that there was an emergency within the meaning of s. 189 of the Contract Act.

Held: Even though his previous agency has been determined, being in charge of property at the time he was an agent of necessity within the meaning of s. 189 of the Contract Act.

Prager v. *Blatspiel, Stamp & Heacock, Ltd.*, (1924) 1 K.B. 566 ; *Springer* v *Great Western Railway Company*, (1921) 1 K.B. 257 at 267, referred to.

Messrs. Surridge and Beecheno for the appellant

U Aung Min for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The appellant whose domicile is in India was for some time resident in Burma carrying on business as money-lender and in the paddy

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* Civil Appeal No. 10 of 1948.

† Before the Hon'ble SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

trade. The seat of his business at all material times was at Henzada. In the course of his business he granted a power of attorney on the 13th March 1934 to one Chinnaya Pillai and two others, by which he authorized the attorneys to take possession of and to hold his properties, to recover his debts and goods, to bring claims on his behalf, to appear for him in Courts and generally to act for him in all legal proceedings. The power of attorney contained a clause expressly prohibiting the agents from selling or transferring any property belonging to him except with his express consent.

In 1940 the appellant had occasion to go to Madras. Owing to various circumstances he was still in Madras when in March 1942 Henzada was occupied by the invading Japanese forces. Once Henzada (and later the major portion of Burma) was occupied by the forces of the enemy it was impossible for him to return to Burma and he remained in Madras till some time after the resumption in Burma of the civil administration of the lawful Government.

About February 1942, three steam launches, which belonged to the appellant and which were used by him in his paddy trade, were commandeered by the British Army. Later and on the advance of the invading Japanese forces, the British Army, prior to its retreat from Henzada area, sunk the three launches in the Irrawaddy to deny their use to the enemy. After the launches were sunk and the British Army had retreated from Henzada area, the Japanese forces occupied the area. By the 29th March 1942, if not earlier, the occupation of that area by the enemy had become effective and on that date Chinnaya Pillai, purporting to act on behalf of the appellant entered into an agreement with the respondent whereby the latter agreed to purchase the wreckage of the three launches

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as they lay under water in the Irrawaddy. The respondent then salvaged the launches and made extensive repairs to all three and employed them as ferries. Later, two of the launches were taken away from the respondent by the Japanese Army in occupation and it is not known what became of them. The third launch, which had been renamed "Zinyaw" (its original name was "Alert"), however, remained in the possession of the respondent and it is for the return of this launch and for damages for the use thereof that the appellant sued the respondent in the District Court of Bassein.

The appellant's case is that on Henzada area coming under effective occupation of the forces of the enemy all persons resident in that area became "enemies" and that accordingly the rule against intercourse with the enemy applied to abrogate even the limited authority he had given to Chinnaya Pillai to act as his agent. The sale of the launches by Chinnaya Pillai on the 29th March 1942, according to the appellant, was not effective to pass title in the launches to the respondent. The respondent's answer so far as is relevant for the purposes of this appeal, is that the contract of agency whereby Chinnaya Pillai was given authority to act on behalf of the appellant had not been terminated by Henzada being under effective occupation of enemy forces and that in the circumstances prevailing after the occupation of Henzada area by the enemy, section 189 of the Contract Act operated to give Chinnaya Pillai powers more extensive than those granted by the appellant himself on the 13th March 1934.

The trial Court, as also the High Court on appeal from the trial Court, rejected the appellant's claim and the appellant has preferred this appeal. Both in the trial Court and in the High Court, as also before us,

Chinnaya Pillai's position when on the 29th March 1942 he entered into a contract of sale of the launches with the respondent has been described on behalf of the respondent as that of an "agent of necessity". The High Court, as also the trial Court, has accepted the claim made on behalf of the respondent that Chinnaya Pillai was on that date "an agent of necessity" and that the extent of his authority to bind the appellant must be judged by the rules of law applicable to agents of necessity, and that even though there was an express prohibition against sales and transfers of any property of the appellant by Chinanya Pillai in the original power of attorney, Chinnaya Pillai's sale on the 29th March 1942 was effective to pass title in the launches to the respondent.

It must be borne in mind that the legal literature of England speaks of "an agency or an agent of necessity" whereas the Contract Act in section 189 does not adopt that nomenclature. It is therefore necessary to consider if the position of an agent of necessity under the English Common Law is at all similar to that of an agent exercising powers under section 189 of the Contract Act. At Common Law agency is normally a relationship arising *ex contractu*; the principal grants and the agent agrees to receive the authority for the latter to act on behalf of the former and by such act or acts to bind the former. The limits of such an agent's authority, whether express or implied, have to be found within the four corners of the grant. Thus the term "agent of necessity" is, from the point of view, a misnomer.

Agency of necessity at Common Law arises by operation of law. The agent's authority to bind the principal is not derived from the latter and in many cases may be against the latter's will. A wife, who, with justification, but against her husband's will, leaves

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him presents a neat example of the right which the Common Law gives to one person to bind another without that other person's agreement and against his will. The exercise of the right by the wife cannot be supported on the fiction of agency arising out of the original contract of marriage. The fiction is too transparent. The husband, it may be, is violently protesting against the wife's act and the original contract of marriage does not imply a separation. The decision in *Prager* v. *Blatspiel, Stamp & Heacock, Ltd.* (1) enunciates the right of the seller of goods when faced with impossibility of delivery of the goods sold and communication with buyer, to sell them to a third party and to bind the original purchaser by that re-sale. The classic case of the ship-master when faced by necessity and in the absence of means of communication with the owners, to sell the ship and its cargo is another example of an agent of necessity under the Common Law. In *Springer* v. *Great Western Railway Company* (2) Scrutton, L.J. says :

> "The defendants have sold somebody else's goods and they have no right to do so unless they establish certain conditions. They are agents to carry, not to sell. To give them the right to sell, circumstances must exist which put them in the position of agents of necessity for the owners to take that action which is necessary in the interests of the owners. Those conditions do not arise if the carrier can communicate with the owners and get their instructions."

It is clear, therefore, that at Common Law previous contractual grant of authority, whether general or restricted, is not an essential feature of the status of an agent of necessity. All that appears to be required for the status of an agent of necessity to arise is for the person acting as such to stand in a certain relation with

(1) (1924) 1 K.B. 566. (2) (1921) 1 K.B. 257 at p. 267.

respect to either the so-called principal or to his goods such as would be recognized by law as giving to the agent authority, in the absence of means of communication with the principal, to bind the principal. What the relation between the two persons or between one of them and the goods of the other must be such as the law would recognize as sufficient for the application of the rule, cannot be said to be very well defined except in the cases of ship-masters, carriers of goods, sellers of goods in relation to property still remaining in their possession, and wives who have with justification left their husbands. *Dr. Jenks in his Digest of English Civil Law* (1) refers to the subjects as "the rather vague doctrine of agency of necessity".

Section 189 of the Contract Act reads :

> "An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances."

At first sight it would appear that this marks a wide divergence from the English Common Law in that before a person can act in an emergency so as to bind another, he must needs be an agent. The qualification "in an emergency" is not to the words "an agent" but is to the words "has authority". But an examination of section 182 of the Contract Act would appear to show that an agent of necessity at Common Law is very much the same person as one who under section 189 of the Contract Act comes to bind another. Section 182 defines an agent as a person employed to do any act for another or to represent another in dealings with third persons ; whereas at Common Law an agent, except in the case of an agent of necessity, derives his authority from the principal and by the will

(1) Book II, Part II, Section V, Article 528.

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of the latter. Section 182 would appear to make agents not merely persons deriving authority from and by the will of the principal but others so long as they are employed (it does not specify the employer) to do any act for another in dealings with third persons. In any event, in relation to section 189 of the Contract Act it appears to us that the interpretation of section 182 of the Act in the above sense is unavoidable. Can it be said that a person who has been granted a special power of attorney for a very restricted purpose, say to represent the principal before the Registrar of Documents, would come within the protection of section 189 of the Contract Act but that a seller of goods in circumstances established in *Stringer* v. *Great Western Railway Company* (1) would not ?

It is impossible to conceive of the authority of an agent who, like Chinnaya Pillai in this case, sold the appellant's launches against the express prohibition in the power of attorney, as being in any way implied in the terms of consensual agency. In what he did, he was acting outside the terms of his employment by the appellant and therefore in relation to that particular transaction he was not a person employed by the appellant. It, therefore, follows that the authority of the so-called agent under section 189 of the Contract Act is an authority which the law has granted to a person who was acting, not as an agent *ex contractu*, so far as that particular transaction was concerned, but outside the scope of his employment by the principal. Status, and not contract, is the determining factor in both cases. In that view, it matters not for the purposes of disposing of the present appeal whether or not the contractual relationship of principal and agent became terminated on Henzada being effectively occupied by the forces of the enemy.

(1) (1921) 1 K.B. 257 at p. 267.

Whether the relation as principal and agent terminated because of the prohibition of intercourse with the enemy or because the contractual relationship of principal and agent could not be invoked as the particular transaction entered into by the agent was outside the scope of his authority, express or implied, the effect is the same. In one case the agent ceased to represent the principal altogether; in the other case, so far as contractual authority was concerned, the dealings of the so-called agent were not the dealings which the principal had either expressly or impliedly authorized (and in fact had prohibited) and therefore to that extent and in regard to that particular transaction the two did not stand in the relation of principal and agent.

Chinnaya Pillai, prior to the three launches being commandeered by the British Army, was in lawful charge of them. The act of commandeering by the British Army had, at the highest, the effect only of postponing this lawful charge to the claims of the Army. This lawful charge over the three launches resting in Chinnaya Pillai was not lost by Henzada area being effectively occupied by the enemy.

The position then on the 29th of March 1942 was that Chinnaya Pillai was lawfully in charge of the wreckage of the three launches then sunk in the river and that he had no means available of communicating with the appellant as to what further was to be done in respect of them. In such circumstances it seems clear that Chinnaya Pillai would come within the definition of "an agent" within the meaning of section 189 of the Contract Act, irrespective of the original appointment of 1934 being still subsisting or having been abrogated on Henzada being occupied by the enemy.

All that remains, then, to be considered is whether the acts of Chinnaya Pillai in relation to the three

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launches satisfied the conditions specified in section 189 of the Contract Act. It is, as already stated above, common ground that on the 29th of March 1942 communication with the appellant was impossible. The requirement, therefore, of an emergency for the exercise of the authority given by law to a person like Chinnaya Pillai is fulfilled. It is true that in the power of attorney granted to Chinnaya Pillai in 1934 there is an express prohibition against sale or alienation of any of the appellant's properties by Chinnaya Pillai without the express consent of the appellant. But on the 29th of March 1942 Chinnaya Pillai was not acting under the authority given by the appellant but under the authority *ex lege* in the circumstances already set out. The prohibition, therefore, in the power of attorney of 1934 was, in itself, not fatal to the respondent's claim. That prohibition may have to be taken into consideration in assessing if Chinnaya Pillai's act in entering into a contract of sale, and later completing the sale, would or would not be the act of a prudent person similary situated in respect of his own property.

The two lower Courts have held that Chinnaya Pillai's acts were, if considered apart altogether from this prohibition, those of a prudent person placed in similar circumstances in respect of his own property and that Chinnaya Pillai by his acts saved or in good faith tried to save the appellant from loss. The concurrent findings of facts would conclude the appeal unless we can find that because of the prohibition in the original power of attorney Chinnaya Pillai should not have done what he did. We have already said that, in law, Chinnaya Pillai when he acted in the matter of the sale of the wreckage of the three launches was not bound by the prohibition in the power of attorney. It is further clear to us that when granting the original power of attorney the appellant did not

envisage the kind of emergency that actually arose in this case. In other words, the prohibition was never intended to operate in circumstances relevant to the decision of this appeal. It cannot, therefore, be said that the concurrent findings of facts of the two lower Courts are open to reconsideration by us.

In these circumstances the appeal fails and is dismissed with costs.

SUPREME COURT.

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Feb. 10.

MA THIN (APPELLANT)

v.

MAUNG SEI TIN (RESPONDENT).*

Constitution of Burma, s. 228—Union Judiciary Act, 1948—Lower Burma Courts Acts of 1889 and 1900—Upper Burma Civil Code Regulations—Shan States Civil Justice Subsidiary Order.

Held : During the British regime the Director of Frontier Areas Administration had final Appellate Jurisdiction in Shan States and that power was not extinguished by reason of Burma attaining independence. That jurisdiction was continued under the existing law as defined by s. 228 of the Constitution. Under s. 134 and 135 of the Constitution the final appellate jurisdiction in respect of Shan States continued in the Director of Frontier Areas Administration till the Union Judiciary Act, 1948, was enacted. After the passing of the Union Judiciary Act, 1948, the power of the Director of Frontier Areas Administration as the final appellate authority passed on to the High Court, Rangoon.

Thet Tun for the appellant.

Ba Nyunt for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The short point for consideration in this appeal relates to the powers and functions of the High Court of the Union of Burma in proceedings which had not reached final adjudication before the Director, Frontier Areas, at a time when the Union of Burma was established as an independent State. The facts are simple. The appellant had obtained a decree for possession of a house in her suit before the Assistant Superintendent (Civil Justice), Taunggyi. The decree in her favour was on appeal confirmed by the Resident, Southern

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* Civil Appeal No. 11 of 1948.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

Shan States, and the respondent preferred an application in revision to the Director, Frontier Areas Administration. This application in revision was, it is said, heard *ex-parte*, and the Director set aside the decree granted by the Courts below in favour of the appellant. This order in revision by the Director, Frontier Areas Administration, was made on the 9th July 1947.

No action was taken to have this *ex-parte* order set aside till after the 4th January 1948. We have not been told and it is not necessary for the purpose of this appeal for us to know, the cause of the delay. We assume, but we must not be taken to have held, that the appellant could have adduced sufficient cause to excuse the delay in making her application so as to overcome the bar of limitation.

When after the 4th January 1948 the application to set aside the *ex-parte* order of July 1947 was made, it came ultimately before the High Court. The learned Judge (San Maung, J.) took the view that the High Court was not competent to entertain an application to set aside an *ex-parte* order made by the Director, Frontier Areas Administration, before the High Court was established under the Constitution and its powers and functions defined by the Union Judiciary Act, 1948. The learned Judge in a very short judgment referred to section 31 of the Union Judiciary Act and clause 44 of the Letters Patent constituting the High Court of Judicature at Rangoon and deduced therefrom that in the absence of a specific provision made in that behalf, either in the Constitution or the Union Judiciary Act, 1948, no proceeding of the Director of the Frontier Areas Administration (sitting as a High Court) which had not reached final adjudication could be continued or concluded in the High Court of the Union of Burma.

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Section 31 of the Union Judiciary Act enables proceedings pending before the High Court of Judicature at Rangoon to be continued and concluded in the High Court of the Union of Burma. Clause 44 of the Letters Patent constituting the High Court of Judicature at Rangoon contained provisions for proceedings pending in the Chief Court of Lower Burma or in the Court of the Judicial Commissioner of Upper Burma being continued and concluded in the High Court of Judicature at Rangoon.

We find it difficult to appreciate the logic of the learned Judge of the High Court that because the Union Judiciary Act, 1948, in respect of proceedings pending in the High Court of Judicature at Rangoon and the Letters Patent of 1922 in respect of proceedings pending in the Chief Court of Lower Burma and in the Court of the Judicial Commissioner of Upper Burma made specific provisions for their continuation and conclusion in the High Court of the Union of Burma and in the High Court of Judicature at Rangoon respectively, similar provisions are essential for proceedings pending before the Director, Frontier Areas Administration (sitting as a High Court for the Shan States) to be continued and concluded before the High Court of the Union of Burma.

For a proper appreciation of the points involved in the determination of this appeal it is necessary to bear in mind the history of the judiciary in Burma since 1886. The Upper Burma Laws Act of 1886 (Act No. XX of 1886) defined the powers of the Governor-General-in-Council to extend to the Shan States any enactment enforced in any part of Burma at the date of the extension. The Lower Burma Courts Act, 1889 (Act No. XI of 1889), set up for Lower Burma, *inter alia*, the Court of the Judicial Commissioner of Lower Burma. By section 10, this Court had granted to it

" the powers of a High Court in relation to all Civil Courts in Lower Burma except the Special Court, the Court of the Recorder and the Court of Small Causes, Rangoon." By the Lower Burma Courts Act, 1900 (Act VI of 1900), the Courts of the Judicial Commissioner of Lower Burma and of the Recorder of Rangoon were merged in the Chief Court of Lower Burma, established under the Act, and the Chief Court was made the highest civil Court of Appeal and the highest Court of Criminal Appeal and Revision in and for Lower Burma. The Upper Burma Civil Courts Regulations, 1896, established *inter alia* the Court of the Judicial Commissioner, Upper Burma, and in section 12 it was provided " that the Court of the Judicial Commissioner shall have all the powers of a High Court established under Statute 24 and 25 Victoria, Chapter 104, and shall be the Court of final jurisdiction throughout the area to which this Regulation for the time being applies."

In 1875 there had already been established for the tract known as the Hill Districts of Arakan a final Court of Appeal in the person of the Commissioner of Arakan. Section 4 of the Arakan Hill District Laws Regulation, 1874, provided that " the functions of the High Court in all civil and miscellaneous matters shall be discharged by the Commissioner." By amendments to the Arakan Hills Civil Justice Regulation of 1874 the Co nmissioner of Arakan Division and the Chief Court of Lower Burma (later the High Court of Judicature at Rangoon) were made at the option of the Chief Court (or the High Court of Judicature at Rangoon) the final appellate authorities for the area known as the Hill Districts of Arakan.

The Kachin Hill Tribes Regulations, 1895, and the Chin Hills Regulations, 1896, empowered the Local Government (later, the Governor) or a delegate of the

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Local Government (later, the Governor) to appoint the final appellate authority in civil and criminal matters.

For the areas then known as the Shan States (now forming the Shan State) section 12 of the Burma Laws Act, 1898, made provision for definition of the powers and the regulation of the procedure of authorities appointed to administer criminal and civil justice. In pursuance of this provision of the Act, the Shan States Civil Justice (Subsidiary) Order, 1906, in section 18A had the following: " The Commissioner shall have all the powers of a Superintendent and in addition shall exercise the appellate and revisional powers of the High Court over all orders passed by a Superintendent ; provided that no 2nd appeal shall lie from the appellate judgment and decree of the Superintendent to the Commissioner."

In 1922 the High Court of Judicature at Rangoon was established by Letters Patent. Section 113 of the Government of India Act, 1919, reads :

" His Majesty may, if he sees fit, by letters Patent, establish a High Court of Judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another High Court,and confer on any High Court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any High Court existing at the commencement of this Act ; and, where a High Court is so established in any area included within the limits of the local jurisdiction of another High Court, His Majesty may, by Letters Patent, alter those limits, and make such incidental, consequential and supplemental provisions as may appear to be necessary by reason of the alteration."

The High Court of Judicature at Rangoon was established, as clause 1 states, " for those portions of the province of Burma at present within the limits of the jurisdiction of the Chief Court of Lower Burma and of the said Judicial Commissioner of Upper Burma."

Thus, immediately after the establishment of the High Court of Judicature at Rangoon there were for the areas, which now form part of the Union of Burma, several authorities exercising final appellate jurisdiction, each of which in respect of the areas within its authority was either specifically or by implication invested with all the powers of a High Court for that particular area.

In 1946 the Frontier Areas Adaptation Regulation was enacted by the Governor of Burma and by section 4 the " Director, Frontier Areas Administration, or Director, whichever is most appropriate therefor, or, in respect of the powers of the High Court conferred by any law such officer as the Governor may by notification invest with such powers ", was to exercise in the areas specified in Part II of the 2nd Schedule of the Government of Burma Act, 1935, all the powers of the Commissioner under the Regulation relevant to any of these areas. Thus, on the eve of the establishment of an independent Union of Burma there were for the areas now forming part of the Union of Burma normally two jurisdictions that could claim to be the High Courts in these areas, namely, the High Court of Judicature at Rangoon and the Director, Frontier Areas Administration. We have used the qualification " normally ", as section 3 of the Regulation of 1946 enabled the Governor to invest the powers of the High Court also in an authority other than the Director, Frontier Areas Administration ; but it does not appear that such investiture was made before the 4th of January 1948.

Of these two jurisdictions which could rightly claim to be High Courts for the areas in Burma respectively under their authority, one was the creature of an enactment by the Governor exercising legislative powers. The other, namely, the High Court of

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Judicature at Rangoon, was the creature of the Letters Patent emanating from His Britannic Majesty in 1922 and was one of His Majesty's Superior Courts of Judicature.

The High Court of Judicature at Rangoon on the enactment of the Burma Independence Act, 1947 (11 Geo. 6 Ch. 3) and by the operation of the Constitution ot the Union of Burma ceased to exist on the 4th of January 1948. The Government of Burma Act, 1935, stood repealed as from that date and section 1 of the Burma Independence Act, 1947, provided that " on the appointed day Burma shall become an Independent country, neither forming part of His Majesty's dominions nor entitled to His Majesty's protection ". Section 226 of the Constitution, in view of the definition of the term " existing law " in section 222, does not operate to save the Letters Patent, which brought into being the High Court of Judicature at Rangoon. The proviso to section 223 puts the matter beyond all doubt.

The final appellate jurisdiction vested in the Director, Frontier Areas Administration, however, was not extinguished by reason of Burma attaining independence. That jurisdiction being the creation of " existing law " within the meaning of the Constitution was saved and section 228 of the Constitution applies to it. The position then clearly is this : The High Court of Judicature at Rangoon had ceased to exist as soon as Burma attained independence and the Constitution came into operation but the other " High Court " would continue to exercise its jurisdiction until " new Courts are established by law in accordance with the Constitution ". It is true that the High Court of the Union of Burma is coeval with the Constitution but the Constitution in sections 134 and 135 left the extent of the appellate jurisdiction of that

High Court to be defined by Parliament. Accordingly, the final appellate jurisdiction in respect of the Shan State continued in the Director, Frontier Areas Administration, till the Union Judiciary Act, 1948, in section 21 enacted that "the High Court shall be a Court of appeal from all civil Courts of the Union other than the Supreme Court."

The matter may be stated in another way. The High Court of Judicature at Rangoon came to an end without a successor to it on the 4th of January 1948 ; whereas the "High Court" for the Shan States continued to exist in the person of the Director, Frontier Areas Administration, till by the combined operation of section 228 of the Constitution and section 21 of the Union Judiciary Act, 1948, that jurisdiction was transferred to the High Court of the Union of Burma.

This difference between the position of the High Court of Judicature at Rangoon and the "High Court" for the Shan State would appear to explain why the provisions of section 31 of the Union Judiciary Act referred to by the learned Judge of the High Court found a place therein. Clause 44 of the Letters Patent appears to have been inserted *ex cautela*. A similar provision is to be found in the Letters Patent constituting the Nagpur High Court but not in the Letters Patents constituting the High Court of Lahore or the Patna High Court or the High Court of Allahabad.

In these circumstances we set aside the order of the learned Judge of the High Court in Civil Miscellaneous Application No. 17 of 1948 and direct that the High Court do proceed with the determination of the application made to it under Order 41, rule 21 of the Code of Civil Procedure by the appellant before us, in accordance with law. The respondent will pay the appellant's cost of this appeal. Advocate's fees ter gold mohurs.

SUPREME COURT.

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May 16.

DAW MYA TIN (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON AND ONE (RESPONDENTS).*

Direction in the nature of habeas corpus—*Before release fresh order of detention under s. 5A* (1) (b) *of the Public Order (Preservation) Act, 1947—Whether such order legal.*

Held: Where a person has been discharged or ordered to be discharged from custody under directions in the nature of *habeas corpus* given by the Supreme Court on the ground that his detention is illegal in consequence of a technical defect of law in the proceedings terminating in the detention order passed against him, he can be re-arrested and detained or if still in custody continued to be detained under a fresh order of detention under s. 5A (*1*) (*b*) of the Public Order (Preservation) Act, 1947.

Rex v. *Secretary of State for Home Affairs*, (1942) 2 K.B. 14 at p. 25; *Rex* v. *Governor of Brixton Prison*, (1912) 3 K.B. 424, followed.

Ba Maung for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

SIR BA U, C.J.—U Wann Maung, the detenu in this case, was a Sub-Inspector of Police in the Rangoon Town Police Force. In or about 1946 he became the President of the Rangoon Police Force Association. While he was holding that office the Rangoon Police Force went on strike. The strike soon spread to the police in the districts with the result that the administration of the country became disorganized. It was settled after it had lasted for about a month.

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* Criminal Misc. Application No. 108 of 1949.

† *Present:* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and MR. JUSTICE TUN BYU.

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After the strike U Wann Maung evidently gained in stature and status for he became the President not only of the Rangoon Police Force but also of the All-Burma Police Association. Reaction soon set in—as usually happens in politics in Burma—and U Wann Maung was deposed from the Presidentship of the All-Burma Police Association. U Wann Maung refused to accept his defeat meekly; he collected his followers and formed a rival association. In or about that time Government made a cut of Rs. 20 in the Cost of Living Allowance. Seizing this as an excuse U Wann Maung staged a demonstration by parading with some of his followers in front of several police stations in Rangoon. This happened in 1947. He then fixed his headquarters at Mogaung, a suburb of Rangoon, and called his association "Peoples Steel Police Union". Government then began to take serious notice of U Wann Maung's activities. Sensing his danger U Wann Maung left his headquarters and went into hiding but he was soon ferreted out of his hiding place at Tapun in Tharrawaddy District and placed under detention in Tharrawaddy Jail. He was later transferred to Shwebo Jail and from there he was taken in February 1948 to Moulmein Jail.

While under incarceration in Moulmein Jail an application was made on his behalf for issue of directions in the nature of *habeas corpus*. But, as at the time constitutional remedies were suspended in Moulmein as Moulmein was under military administration the application was dismissed. When the military administration came to an end a fresh application was filed on his behalf and this application was allowed as there was a technical defect or flaw in the proceedings in which the order for his detention was passed. A few days before this Court passed the order directing his release, the Commissioner of Police

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passed a fresh order of detention under section 5A (*1*) (*b*) of the Public Order (Preservation) Act. The result is that the fresh order of detention has effectively nullified the order of release passed by this Court.

The question that therefore arises is whether a person who has been discharged from custody upon directions given by this Court in the nature of *habeas corpus* on the ground that his detention was illegal in consequence of a technical defect or flaw in the proceedings terminating in the detention order passed against him can be arrested and detained under a fresh order of detention? This question can best be answered by what Lord Greene M.R. observed in *Rex* v. *Secretary of State for Home Affairs* (1). In that case that learned Master of Rolls said :

"The argument presented to us was based on the proposition that a person who has been released from custody on a "writ of *habeas corpus* cannot be subjected to a second detention for the same cause. This argument is, in our opinion, misconceived. The first detention of the applicant was illegal in that the prerequisites of a lawful detention had not been complied with. In the case of the present detention, those prerequisites have been complied with and the detention is lawful."

See also the case of *Rex* v. *Governor of Brixton Prison* (2). Though the observations in that case were made with reference to section 6 of the *Habeas Corpus* Act, 1679, they are equally relevant in the present case inasmuch as the principle enunciated there is of universal application : the principle being that no man should be put in peril for his life or limb twice for the same offence and on the same facts.

Now, dealing with the facts of the present case what is alleged and not seriously controverted is that when a split took place in the All-Burma Police Association

(1) (1942) 2 K.B. 14 at p. 25. (2) (1912) 3 K.B. 424.

the detenu collected his followers, made a demonstration in front of several police stations in Rangoon calling on the members of the Police Force to desert their post and join him, and thereafter fixed his headquarters at Mogaung with the object of overthrowing the lawfully constituted Government by disorganization of the administration of the country. Such an act was undoubtedly a treasonable act and the man who promoted it or attempted to promote it brought himself within the purview of the Public Order (Preservation) Act.

The application is dismissed.

SUPREME COURT.

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June 15.

TAI CHUAN & CO. (APPELLANTS)

v.

CHAN SENG CHEONG (RESPONDENT). *

Interpretation of Statutes—S. 5, General Clauses Act—Urban Rent Control Act, 1946—Amending Act XIV and XXVI of 1947—Urban Rent Control Act, ss. II (1) (f), II (c), 12 and 14 (3).

Held: That general principle is that when the law is altered during the pendency of an action, the rights of the party are decided according to the law as it existed when the action was taken unless the new statute shows clear intention to vary such right but an exception to this general principle is that even though the Act is silent as to whether or not it should operate retrospectively, if it deals with the procedure or remedies it always operate retrospectively. The provisions of Urban Rent Control Act are retrospective and applies to pending suits.

To remedy a glaring instance of injustice to the owner the Urban Rent Control Act was amended by the introduction of s. II *(1) (f)*. It deals with questions of relief to the landlord and applies to pending suits. Such relief to landlord under s. II *(1) (f)* can be granted even when the decree has been passed before the introduction of the amending Act and no separate suit is necessary.

Quilter v. *Mapleson*, (1881-82) 9 (Q.B.) 672; *In re A Debtor*, (1936) 1 Ch. 237 at p. 242; Maxwell's Interpretation of Statutes, 8th edn., 195; Craie's Interpretation of Statutes, 4th edn., 314, followed.

Leong for the appellants.

Thein Maung for the respondent.

The judgment of the Court was delivered by

SIR BA U, C.J.—This appeal is by special leave granted under section 6 of Union Judiciary Act. The point of law that arises is—how the rights of the parties to a suit or proceeding are to be decided when there is a change in the law during the pendency of the suit or proceeding.

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* Civil Appeal No. 8 of 1948.

† *Present*: SIR BA U Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and MR. JUSTICE SAN MAUNG.

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TAI CHUAN & Co. v. CHAN SENG CHEONG.

The facts of the case are these. Respondent Chan Seng Cheong is the owner of a building known as No. 368, Strand Road, Rangoon, and a godown just behind it. He let these two premises to the appellant company some time before August 1946. On the 2nd August 1946 the respondent served the appellant company with a notice to quit by the end of August 1946. The appellant company refused to do so. Thereupon the respondent filed two suits under section 17 of the City Civil Court Act—one in respect of the premises known as No. 368, Strand Road, and the other in respect of the godown,—for ejectment of the appellant company therefrom. Both the suits were filed on the 4th September 1946 and orders for ejectment were passed in both cases on the 10th January 1947 ; but the appellant company was given time to stay on on the premises till the 10th April 1947 on condition that the appellant company paid the respondent, within one month from the date of the orders, all arrears due for the use and occupation of the premises. The arrears were duly paid. Before the orders for ejectment were passed but after the institution of the suit the Urban Rent Control Act came into force. It came into force on the 19th October 1946. Under sub-section (*1*) of section 14 of the said Act the Court had power to adjourn an application for recovery of possession of or ejectment from any premises ; or if it did not choose to do so, to proceed with the hearing of the application and then at the time of passing an order or decree for ejectment or for recovery of possession it had power to stay the execution thereof for such period as the Court thought fit subject to any conditions in regard to payment of arrears of rent or mesne profits by the person against whom the application or order or decree had been made. If the conditions thus imposed were complied with, then

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the Court, if it chose to do so, might discharge or rescind the order or decree. The Court had however no power to do any of the kinds mentioned above in cases where the tenant had failed to satisfy a decree for rent passed by a Civil Court in respect of any period before the date of resumption of civil government on the conclusion of the hostilities with Japan and in cases where any person permitted under section 12 of the Act to occupy any premises or any person living with him had been guilty of conduct which was a nuisance or annoyance to his neighbours or been convicted for using the premises for illegal or immoral purposes and in cases where the condition of the premises had deteriorated owing to acts of waste or neglect committed by any such person.

As the Act came into force during the pendency of the suit the learned Chief Judge of the City Civil Court apparently took advantage of sub-section (*1*) of section 14 and allowed the stay of the execution of the order of ejectment till the 10th April 1947. On the 3rd April 1947 the appellant company filled an application for rescission of the order of ejectment under section 14 (*1*) of the Act on the ground that he had complied with the conditions imposed by the Court. By that time the Urban Rent Control Act was amended by two Amending Acts, namely, Acts Nos. XIV and XXVI of 1947. Both the Amending Acts were curiously enough passed on the same day, that is the 18th March 1947. Section 14 of the Act was considerably amended. Though the appellant company filed its application for rescission of the order of ejectment apparently under section 14 (*1*) before its amendment, yet the learned Chief Judge of the City Civil Court considered the application with reference to the new provisions as contained in the 1st Amending Act, Act XIV of 1947. The learned Chief Judge, however, made no reference

to the provisions of section 14 as contained in the 2nd Amending Act, Act XXVI of 1947. In dealing with the 1st Amending Act the learned Chief Judge observed :

"The principles that I can deduce from the amended section 14 appear to be these :

Sub-section 1 (*a*).—Where a decree or order had been passed whether before or after the commencement of the Act and has not yet been executed, the Court *may* stay or suspend execution by the imposition of conditions as it may think fit.

(*b*) Where such conditions had been imposed and complied with, then the Court shall discharge or rescind the decree or order.

Sub-section 2.—The Court *shall* give relief as embodied in sub-section 1 where a tenant who uses the premises as a *bona-fide* residence is unable to obtain alternative accommodation.

Sub-section 3.—Where a decree or order had been passed before the commencement of this Act and not yet executed the Court must consider whether such a decree would have been passed if the Act had been in force. If in the opinion of the Court such an order could not have been passed then the Court is required to rescind or alter the decree.

Sub-section 3 has no application to the cases before me as the orders were passed *after* the commencement of the Act.

Nor has sub-section 2 any application for the premises are not used for residential purposes.

Sub-section 1 would apply and the point for determination is whether this court should exercise the discretion vested in it in favour of the judgment-debtors."

The learned Chief Judge refused to exercise his discretion in favour of the appellant company after holding that the said company had several buildings and godowns besides those in suit.

The appellant company went up on appeal to the High Court and the High Court confirmed the order of the learned Chief Judge on the 4th August 1947 on

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the ground that it would not interfere with the exercise of discretion vested in the learned Chief Judge by law.

Now, what is noticeable is that neither the learned Chief Judge of the City Civil Court nor the learned Judges of the Appellate Court made any reference to the provisions (*b*) of section 14 (*1*). According to this provision if the tenant or any person permitted under section 12 to occupy premises complied with the conditions imposed by Court, the Court—to use the language of the Act—"shall discharge or rescind the order or decree." The provision (*a*) dealt with the stay or suspension of order or decree for ejectment; whereas the provision (*b*) dealt with the discharge or rescission of such an order. If the learned Chief Judge had referred to the 2nd Amending Act, Act XXVI of 1947, which, as pointed out above, was passed on the same date as the 1st Amending Act, he would have noticed that he had no discretion in the matter but to rescind or discharge the order for ejectment. By the 2nd Amending Act section 14 (*3*) of the 1st Amending Act was amended and under the 2nd Amending Act the Court could deal with an order of ejectment passed either before or after the commencement of the Urban Rent Control Act, 1946. Section 14 (*3*), as amended, was in these terms:

"Where any order or decree of the kind mentioned in section 11 or sub-section (*1*) of section 13 is made or given, whether before or after the commencement of this Act, and the order or decree has not been executed, and the Court is of opinion that such order or decree would not have been made or given if the provisions of section 11 or 13, as the case may be, were in force or applicable thereto at the time when the order or decree was made, the Court *shall*, on an application by the tenant or person permitted to occupy under section 12 (*1*), ***rescind or alter the order or decree*** in such manner as it thinks fit for the purpose of giving effect to this Act; . . . . . ."

As both the High Court and the City Civil Court did not refer to this provision in their judgments, the appellant company filed an application thereunder a day after its appeal was dismissed by the High Court, that is, on the 5th August 1947. For one reason or another the case dragged on till the 13th November 1947 when objection was filed by the respondent. In the course of the objection the respondent charged the appellant company with having committed acts of waste or neglect. This plea was taken apparently because section 11 (*c*), as amended, provided that the order or decree for ejectment or recovery of possession of premises should not be discharged or rescinded if the tenant or any person permitted to occupy under section 12 of the Act was guilty of any acts of waste or neglect.

Before the case was ready for hearing the whole of the Urban Rent Control Act of 1946, as amended, was repealed and a new Urban Rent Control Act passed on the 17th January 1948. Relying on section 11 (*1*) (*f*) of the new Act the respondent filed an application praying that the application of the appellant company for rescission of the order might be dismissed, as he (the respondent) wanted the premises for his residential purpose. Section 11 (*1*) (*f*) provides :

"Notwithstanding anything contained in the Transfer of Property Act or the Contract Act or the Rangoon City Civil Court Act no order or decree for the recovery of possession of any premises to which this Act applies or for the ejectment of a tenant therefrom shall be made unless the building or part thereof to which the Act applies is reasonably and *bona-fide* required by the owner for occupation by himself exclusively for residential purposes and the owner executes a bond in such amount as the Court may deem reasonable that said premises will be occupied by himself and that he will give effect to such purpose within three months from the date of vacation of the premises by the tenant."

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The learned Chief Judge of the City Civil Court held that the Act of 1948 was not only prospective but also retrospective in its operation and that as the respondent needed the premises for his residential purposes the decree could not be rescinded as provided by the above section. The application of the appellant company was accordingly dismissed. On appeal to the High Court the learned Judges of the Appellate Court held the same view as the learned Chief Judge of the City Civil Court and dismissed the appeal.

The submission now made on behalf of the appellant company is that the application of the appellant company to have the order of ejectment rescinded or discharged should be decided under the law as it stood at the time the application was filed and not under the law which came into force only after the filing of the application. To decide it under the present law means depriving the appellant company of a substantive right to have the order of ejectment discharged or rescinded and this, the learned counsel for the appellant company submits, cannot be done in view of section 5 (*b*) (*c*) and (*d*) of the General Clauses Act.

Section 5 of the General Clauses Act is in no way contrary to the general principle that when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless a new statute shows a clear intention to vary such right. But an exception to this general principle is that, even though the Act is silent as to whether or not it should operate retrospectively, but if it deals with procedure or remedies it always operates retrospectively. [Cf. *Quilter* v. *Mapleson* (1); *In re A Debtor* (2);

(1) (1881-82) 9 (Q.B.) at p. 672. (2) (1936) 1 Ch. 237 at p. 242.

Maxwell's Interpretations of Statutes (3); and Craie's Interpretation of Statutes (4).]

Now, if the old Urban Rent Control Act is referred to it will be found that the object of the Act was to give relief to tenants or persons permitted under section 12 of the Act to occupy as against owners; the owners got no relief whatsoever as against these people unless they defaulted in the payment of rent or misused the premises which they occupied. Even if an owner wanted his house back from a tenant for his occupation as a residence he could not get it back. This was a glaring instance of injustice done to an owner. To remedy this state of affairs, section 11 (*1*) (*f*) was enacted. Under the present Act relief can be given to tenants and persons permitted to occupy under section 12 and to owners as well under certain circumstances, one of which is if the owner wants his building back for his own use as a residence. As the present Rent Control Act deals largely with the question of relief, we have no doubt in our mind that it operates retrospectively. Relief can accordingly be granted under section 11 (*1*) (*f*) of the present Act in a pending suit. That is what the High Court and the Rangoon City Civil Court did.

The learned counsel for the appellant company however submits that relief under section 11 (*1*) (*f*) can be given only in a suit filed by an owner for ejectment of a tenant or for recovery of possession of his building but before he can file such a suit he must get a certificate from the Controller as provided by section 14A that he (the owner) really needs the building for his occupation as a residence. According to the learned counsel section 11 (*1*) (*f*) does not apply to a case where a tenant applies to have the order of

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(1) 8th edn. at p. 195. (2) 4th edn. at p. 314.

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ejectment passed against him rescinded or discharged. It is true that the Act is silent on this point but the general principle is that where there is an obligation there is always an implied remedy or relief. As pointed out above, the whole object of the Act is to give relief not only to tenants but to owners as well under certain circumstances, and if relief were to be denied under section 11 (*1*) (*f*) when the tenant applied to have the order of ejectment passed against him rescinded it would mean not only frustrating the object of the Act but a denial of justice to the owner The Legislature, in framing the Urban Rent Control Act, 1948, never intended to have such a result as contended for by the learned counsel for the appellant company. We are clearly of opinion that section 11 (1) (*f*) can not only be used, so to speak, for the purpose of offence in a suit filed by the owner but also as a shield in a case where the tenant applies to have the order of ejectment passed against him discharged or rescinded.

For all these reasons we dismiss the appeal with costs.

SUPREME COURT.

U KYAI (APPLICANT)

v.

KYWE TAI VILLAGE AGRICULTURAL COMMITTEE AND TWENTY OTHERS (RESPONDENTS).*

† S.C. 1949 Feb. 3.

Upper Burma Land Revenue Regulation, 1889—S. 4 (1) (2), 5 23 (c) and 25 (c)—Occupation of State land—Myenu land—How and when occupant can be ejected—Disposal of Tenancies Act, 1948—How far can modify the Upper Burma Land Revenue Regulation.

Held : A Village Agricultural Committee appointed under Disposal of Tenancies Act, 1948, is not a Revenue authority within the meaning of s. 4 (i) of the Upper Burma Land Revenue Regulation, 1889, nor is it authorized by the President to exercise powers of a Revenue authority within s. 5 of the Regulation. When a signal order is issued by the Government to the Collector to entrust to the Village Agricultural Committee the power of distributing *myenu* lands in accordance with the principle of Direction 41 of Land Revenue Manual, such signal order cannot take the place of appointments under ss. 4 and 5 of the Upper Burma Land Revenue Regulation.

That where a Cultivator has held *myenu* lands paying land revenue for some years, he has a right to occupy such lands except when he makes default in payment of land revenue and notice as prescribed by the Rules has been served upon him or compensation has been paid to him. A Village Agricultural Committee cannot eject him.

Yan Aung for the applicant.

Tin Hla for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—It is clear that the 1st respondent, Kywe Tai Village Agricultural Committee, acted in excess of its jurisdiction and powers, and that, accordingly, its proceedings, challenged herein, must be quashed.

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* Civil Misc. Application No. 45 of 1948 of the Supreme Court of the Union of Burma.

† *Present :* MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT of the Supreme Court and U BO GYI, J.

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The Kywe Tai Village Agricultural Committee is a body appointed under the Disposal of Tenancies Act, 1948, and its powers and functions are confined to the disposal of leases of agricultural land under that Act and the rules made thereunder. It is not a revenue authority within the meaning of section 4, sub-section (1), of the Upper Burma Land and Revenue Regulation, 1889. Neither has the President, exercising his powers under section 4 (2) of the Regulation, appointed that Committee to exercise all or any of the powers of any class of Revenue Officer under the Regulation or any rule made thereunder. Moreover, there is no provision made under section 5, either by the President or by the Financial Commissioner, determining the functions to be discharged by this Committee. All that has happened, so far as is relevant to this case, is that on the 6th July 1948 a signal order was issued by some department of Government at Rangoon to the Collector, Pakôkku, under which he was instructed to entrust to the Village Agricultural Committees within his jurisdiction the function of distributing *myenu* lands in accordance with principles laid down in Direction 41 of the Land Revenue Manual. Clearly, such a signal order cannot take the place of an appointment under sections 4 and 5 of the Upper Burma Land and Revenue Regulation.

The facts which are not in dispute in this case are as follows. The applicant, since 1944, has been assessed to land revenue, and has been paying the revenue so assessed, in respect of Holding No. N/117 of 1947-48, in Bhodagon *kwin* in Pakôkku Township, measuring 4·52 acres. Further, the applicant has, from 1946, been assessed to revenue, and has been paying the revenue so assessed, in respect of another Holding, being N/108 of 1947-48 in the same *kwin*. These holdings form part of a strip of island land

measuring one hundred acres in Kywe Tai Village-tract. The 1st respondent Committee, purporting to act under instructions from the Collector, Pakôkku, allotted these two plots of land among the other respondents in this case. In doing so, the Committee did not take into consideration the claim made by the applicant that the two plots of land held by him under revenue assessment, in respect of one plot since 1944, and in respect of the other plot since 1947, have been assessed to land revenue in his name and that he has been paying the sums so assessed regularly ; they proceeded entirely on the basis that these two plots are entirely at their disposal and that the applicant has not any substantive right whatsoever in respect of the same.

Section 23, clause (*c*), of the Upper Burma Land and Revenue Regulation declares that all islands and alluvial formations in rivers shall be " State Land " and section 25, clause (*c*), provides that " an occupier " of State Land may not, except for default in the payment of land revenue due from him to the Government, be ejected from such land without such " notice as may be prescribed by rules to be made by the President in this behalf or failing such notice, such compensation as, subject to any such rules, the Collector may, having regard to all the circumstances of the case, deem just."

Therefore, it is clear in this case that the 1st respondent Committee has usurped to itself a function which is not vested in it, and that, in performing that function, it has entirely ignored factors which, under the law in force, have to be taken into consideration in determining the rights of a person who has been assessed to land revenue in respect of any land at the disposal of the Government and of which he is in occupation. That being so, the proceedings

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of the 1st respondent Committee cannot be allowed to stand. These proceedings must be and they are hereby quashed. The respondents will pay the applicant's costs of these proceedings : advocate's fees five gold mohurs.

SUPREME COURT.

DAW MYA TIN (APPLICANT)

v.

THE DEPUTY COMMISSIONER, SHWEBO AND ONE (RESPONDENTS).*

†S.C. 1949

Mar. 15.

Public Order (Preservation) Act—Exercise of discretion must be by the Officer making the order—Delegation of power to the Deputy Commissioner—Whether Additional Deputy Commissioner can exercise such power.

Held : The quasi-judicial act of directing the preventive detention of a Citizen for an indefinite period under Public Order (Preservation) Act is in exercise of the discretion of the Officer who makes the order. Where the Officer does not exercise his own discretion but acted automatically on the instructions of the Deputy Inspector-General of Police, his order is illegal.

It is a matter for consideration whether powers delegated to the Deputy Commissioner under the Public Order (Preservation) Act, can be exercised by the Additional Deputy Commissioner.

Ba Maung for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—On summons being issued to the Superintendent of Jail, Moulmein, who has the custody of the person of the applicant's husband Maung Wan Maung (at one time a Sub-Inspector of Police) a return was made by him by his affidavit of the 5th February 1949. He claims that the detention of Maung Wan Maung is legal as it is under an order of detention issued by the Deputy Commissioner, Shwebo, and refers to Detention Order No. 67

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* Criminal Misc. Application No. 64 of 1949 of the Supreme Court of the Union of Burma.

† *Present* : SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

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of 1947 issued from the Office of the Deputy Commissioner, Shwebo, on the 17th October 1947. A certified copy of the Detention Order is placed before us.

In the first place, though the Detention Order in question purports to have been issued from the Office of the Deputy Commissioner, Shwebo, it was under the hand of U Ko Ko who describes himself as " Additional District Magistrate, Shwebo ". It is not at all clear whether U Ko Ko, in addition to being an Additional District Magistrate for Shwebo under the Code of Criminal Procedure, has also been appointed Additional Deputy Commissioner for Shwebo. It is also a matter for consideration, at the proper time, whether the delegation of powers under the Public Order (Preservation) Act by the President of the Union to Deputy Commissioners would entitle Additional Deputy Commissioners to act under the same delegation.

These matters are, however, not necessary to be pursued in this case, for, assuming that U Ko Ko had all the powers of the Deputy Commissioner of Shwebo, the order of detention on the face of it is clearly illegal. It reads as follows :

" Under the instructions of the D.I.G., C.I.D., Burma, Rangoon, in his Confidential Intelligence Branch No. 163561, dated the 15th October 1947, S.I.P. Maung Wan Maung will be detained in the Shwebo Jail until further orders, under section 5 of the Public Order (Preservation) (Amendment) Act, 1947.

He will be placed in ' B ' Class."

The quasi-judicial act of directing the preventive detention of a citizen for an indefinite period is in the exercise of the discretion of the person who makes the order. In the present case it is clear that U Ko Ko never in fact applied his mind to the necessity or otherwise of Maung Wan Maung's detention. He

acted merely on receipt of instructions from the Deputy Inspector-General of Police in the Criminal Investigation Department, Burma, and the order of detention was clearly automatic.

We have no materials before us from which we can decide—and therefore we must not be taken to have decided—on the merits of the order of detention. It is sufficient for the purpose of this case to say that the order of detention, not having been made in the exercise of discretion vested in the officer who passed it, must be set aside.

Maung Wan Maung will therefore be set at liberty so far as his detention is under Detention Order No. 67 of 1947 of the 17th October 1947 issued from the office of the Deputy Commissioner, Shwebo.

SUPREME COURT.

†S.C. 1949

May 16.

MRS. G. LATT (APPLICANT)

v.

THE COMMISSIONER OF POLICE AND ONE (RESPONDENTS).*

Detention under Public Order (Preservation) Act—Subordination of personal liberty to National interest—Discretion exercised by Officers entrusted with the power to order detention should not be lightly brushed aside.

The Public Order (Preservation) Act is aimed at potential and not actual enemies of the State. The Act is not a punishing Act but a preventive one. Where a responsible Officer entrusted with the duty of guarding and protecting the safety of the State, says on oath that his order is based on information obtained from agents, informers and other reliable sources that through the detenu arms and ammunition were being supplied to insurgents, the Court cannot on mere denial by wife of the detenu, brush aside such statement on oath of such responsible Officer.

Personal liberty of a subject though precious, will have to be sacrificed to some extent by legal enactments promulgated for the safety of the Nation.

Rex v. *Halliday* (1917) A.C. 260 at 271, followed.

C. C. Khoo for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by the Chief Justice of the Union.

SIR BA U.—G. Latt, the detenu in this case, is a dentist of some repute practising in the City of Rangoon for the past several years. It is not alleged that he was before his incarceration connected in any way with any political party or took any interest in politics. Because of these facts we have given several anxious moments to the consideration of this case.

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* Criminal Misc. Application No. 105 of 1949 of the Supreme Court of the Union of Burma.

† *Present* : SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG of the Supreme Court and U TUN BYU, J.

The grounds given by the Commissioner of Police for G. Latt's detention are as follows :

"(1) He wields a great influence over the Karens of Hanthawaddy District especially in Twantè area.

(2) He has connections with many Karens of Twantè where the activities of the Karen insurgents have now been intensified.

(3) He is reported to have been distributing arms and ammunition to Karen insurgents in Twantè area. These arms and ammunition were reported to have been sent through his Karen agents on board 'Htaiksan' motor launch."

If the first two grounds are taken by themselves they can hardly form a basis for the arrest and detention of any man, leave alone a man of position and influence. If a man were to be arrested and detained simply because he happened to be a man of position and influence, nobody would be safe. Besides it would be against not only the spirit but the letter of the Constitution. But if these two grounds are taken into consideration with the third ground, there may then be something to be said against the detenu. Even the third ground as it stood originally, when properly analysed and considered carefully, would not sustain an order for detention. We therefore directed that fuller and better particulars regarding the alleged activities of the detenu should be given. They have now been given. In brief, what these particulars amount to is that the detenu was seen going about with Karens bringing rice from Twantè by a certain motor launch flying the Karen "Phasi" flag to the Ghee Hin Pweyon in No. 15, Oliphant Street, Rangoon, and the said Karens took back arms and ammunition from Rangoon by the same motor launch. The implication is that the said Karens obtained arms and ammunition from the detenu. All these allegations are of course denied by the wife of the detenu, who is the applicant in this case.

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Now, what is to be remembered is that the Public Order (Preservation) Act is aimed at potential and not actual enemies of the State. The Act is not a punishing Act but a preventive one. Therefore when those entrusted by Parliament with the duty of guarding and protecting the safety of the State, say on oath that the information that it was through the detenu that the Karen insurgents in Twantè area obtained their arms and ammunition, was obtained through their agents and informers and other reliable sources, we cannot lightly brush aside their statements ; more so in a case, as in the present one, when their statements are controverted by a single statement of the wife of the detenu. Borrowing the words utterd by Lord Atkinson in the case of *Rex* v. *Halliday* (1) we may say: "However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement."

For all these reasons we do not see our way to interfere with the order of detention passed by the Commissioner of Police. The application is dismissed.

(1) (1917) A.C. 260 at p. 271.

SUPREME COURT.

U OHN KHIN (APPLICANT)

v.

DAW SEIN YIN (RESPONDENT).*

†S.C. 1949

May 30.

Appointment of Receiver—Object—Limitation for application for Special Leave—Order XI Rules 1, 2 and 10 of Supreme Court Rules—Meaning of the word "granting" in Rule 2—Sufficient cause within s. 5 of the Limitation Act—Want of due care and attention—Meaning of the word "judgment" in ss. 5 and 6 of the Union of Burma Judiciary Act.

Held : That the object of appointing a Receiver in a pending suit, is to keep the subject-matter intact, so that at the conclusion of the suit, the successful litigant may not be deprived of the fruits of his success.

The word "granting" in Rule 2 of Order X of the Supreme Court Rules, does not include "refusing."

The words "sufficient cause" are not defined or explained in the Limitation Act. From the nature of the thing it cannot be defined ; it must be decided on the facts and circumstances of each case. The fundamental principle is that a cause for delay which a party seeking the aid of s. 5, could have avoided by the exercise of due care and attention cannot be said to be a sufficient cause. A mistake by a lawyer is not *per se* a sufficient cause unless it can be shown that the mistake could not have been avoided in spite of the exercise of due care and attention. The wordings of Rules 1, 2 and 10 of Order XI of Supreme Court Rules are simple and unambiguous. Therefore no sufficient cause has been made out in the present case.

Where it is not certain whether a Certificate will be granted by the High Court as a matter of course, the prudent course is to apply to the Supreme Court for Special Leave within time allowed by law.

The question whether the meaning of the word "judgment" as in ss. 5 and 6 of the Union Judiciary Act is the same as given in *In re Dayabhai Jiwandai* v. *A.M.M. Murugappa Chettiar*, I.L.R. 13 Ran. 457, or not, is left open for future consideration.

In re Dayabhai Jiwandas v. *A.M.M. Murugappa Chettiar*, 13 Ran. 457 (F.B.); *T. V. Tuljaram Row* v. *M.K.R.V. Alagappa Chettiar*, I.L.R. 35 Mad. 1, referred to.

Chan Htoon (Attorney-General) for the applicant.

E. C. V. Foucar for the respondent.

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* Civil Misc. Application No. 8 of 1949 of the Supreme Court of the Union of Burma.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT of the Supreme Court and U SAN MAUNG, J.

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U OHN KHIN v. DAW SEIN YIN.

The judgment of the Court was delivered by the Chief Justice of the Union.

SIR BA U.—The point canvassed before us very strenuously by the learned Attorney-General on behalf of the applicant U Ohn Khin is that the order passed by the High Court on the 4th of May 1948 setting aside an order passed during the Japanese occupation of Burma by the then Additional Divisional Court of Pyapôn appointing the applicant as Receiver in Civil Regular Suit No. 17 of 1944 of the said Court is a judgment within the meaning of sections 5 and 6 of the Union Judiciary Act. The word "judgment" as used in the Letters Patent of the several High Courts in India and in Clause 13 of the Letters Patent of the late High Court of Judicature at Rangoon gave rise to different interpretations and a conflict of decisions both in India and Burma. But so far as this country was concerned it was finally settled by a Full Bench of seven Judges *in re Dayabhai Jiwandas* v. *A.M.M. Murugappa Chettiar* (1). According to that decision the word "judgment" in clause 13 of the Letters Patent means and is a decree in a suit by which the rights of the parties in issue in the suit are determined.

The learned Attorney-General submits that the said decision requires further consideration in so far as the word "judgment" as used in sections 5 and 6 of the Union Judiciary Act is concerned. According to the learned Attorney-General the framers of the Union Judiciary Act by not adopting the language of section 109 of the Code of Civil Procedure must have intended to use the word "judgment" in a wider sense than the Full Bench did in *Murugappa*'s case (1). Therefore the construction as adopted in the case of *T. V. Tuljaram Row* v. *M.K.R.V. Alagappa Chettiar* (2)

(1) 13 Ran. 457. (2) 35 Mad. 1.

is, according to the learned Attorney-General, more preferable than the one adopted in *Murugappa*'s case (1), as it is in consonance with the intention of the Legislature. If the definition of judgment as given in *Tuljaram*'s case (2) is not adopted, the learned Attorney-General submits it will mean the denial of justice in several cases as in the present one. In the present case jewelleries worth at least Rs. 5 lakhs form the major portion of the subject-matter of the suit out of which the present proceedings arise. If the High Court did not find it advisable to confirm the order of the Additional Divisional Court appointing the plaintiff (now applicant in this Court) as Receiver, it should not have allowed the jewelleries to remain in the possession of the defendant-respondent, who is a lady fairly advanced in age. The object of appointing a Receiver in a pending suit is to keep the subject-matter of the suit intact so that at the conclusion of the suit the successful litigant may not be deprived of the fruits of his success. If the defendant-respondent were to die during the pendency of the suit, the jewelleries which form the major portion of the subject-matter of the suit would undoubtedly disappear and the plaintiff would undoubtedly suffer an irreparable loss if he were to succeed ultimately. What the High Court, according to the learned Attorney-General, should have done if it did not want to confirm the appointment of the plaintiff-applicant as Receiver *pendente lite* was to appoint an officer of the Court, such as the Bailiff, as Receiver with instructions to keep the jewelleries in a safe and reliable bank in Rangoon covered by insurance. The point of law that therefore arises, according to the learned Attorney-General, is whether the High Court exercised its discretion judicially in setting aside the

(1) 13 Ran. 457. (2) 35 Mad. 1.

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order of the Additional Divisional Court appointing the plaintiff (applicant) as Receiver *pendente lite* in the case.

The points thus raised are very interesting and important points. If they are not considered now, they may have to be considered at some other time. But before we can consider them, the first and the most important question that calls for consideration is the question of limitation. The High Court set aside the order of the Additional Divisional Court by an order passed on the 4th May 1948 and an application was thereafter filed in the High Court under section 5 of the Union Judiciary Act for a certificate to appeal to this Court. The High Court dismissed the application by an order dated the 17th January 1949, and on the 5th February 1949 the present application under section 6 of the Union Judiciary Act was filed in this Court. The question is whether the application is within time. The learned Attorney-General submits that it is as it falls within Order XI, Rules (1) and (2) of this Court's Rules. The said rules are in the following terms :

"(1) Where a certificate has been given under section 5 of the Union Judiciary Act, any party who desires to appeal shall file a petition of appeal in this Court.

(2) Subject to the provisions of sections 4, 5 and 12 of the Limitation Act, the petition shall be presented within thirty days from the date of the order granting the certificate."

The meaning of the rules as they stand is as clear as it possibly can be. They mean that when a certificate granting leave to appeal to this Court is granted by the High Court a petition of appeal shall be filed within one month from the date of the grant. These rules therefore deal with the matter of appeals only and nothing else. But when the matter of *applications for special leave* to appeal filed under section 6 of the Union Judiciary Act comes under consideration, the

rules that apply are 10 (*a*) and 10 (*b*) of Order XI, which run as follows :

"10. (*a*) When a party desires to pray for special leave to appeal under section 6 of the Union Judiciary Act, the petition of appeal shall be accompanied by a special petition indicating the grounds upon which special leave is sought, and both petitions shall, unless the Court otherwise directs, be heard together.

10. (*b*) Subject to the provisions of sections 4, 5 and 12 of the Limitation Act, the petition shall be presented within ninety days from the date of the decree or order from which leave to appeal is sought."

Now, as pointed out above, the order from which leave to appeal is sought was passed on the 4th of May 1948 and the present application was filed only on the 5th February 1949. The application is therefore, on the face of it, barred by 164 days, making an allowance of 22 days occupied in getting copies of the order of the High Court. To get over this bar of limitation two submissions are made by the learned Attorney-General. The first is that the word "granting" as used in Rule 2 of Order XI of this Court's Rules also means "refusing" and if it does the present application is in time as it was filed within 30 days from the date on which the application for a certificate under section 5 of the Union Judiciary Act was refused. The second submission is that in the circumstances obtaining in this case, the delay of 164 days should be excused under section 5 of the Limitation Act. The circumstances are that the learned Attorney-General was genuinely under the impression that an order appointing or refusing to appoint a Receiver in a pending suit was a judgment within the meaning of section 5 of the Union Judiciary Act. If it was a judgment, as he thought it was, a certificate to appeal should be granted by the High Court as a matter of course as the amount involved was, both in the trial

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Court and in the High Court, well over Rs. 10,000 and as the High Court set aside the order of the Additional Divisional Court.

Dealing with the first submission, if we have to put the construction as desired by the learned Attorney-General on the word "granting" as used in Order XI, Rule 2 of this Court's Rules, it will render the meaning of the said rule almost, to say the least, unintelligible. If the word "granting" also means "refusing" the rule will run thus :

> "Subject to the provisions of sections 4, 5 and 12 of the Limitation Act, the petition shall be presented within 30 days from the date of the order *refusing* the certificate."

What petition is to be filed ? The petition of appeal as laid down in Rule 1 is to be filed. How can a petition of appeal be filed if no certificate is granted therefor. Therefore the rule if considered in the way as desired by the learned Attorney-General would become meaningless. We cannot therefore accept his first submission.

Dealing with the second submission, the question is whether a mistake of law made by a lawyer is "a sufficient cause" within the meaning of section 5 of the Limitation Act. What is meant by "sufficient cause" is not defined or explained in the Act. From the nature of the thing it cannot be defined ; it must be decided from the facts and circumstances of each case. The one fundamental principle that has been adopted by the Courts in India is that a cause for delay, which a party seeking the aid of section 5 of the Limitation Act could have avoided by the exercise of due care and attention, cannot be said to be "a sufficient cause." It follows therefore that a mistake of law made by a lawyer is not *per se* "a sufficient cause" unless it can be shown that the

mistake could not have been avoided in spite of the exercise of due care and attention.

Now, in the present case, the mistake made by learned counsel for the applicant could have been avoided if Rules 1 and 2 and Rules 10 (*a*) and 10 (*b*) of Order XI of this Court's Rules had been studied with due care and attention. These rules are, as pointed out above, quite simple and easy to understand. Assuming that the order passed by the High Court, setting aside the appointment of the plaintiff-applicant as Receiver, was a judgment, as assumed by the learned counsel for the applicant, it does not necessarily follow that a certificate would as a matter of course be granted by the High Court under section 5 of the Union Judiciary Act, though the practice has been all along to give a certificate in a case where the amount involved in the trial Court and in the High Court is over Rs. 10,000 and where the High Court has upset the judgment of the trial Court. If by chance no certificate was granted the only method by which the unsuccessful litigant can come to this Court would be to apply for special leave to appeal under section 6 of the Union Judiciary Act. It must then be done within 90 days from the date of the decree or order from which leave to appeal is sought. Where it is not certain that a certificate under section 5 of the Union Judiciary Act would be granted by the High Court as a matter of course the prudent course to adopt is to apply to this Court under section 6 of the Union Judiciary Act within the time allowed by law. This is the practice that has been adopted by some members of the Bar.

Having regard to all the circumstances of the case we are of opinion that no sufficient cause has been shown to excuse the delay of 164 days in this case. We dismiss the application with costs five gold mohurs.

SUPREME COURT.

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June 6.

HAKIM AND TWO OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, ss. 76 and 79—Notice by Municipality under s. 120 of Burma Municipal Act to repair roof of tenanted house—Failure to repair punishable under s. 202 (b) *of the Act—Trespass to the premises without notice to tenants—Removal of a portion of roof—Debris falling inside house—Damage caused—Conviction for house trespass and mischief and abetment—Ss. 235* (*1*) *and 403 of the Code of Criminal Procedure.*

A notice to effect some repairs in a tenanted building was served on the owner of the property under s. 120 of the Burma Municipal Act under which such notice could be served either on the Owner or the occupier. Failure to carry out the requirement of the notice was punishable under s. 206 (*b*) of the Burma Municipal Act. The owner did not do anything for a considerable time and then engaged a person to effect the repairs. The owner or the Contractor did not give any notice or intimation to the tenants occupying the building. The Contractor and owner's son, without permission of the tenants gained access to the roof of the building and removed certain sheets of corrugated iron and as a consequence debris fell to the premises occupied by the tenants and some damage was caused to their foodstuff, crockery and furniture ; the owner, his son and the Contractor were then prosecuted by each tenant in two different cases and were convicted.

It was contended that in view of the provisions of ss. 76 and 79 of the Penal Code the accused were not guilty.

Held : That s. 76 applies to an act committed by reason of mistake of fact and not a mistake of law, by a person, who in good faith believes that he is bound by law to do it. S. 79 applies to an act done by a person who, by reason of a mistake of fact (not by mistake of law) in good faith believes himself justified by law in doing it.

The distinction between s. 76 and 79 is that in the former the person *bona fide* believes himself to be bound to do it and in the latter he *bona fide* believes himself to be justified by law in doing it.

The distinction is between the real or supposed legal obligation and real or supposed justification in doing a particular act. Under both these sections there must be *bona fide* intention to advance the law. The party accused cannot allege generally that he had a good motive. He must allege specifically under s. 76 that he believed in good faith that he was bound to do it as he did, or under s. 79 that being empowered by law to the best of his judgment exerted in good faith.

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* Criminal Appeal Nos. 2 and 3 of 1948.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U SAN MAUNG, J.

Queen-Empress v. *Nga Myat Tha and Nga Po Kin*, (1872—92) S.J.L.B. 164 ; *Niamat Khan and others* v. *The Empress*, (1883) P.R. Criminal 29 ; *Chaman Lal* v. *The Crown*, (1940) I.L.R. 21 Lah. 521 ; *Emperor* v. *Ramlo and others* A.I.R. (1918) Sind 69=19 C.L.J. 955 ; *U San Win* v. *U Hla*, A.I.R. (1931) Ran., 83, referred to.

If the owner was prosecuted for the act or acts of executing the repair, s. 76 would be a complete answer to such a charge. But the owner was bound by law to execute the repairs ; but his son, and the employee, did not believe themselves to be bound to commit the offence of Criminal Trespass and mischief. The owner had time before he instructed the Contractor to carry out the repairs, and he could have come to some arrangement with the tenants to carry out the same without causing any trespass or damage to them. In any case the accused were not under any mistake of fact. If there was any mistake—it was a mistake of law. The mistake could not have been made in good faith as the Appellant did not exercise due care and attention as required by s. 52 of the Penal Code. Dismantling of the roof of the building in actual physical possession of tenants without giving them reasonable opportunity to remove their properties, cannot be said to be an act done with due care and attention or in good faith.

S. 235 of the Code of Criminal Procedure is permissive and permits a Court to try together more than one offence so connected together so as to form part of the same transaction. There is nothing in law to prevent a person who has committed more offences than one from being tried separately for each of the offences.

Where a person, by his act, causes wrongful loss and damage to the properties in two separate premises, he can be convicted for two different offences and conviction for injury to one person cannot be a bar under s. 403 to conviction for the offence against the property of another.

Ganesh Sahu v. *Emperor*, (I.L.R. 50 Cal. 594), referred to.

The opinion of Cunliffe J. in *Yeok Kuk* v. *King-Emperor*, I.L.R. 6 Ran. 386 regarding the definition of a distinct offence is too broad though on the facts of that case the case was correctly decided. The test is not whether the offences were connected, but whether they are distinct offences.

C. H. Campagnac for the appellant.

Ba Sein (Government Advocate) for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE KYAW MYINT.—This judgment covers two connected appeals, namely, Criminal Appeals Nos. 2 and 3 of 1948, which have been heard together. The appellants are the same in each appeal, and the facts are now not in dispute.

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The 3rd appellant Hajee Abdul Samad is the owner of a one-storeyed building of some antiquity situate in B Road, Mandalay. The building is divided into two parts, each of which is let to a tenant. One portion is in the occupation of Musa Kaka, the complainant in Criminal Regular Trial No. 92 of 1947 of the Court of the 8th Additional Magistrate of Mandalay, while the other is in the occupation of Abdul Shakoor, the complainant in Criminal Regular Trial No. 93 of 1947 of the same Court. Both these tenants carry on the business of teashop-keepers in their respective premises.

Some time prior to the commission of the acts complained of, the 3rd appellant was served with a notice by the Chief Executive Officer, Mandalay Municipality, requiring him to execute repairs to the roof of the building above mentioned, which was in a dangerous condition. This notice appears to have been one under section 120 of the Municipal Act. Such a notice can be served on either the owner or the occupier of a building, and under section 202 (*b*) of the said Act, the person on whom the notice is served is liable, upon failure to comply with the direction contained therein, to suffer the infliction of a fine which may amount to Rs. 100.

The 3rd appellant engaged the services of the 1st appellant Hakim, a contractor, to carry out the necessary repairs. The 2nd appellant Ba Chit *alias* Abdulla is the son of the 3rd appellant.

On the 4th February 1947, the 1st and 2nd appellants, accompanied by some workmen, without notice to, and without the permission of, the tenants, entered the premises occupied by Musa Kaka, gained access to the roof of the building, and caused four sheets of corrugated iron, which formed part of the roof, to be removed. Upon a report being made to the

police, the work of dismantling the roof was stopped at the instance of the police. As a consequence of the removal of the corrugated iron sheets, some debris fell inside the premises respectively occupied by Musa Kaka and Abdul Shakoor and some damage was thereby caused to foodstuffs, crockery and furniture in those premises.

The appellants were prosecuted and have in Criminal Regular Trial No. 92 of 1947 been respectively convicted of the offences of house-trespass, abetment thereof, mischief and abetment thereof. These proceedings were in respect of the premises occupied by Musa Kaka. In Criminal Regular Trial No. 93 of 1947, they have been respectively convicted of the offence of mischief and abetment thereof. The latter proceedings were in respect of the premises occupied by Abdul Shakoor.

Applications for revision made to the High Court, being Criminal Revision Nos. 94B and 95B, have been dismissed.

It is contended on behalf of the appellants that the acts complained of do not amount to offences in law. In the memoranda of appeal, reliance is placed on sections 79 and 81 of the Penal Code, but in Court the learned Counsel for the appellants referred only to section 79 presumably because section 81 obviously has no bearing on the cases before us.

It is also contended that, having been convicted of various offences in Criminal Regular Trial No. 92, the appellants cannot be convicted of any offence in Criminal Regular Trial No. 93, inasmuch as the acts complained of in the latter trial arose out of the same transaction.

Learned counsel however did not, either in the memoranda of appeal or in argument, mention

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section 76 of the Penal Code. Sections 76 and 79 of the Penal Code are in the following terms :

"76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

Illustrations.

(*a*) **A**, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. **A** has committed no offence.

(*b*) **A**, an officer of a Court of Justice, being ordered by that Court to arrest **Y**, and, after due enquiry, believing **Z** to be **Y**, arrests **Z**. **A** has committed no offence.

* * * * *

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

Illustration.

A sees **Z** commit what appears to **A** to be murder. **A** in the exercise, to the best of his judgment, exerted in good faith of the power which the law gives to all persons of apprehending murderers in the act, seizes **Z** in order to bring **Z** before the police authorities. **A** has committed no offence, though it may turn out that **Z** was acting in self-defence."

These two sections of the Penal Code are clearly worded and the illustrations are sufficient to dispel any doubts that may exist as to their meaning. In respect of section 76 there is no dearth of authority, but the words "justified by law" in section 79 do not appear to have been the subject of judicial consideration in more than a few reported cases.

Although the learned counsel for the appellants has not relied on section 76 of the Penal Code, the case he presents on behalf of the appellants appears to be

based on both sections 76 and 79. His case, in fact, is that the 3rd appellant, having received a notice from the Chief Executive Officer of the Mandalay Municipality requiring him to execute repairs to the roof of the building referred to above, was bound by law to comply with that notice, and, further, that the acts committed by the three appellants were justified in law because the said acts were committed while they were complying with the said notice.

In our opinion, this case is founded upon a misconception. It is true that the 3rd appellant was bound by law to carry out the repairs ordered by the Chief Executive Officer and that the other appellants were carrying out his instructions, and, if they were being prosecuted for the act or acts of executing the repairs, section 76 would doubtless furnish an answer to the charge or charges. But the charges against them are of trespass and mischief, and abetment thereof, and it is no answer to these charges to say that, because the 3rd appellant was bound by law to execute the repairs, all the appellants were bound by law to commit acts amounting to the offences of trespass or mischief or abetment thereof. Nor would section 79 provide an answer to the charges against the appellants, for there can be no justification by law of the said acts.

Neither the learned counsel for the appellants nor the learned Government Advocate has cited any authorities before us in this connection but we have considered the effect of the decisions in the cases mentioned hereinbelow.

In *Queen-Empress* v. *Nga Myat Tha and Nga Po Kin* (1) a first-class constable verbally ordered two police constables to arrest bad characters on a certain

(1) (1872—92) S.J.L.B. 164.

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road and to fire on them if they offered resistance. The constables challenged two men and when they did not stop fired on them, killing one of them. The Sessions Judge acquitted the accused, holding that as they appeared to have acted in accordance with an order issued to them, they were "excusable of all fault" under section 76 of the Penal Code. On appeal it was held that the said section did not apply as the mistake made by the accused was a mistake of law which was not a defence.

In *Niamat Khan and others* v. *The Empress* (1) the four accused were a Naik and three Sepoys of an Indian regiment. The Naik, and the three other accused under his direction, fired upon a mob which was threatening them under circumstances which did not confer upon them the right of private defence. It was contended on behalf of the three Sepoys that, having fired by order of their commanding officer, the Naik, they were protected from punishment by section 76 of the Penal Code. It was however held that that section was inapplicable to the circumstances of the case as the Sepoys were cognizant of all the circumstances of the quarrel and, there being no room for a mistake of fact, they must be taken to have known that the Naik was wrong in law in firing upon the mob and that they were not bound to obey his illegal order.

In *Chaman Lal* v. *The Crown* (2) four convicts in a prison refused to work, alleging that they were unfit, and were sent to the punishment cells. On the following morning Chaman Lal, Deputy Superintendent of the Jail, together with convict officers, went to the cells and severely beat the delinquent convicts. This caused four other convicts to go on hunger-strike.

(1) (1883) P.R. Criminal 29. (2) (1940) I.L.R. 21 Lah. 521

Chaman Lal and the other accused took these convicts to the punishment cells and on the way beat them so severely that two of them died. It was contended on behalf of the accused other than Chaman Lal that they had acted under the orders of their superior officer and that they were therefore protected by the provisions of section 76 of the Penal Code. The contention was not accepted, Young C.J. holding that all the accused knew that they were engaged in an unlawful act and there was no question either of a mistake of fact or of law, or of good faith, as all of them must have known that the beating of convicts was contrary to law.

In *Emperor v. Ramlo and others* (1) where a Hindu husband accompanied by several associates forcibly entered the house of a third person and took away by force his married wife from there against her will it was held that, although it was the duty of a wife to reside and cohabit with her husband, the husband had no right to use force to enforce his rights even when the wife's refusal to live with him was without any reasonable cause, and the husband and his associates could not be justified by section 79 of the Penal Code.

In *U San Win* v. *U Hla* (2) an advocate, acting under alleged instructions from his client, wrote a letter to a magistrate asking him to return a bribe alleged to have been given to him. In his letter the advocate threatened the magistrate with legal action in the event of his failure to comply with the demand and promised to hush up the matter if the demand was met. The advocate was prosecuted on charges of defamation and extortion and upon application being made to the High Court for the quashing of the proceedings it was held that section 76 of the Penal Code had no application to the case as there was no question of any

(1) A.I.R. (1918) Sind 69=19 Cr.L.J. 955. (2) A.I.R. (1931) Ran. 83.

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mistake of fact on the part of the advocate. It was also held that section 79 had no application as the advocate was not justified by law in making the demand.

In Ratanlal's Law of Crimes (1) the learned authors say :

" The distinction between section 76 and this section (79) is that in the former a person is assumed to be bound, and in the latter to be justified, by law; in other words, the distinction is between a real or supposed legal obligation and a real or supposed legal justification, in doing the particular act."

The learned authors then reproduce a passage from the first Report on the Penal Code by the Indian Law Commissioners, 1846, which is in the following terms :

" Under both (these sections) there must be a *bona fide* intention to advance the Law, manifested by the circumstances attending the act which is the subject of charge; and the party accused cannot allege generally that he had a good motive, but must allege specially that he believed in good faith that he was bound by Law (s. 76) to do as he did, or that being empowered by Law (s. 79) to act in the matter, he had acted to the best of his judgment exerted in good faith."

With regard to the words " justified by law " in section 79, the learned authors say :

" This phrase is used in its proper and strict sense in reference to something needing to be vindicated as being in conformity with law."

In the cases before us, it appears that, after the receipt of a notice under section 120 of the Municipal Act, the 3rd appellant allowed a considerable period of time to elapse before he instructed the 2nd appellant to carry out the repairs. He could during that period

(1) (1945) 16th Edn., p. 146.

have come to some arrangement with the tenants which would enable him to carry out the repairs without causing annoyance to them or damage to their property. On the contrary, he did not even give them notice of his intention to have the repairs executed.

Further, it would be impossible to contend that the appellants were labouring under a mistake of fact, for, if they were acting under any mistake, it could only have been a mistake of law. In any event, the mistake could not have been in good faith, as upon the evidence on record it cannot be held that the appellants exercised due care and attention as required by section 52 of the Penal Code. No reasonable person would have begun the work of dismantling the roof of a building in the actual physical possession of tenants without giving them reasonable opportunity of removing their property to a safe place, especially when, as in these cases, the tenants were teashop-keepers whose property was liable to be damaged by falling debris. There is moreover evidence on the record to indicate that there was ill-feeling between the 3rd appellant and his tenants over the matter of heavy arrears of rent.

With regard to the second contention, which is based on section 403 of the Criminal Procedure Code, the learned counsel for the appellants relies on the cases of *Ganesh Sahu* v. *Emperor* (1) and *Yeok Kuk* v. *King Emperor* (2).

In the first case, Ganesh Sahu was prosecuted in respect of some only of certain articles of property found in the room occupied by him, the room being part of his father's house. He was convicted under section 411 of the Penal Code but was acquitted on appeal. He was subsequently tried and convicted in respect of other properties found in his room on the same date. There was evidence that the different

(1) I.L.R. 50 Cal. 594. (2) 6 Ran. 386.

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articles, which were the subject of the charges in the two trials, were stolen from different persons, but there was no evidence that they were received at different times. It was held by Newbould and Suhrawaddy JJ. that the second trial was illegal under the provisions of section 403 of the Criminal Procedure Code.

In the second case, Yeok Kuk was first prosecuted for offences under the Burma Forest Act. Out of six charges made against him, four were withdrawn by the prosecution, and he was acquitted of the the remaining two. Subsequently, he was prosecuted afresh under sections 379 and 411 of the Penal Code. It is not expressly stated, but is clear from the trend of the judgment as reported, that the charges in the second trial were in respect of the same timber as in the first trial. Cunliffe J. held that the plea of *autrefois acquit* was available to the accused and quashed the proceedings in the second trial.

The cases before us are easily distinguishable from the cases cited above. It is to be observed that there is no conviction for house-trespass or abetment thereof in Criminal Regular Trial No. 93 of 1947.

The material portion of section 403 of the Criminal Procedure Code which requires consideration here runs as follows:

"(1) A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him in the former trial under section 235, sub-section (1)."

Section 235 (1) of the Criminal Procedure Code is as follows :

"If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence."

Section 235 (1) is merely permissive and appears to have been enacted to meet a possible plea of misjoinder of charges. There is nothing in law to prevent a person who has committed more offences than one in the course of the same transaction from being tried separately for each of the offences.

By the acts of the appellants, wrongful loss or damage to property was caused in two separate premises, and we see no reason why the appellants should not have been convicted of the offence of mischief or abetment thereof separately in respect of the property in each of the premises.

It is to be noted that in *Ganesh Sahu* v. *Emperor* (1) there was no evidence that the different articles, which were the subject of the charges in the two trials, were received at different times. Had such evidence been available, there can be no doubt that the second trial would not have been illegal.

We observe also that in *Yeok Kuk* v. *King-Emperor* (2) Cunliffe J. while discussing the meaning of the words "distinct offence" in sub-section (2) of section 403 of the Criminal Procedure Code, states, at page 389 of the report :

' By ' distinct offence ' I apprehend the plain meaning of the section to be that it must be an offence entirely unconnected with a former offence charged."

While we have no doubt that upon the facts of the case before him Cunliffe J. arrived at a correct

(1) I.L.R. 50 Cal. 594. (2) 6 Ran. 386.

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decision, we are of opinion that the proposition laid down by him in the passage quoted above is too broad to be strictly correct. The test is not whether the offences charged in the two trials are unconnected, but whether they are distinct offences.

For the reasons given above, we are unable to accept either of the contentions raised on behalf of the appellants. The appeals are dismissed.

SUPREME COURT.

SYED ALLY AND ONE (APPELLANTS)

v.

CASSIM MOHAMED SURETY (*a*) U MAUNG MAUNG (RESPONDENT).*

† S.C. 1949

June 20.

Code of Civil Procedure, ss. 24 and 122—Order 7, Rule 10—Rule 21 of the Original Side Rules of Procedure (Civil).

Held : The High Court has framed rules under s. 122 of the Code of Civil Procedure for regulating the procedure on the Original Side of the Court. These rules have preference over the rules of the Code of Civil Procedure in the Original Side of the High Court. Rule 21 of the Original Side Rules of Procedure (Civil) supersedes Order 7, Rule 10 of the Code of Civil Procedure.

That where a suit is instituted rightly in a Court and the Court subsequently loses jurisdiction owing to the passing of a new Act, and certain preliminary steps such as appointment of receiver have been taken, instead of returning the plaint, the Court should transfer the suit. The effect of the return of the plaint is to wipe out everything that has been done in the Court in which the suit is instituted ; but in case of transfer, the Transferee Court will proceed from the stage at which the transfer is made.

Leong for the appellants.

Dawoodji for the respondent.

The judgment of the Court was delivered by the Chief Justice of the Union.

SIR BA U.—What is involved in this case is only a question of procedure and the question is that, if part of the pecuniary jurisdiction of a Court is taken away during the pendency of a suit because of which the Court cannot continue to try the suit to its conclusion, what procedure should be adopted to enable the suit to be tried by a Court of competent jurisdiction ? The question arises in these circumstances. Before the second World War there were two Civil Courts in Rangoon to try civil suits—the

* Civil Appeal No. 7 of 1948.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U TUN BYU, J.

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High Court and the Small Cause Court. The Small Cause Court tried suits of a small cause nature up to the value of Rs. 2,000, while the High Court tried all other classes of suits.

The present suit is a suit for dissolution of partnership taking of accounts and payment of the plaintiff's share. The suit was valued at Rs. 1,000 for the purpose of jurisdiction. Not being of a small cause nature it was instituted in the High Court in January 1941. A few days later, the defendant, now the respondent, was by consent appointed Receiver *pendente lite* on his furnishing security in the sum of Rs. 8,000. A few months later differences arose over the management of the business by the defendant and the Court laid down certain terms on which the defendant was to manage the business. The second World War then broke out and the Civil Government evacuated to Simla in India and the High Court also ceased to function.

While in India the Governor, in exercise of the power conferred on him by the Government of Burma Act, 1935, enacted the Rangoon Small Cause Court (Amendment) Act, 1945, whereby the name of the Rangoon Small Cause Court was changed to that of the Rangoon City Civil Court and the said Court was empowered to try suits of a civil nature up to the value of Rs. 5,000. A few months after the passing of the Act hostilities with Japan terminated and the Civil Government returned to Burma. The High Court also started to function. The record of the present case along with those of several others was found to have been either lost or destroyed. By consent the record of the case was ordered to be reconstructed. When reconstruction was complete the case was placed before the 2nd Deputy Registrar of the High Court for directions. By that time the pecuniary

jurisdiction of the Rangoon City Civil Court was raised to Rs. 10,000.

Following the decision in Civil Regular Suit No. 30 of 1947 of the High Court, the Deputy Registrar returned the plaint for presentation to the Rangoon City Civil Court. This decision was later confirmed by a Judge sitting on the Original Side of the High Court.

In Civil Regular Suit No. 30 of 1947 the learned Chief Justice of the High Court observed :

"The learned Advocates who contend that this Court has jurisdiction to dispose of them (suits) have submitted that there is no provision of law under which this Court can transfer them to the Rangoon City Civil Court. However, there is a way out as the plaints therein can be returned under Order 7, Rule 10 of the Code of Civil Procedure."

The learned Chief Justice then held that the plaint should be returned under Order 7, Rule 10 of the Code of Civil Procedure. In so holding the learned Chief Justice apparently overlooked Rule 21 of the Original Side Rules of Procedure (Civil). These rules were passed by the High Court in exercise of the power conferred by section 122 of the Code of Civil Procedure. These rules should be followed and not those as are prescribed in the First Schedule of the Code of Civil Procedure. Only when there is no rule framed by the High Court, then the appropriate rule in the First Schedule of the Code of Civil Procedure should be followed. But for the purpose of this case it does not make much difference whether Rule 21 of the Original Side Rules of Procedure or Order 7, Rule 10 of the Code of Civil Procedure is prayed in aid as they do not in effect differ from each other.

The question is therefore whether in cases such as the present one, where such preliminary steps as the

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appointment of Receiver and the rendering of accounts by the Receiver have been taken, the procedure as prescribed by Rule 21 of the Original Side Rules is the appropriate procedure to be adopted. If the procedure as prescribed by Rule 21 were adopted as in this case, the result would be, so to speak, the wiping out of what has been done off the slate. Further, in some cases it is imaginable that the question of limitation may arise in spite of what section 14 of the Limitation Act may say. That would mean causing not only inconvenience and extra expense to the parties but also it would mean delay in the trial of the suit and in some cases defeating the ends of justice. Procedure is prescribed to enable the Court of Justice to dispense justice in a quick and efficient manner. Therefore if there are two modes of procedure available to deal with a certain matter, that procedure that would cause less inconvenience and expense and that would promote the speedy termination of the litigation and serve the ends of justice should be adopted. Here in the present case the matter under discussion can be disposed of under section 24 of the Code of Civil Procedure. Section 24 says *inter alia* :

> " On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—
>
> (*a*) transfer any suit, appeal or other proceeding *pending* before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, ... "

When then is a suit said to be pending before a Court ? If a suit were filed in a Court which had no jurisdiction to entertain and try it from the beginning, then it could not be said to be pending before that

Court ; but if the suit were filed in a Court which had jurisdiction to entertain and try it but only later, by operation of law, it ceases to have jurisdiction to try it, then the suit must be said to be pending before that Court. The reason why it must be said to be pending before that Court is that it had seizin of the suit up to the stage when it ceases to have jurisdiction to try it. When that stage is reached the only thing to do is to get rid of the suit so that the trial of the suit can be continued by a Court of competent jurisdiction. Two methods are available to do this : one is to return the plaint as has been done in this case and the other is to transfer it by the High Court or the District Court to the Court of competent jurisdiction.

In such circumstances as are obtaining in the present case the appropriate procedure which, in our opinion, should be adopted is the procedure prescribed by section 24 of the Code of Civil Procedure. If the procedure were to be followed as has been followed in this case, complications and unnecessary consequences, as pointed out above, would ensue. If the suit were instituted in a Court which never had jurisdiction to entertain and try it from the beginning, section 24 would of course not apply. In such a case the only procedure to follow is to return the plaint.

For all these reasons we are of opinion that in the present case the appropriate procedure to adopt is to transfer the suit under section 24 of the Code of Civil Procedure to the Rangoon City Civil Court instead of returning the plaint. We accordingly set aside the order of the High Court and direct that the suit be transferred.

SUPREME COURT.

† S.C. 1949

June 22.

G. NANDIA (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Code of Criminal Procedure, s. 421—Appeal presented to the High Court through Superintendent of Jail—Another appeal presented through Advocate—Appeal dismissed summarily without hearing the Advocate for the appellant.

Held: That where an appeal has been preferred by a convicted person from Jail and also an appeal has been presented on his behalf by an advocate of the Court then under the proviso to s. 421 of the Code of Criminal Procedure the Judge must give a hearing to the Appellant's Advocate before he dismisses the appeal, and as this has not been done the order should be set aside.

V. S. Venkatram for the appellant.

Ba Sein (Government Advocate) for the respondent.

The judgment of the Court was delivered by the Chief Justice of the Union

SIR BA U.—The appellant in this case was convicted under section 454 of the Penal Code and sentenced on the 18th December 1948 by the Eastern Subdivisional Magistrate, Rangoon, to suffer one year's rigorous imprisonment. On the 3rd January 1949 the appellant presented an appeal to the High Court through the Superintendent of the Rangoon Jail where he was confined. On the 6th January the appellant again presented another appeal through an advocate of the High Court. Both the memoranda of appeal were filed together in the same file and submitted to a Judge in Chambers for orders as to admission. The learned Judge dismissed the appeal summarily in purported exercise of the power under section 421 of the Code of

* Criminal Appeal No. 2 of 1949.

† *Present:* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U TUN BYU, J.

Criminal Procedure. In so doing the learned Judge apparently overlooked the fact that the appeal presented through the Superintendent of Jail was filed together with the appeal presented by an advocate of the High Court, and both were treated as one appeal. That being so, under the proviso to section 421 of the Code of Criminal Procedure the learned Judge must give a hearing to the advocate of the appellant before he passed orders. The matter might have been different if the appeal filed by the appellant through the Superintendent of Jail had been submitted to the Judge in Chambers and the Judge had passed orders on it and only subsequently the appellant had presented another appeal through a lawyer.

The learned Government Advocate who appears on behalf of the State submits that he is unable to support the procedure adopted by the learned Judge of the High Court.

Such being the position, the appeal must be allowed. It is accordingly allowed and we set aside the order of the High Court and remit the case to the High Court for disposal according to law.

SUPREME COURT.

† S.C. 1949

July 4.

PEERBHAI VEERJEE (APPELLANT)

v.

DR. A. K. BHATTACHARJEE (RESPONDENT).*

Institution of Summary Suit under Order 37 of the Code of Civil Procedure in the High Court in 1947—Written statement filed—Subsequent amendment of the Rangoon City Civil Court Act by Burma Act LXXVII of 1947—Jurisdiction raised to Rs. 10,000—Plaint returned from the High Court under Order 7, Rule 10 of the Code.

Held : That where a suit was filed in a Court which had jurisdiction to entertain and try it at the time of institution but which subsequently owing to the passing of a new Act, ceases to have jurisdiction so to do, the appropriate procedure to adopt is to transfer the suit under s. 24, Code of Civil Procedure, to the Court having jurisdiction.

Syed Ally and one v. *Cassim Mohamed*, (1949) B.L.R. 1949 S.C. 125, followed.

A suit for the recovery of Rs. 7,840 was filed in the High Court under Order 37 of the Code of Civil Procedure. Thereafter owing to the passing of two Acts the jurisdiction of the High Court to try such suit was taken away and the plaint was ordered to be returned by the High Court for presentation to the Rangoon City Civil Court and the plaint was represented to the Rangoon City Civil Court without any objection or complaint from the defendant. Thereafter under s. 15 of the Rangoon City Civil Court Act, an application was presented by the defendant for removal of the case to the High Court and was dismissed. It was contended in the Supreme Court that the Rangoon City Civil Court had no power to try such summary suits.

Held : That under s. 13 the Rangoon City Civil Court has jurisdiction to try all suits, of civil nature, when the amount of the subject-matter does not exceed rupees ten thousand. The Rangoon City Civil Court has jurisdiction to try the suit.

In suits on Negotiable Instruments where the value of the subject-matter does not exceed Rs. 1,000 summary procedure as laid down in Part II of the Rangoon City Civil Court Rules is available to the plaintiff. In suits where the subject-matter exceeds that amount such procedure is not available and the plaintiff has no option but to follow the procedure for suits instituted in the ordinary manner, and Rule 88 will apply to such suits.

Under s. 15 of the Code of Civil Procedure, a suit must be instituted in the Court of lowest jurisdiction. Rules of Procedure laid down in Order 37 of the Code of Civil Procedure are applicable only to suits which can be filed in the High Court and can only be applied after the plaint has been admitted.

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* Civil Appeal No. 1 of 1949.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U TUN BYU, J.

Order 37 of the Code does not in any way alter the nature of the suit nor the jurisdiction of the Court.

Doulatram Valabdas and another v. *Halo Kanya and another*, 13 I.C. 244 ; *Wor Lee Lone & Co.* v. *A. Rahman*, 9 L.B.R. 69, followed.

C. H. Campagnac for the appellant.

R. Basu for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE KYAW MYINT.—This appeal is by special leave preferred against the order dated the 9th November 1948 passed in the Original Side of the High Court in Civil Miscellaneous case No. 334 of 1948. The circumstances preceding the passing of that order are as follows :—

The respondent in this appeal instituted Civil Regular Suit No. 285 of 1947 in the High Court of Rangoon, under the summary procedure provided by Order 37 of the Code of Civil Procedure, against the appellant for the recovery of Rs. 7,840 alleged to be due on a promissory-note. The appellant applied for, and obtained, leave to defend the suit and filed a written statement. At the time of the institution of the above suit, the pecuniary jurisdiction of the Rangoon City Civil Court was limited to Rs. 5,000. By the Rangoon City Civil Court (Second Amendment) Act (Burma Act LXXXVII of 1947) the jurisdiction of the said Court was extended to Rs. 10,000 and, as a consequence of this extension, the plaint in the respondent's suit in the High Court was returned to the respondent to be presented in the Rangoon City Civil Court. The order of the High Court ordering the return of the said plaint is not before us but we understand that the High Court purported to act under Order 7, Rule 10 of the Code of Civil Procedure.

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We have also been informed by the learned counsel for the appellant that the said order was passed without notice to the appellant.

In *Syed Ally and one* v. *Cassim Mohamed Surety* (1) this Court has held that, where a suit was filed in a Court which had jurisdiction to entertain and try it but which subsequently, by operation of law, ceases to have jurisdiction so to do, the appropriate procedure to adopt is to transfer the suit under section 24 of the Code of Civil Procedure to the Court having jurisdiction.

The appellant, upon learning that an order returning the plaint to the respondent had been passed, took no steps to have it set aside. Instead, after the suit had been instituted afresh in the Rangoon City Civil Court as Civil Regular 742 of 1948, he applied to the High Court under section 15 of the Rangoon City Civil Court Act to remove the said suit from the Rangoon City Civil Court to the High Court on the ground that the Rangoon City Civil Court had no jurisdiction to entertain a suit instituted under Order 37 of the Civil Procedure Code. The application was dismissed.

In the memorandum of appeal before us also it is contended that the Rangoon City Civil Court has no jurisdiction to try a suit instituted under Order 37 of the Code of Civil Procedure. This contention was however modified at the hearing of the appeal, when the learned counsel for the appellant stated that the said Court has no jurisdiction to try a suit instituted under Order 37 of the Code of Civil Procedure where the value of the subject-matter exceeds Rs. 1,000.

The statement made by the learned counsel is not strictly accurate. The pecuniary jurisdiction of the Rangoon City Civil Court is fixed by section 13 of the

(1) (1949) B.L.R., S.C. 125.

Rangoon City Civil Court Act, which is in the following terms :

" 13. Subject to the provisions contained in section 14 and to the provisions of the Code of Civil Procedure, the Court shall have jurisdiction to try all suits of a civil nature when the amount or value of the subject-matter does not exceed rupees ten thousand."

Jurisdiction of the Court.

(Section 14 deals with the Court's jurisdiction as a Court of Small Causes.)

Provision is made for the trial of suits in accordance with summary procedure in Part II of the Rangoon City Civil Court Rules, the first relevant rule being in the following terms :

" PART II

SUMMARY PROCEDURE IN CERTAIN CASES.

82. This Part shall apply to suits on negotiable instruments when the value of the subject-matter does not exceed rupees one thousand."

This rule is followed by several other rules laying down the summary procedure to be followed, which is analogous to the summary procedure laid down in Order 37 of the Code of Civil Procedure. The last rule in Part II is in the following terms :

" 88. Save as provided by this Part the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner."

Upon a consideration of the relevant section of the Rangoon City Civil Court Act and the relevant rules of the Rangoon City Civil Court Rules, we arrive at the following conclusion. The pecuniary jurisdiction of the said Court is limited to Rs. 10,000. In suits on negotiable instruments where the value of the subject-

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matter does not exceed Rs. 1,000, summary procedure as laid down in Part II of the Rangoon City Civil Court Rules is available to the plaintiff. In suits where the value of the subject-matter exceeds that amount, such procedure is not available and the plaintiff has no option but to follow the procedure for suits instituted in the ordinary manner.

There is no lack of authority on the point although none has been cited before us. (In fairness however we must state here that the learned advocate for the respondent was not called upon). In *Doulatram Valabdas and another* v. *Halo Kanya and another* (1) the plaintiff presented a plaint in the Court of the Assistant Judicial Commissioner of Sind in a suit for the recovery of Rs. 77 due on a promissory-note, claiming that it was a suit under Order 37 of the Code of Civil Procedure and therefore triable only in the said Court. The Court of Small Causes at Karachi had jurisdiction to try all suits on negotiable instruments when the subject-matter of the suit did not exceed Rs. 1,000, but there was no provision for the trial of suits under the summary procedure in that Court. It was held that the suit should have been filed in the Court of Small Causes and the plaint was returned.

The above decision was followed in *Wor Lee Lone & Co.* v. *A. Rahman* (2) where the plaintiff had presented a plaint in the Original Side of the then Chief Court of Lower Burma in which he claimed Rs. 824 on a promissory-note and stated that he desired to proceed under Order 37 of the Civil Procedure Code. The plaint was returned for presentation to the Court of Small Causes. Upon appeal a Bench of the said Chief Court held that the plaint had been rightly

(1) 13 I.C. 244. (2) 9 L.B.R. 69.

returned and made the following observations in the judgment :

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"Section 15 of the Code (of Civil Procedure) says, 'every suit shall be instituted in the Court of the lowest grade competent to try it,' and section 16 of the Provincial Small Cause Court Act says, 'a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes.'

The suit was one on a promissory-note for Rs. 824 and was cognizable by the Court of Small Causes and that Court was competent to try the suit. Order 37 lays down certain rules of procedure which are applicable only to the Chief Court, and such rules of procedure can only be applied after the plaint has been admitted. The rules do not in any way alter the nature of the suit, nor the jurisdiction of the Court."

Reverting to the appeal before us, we are informed by the learned counsel for the appellant that, after the institution of the suit in the Rangoon City Civil Court, the plaint was amended and that the amendment was allowed without notice to the appellant. This matter is however irrelevant for the purposes of this appeal.

In any event, what is now before the Rangoon City Civil Court is a suit for Rs. 7,840 alleged to be due on a promissory-note in which the procedure will be the ordinary procedure as distinct from the summary procedure provided under Part II of the Rangoon City Civil Court Rules. It is clear that the appellant has no grievance whatsoever and that the order of the learned Judge of the High Court dismissing the application made under section 15 of the Rangoon City Civil Court Act was correct.

For the reasons given above we dismiss the appeal with costs. Advocate's fee five gold mohurs.

SUPREME COURT.

†S.C. 1949

July 11.

U KHIN AND SEVEN OTHERS (APPLICANTS)

v.

THE DEPUTY COMMISSIONER, MYAUNGMYA AND TWO OTHERS (RESPONDENTS).*

Burma Agriculturists' Debt Relief Act (Burma Act LXXII of 1947), ss. 3, 4 and 31—Rules 3 and 4 made under s. 31 of the Act authorizing Deputy Commissioner and Subdivisional Officers to act till the Debt Settlement Board is constituted—Rules whether ultra vires.

The point for decision was whether in view of the fact that the Burma Agriculturists' Debt Relief Act nowhere provides that any officer can perform the duties of the Debt Settlement Board, Rules 3 and 4 made under s. 31 of the Act authorizing the Deputy Commissioner and Subdivisional Officers to perform the duties of the Board till the Debt Settlement Board is established are *ultra vires*.

Held : Rules which have been made under an Act for the purpose of achieving the objects of the Act will be *intra vires* so long as they are not inconsistent with any of the provisions of the Act.

Ex-parte Davis, L.R. (1872) 7 Chan. App. 526 at 529, followed.

S. 31 of the Burma Agriculturists' Debt Relief Act gives the President power "to make rules to carry out all or any of the purposes of the Act and not inconsistent therewith."

The Burma Agriculturists' Debt Relief Act was passed with the object of giving immediate relief to the agriculturists-debtors. The object of the Act may be partially defeated if there is delay in the constitution of the Board or reconstitution in case the Board is dissolved. Therefore in order to give effect to the main purpose of the Act the Rules 3 and 4 were made authorizing the Deputy Commissioner and the Subdivisional Officers to perform the functions of the Board till the Debt Settlement Board is constituted; and they are not inconsistent with any of the provisions of the Act and in view of the wide terms of s. 31 those rules are not *ultra vires*.

Dr. Thein for the applicant.

Ba Sein (Government Advocate) for the respondent No. 1.

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* Civil Misc. Application No. 7 of 1949.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U TUN BYU, J.

S.C. 1949

U KHIN AND SEVEN OTHERS v. THE DEPUTY COMMISSIONER, MYAUNGMYA AND TWO OTHERS.

The judgment of the Court was delivered by

U TUN BYU, J.—It appears that the applicants, U Khin and seven others, instituted a suit, which was known as Civil Regular No. 18 of 1947 of the Court of the 2nd Assistant Judge, Wakèma, against Ko Ba Maung and Ma E May, who are husband and wife, for the recovery of a sum of Rs. 2,130-2-0, which was said to be the amounts due on three promissory notes. After the suit was instituted the 2nd Assistant Judge, Wakèma, received an intimation which was signed by the *Akunwun* U Tha Hla Gyaw who purported to have signed it on behalf of the Deputy Commissioner, Myaungmya, intimating that Ko Ba Maung and Ma E May had filed an application under section 4 of the Burma Agriculturists' Debt Relief Act, 1947; and the 2nd Assistant Judge thereafter passed an order of stay, *sine die*, in the Civil Regular Suit No. 18 of 1947 in view of the provisions of section 26 of the Burma Agriculturists' Debt Relief Act, 1947.

The application of Ko Ba Maung and Ma E May before the Deputy Commissioner, Myaungmya, was apparently made in pursuance of Rules 3 and 4 of the Agriculturists' Debt Relief Rules, 1948, which read :

"3. (1) Pending the constitution of the Debt Settlement Boards in pursuance of sub-section (*1*) of section 3 of the Act a debtor may make an application for compulsory scaling down of his debt in accordance with the provisions of sections 4, 5, 6 and 7 of the Act to the Deputy Commissioner, the Subdivisional Officer or the Township Officer within whose jurisdiction he resides :

Provided that in the case of a debtor against whom a decree has been passed, such application shall be made to the Deputy Commissioner, the Subdivisional Officer or the Township Officer of the place where the Court which passed the decree in the first instance is situate.

(2) The applications so made shall be made over to the appropriate Board when constituted.

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4. For the purposes of section 26 of the Act, the applications made under Rule 3 (1) of these Rules shall be deemed to be applications made to a Board."

It has been contended on behalf of the applicants U Khin and others that Rules 3 and 4 are *ultra vires* of the Burma Agriculturists' Debt Relief Act, 1947. It will be convenient to reproduce here the provisions of section 31 (*1*) of the Agriculturists' Debt Relief Act, 1947, which are as follows :

" 31. (*1*) The President may make rules to carry out all or any purposes of this Act and not inconsistent therewith."

It will be observed that sub-section (*1*) of section 31 gives a wide rule making power for the purpose of achieving the objects of the Act ; and rules which have been made for the purpose of achieving the objects of that Act will be *intra vires* so long as they are not inconsistent with any of the provisions of the Act.

In the case of *ex-parte Davis* (1) James L.J. observed :

"The Act of Parliament is plain, the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the plain terms of the Act."

It will be necessary to examine the provisions of the Burma Agriculturists' Debt Relief Act, 1947, in order to ascertain whether Rules 3 and 4 of the Agriculturists' Debt Relief Rules, 1948, are *ultra vires* or *intra vires* of the Burma Agriculturists' Debt Relief Act, 1947. The question then becomes whether the rule making power given under section 31 has, in framing Rules 3 and 4, been exceeded.

A perusal of the Burma Agriculturists' Debt Relief Act, 1947, shows that the object of the Act is to extend certain reliefs and afford certain facilities to the

(1) (1872) L.R 7, Chan. App. 526 at 529.

agriculturists-debtors in respect of the repayments of the loans which they owe—*vide* sections 13 and 14 and other sections of the Burma Agriculturists' Debt Relief Act, 1947. It is obvious that the agriculturists-debtors cannot obtain the reliefs and facilities, which were intended for them under the Burma Agriculturists' Debt Relief Act, 1947, unless the Debt Settlement Boards are constituted in the various districts of Burma in which the Act is in force. It is not difficult to conceive that there might be, for one reason or another, considerable delay before the Debt Settlement Boards can be constituted under section 3 ; and delay in constituting such Boards are likely to deprive some of the agriculturists-debtors of their right to claim the reliefs given to them under the Act. It will be necessary, if some of the agriculturists-debtors are not to be deprived of the reliefs which they are entitled to under the Burma Agriculturists' Debt Relief Act, 1947, to make provisions by means of rules under which applications under the Burma Agriculturists' Debt Relief Act, 1947, might be filed before the Debt Settlement Boards had been constituted. If this is not done, the creditors could take advantage of the delay in constituting the Debt Settlement Boards and have their cases decided before the Boards are constituted. It is also possible that it might be necessary to dissolve some of the Debt Settlement Boards which had already been constituted, and in which case it will be necessary to also make provisions by means of rules under which the applications under the Burma Agriculturists' Debt Relief Act, 1947, might be presented before the new Debt Settlement Boards are constituted if we are to prevent the creditors from taking advantage of the delay which might occur in the interval. Rules 3 and 4 must accordingly be considered to be rules which are consistent with the

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provisions of the Burma Agriculturists' Debt Relief Act, 1947, in that they purport to help in giving effect to the purposes of the Act. We are unable to see anything in the Burma Agriculturists' Debt Relief Act, 1947, which will indicate that Rules 3 and 4 of the Agriculturists' Debt Relief Rules, 1948, are inconsistent with any of the provisions of the Burma Agriculturists' Debt Relief Act, 1947. Rules 3 and 4 must therefore be considered to have been properly made within the ambit of the rule making power given in section 31 of the Burma Agriculturists' Debt Relief Act, 1947.

It does not appear to us that there is any substance in the contention that rules of the nature of Rules 3 and 4 of the Agriculturists' Debt Relief Rules, 1948, could not properly be made unless and until the Debt Settlement Board has been established. It is clear that section 3 does not provide for the separate establishment of a Debt Settlement Board before the personnel of the Board are appointed ; and we do not see anything in the Act which will indicate that no rules of the nature of Rules 3 and 4 could be framed before the Debt Settlement Board is established.

The application is therefore dismissed. Advocate's fee five gold mohurs in respect of Respondent No. 1 who was represented by Counsel during the hearing of this application.

SUPREME COURT.

MRS. D. M. SINGER (APPLICANT)

v.

THE CONTROLLER OF RENTS AND THREE OTHERS (RESPONDENTS).*

†S.C. 1949

July 12.

Urban Rent Control Act, s. 2 (g), *s. 11 and s. 16* (a)—*Meaning of the word "tenant"—The Urban Rent Control Act whether retrospective so as to affect substantive rights—When Supreme Court will interfere by writ of certiorari.*

Held: That the following classes of persons are termed tenants within the meaning of the Act :

(*a*) A person who takes a lease of any premises and occupies them himself ;

(*b*) A person who is permitted under s. 12 of the Urban Rent Control Act to occupy ;

(*c*) A legal representative of either of the above two ;

(*d*) A sub-tenant ; and

(*e*) A tenant-holding-over.

Held further: When a person has been occupying a house before the Urban Rent Control Act came into operation and claims that the house was rented for her by a third party and she has been paying the rent though in the name of another person, the Rent Controller could not reject her application for review without enquiring into the facts alleged by her.

That the Rent Controller under the Urban Rent Control Act exercises functions of quasi-judicial nature and was therefore amenable within the jurisdiction of the Supreme Court. As the Rent Controller failed to exercise the jurisdiction in making the enquiry the Supreme Court will issue certiorari to quash the proceedings.

Tai Chuan & Co. v. *Chan Seng Cheong*, B.L.R. (1949) (S.C.) 86 ; *U Htwe* (*a*) *A. E. Madari* v. *U Tun Ohn and one*, (1948) B.L.R. (S.C.) p. 541 followed.

C. C. Khoo for the applicant.

Ba Sein (Government Advocate) for the respondents.

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* Civil Misc. Application No. 24 of 1949.

† *Present:* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U TUN BYU, J.

S.C. 1949

MRS. D. M. SINGER v. THE CONTROLLER OF RENTS AND THREE OTHERS.

The judgment of the Court was delivered by the Chief Justice of the Union

SIR BA U.—Two questions arise on this application, namely, whether the applicant, Mrs. D. M. Singer, is a tenant within the meaning of the Urban Rent Control Act and, if she is, whether the Controller of Rents has jurisdiction to evict her from the flat which she now occupies.

Mrs. D. M. Singer occupies a flat known as No. 59, 49th Street, Rangoon. The lease of the flat was taken in the name of one Mr. R. A. Phillips from the owners, R. E. Shansuddin and M. S. Abdur Rahman. On the 3rd January 1949 Phillips sent a note to the owners, saying that he had vacated the flat with effect from the 1st January 1949. He also sent intimation to that effect to the Controller of Rents and the said officer sent a notice on the 2nd February to the house owners, calling upon them to submit particulars as required by section 16AA, Urban Rent Control Act. On the same day the owners submitted particulars, as directed, and said that Mrs. D. M. Singer resided in the aforesaid flat without their consent and knowledge. On the 4th February the Controller of Rents, sitting with the members of the Advisory Board, allotted the aforesaid flat to U Ba Tu, an Advocate of the High Court On the 15th February Mrs. Singer was served with a notice to deliver possession of the flat to U Ba Tu immediately, failing which she would be summarily evicted, as provided by section 16BB of the Urban Rent Control Act. On the following day, that is on the 16th February, Mrs. Singer put in a statement which she called "written objection," saying that she obtained the lease of the flat through Messrs. The Bombay Burma Trading Corporation Limited but the rents were paid in the name of

Mr. Phillips. On this the Controller of Rents passed an order in the course of which he observed : "possibly the statement may be true but when Mr. Phillips actually vacated the premises on the 1st January 1949 she must be treated as an unauthorized occupier of the premises since 1st January 1949."

Mrs. Singer thereupon applied for a review of the said order as allowed by section 21A of the Urban Rent Control Act, 1948. In support of the application she filed an affidavit in the course of which she said :

"1. That I am the tenant of the premises known as No. 59, 49th Street, Rangoon.

2. That I have been in occupation of the said premises for over two years in the past and the rent has been paid by Mr. Phillips on my account in his name.

3. That I say that the present premises were obtained for me by the Bombay Burma Trading Corporation Limited and the arrangement of payment of rent in the name of Mr. Phillips was made by the Bombay Burma Trading Corporation Limited as Mr. Phillips was also a B.B.T.C.L. employee.

4. I say that I interviewed the Controller of Rents in the month of December 1948 when Mr. Phillips was on bad terms with me regarding the tenancy and payment of rent of the suit premises and I was advised by the Controller to continue payment of rent as usual in the name of Mr. Phillips."

The application was considered at a meeting of the Advisory Board but was rejected. Mrs. Singer was however offered a flat first in one place and then in another place in exchange for the flat No. 59, 49th Street. She was at first inclined to take one of those two flats offered to her but subsequently she changed her mind and said that as she was not an unauthorized occupier of the flat in question she would not give up possession thereof. Thereupon the Controller requested the Deputy Commissioner of Police to remove her from the flat by force, if necessary.

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In *Tia Chuan & Co.* v. *Chan Seng Cheong* (1) this Court pointed out that a tenant cannot be ejected from the premises which he occupies unless he has committed one of the mischiefs mentioned in section 11 of the Urban Rent Control Act or unless the premises are required for any of the purposes mentioned therein and even then it is not the Controller but a Court that has power to do it.

The term "tenant" as defined in the Urban Rent Control Act is a very wide and comprehensive term. The definition runs as follows : "'Tenant' means any person by whom or on whose account rent is payable for any premises, and includes a legal representative as defined in the Code of Civil Procedure and every person from time to time deriving title under a tenant and also every person remaining in possession of the premises let to him after the termination of the tenancy or lease with or without the assent of the landlord." Paraphrase this and we get the following classes of persons who are termed "tenants" within the meaning of the Act :

(*a*) Any person by whom rent is payable ;

(*b*) Any person on whose account rent is payable ;

(*c*) A legal representative, as defined in the Code of Civil Procedure, of any of the above-mentioned two classes of persons ;

(*d*) Every person who derives title from time to time from a tenant ; and

(*e*) Every person remaining in possession of the premises let to him after the termination of the tenancy or lease, with or without the assent of the landlord.

Now, what is really meant by "any person by whom rent is payable" ? Taking it literally as it stands, it may mean a person who takes a lease of any premises, whether he occupies the said premises

(1) B.L.R. (1949) (S.C.) 86.

or not, is the person who is liable to pay. If that is the sense in which the clause is to be interpreted, it means defeating the object of the Urban Rent Control Act, which is to afford relief and give protection to people who have no houses of their own to live in. Having regard therefore to the object of the Act what clause (*a*) really means is that a person who takes a lease of any premises and who occupies them is the person who is liable to pay rent and who is in consequence to be termed a "tenant."

Clause (*b*) is equally not free from ambiguity. What is meant by "any person on whose account rent is payable"? It may mean a person as explained in clause (*a*) or it may mean a person who occupies any premises, though the lease of which is not taken by him. Having regard to the object of the Act, it, in our opinion, can only mean the class of persons mentioned in section 12 of the Act, *i.e.* a person permitted to occupy under that section.

Clause (*c*) is simple enough to understand, as it stands. It may give rise to difficulties only when the question as to who is a legal representative, as defined in the Code of Civil Procedure, arises. But for the purpose of this case it is not necessary to consider the question.

Clauses (*d*) and (*e*) are simple and free from ambiguity. Clause (*d*) deals with the case of persons who take sub-leases from persons described in clause (*a*) and clause (*e*) deals with the case of persons described in clause (*a*) who continue to stay on after the expiration of the lease.

Now we know who is a "tenant" within the meaning of the Urban Rent Control Act. A tenant means and includes—

(*a*) a person who takes a lease of any premises and occupies them himself ;

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(*b*) a person who is permitted under section 12 of the Urban Rent Control Act to occupy ;
(*c*) a legal representative of either of the above two ;
(*d*) a sub-tenant, and
(*e*) a tenant-holding-over.

Is Mrs. Singer a tenant within the meaning of the terms as explained above ? If the flat in question was taken by the Bombay Burma Trading Corporation Limited for her in the name of Phillips and the rent was first paid by the Corporation on her behalf and later by herself as alleged by her, both in her affidavit in support of the review application and in the application filed in this Court, Mrs. Singer is undoubtedly a sub-tenant. Even if she is a sub-tenant but if she took the sub-lease of the flat after the enactment of the present Urban Rent Control Act without the permission of the Controller of Rents as required by section 16A of the Act she would undoubtedly be an unauthorized occupier. She would thereby bring herself within the ambit of section 16AA, sub-section (*4*) (*d*). So far the law is quite clear but some questions may arise under section 16AA and they are these :

(1) Whether a landlord can terminate a tenancy in view of section 11 of the Urban Rent Control Act ; and

(2) If the landlord does terminate a tenancy and gives information thereafter to the Controller of Rents who, in consequence thereof and acting on the advice of the Advisory Board directs the landlord to let the premises to a person mentioned in the direction and the landlord lets the premises to the said person but the former tenant, who may be termed "a tenant-holding-over" refuses to give up possession, whether

the said tenant-holding-over brings himself within the ambit of section 16AA, sub-section (*4*) (*d*), of the Act.

These questions do not however arise for the purposes of this case if Mrs. Singer's allegation that she occupied the flat about two years ago is correct. The right to occupy is a substantive right and Mrs. Singer's right to occupy accrued, as alleged by her, long before the enactment of the present Urban Rent Control Act. It is a well settled principle of law that an Act never operates retrospectively to affect a substantive right unless the Act expressly says so. But the present Urban Rent Control Act does not do so.

In the case of *U Htwe* (a) *A. E. Madari* v. *U Tun Ohn and one* (1) this Court observed :

"Under section 133 of the Constitution justice throughout the Union shall be administered in Courts established by the Constitution or by law and by Judges appointed in accordance therewith. The proviso to this is section 150 of the Constitution. Under section 150, any person or a body of persons, though not a Judge or a Court in the strict sense of the term, can be invested with power to exercise limited functions of a judicial nature. When so invested, that person or body of persons, when determining questions affecting the rights of the citizens of the Union, must do so as provided by section 16, according to law. If it did not, it would at once render itself amenable to the jurisdiction of this Court, as provided in section 25."

Having regard to the provisions of sections 19A, 20 and 21 of the Urban Rent Control Act, there is no doubt that the functions which the Controller has to discharge under the Act are of a quasi-judicial nature. Therefore it was clearly his duty to hold an enquiry as to how and under what circumstances Mrs. Singer came to occupy the flat in question. It was the more incumbent on the Controller to do so when Mrs. Singer urged in her affidavit filed in support of her application

(1) (1948) B. L.R.

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for review that the flat was taken by the Bombay Burma Trading Corporation Limited for her though in the name of Phillips and the rent was first paid on her account by the Corporation and subsequently by herself.

In passing an order of eviction without holding an enquiry as required by the Act, the Controller has undoubtedly exceeded his jurisdiction and consequently he is amenable to the jurisdiction of this Court.

For all these reasons we set aside the order of eviction passed by the Controller of Rents and quash the proceedings. The Controller can, if he thinks fit, open fresh proceedings and hold an enquiry in the manner laid down in the Urban Rent Control Act.

In the circumstances of the case we make no order as to costs.

SUPREME COURT.

GWAN KEE (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

†S.C. 1949

July 20.

Sea Customs (Amendment) Act, 1949, s. 2 (b)—*Order of the President—Authentication under s. 121 of the Constitution.*

The Collector of Customs seized certain rice on the ground that it was being smuggled out of Burma and imposed a penalty on the owner of the rice and ordered confiscation of the rice. On appeal, the order of the Collector was set aside by the Financial Commissioner. In the meantime the Collector had sold the confiscated rice. After the decision of the appeal the Collector offered to return the price obtained by the sale. The owner of the rice claimed a larger sum and filed a suit in the High Court ; after the institution of the suit some Preventive Officers filed an application to His Excellency the President of the Union of Burma to revise the order of the Financial Commissioner. The President, in the purported exercise of the power conferred by s. 191 of the Sea Customs Act set aside the order of the Financial Commissioner and restored that of the Collector. Thereafter the Sea Customs (Amendment) Act, 1949, was passed. It provides that the Act shall be deemed to have come into force on the 4th day of January 1948, and s. 2 (*b*) of the amended Act provides that the President of the Union may at any time call for the records of any case disposed of by any Officer of Customs or the Chief Customs Authority and he may make such order as he thinks fit.

Held : That in view of the Sea Customs (Amendment) Act, 1949, provisions ss. 1 and 2 (*b*) the President had jurisdiction to pass the order he did even though his act might not have come under s. 191 of the Sea Customs Act.

Held further: That authentication order issued by the President under s. 121 of the Constitution provides that orders and instruments made and executed in the name of the President shall be signed by the Secretary, Additional Secretary, the Deputy Secretary or Under Secretary or the Assistant Secretary to the Government of the Union of Burma in the Ministry concerned and therefore when the Secretary signs the order concerned as "BY ORDER" the order has been properly passed.

Dr. Thein for the applicant.

Chan Hloon (Attorney-General for the Union of Burma) for the respondent.

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* Civil Misc. Application No. 3 of 1949.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U TUN BYU, J.

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The judgment of the Court was delivered by the Chief Justice of the Union.

SIR BA U.—The facts essential for the purpose of this case are, briefly stated, these. Acting on information received that 3,000 bags of rice would be smuggled out of Burma a party of five Preventive Officers of the Customs Department headed by Mr. Todd, Preventive Inspector, went down the Rangoon river on the 17th November 1947 at about 2 p.m. in a launch and found eight large sampans loaded with 2,019 bags of rice, with six Chinese merchants and fifty Indian coolies on board, lying at anchor at the mouth of the Bassein creek. The Preventive Officers boarded the sampans and interrogated the Chinese and the coolie maistry but received no satisfactory replies. While they were there, a motor schooner appeared on the scene and anchored a little way up stream. The Preventive Officers boarded the schooner and on checking up the Port Clearance Certificate they found that the schooner had left Johore about ten days previously. They also found 100 bags of sago flour on board the schooner, which was not covered by any import licence. In these circumstances the Preventive Officers seized the rice and took it to Rangoon. The Collector of Customs then issued a notice to the owner, Gwan Kee, now applicant before this Court, calling upon him to show cause why the rice should not be confiscated and why he should not be fined. Gwan Kee offered an explanation but the Collector was not satisfied with it. He ordered the confiscation of the rice and imposed a penalty of Rs. 50,000 on the applicant. The applicant paid the fine and then lodged an appeal with the Financial Commissioner, Commerce, against the order of the Collector of Customs. The Financial

Commissioner set aside the order of the Collector and directed the refund of the fine and confiscated rice. The fine was refunded but the rice was not returned as it had in the meantime been sold by the State Agricultural Marketing Board under the instructions of the Collector. The applicant thereupon asked for the payment of the price of the rice which he valued at Rs. 1,05,071 but the Collector agreed to pay Rs. 55,705-3-0, which, the Collector said, was the price fetched by the sale of the confiscated rice. Thereupon the applicant filed a suit in the High Court claiming Rs. 1,05,071 together with interest at 1 per cent per month and other incidental charges. Soon after the institution of the suit, the five Preventive Officers who were concerned in the seizure of the applicant's rice applied to His Excellency the President to revise the order of the Financial Commissioner. His Excellency the President, in purported exercise of the power conferred by section 191 of the Sea Customs Act, set aside the order of the Financial Commissioner and restored that of the Collector. The present application was therefore filed, praying for the issue of directions in the nature of a writ of certiorari to the Government of the Union of Burma in the Ministry of Finance and Revenue to submit the proceedings resulting in the order of the President setting aside that of the Financial Commissioner and restoring that of the Collector and thereafter to quash the said proceedings.

As has been pointed out by this Court on several occasions, the writ of certiorari deals with the question of want of jurisdiction or excess of jurisdiction. If the authority whose order is impugned by means of the writ of certiorari had jurisdiction to deal with a certain matter and dealt with it, this Court would not interfere even though it might not agree with the said authority on questions either of law or fact or of both. We are

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therefore in the present case not concerned with the merits of the applicant's case. All we have to consider is whether His Excellency the President had jurisdiction to interfere with the order of the Financial Commissioner on the application of the aforesaid five Preventive Officers. This question might prove to be a somewhat difficult question to solve if section 191 of the Sea Customs Act had not been amended by the Sea Customs (Amendment) Act, 1949. Section 1 of the amending Act says :

" 1. This Act shall be deemed to have come into force on the fourth day of January 1948."

As the Act must be deemed to have come into force on the fourth day of January 1948, the procedure taken in the course of the proceedings now under discussion must be deemed to be the procedure taken under the said amending Act.

Section 2 (*b*) of the amending Act says :

" (*b*) the President of the Union may, at any time and on application or otherwise, call for the record of any case disposed of by any officer of Customs or the Chief Customs Authority for the purpose of satisfying himself as to the correctness, legality or propriety of any decision or order made and may make such order as he thinks fit."

Under this section the President had jurisdiction to call for the record of proceedings from the Financial Commissioner on his own motion or on the motion of the aforesaid five Preventive Officers, even though they might not be 'aggrieved persons," as submitted by the learned Counsel for the applicant, and set aside the order of the Financial Commissioner.

The learned Counsel for the applicant, however, submits that even though the procedure adopted in the proceedings now under discussion must be deemed in law to have been taken under the amending Act,

the order purporting to be the order of the President was in fact not passed by the President but by some one in the Finance and Revenue Department, presumably by one of the Secretaries in that Department. In support thereof the learned Counsel refers to certain orders signed by one of the Secretaries. What evidently has been overlooked is the authentication order issued by the President under section 121 of the Constitution, whereby orders and other instruments made and executed in the name of the President shall be signed by either the Secretary, the Additional Secretary, the Deputy Secretary, the Under Secretary or the Assistant Secretary to the Union Government in the Ministry concerned.

The order of the President setting aside the order of the Financial Commissioner shows clearly that U Aung Myint, Secretary in the Finance and Revenue Ministry, signed it in accordance with the above authentication order for he says that he signed it " By order."

Apart from this there is the sworn statement of U Aung Myint to show that the order was passed by the President himself and that he (U Aung Myint) signed it " By order."

The next and the last point urged is that the President exceeded his jurisdiction in passing the order which he did without issuing notice to the applicant and giving him an opportunity to offer an explanation in his defence. If the amending Act is referred to, it will be seen that only in the matter of review should notice be issued to the party likely to be affected by the result but in the matter of revision under section 2 (*b*) it is not necessary to issue notice.

For all these reasons the application is dismissed with costs ten gold mohurs.

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We may say that we have read the authorities citep by the learned Counsel for the applicant. As they have no bearing whatsoever on the points in issue in this case we have refrained from discussing them in the course of this order.

SUPREME COURT.

WON SHWE BEE (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON AND ONE (RESPONDENTS).*

† S.C. 1949

Aug. 2.

Directions in the nature of habeas corpus—*Whether 2nd application is maintainable in Burma—Right of review when exerciseable.*

Held : That according to English practice if an applicant fails to get a writ of *habeas corpus* issued or if having obtained it he fails on the return to get his discharge, he can apply one after the other to the other Judges of the same Court or to the other Courts having jurisdiction to deal with it on precisely the same grounds.

The Rev. James Bell Cox v. *James Hakes and one*, L.R. 15 A.C. 506 ; *Eshubgayi Eleko* v. *Officer Administering the Government of Nigeria and another*, (1928) A.C. 459, followed.

But the Supreme Court of the Union of Burma is the only Court which has jurisdiction to deal with the issue of directions in the nature of various writs under Article 25 of the Constitution. The Court under the Union Judiciary Act and the rules framed thereunder always sit in *banco*. Therefore no 2nd application for direction in the nature of *habeas corpus* lies in Burma.

The right of review like the right of appeal is a creature of the statute and there is no statute giving a right of review in respect of the judgment of the Supreme Court.

U Htwe (*a*) *A. E. Madari* v. *U Tun Ohn and one*, (1948) B.L.R. S.C. 541, referred to.

L. Lin Su for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by the Chief Justice of the Union

SIR BA U.—This is the 2nd application made on behalf of the *detenu* Chow Ho Sou, for a writ of *habeas corpus*. Chow Ho Sou was arrested at the marine base on the 4th April 1949 when he was about to board a plane bound for Hongkong. When

* Criminal Misc. Application No. 186 of 1949.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U TUN BYU, J.

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a search was made, some letters indicating him as a link between the Communists in Burma and the Communists in China were found. Since the date of his arrest he has been kept under detention under the orders of the Commissioner of Police passed under section 5A (*1*) (*b*) of the Public Order (Preservation) Act. Three days after his arrest and detention an application for *habeas corpus* was made on his behalf. It was dismissed after a full enquiry into the causes of his detention and the legality of the detention order.

The ground put forward in support of the present application is that new facts have now been discovered and that if these facts had been available at the time of the 1st application the result of that application would have been different.

The question that, therefore, arises is whether a 2nd application lies, whether on the same facts or on new facts after the 1st application has been dismissed on merits.

In *U Htwe*'s case (1) this Court observed :

> " The writs as set out in Article 25 or the Constitution are borrowed from English Law, and they should, therefore, consistently with our Constitution, be used in the same way as they are used in English Law."

In English Law, if the applicant fails to get a writ of *habeas corpus* issued or if, having obtained it, he fails on the return to get his discharge, he can apply one after the other to the other Judges of the same Court or to other Courts having jurisdiction to deal with it on precisely the same grounds. [Cf. *The Rev. James Bell Cox* v. *James Hakes and one* (2) and *Eshugbayi Eleko* v. *Officer Administering the Government of Nigreia and another* (3)].

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(1) (1948) B.L.R. 541. (2) L.R. 15 A.C. 506.
(3) (1928) A.C. 459.

The reason why the same Judge or the same Court cannot entertain a 2nd application in respect of the same subject-matter is because the Court becomes *functus officio* after it has passed an order of judgment thereon. The same principle is to be found in the criminal law of this country.

Though in England successive applications to the Judges of the same Court or to different Courts can be made, one after the other, the same cannot be done in this country. This Court is the only Court which has jurisdiction to deal with the issue of the various writs mentioned in Article 25 of the Constitution and this Court under the Union Judiciary Act and the rules framed thereunder always sits in *banco*.

A 2nd application cannot also be treated as an application for review because the right of review, just like the right of appeal, is a creature of statute and and there is no statute giving a right of review.

The application stands dismissed.

SUPREME COURT.

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Aug. 9.

L. HOKE SEIN (APPLICANT)

v.

THE CONTROLLER OF RENTS FOR THE CITY OF RANGOON AND ONE (RESPONDENTS). *

Urban Rent Control Act, s 2 (c), (d) *and 19* (1)—*Meaning of the words "landlord" and "premises"—In case of a joint lease of the premises and other properties whether rent can be fixed by the Rent Controller—Court whether a person—Effect of appointment of a Receiver by Court—Rule for interpretation of a Statute.*

Held : That the Receiver appointed by the Court is within the definition of the word "landlord."

That the definition of the word "premises" in s. 2 (*d*) of the Act includes industrial concern like Rice Mill.

Held furher : That the proceeding taken without the leave of the Court against Receiver does not affect the jurisdiction of the Court trying the suit and leave can be obtained in the course of the suit.

K. P. Ammukutty and others v. *K.P.K.P.T. Manavikraman and others*, A.I.R. (1920) Mad. 709, followed.

When an application is made to the Rent Controller under s. 19 (*1*) of the Urban Rent Control Act he is bound to exercise his jurisdiction conferred on him by law and fix the fair rent. Whether that order supersedes the agreement to pay a consolidated rent for the premises and other properties is not for the Controller to consider.

S. 32 of the Act does not apply to property in possession of a Court of law through its Receiver. It refers to properties in possession of Government or Public bodies.

Held further : That the Court is not a juridical person.

Raj Raghubar Singh and another v. *Jai Indra Bahadur Singh*, 46 I.A. 228 at 238, followed.

The effect of the appointment of a Receiver is to bring the subject matter of litigation in *custodia legis* and the Receiver ordinarily is not the representative or agent of either party but his appointment is for the benefit of all parties.

Harihar Mukherji v. *Harendra Nath Mukherji*, I.L.R. 37 Cal. 754, followed.

The Court should not read into an Act of Parliament words which are not there, in the absence of clear necessity.

Thompson v. *Goold*, (1910) 79 L.J. (K.B.) 905 at 911, followed.

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* Civil Misc. Application No. 41 of 1949.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U TUN BYU, J.

P. K. Basu for the applicant.

Ba Sein for the 1st respondent.

Dr. Ba Han for the 2nd respondent.

The judgment of the Court was delivered by

SIR BA U, C.J.—In Civil Regular Suit No. 172 of 1947 of the High Court one Hwe Eye Hain filed a suit against the 2nd respondent, Hwe Ngwe Chew and four others for recovery of possession of C-1 Rice Mill, Dalla, and five cargo boats or in the alternative for dissolution of partnership regarding the rice mill and accounts. The petitioner was appointed Receiver by consent in that suit. One of the terms of the appointment was that, other terms being equal, the 2nd respondent, Hwe Ngwe Chew should be given the lease of the mill. In pursuance of the terms of the appointment the 2nd respondent was given the lease of the rice mill and five cargo boats for Rs. 2,000 a month. The lease was later confirmed by the learned Judge sitting on the Original Side of the High Court. Subsequent to the confirmation of the lease the 2nd respondent applied to the Controller of Rents under section 19 (*1*) of the Urban Rent Control Act to fix the rent of the rice mill only. The Controller of Rents fixed the rent of the rice mill at Rs. 1,100 a month. The present application is for issue of directions in the nature of a writ of certiorari calling for the record of the Controller of Rents resulting in the order fixing the rent of rice mill and to quash it thereafter.

In support of the application the learned Counsel for the applicant submits that the Controller of Rents had no jurisdiction to entertain the application presented by the 2nd respondent to fix the rent of the rice mill, inasmuch as section 19 (*1*) of the Urban

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Rent Control Act read with section 2 (*c*) does not apply to property in charge of a Receiver appointed by Court. Secondly, the learned Counsel submits that the rice mill, being an industrial concern, does not come within the definition of premises as given in the Urban Rent Control Act and consequently the Controller of Rents had no jurisdiction to fix the rent of the rice mill. Thirdly, the learned Counsel submits that as the rent of Rs. 2,000 was not only for the lease of the rice mill but also for the lease of five cargo boats, the Controller of Rents had no jurisdiction to split the said rent into two and fix the rent of the rice mill separately. Lastly, the learned Counsel submits that the jurisdiction of the Controller of Rents is barred by section 32 of the Urban Rent Control Act.

Dealing with the first submission, we may, leaving out what is not relevant to the point in hand, quote the definition of landlord as given in section 2 (*c*) of the Urban Rent Control Act as follows :

> "'Landlord' means any person for the time being entitled to receive rent in respect of any premises . . . as receiver for any other person who would so receive the rent or be entitled to receive the rent, if the premises were let to a tenant."

Does the word "receiver", as used in this definition, mean a Receiver appointed out of Court or does it mean a Receiver appointed by Court or does it mean a Receiver appointed either by Court or out of Court ?

The learned Counsel for the applicant contends that the "receiver" as used in the definition means a Receiver appointed not by Court but out of Court. In elaboration of his contention he makes the following submission. When a Receiver is appointed by Court of property which is the subject-matter of litigation before it the possession of the Receiver is the possession of the Court. The Receiver is, as he is commonly

called, the "hand" of the Court. Therefore when the Receiver receives rents and profits from the property of which he is the Receiver he receives them for and on behalf of the Court. The Court is not a juridical person. As the Court is not a juridical person and as the Receiver as defined in section 2 (*c*) of the Urban Rent Control Act means a "receiver for any other person", the Receiver, as defined in the aforesaid Act, must and, in fact, means a Receiver appointed out of Court and not by Court. In support thereof the learned Counsel cites the case of *Raj Raghubar Singh and another* v. *Jai Indra Bahadur Singh* (1). In that case Lord Phillimore delivering the judgment on behalf of the Board observed :

"The Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it."

We accept the principle as laid down by Lord Phillimore as a correct principle of law but, in our opinion, it does not in the least support the contention of the learned Counsel for the applicant for the purpose of this case. When the Court takes charge of property which is the subject-matter of litigation before it through one of its appointed officers, namely, a Receiver, it does so simply for the purpose of protecting and preserving the property for the party who may ultimately be entitled thereto. The same view was expressed by Mookerjee and Carnduff JJ. in the case of *Harihar Mukherji* v. *Harendra Nath Mukherji* (2) where the learned Judges observed :

"The effect of the appointment of a Receiver is to bring the subject-matter of the litigation in *custodia legis*, and the Court can effectively manage the property only through its officer, who is the Receiver. In other words, the Receiver ordinarily is not

(1) 46 I.A. 228 at 238. (2) 37 Cal. 754.

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the representative or agent of either party in the administration of the trust, but his appointment is for the benefit of all parties, and he holds the property for the benefit of those ultimately found to be the rightful owners."

It is true that the possession of the Receiver is the possession of the Court. The possession of the Court is for the benefit of those who would ultimately be found to be the rightful owners. That is, in our opinion, what is meant by the Legislature when it says "receiver for any other person who would so receive the rent and be entitled to receive the rent if the premises were let to a tenant." The rents and the profits received by the Receiver would ultimately go to the rightful owners. To say that the Receiver, as used in the Urban Rent Control Act, means a Receiver appointed not by Court but out of Court amounts to putting in words which are not to be found in the Act. "It is a strong thing to read into an Act of Parliament words which are not there and, in the absence of clear necessity, it is a wrong thing to do," *per* Lord Mersey in *Thompson* v. *Goold* (1). We are therefore clearly of opinion that the word "receiver" as used in section 2 of the Urban Rent Control Act, as amended by Act No. LIII of 1948, means a Receiver appointed either by Court or out of Court.

Dealing with the second contention we must refer to the definition of "premises" as given in the Urban Rent Control Act :

> "'premises' means—
>
> (1) any land on which a building has been erected and any building or part of a building let separately for any purpose whatever, including a stall let for the retail sale of goods in a market or any other buildings, and any land, furniture or fixture let together with such building or part of a building."

(1) (1910) 79 L.J. (K.B.) 905 at 911.

Leaving out what is not pertinent to the purpose in hand, we get the definition of premises as follows: Any land on which a building has been erected and let for any purpose whatsoever. Now, a rice mill means a piece of land with a building with machinery for rice-milling purposes therein together with out-houses thereon. This clearly comes within the definition of "premises" as given in the Act. This is made clear by section 16A which refers to "any premises other than residential premises." Premises other than residential premises are premises for business or industrial concerns. We are therefore of opinion that a rice mill is included within the term "premises" as defined in the Urban Rent Control Act.

In elaboration of the third point the learned Counsel for the applicant submits that as Rs. 2,000 was the sum agreed upon between the Receiver and the lessee, the second respondent, for the lease of the rice mill and five cargo boats and as this agreement was subsequently confirmed by the High Court, the Controller had no jurisdiction to split the agreement into two and fix the rent of the rice mill only. In so doing the Controller, according to the learned Counsel, has committed contempt of the High Court. There is no statutory law which says that when a Court takes possession of property which is the subject-matter of litigation before it, through one of its officers, *viz.* the Receiver, nobody is to interfere with its possession, either directly or indirectly, and if he did it, he would be guilty of contempt of Court. But the practice which is of very long duration and which is in consequence as sacrosanct as any statute law is that nobody shall interfere, directly or indirectly, with the possession of the Court through one of its appointed officers of the property which is the subject-matter of litigation before it and

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if he did it, he would be guilty of contempt of Court. The point now is whether a third party can get no relief even if he has a genuine claim against the property which the Court has taken possession of through its appointed officer, a Receiver. The principle on this point is settled and the principle is that if a third party has a claim against the property taken possession of by the Court through a Receiver and if he wants to prosecute his claims he must apply to the Court for leave to sue the Receiver in respect of the said property and if the Court grants leave he can prosecute his claim in an appropriate Court. If he prosecutes his claim without getting leave of the Court which has taken possession of the property through a Receiver he is liable to be dealt with for contempt, and the Court in which the claimant prosecutes his claim without leave may dismiss the claim or may stop the proceedings and ask the claimant to obtain leave of the Court which has taken possession of the property through a Receiver. Nowhere has it been laid down, as far as we know and, in fact, no authority has been brought to our notice, that a Court has no jurisdiction to entertain the claim of a person against the property taken possession of by another Court through a Receiver because the claimant has not obtained leave of that Court. There is one case decided by a Bench of the Madras High Court, though not officially reported, which, in our opinion, has laid down the law on this point correctly. The case is that of *K. P. Ammukutty and others* v. *K.P.K.P.T. Manavikraman and others* (1) where Sadasiva Aiyar and Spencer JJ. observed, quoting the head note :

" The omission to obtain the previous sanction of the Court appointing a receiver for bringing a suit against the receiver does not affect the jurisdiction of the Court trying the suit but is an

(1) A.I.R. (1920) Mad. 709.

illegality which can be effectively cured by the plaintiff obtaining the requisite sanction during the course of the litigation."

The same principle is applicable to the present case.

Section 19 (*1*) of the Urban Rent Control Act says in no uncertain terms that the Controller of Rents shall on application made to him by any landlord or tenant grant a certificate certifying the standard rent of any premises leased or rented by such landlord or tenant, as the case may be. When an application is therefore made, either by a landlord or by a tenant, the Controller has no option but to fix the rent. In fixing the rent of the rice mill in question the Controller did nothing but exercise the jurisdiction conferred on him by law. In entertaining and deciding the application presented by the 2nd respondent without directing him to obtain the leave of the High Court, it might be improper but impropriety does not mean want of jurisdiction. We are not concerned with the question as to whether the 2nd respondent in presenting the application under section 19 (*1*) of the Urban Rent Control Act has committed a contempt of Court or not. Nor are we concerned with the question as to whether which of the rents, that is the rent agreed upon between the applicant in the present case and the 2nd respondent or the rent fixed by the Controller of Rents, is payable.

There now remains only one point submitted by the learned Counsel for the applicant and the point is that section 32 of the Urban Rent Control Act bars the jurisdiction of the Controller of Rents. We do not propose to say much on this question. The section is plain in its terms. It does not, in our opinion, cover property which is in the possession of a Court of Law through its officers, a Receiver.

For all these reasons this application fails and is dismissed with costs ten gold mohurs.

SUPREME COURT.

†S.C. 1949

Aug. 10.

ARIFF EBRAHIM BHAROOCHA (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON AND ONE (RESPONDENTS).*

Action under Public Order (Preservation) Act, s. 5 (2) (ii), 4 and 5A (1) (b).

Held: That where allegation against a *detenu* is that he is a dangerous criminal and he is a smuggler of military stores and cattle thief the *detenu* cannot be kept indefinitely under detention under Public Order (Preservation) Act. Proceedings could be instituted against him under appropriate criminal statute, failing which he could be dealt with under s. 110 of the Criminal Procedure Code.

Tun Sein for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE KYAW MYINT.—On the 3rd August 1949 we ordered the release of the *detenu* Ahmed Ebrahim Bharoocha (*a*) Babulay, pending the disposal of the application for a direction in the nature of *habeas corpus*, on his furnishing security in the sum of Rs. 1,000 with two sureties. On 8th August 1949, when the said application came up for hearing, the *detenu* was still under detention owing to his inability to furnish the security ordered. On the latter date we directed his release, and now proceed to give our reasons for the order of release.

In our order granting bail we pointed out that the order of detention passed on the 21st June 1949 by the Deputy Commissioner of Police, Rangoon, was one

*Criminal Misc. Application No. 245 of 1949.

† *Present:* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U TUN BYU, J.

under section 5 (*2*) (ii) (*4*) of the Public Order (Preservation) Act. At the hearing of the application we were informed by the learned Government Advocate that a subsequent order under section 5A (*1*) (*b*) of the said Act had been passed in respect of the *detenu*. It was however stated that the second order of detention was based upon the same materials as the previous order.

The allegations against the *detenu* are in effect that he is a dangerous criminal, being a member of a gang of dacoits headed by one Bo Ba Soe who appears to be a Military Officer, that the *detenu* has been responsible for a series of dacoities committed in Rangoon, that he is a notorious smuggler of military stores, and that he has stolen cattle, slaughtered them and sold the meat in Rangoon. It is also alleged that no action could be taken against the *detenu* under any of the provisions of the Penal Law because no one would come forward to give evidence against him.

In our order granting bail we pointed out that even if the above allegations are true, the *detenu* cannot be kept indefinitely under detention under the Public Order (Preservation) Act. We pointed out also that proceedings could be instituted against him under the appropriate criminal statute, failing which he could be dealt with under section 110 of the Criminal Procedure Code. We also pointed out that, since his leader Bo Ba Soe is now under detention, evidence against the *detenu* would probably now be available.

In our opinion the materials on record do not justify the detention of the *detenu* under Public Order (Preservation) Act.

SUPREME COURT.

†S.C. 1949

Aug. 29.

BO THEIN SWE AND OTHERS (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENTS).*

City of Rangoon Municipal Act, s. 15—Meaning of the word "Election"—Sub s. (2) controls sub-s. (1)—S. 12 for application of candidates—"Disqualified"—Interpretation of statutes.

Held: That in determining the general object of the legislature or the meaning of its language, in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one. To get the true meaning of any passage or word of doubtful import it should be construed with reference to the context and other sections of the Act.

Sugar Refining Company v. *Rex*, (1898) A.C. 741 ; *A. G.* v. *Brown*, (1921) 1 K.B. 773 at 791, followed.

Read with other sections, the word "Election" in s. 15 (*1*) and (2) of the City of Rangoon Municipal Act means the election of a particular candidate and not the whole election.

The word "disqualified" in that clause is used not only with reference to disabilities as set out in s. 12 but also with reference to any irregularity in the course of the election proceedings or illegal practices such as bribery, corruption, etc. which would make an election invalid. Therefore a person may disable himself from being elected or appointed a Councillor—

(1) if he has not got the necessary qualification,
or (2) having the necessary qualification he loses it by other means,
or (3) he may also be disqualified by corrupt practices.

The object of the enquiry under s. 15 (2) is to find out the real wishes of electors as to who should be their representative.

The procedure framed by the High Court with regard to trial of suits and petitions should be the procedure to govern an enquiry into election disputes. Permission can also be granted to make counter charges or recriminations. Even if no counter charges are made if in the course of the enquiry it comes out that such irregularities or such illegal practices have been committed in the course of the election that the real intention of the electors has not been ascertained as to who should be their representative, the whole election should be set aside.

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* Civil Misc. Application No. 47 of 1949.

† *Present:* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U TUN BYU, J.

The true meaning of s. 15 is that if the successful candidate was qualified at the time of the election and did not suffer from any disability as set out in s. 12 either before or after the election he or his agents have not during election committed any irregularities or illegal practices and there are no such irregularities in the election proceedings or illegal practices so as to stifle the real wishes of the electors, the election of the successful candidate must be confirmed.

If the successful candidate was not qualified at the time of election or suffered from any of the disabilities mentioned in s. 12, either before or after the election, or if either he or any of his agents committed any irregularities in the election proceedings or illegal practices, the election of the successful candidate must be set aside as being null and void and the candidate who received the next highest number of votes must be declared to have been duly elected. But if owing to irregularities in the election proceedings or illegal practices committed by the successful candidate or any other candidate or candidates or by any of their agents, the real wishes of the electors as to who should be their representative has not been ascertained, the whole election should be set aside and a report should be made to the President by the High Court through the Commissioner of the Corporation of Rangoon. The President can either appoint a fit person to fill the vacancy or direct the Commissioner to fix another date and hold a fresh election.

Rule 2, Chapter I, Schedule I of the City of Rangoon Municipal Act in so far as it fixes the power of the President to appoint only 5 Councillors is *ultra vires* as being inconsistent with s. 7 of the Act, which gives the President power to nominate not more than one-fourth of the Councillors—that is—when the number of Councillors was 40, he could nominate up to 10.

When the President exercises his power under s. 15 (4) his decision is an administrative one, over which, the Court has no control. But the President, when he has to give his decision on the rights and liabilities of the parties, is to act according to law and amenable to the jurisdiction of the Court.

The question whether the electoral right comes within the purview of s. 16 or 17 (1) of the Constitution of Burma is left open.

Jones v. *Skinner*, (1835) 5 L.J. Chan. 87 at 90; *U Htwe*'s case, (1948) B.L.R. 541; *Gwan Kee*'s case, B.L.R. (1949) S.C. 151, referred to.

Ba Thawt and *Ba On* for the applicants.

Chan Htoon (Attorney-General) for respondent No. 1.

The judgment of the Court was delivered by the Chief Justice of the Union

SIR BA U.—The facts of the case are simple and not in dispute but the points of law involved are

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intricate and of great importance. The facts are these. At an election held on the 16th February 1949 of the Councillors of the Rangoon Municipal Corporation the 1st applicant, Bo Thein Swe, U Maung Maung and four others stood for election from Ward No. 6 (Sanchaung-Nandawun). U Maung Maung obtained 605 votes, while Bo Thein Swe obtained 593 votes. U Maung Maung, having received the largest number of votes, was declared by the Returning Officer to have been duly elected.

An application under section 15 of the Rangoon Municipal Act for a declaration that the election of U Maung Maung was null and void and that the applicant, Bo Thein Swe, was the candidate to have been duly elected in respect of Ward No. 6 was filed in the High Court. After a due inquiry a learned Judge of the High Court sitting on the original side set aside the election of U Maung Maung as being null and void on the ground that U Maung Maung either by himself or through some of his agents had committed bribery in the course of the election. No order was, however, passed in respect of the prayer that the applicant, Bo Thein Swe, be declared to have been duly elected in respect of Ward No. 6.

The order of the High Court was forwarded to the Commissioner of the Corporation and the Commissioner in turn forwarded it to the Ministry of Education and Local Self-Government. The President in exercise of the power conferred by section 15 (*4*) (*a*) of the Municipal Act appointed the 3rd respondent, U Thein Maung, a Councillor to represent Ward No. 6.

The present application is for a writ of certiorari to quash the order of the President and for a writ of prohibition prohibiting the 3rd respondent, U Thein Maung, from acting as a Councillor for Ward No. 6.

Several points were raised in support of the application but the most substantial points are the following:

(i) That under section 15 (*1*) of the Municipal Act a declaration should have been made that the applicant, Bo Thein Swe, was the candidate to have been elected in respect of Ward No. 6;

(ii) That the President exceeded his power and jurisdiction in appointing the 3rd respondent a Councillor who is not a fit person within the meaning of section 15 (*4*) (*a*) of the Act and in excess of the number fixed by Rule 2, Chapter I, Schedule I of the Municipal Act.

Judging from the submissions made from the Bar it appears to us that there is a great difference of opinion over the interpretation of section 15 of the Rangoon Municipal Act, especially in connection with the question as to when and under what circumstances the election of a successful candidate is to be set aside as being null and void and the question as to when and under what circumstances the whole election should be set aside. It is not surprising that there should be such a difference of opinion, seeing that section 15 has not been couched in clear and precise language as it should have been.

According to the learned Attorney-General what section 15 contemplates is the happening of three eventualities as follows:

(i) The first eventuality arises in a case where the Court holds that the election was a valid election and that the successful candidate at the time of the election was qualified and since then has not become disqualified; and in that eventuality the Court is to confirm the election of the successful candidate.

(ii) The second eventuality arises in a case where the Court finds that the successful candidate was at the

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time of the election not qualified, or was disqualified before or since the election, the election of the successful candidate must be set aside as being null and void and the candidate who received the next highest number of votes must be declared to have been duly elected.

(iii) The third eventuality arises in a case where the Court finds that the election of the successful candidate was due to irregularity in the election proceedings, bribery, corruption, personation, treating, undue influence or for any other cause committed either by the successful candidate or any of his agents and in that eventuality the whole election must be set aside as being null and void.

We must now examine what section 15 means and says. Leaving out what is not relevant to the purpose in hand, sub-section (*1*) of section 15 reads :

"If the qualification of any person declared to be elected a Councillor is disputed, or if the validity of any election is questioned by reason of irregularity in the election proceedings, bribery, corruption, personation, treating, undue influence or for any other cause, any person whose name is entered in the register of electors in the ward may apply to the High Court in exercise of its original jurisdiction for an adjudication on the matter. If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates who, although not declared elected, have, according to the results declared by the Commissioner, obtained a greater number of votes than the said candidate and proceed against them in the same manner as against the candidate who has been declared to be elected."

So far as the first part of the sub-section is concerned, it deals with the question of election dispute. The second part deals with the question of parties to the election proceedings and the relief that can be prayed for from the High Court. Even with regard to the

first part, it may be divided into two: one deals with the question of the qualification of the successful candidate and the other deals with the validity of the election. If the successful candidate did not possess the qualifications, as set out in Schedule I, Chapter III, sub-rule 1 (*2*) and sub-rule 2, as amended by Notification No. 1, dated the 20th October 1947, issued by the Union Government in the Ministry of Education and Local Self-Government, at the time of election his election can be questioned. Even if the successful candidate possessed the necessary qualifications at the time of the election, the validity of any election can be questioned if any irregularity in the election proceedings took place or if any illegal practices as set out in sub-section (*1*) of section 15 have been committed. Now, the crux of the question is: The validity of whose election is it that can be questioned? The validity of the election of the successful candidate or the validity of the whole election? The words used are "any election." They may mean the election of the successful candidate or they may mean the whole election or they may mean either one or the other. To understand what they mean we must refer to sub-section (*2*). It controls sub-section (*1*) as it prescribes what should be done by the High Court in case of a certain event taking place. Sub-section (*2*) deals with three eventualities according to the learned Attorney-General, as pointed out above, but in our opinion it does not exactly bear the meaning given by him. Taking the first part of sub-section (*2*) and leaving out what is not quite relevant to the point in issue, it reads:

> "The person whose election is objected to was at the time of the election qualified to be elected as a Councillor and was not disqualified for being a Councillor, it (the High Court) shall confirm the declared result of the election."

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As it stands, it is quite plain and obvious as to what kind of question it deals with. It deals with the validity of the election of the successful candidate. If the successful candidate possessed the qualifications prescribed by the Act at the time of the election and was not disqualified for being Councillor, his election must be declared to be valid, and must in consequence be confirmed. We know what qualifications a candidate for election as a Councillor must possess. But on what grounds the successful candidate must be disqualified ? We shall deal with this question after we have dealt with the second part of sub-section (*2*) of section 15. Sub-section (*2*) is the converse of sub-section (*1*). It reads :

> " If it (the High Court) finds that the person whose election is objected to was at the time of the election not qualified to be elected as a Councillor or was disqualified for being a Councillor it shall declare such person's election null and void, in which case it shall direct that the candidate, if any, in whose favour the next highest number of votes is recorded after the said person or after all the persons who were declared to be elected at the said election, and against whose election no cause of objection is found, shall be deemed to have been elected."

What this part deals with is the invalidity of the election of the successful candidate and the declaration that the candidate who receives the next highest number of votes is the duly elected candidate. The election of the successful candidate can be set aside as being null and void either because he did not possess the qualifications prescribed by the Rangoon Municipal Act or because, though he possessed all the necessary qualifications at the time of the election, he was disqualified for being a Councillor. The same expression " was disqualified for being a Councillor " is used here as in the first part of sub-section (*2*). If we understand him correctly, what the learned Attorney-

General submits is that the term "disqualify" is used in contradiction to the term "qualify." Unless a candidate possesses certain qualifications as prescribed by the Rangoon Municipal Act, he cannot stand for election; similarly, if a candidate possesses certain disqualifications, *i.e.* suffers from certain disabilities he cannot stand for election and if by chance his nomination is passed by the Commissioner of the Corporation and he is allowed to stand and subsequently elected, he cannot be a Councillor. As the qualifications are prescribed by the Act, so are the disqualifications in section 12. Section 12 says:

> "A person shall be disqualified for being elected or appointed or for being a Councillor if such person has been convicted and sentenced to more than six months' imprisonment or is an undischarged insolvent, etc."

Put it in other words, what section 12 means and says, according to the learned Attorney-General is that no person can either be elected or appointed a Councillor if he suffers from any of the disabilities mentioned in section 12, but if either elected or appointed he cannot become a Councillor if he is found to be suffering from any of the disabilities since the election. The word "disqualify" should therefore, according to the learned Attorney-General, be construed with reference to section 12 and nothing else. The further contention of the learned Attorney-General is that if any irregularity in the election proceedings is found to have taken place or if any of the illegal practices as mentioned in section 15 (*1*) is found to have been committed by either the successful candidate or his agents, not only the election of the successful candidate but the whole election should be set aside.

The question that is naturally prompted by these submissions is whether other candidates should suffer

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because of the illegal practices committed by the successful candidate although they have done nothing. The answer of the learned Attorney-General is that that is the unfortunate and inevitable result as the law stands. The next question that arises from this submission is what is to happen to the relief that is granted by sub-section (*1*) of section 15 that the applicant can ask for a declaration that the candidate who received the next highest number of votes should be declared to have been duly elected. The answer given is that that relief can be given only in cases where the successful candidate was found not to be qualified at the time of the election or disqualified either before or after the election under section 12 of the Rangoon Municipal Act.

We regret we cannot wholly accept this interpretation of the learned Attorney-General of section 15. Section 15, as construed by the learned Attorney-General, would in our opinion lead to injustice. The learned author of Maxwell on the Interpretation of Statutes (1) says :

> " In determining either the general object of the legislature or the meaning of its language, in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one."

To get the true meaning of any passage or word of doubtful import it should be construed with reference to the context and other clauses of the Act. [Cf. *Sugar Refining Company* v. *Rex* (2) and *A. G.* v. *Brown* (3)]. Therefore to understand in what sense the word " disqualify " is used in sub-section (*2*) we must go

(1) 8th Edn., p. 169. (2) (1898) A.C. 741.
(3) (1921) 1 K.B. 773 at 791.

back to sub-section (*1*) of section 15. As pointed out above, sub-section (*1*) first deals with the qualifications of the successful candidate at the time of the election and the invalidity of the election because of irregularity in the election proceedings, bribery, corruption, etc. and then it deals with the relief that can be granted to the candidate who receives the next highest number of votes. If the construction put by the learned Attorney-General on sub-section (*2*) is the correct construction, the relief that is granted by sub-section (*1*) becomes not only unreal and unsubstantial but illusory altogether. We do not think that the Legislature ever intended to produce that result. The word "disqualify" is therefore, in our opinion, used not only with reference to the disabilities as set out in section 12 but also with reference to any irregularity in the course of the election proceedings or illegal practices such as bribery, corruption, etc. as mentioned in sub-section (*1*) of section 15. A person may disable himself from being elected or appointed a Councillor by, for instance, accepting an appointment in the service of the Corporation, or, after election or appointment, from being a Councillor by accepting the appointment. Even though he does not disable himself or, become disabled and even though he possesses all the necessary qualifications as prescribed by the Municipal Act, but if he either himself or through any of his agents commits any irregularity in the election proceedings or any illegal practices, he becomes disqualified. This construction is, in our opinion, not only consistent with good sense, reason and justice but makes for the smooth working of the Act.

Only in this sense the meaning of the expression "the validity of any election" as used in sub-section (*1*) of section 15 becomes clear. Any election means

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the election of a successful candidate or the whole election. This is made clearer by the third part of sub-section (2) which reads: "If it (the High Court) finds that the election is not a valid election it shall set it aside." The use of the words "the election" without any qualification is significant. If it is intended that "the election" should mean the election of any particular candidate, some qualifying words might have been used. No such words are now used. The meaning becomes clearer still if the power of the President under sub-section (4) and the proviso to section 7 is examined. Under the proviso to section 7, if there is no qualified candidate nominated to represent any ward the President can either appoint a fit person to fill the vacancy or else order the Commissioner to fix another date and hold a fresh election. Similarly, if as the result of an enquiry under sub-section (2) of section 15 no candidate is found to have been duly elected or declared to have been duly elected to represent any ward, the President can do one of two things mentioned above.

It may be asked how the questions of disabilities and illegal practices committed by candidates other than the one whose election is objected to, can be enquired into since no recrimination is allowed. No procedure is laid down in the Act as to how an enquiry into an election dispute is to be held. But the High Court is given full power under sub-section (2) of section 15 to hold such an enquiry in any manner as it deems necessary. It does not however mean that the enquiry should be conducted in an arbitrary manner. The object of the enquiry is to find out the real wishes of the electors as to who should be their representative. As the enquiry is to be held by the High Court in the exercise of its ordinary civil jurisdiction, the procedure framed by the High Court with

regard to the trial of suits and petitions should be the procedure to govern an enquiry into an election dispute. If this procedure is followed, then permission can be granted to make counter charges or recriminations. Even if no counter charges are made it may be that in the course of the enquiry it may come out that such irregularities in the election proceedings or such illegal practices have been committed in the course of the election that the real intention of the electors cannot be ascertained as to who should be their representative. Then, in that case, the whole election should be set aside.

To sum up, what section 15 of the Rangoon Municipal Act says is as follows: If the successful candidate was qualified at the time of the election and suffered from no disabilities as set out in section 12 either before or after the election, and no irregularities in the election proceedings or illegal practices were committed to such an extent as to stifle the real wishes of the electors, the election of the successful candidate must be confirmed. If the successful candidate was not qualified at the time of the election or suffered from any of the disabilities mentioned in section 12 either before or after the election, or, if either he or any of his agents committed any irregularity in the election proceedings or illegal practices, the election of the successful candidate must be set aside as being null and void and the candidate who received the next highest number of votes must be declared to have been duly elected. Because of any irregularity in the election proceedings or illegal practices committed by either the successful candidate or any other candidate or candidates or by any of their agents, with the result that the real wishes of the electors as to who should be their representative cannot be ascertained, the whole election should be set aside and a report should be

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made to the President by the High Court through the Commissioner of the Rangoon Corporation. The President on receipt of the report can either appoint a fit person to fill the vacancy or direct the Commissioner to fix another date and hold a fresh election.

Here, in the present case, the learned Judge who tried it set aside the election of the successful candidate on the ground that he had been guilty of illegal practices in the course of the election. But the learned Judge did not declare that the present applicant, Bo Thein Swe, who received the next highest number of votes, to be the duly elected candiate. Instead the matter was reported to the President and we are now confronted with the President's order.

As pointed out above the order of the President is assailed on two grounds, namely, that the President appointed U Thein Maung a Councillor although U Thein Maung is not a fit person within the meaning of section 15 (*4*) (*a*) and that the President exceeded his power and jurisdiction by appointing more Councillors than he was allowed to do under Rule 2, Chapter I, Schedule I, as amended. The number of Councillors fixed under the Rangoon Municipal Act is forty, of which the President can appoint not more than five under the aforesaid rule. Before he appointed U Thein Maung the President had already appointed five. Therefore in appointing U Thein Maung the President did it in excess of the number allowed by the rule. But the rule is inconsistent with section 7 of the Act which says that the President has power to nominate, that is to appoint, not more than one-fourth of the Councillors. As the number of Councillors is fixed at forty the President has power to nominate up to ten. To the extent of inconsistency and repugnancy the rule is *ultra vires*. Therefore in appointing U Thein Maung the President did not exceed his power.

But is U Thein Maung a fit person within the meaning of section 15 (*4*) (*a*) of the Act? The learned Advocate for the applicant says that he is not a fit person as he does not possess the qualifications as prescribed by the Act. On the other hand, the learned Attorney-General says that it is not necessary for a person to possess the qualifications prescribed by the Act to be a fit person. According to him the question as to who is and who is not a fit person is a question to be decided by the President and the President alone. If this submission is followed to its logical conclusion it may produce startling results. We do not propose to do so until and unless we know that we have jurisdiction to interfere with the order of the President.

The learned Attorney-General submits that we have no jurisdiction to interfere in this matter, partly because the application for a writ of certiorari and a writ of prohibition does not lie as none of the fundamental rights as given in Chapter II of the Constitution is affected in this case and partly because the order in question was passed by the President in exercise of his administrative functions and not in the exercise of judicial functions.

The question that arises out of the first submission is—is an electoral right one of the fundamental rights mentioned in Chapter II of the Constitution. It is not mentioned by name as such but what is to be remembered is that the Constitution is based on democratic principles. The right to elect a representative to a local body or a National Assembly is a most valuable right which a citizen can have in a democratic country. It is a right by means of which he can not only express his convictions and opinions freely but along with several others he can shape and mould the life of a nation. To withhold it is to stifle a nation. It is the essence of political life in a democratic

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country. As a right it is therefore a much more valuable right than a right to a patent or a right to easement. A right to a patent or a right to easement has been held to be property.

The word "property" is neither defined nor explained in the Constitution but section 222 of it says that the provisions of the Burma General Clauses Act shall extend to the interpretation and application of the Constitution. On reference to the General Clauses Act we get no help whatsoever. It explains what "movable property" is by saying that movable property means property of every description except immovable property ; but what immovable property is, is not even explained. Nor is the word "property" defined or explained in the Transfer of Property Act, but an indication of what "property" means is given in section 54 of it. Section 54 speaks of tangible immovable property and intangible thing. Intangible thing means something that cannot be seen, touched or felt but can be enjoyed. The word "property" thus explained is a most comprehensive term. In *Jones* v. *Skinner* (1) Lord Langdale says :

> "It (property) is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have."

In a similar strain Professor Holland in his book on Jurisprudence (2) says :

> "With such intangible property (patent right, copyright and trade mark) are probably also to be classified those royal privileges subsisting in the hands of a subject which are known in English Law as 'franchises' such as the right to have a fair or market, a forest, free-warren or free-fishery."

Is the word "property" as used in the Constitution, to be interpreted in a comprehensive or a

(1) (1835) 5 L.J. Chan. 87 at 90. (2) 13th Edn. at 215.

restricted sense? In *U Htwe*'s case (1) this Court observed:

"In the case of the interpretation of a Constitution, we must interpret it not only to avoid absurdity or inconsistency, but we must interpret it in such a way as to make it most beneficial to the widest possible amplitude of its powers."

If so interpreted, an electoral right may come within the purview of either section 16 or section 17 (*1*) of the Constitution. We do not, however, propose to express our opinion on the question definitely one way or the other, until we know—as in the case of who is a "fit" person, so in this case also—that we have jurisdiction to interfere with the order of the President.

As pointed out above, the writs applied for in this case are the writ of certiorari and the writ of prohibition. These two writs deal with the question of the exercise of jurisdiction by an inferior Court, which it does not possess or, if possessed, an exercise of it in excess. Now, what is meant by a Court? Again, in *U Htwe*'s case (1) it is explained as follows:

"Having regard to a long series of English cases, there can hardly be any doubt that originally a Court, as used, was meant to mean a tribunal legally appointed to determine civil or criminal cases judicially. Subsequently, the meaning of the word 'Court' was expanded so as to include not only civil or criminal Courts, but also ecclesiastical, maritime or military Courts. Since then the term 'Court' has again been expanded so as to include not only the above-mentioned tribunals, but also other bodies entrusted with quasi-judicial functions."

What tribunal or body is to be deemed a Court so as to make it amenable to a writ of prohibition or a writ of certiorari is explained in the same case as follows:

"A person or body of persons having legal authority to determine questions affecting the right of subjects and having the

(1) (1948) B.L.R. 541.

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duty to act according to Law acts in excess of his or their legal authority."

Why such a person or body of persons is subject to the controlling authority and supervision of this Court is because in our Constitution the rule of law, or, as it is sometimes called, the supremacy of law, is enshrined. Everybody from the President downward is subject to the law of the land and it is the duty and privilege of this Court, as declared by section 152 of the Constitution, to uphold and maintain the supremacy of law :

> "Amid the cross-currents and shifting sands of public life the law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of public life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice."

Though the law is supreme, yet there are certain kinds of decisions over which this Court has no control and these decisions are the decisions of non-judicial tribunals, *i.e.* administrative officers. The decisions of non-judicial tribunals are based on policy and expediency, whereas the decisions of judicial tribunals are based on law. The functions of a tribunal may sometimes be partly judicial and partly non-judicial. It is judicial when the tribunal when dealing with rights and liabilities of parties, is directed to collect facts, sift evidence and gives its decision thereon in accordance with law ; but it ceases to be judicial if it is directed to give its decision according to discretion. Such a decision we may call an executive or administrative decision and over such a decision this Court has no control. This is well illustrated in the present case. The proceedings in this case were judicial from the start right up to the time when the High Court gave its decision. It had to collect facts and sift evidence concerning the rights and liabilities of the parties and

thereafter gave its decisions in accordance with law. But when the proceedings passed on to the President, he was no longer concerned with the rights and liabilities of the parties. All he was directed to do by section 15 (4) of the Rangoon Municipal Act was either to appoint a fit person or order a fresh election. In other words, the President had to give his decision in exercise of his discretion guided solely by policy and expediency. His decision is, therefore, an administrative decision over which this Court, as pointed out above, has no control. This case is the converse of *Gwan Kee*'s case (1) where the President had to give his decision on the rights and liabilities of the parties concerned in accordance with law. He was then in the eyes of the law a Court amenable to the jurisdiction of this Court. We may invite reference to *Robinson* v. *Minister of Town and Country Planning* (2), *B. Johson & Co. (Builders), Ltd.* v. *Minister of Health* (3) and *Franklin and others* v. *Minister of Town and Country Planning* (4), where the principle just enunciated is, we may say with respect, well expounded.

For all these reasons this application fails and is dismissed. As regards costs, we feel that no costs should be awarded as against the applicants. If not for fortuitous circumstances the applicants, especially the 1st applicant, might have fared better.

(1) B.L.R. (1949) S.C. 151.
(2) (1947) 1 K.B. 702 at 713 and 716.
(3) (1947) 2 All England Law Reports, 395 at 397 and 399.
(4) (1948) A. C. 87 at 102.

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Aug. 29.

THAKIN AYE MAUNG (APPLICANT)

v.

THE HON'BLE JUSTICE U AUNG THA GYAW AND OTHERS (RESPONDENTS).*

Rangoon Municipal Corporation Election—Voters' names appeared in the Election Rolls of two wards—Voting in both—Election set aside—Whether writ for certiorari lies—Meaning of the word "final and conclusive" in s. 15, sub-s. (3) of the City of Rangoon Municipal Act.

The use of the words "final and conclusive" in sub-s. (3) of s. 15 of City of Rangoon Municipal Act" does not mean that the right to apply for direction in the nature of certiorari is taken away.

Held: That the words in s. 15, sub-s. (3) "final and conclusive" has not an inflexible meaning. It may mean "final and unalterable in the Court which pronounced it" or it may mean that "it cannot be made the subject-matter of the appeal." In s. 15, sub-s. (3) of the City of Rangoon Municipal Act, the words "Final and conclusive" means that no appeal lies from such an order. Therefore no appeal lies from the order in dispute. Even though the appeal may not lie under s. 15, sub-s. (3) of the City of Rangoon Municipal Act, yet under s. 25 of the Constitution of Burma if any fundamental right of a citizen is infringed he can apply to the Court for direction in a writ of certiorari.

Ma Mar Mar v. *P.S.O., Ahlone*, (1948) B.L.R. 214; *Bo Thein Swe and two* v. *Union of Burma and two*, B.L.R. (1949) S.C. 170, distinguished.

The Commonwealth v. *Limerick Steamship Co., Ltd.*, (1924-25) 35 C.L.R. 69 at 89; *Nouvion* v. *Freeman*, (1889) 15 A.C. 1 at 13, followed.

Thein Maung for the applicant.

Chan Htoon (Attorney-General) for respondent No. 1.

Captain Ba Hpu for respondent No. 2.

Toe Sein for respondent No. 3.

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* Civil Misc. Application No. 44 of 1949.

† *Present*: SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE KYAW MYINT and U TUN BYU, J.

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THAKIN AYE MAUNG v. THE HON'BLE JUSTICE U AUNG THA GYAW AND OTHERS.

The judgment of the Court was delivered by the Chief Justice of the Union

SIR BA U.—This is an application for a writ of certiorari. It arises out of an election dispute tried by the High Court in Civil Miscellaneous No. 51 EP of 1949 in exercise of its Original Civil Jurisdiction. And the dispute arose out of the recent General Election for Councillors of the Rangoon Municipal Corporation held on the 16th February 1949. At the said election the applicant Thakin Aye Maung, and the respondents 2 and 3, U Min Oh and U Ba Yon, stood for election from Ward No. 8. Thakin Aye Maung stood first with 583 votes, U Min Oh stood second with 578 votes and U Ba Yon third with 344 votes. Thakin Aye Maung was accordingly declared by the Returning Officer to be the duly elected candidate ; whereupon an application was filed in the High Court to set aside the election of Thakin Aye Maung as being null and void on the ground that he had committed illegal practices in the course of the election proceedings, and to declare U Min Oh the duly elected candidate from Ward No. 8.

After a due enquiry, the learned Judge who tried the case found as a fact that some 15 voters who resided in Ward No. 7 and who had their names in the election rolls of both Wards No. 7 and 8 not only cast their votes in both the wards but in Ward No. 8 cast their votes in favour of Thakin Aye Maung, which they had no right to do. In accordance with this finding the election of Thakin Aye Maung was set aside and U Min Oh was declared to be duly elected from Ward No. 8.

The present application is to set aside the order of the High Court by way of a writ of certiorari.

The learned Attorney-General who appears for the respondent No. 1 raises one point and one point only

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by way of objection that this application is incompetent as there is another mode of redress by way of appeal under section 6 of the Union Judiciary Act available to the applicant. In support of his contention the learned Attorney-General relies on the case of *Ma Mar Mar* v. *P.S.O., Ahlone* (1). But that case does not, in our opinion, help the learned Attorney-General. It is on the contrary, in our opinion, against him. What this Court observed in that case was as follows :

" Section 6 of the Union Judiciary Act thus clearly provides for cases which do not come within the purview of section 5. It is what we call a residuary provision of law enacted with the sole intention that no subject of the Union shall go without redress by this Court if he has a genuine and a well-founded grievance either against another subject of the Union or against the State itself. Being a residuary provision, it can be made use of only when there is no other remedy open to an allegedly aggrieved subject of the Union. In the present case, there is an effective remedy provided for the applicant in section 25 of the Constitution, which says, *inter alia* " Without prejudice to the power that may be vested in this behalf in other Courts, the Supreme Court shall have power to issue directions in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and certiorari."

Even assuming that what this Court has observed in the above case is in favour of the submission made by the learned Attorney-General the question is whether the applicant can get any redress by way of appeal in view of sub-section (3) of section 15 of the Rangoon Municipal Act. Sub-section (3) is in the following terms :

" The order made by the Judge of the said High Court in exercise of its Original Civil Jurisdiction shall be final and conclusive."

(1) (1948) B.L.R. at p. 214.

What the expression "final and conclusive" means is clearly and succinctly explained by Isaacs and Rich JJ. in *The Commonwealth* v. *Limerick Steamship Co., Ltd.* (1) as follows :

> " Then as to the phrase final and conclusive, that is not in all cases an expression of inflexible meaning. It may mean simply ' final and unalterable in the Court which pronounced it ' [*per Lord Watson in Nouvion* v. *Freeman* (2)]. But, as the word ' final ' alone may as applied to a judgment be used ' in the sense that it cannot be made the subject of appeal to a higher Court ', so the compound and more emphatic expression ' final and conclusive ' may and generally does mean finality as to a litigation."

We accept this construction as a correct and true construction of the phrase " final and conclusive." It is in this sense that the phrase has, in our opinion, been used by the Legislature in section 15 (*3*) of the Rangoon Municipal Act. It is desirable that enquiries into election disputes, whether the dispute is in respect of an election to a local body or the National Assembly, should be conducted and concluded finally in the interest of the public as speedily as possible. Therefore, assuming that a right of appeal is ordinarily available in such proceedings as the present one, such a right is barred in the present instance by sub-section (*3*) of section 15 of the Rangoon Municipal Act.

Though a right of appeal is barred, yet every citizen of the Union has a right to come to this Court for redress by means of an appropriate writ mentioned in section 25 of the Constitution if any of his fundamental rights is in any way infringed. The right thus conferred cannot be abrogated or taken away by ordinary legislation except by amendment or change of the Constitution.

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(1) (1924-25) 35 C.L.R. 69 at 89. (2) (1889) 15 A.C. 1 at 13.

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The objection of the learned Attorney-General thus fails.

Dealing with the point raised by the applicant that the learned Judge who tried this case had no jurisdiction to declare the 2nd respondent, U Min Oh, as the duly elected representative of Ward No. 8 under section 15 (2) of the Rangoon Municipal Act, we do not propose to go into this question at length in this judgment. We have given full reasons in our judgment in *Bo Thein Swe and two* v. *Union of Burma and two* (1) that in a case of the present nature, the High Court has power to set aside the election of the successful candidate on the ground of illegal practices committed by him or his agents and to declare the candidate who receives the next highest number of votes as the duly elected candidate. This is exactly what the learned Judge of the High Court has done in the present case.

For all these reasons we dismiss the application with costs, ten gold mohurs.

(1) B.L.R. 1949 S.C. 170.

SUPREME COURT.

DAW KHIN TEE (APPLICANT)

v.

U CHAN THA AND ONE (RESPONDENTS).*

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July 29.

Writ of habeas corpus—*Application for bail—Powers of Court—Circumstances governing.*

Held per MR. JUSTICE E MAUNG : The Court may be justified in granting bail either where the return to the writ is manifestly insufficient or where the Court entertains a doubt as to whether the facts stated in the return do constitute an offence or a sufficient cause for detention.

Bronker's case, 82 E.R. 495 ; *King* v. *Bethel*, 87 E.R. 494; *Rex* v. *Davidson*, 91 E.R. 97, referred to.

On a reference to Full Court. Held : That the Supreme Court has power in proper cases to grant bail to persons in custody or under detention pending the hearing of the application for direction in the nature of *habeas corpus*. But there were no materials to warrant granting of bail in the case.

E. C. V. Foucar for the applicant.

Chan Tun Aung (Assistant Attorney-General) for the respondents.

The following order was passed in Chamber by

MR. JUSTICE E MAUNG.—In this application for bail pending the hearing of an application for directions in the nature of *habeas corpus* I have heard the learned Counsel and have also consulted the authorities quoted.

Bronker's case (82 E.R. 495) which reports the grant of bail in a proceeding for *habeas corpus* appears to be an extreme case. There the return which was made to the writ showed no sufficient matter for the commitment and the jailor desired time to amend the return. It was when granting time to amend the insufficient return that the Court granted bail for the prisoner. *The King* against *Bethel* (87 E.R. 494) does not carry the matter any further than *Bronker's* case. At page 496 of the report appears the following passage :

> " At another day the question was, whether pending the debate about the return to the *habeas corpus*, which

* Criminal Misc. Application No. 14 of 1948.

† *Present :* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE KYAW MYINT.

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was filed, the party should be bailed ? for which the case of Sir William Bronker was quoted : information to a Justice of Peace against Sir William Bronker for cheating him at play ; upon refusal to find sureties the Justice committed him to prison, and, upon *habeas corpus*, the Court took bail for his appearance."

The actual decision of Holt C.J. and Eyre J. suggests that even if the return is not sufficient or contains something not wholly regular, if there is enough return to justify further debate about the legality of the detention, the proper course would be for the prisoner if produced before the Court to be remanded pending that debate.

Rex against *Davidson* (91 E.R. 97) was a case where the Court entertained doubts whether the facts stated in the return constituted an offence for which the prisoner could have been committed to custody and it was because the Court, desiring to hear Counsel upon the question, adjourned the case that the applicant in *habeas corpus* was granted bail in the meantime.

These three cases suggest that the Court may be justified in granting bail either where the return to the writ is manifestly insufficient or where the Court entertains a doubt if the facts stated in the return do constitute in law an offence or a sufficient cause for detention.

This is the first application of its kind coming before the Court and though normally an application for bail is to be disposed of by a Judge in Chambers, I consider that it would be advisable to place this matter before the full Court so that an authoritative decision can be had.

The application for bail will therefore come before the Court . . . . . .

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—On the 13th July 1948 the applicant filed an application praying for directions in the nature of *habeas corpus* relating to her husband U Aye Kyi. On the 22nd July 1948 she filed a second application praying that U Aye Kyi be released on bail

pending the disposal of the first application. This order deals with the second application

The affidavit in support of this application sets out that U Aye Kyi was arrested on the 3rd July 1948 and that the the applicant believes that the said arrest was effected under the provisions of section 7 (*2*) of the Public Property Protection Act, 1947.

On behalf of the respondents the affidavit of U Aye Kyaw, Chairman of the Public Property Protection Committee, has been filed. It is stated therein that U Aye Kyi was in fact arrested under the provisions of section 7 (*2*) of the said Act for having committed prejudicial acts within the meaning of section 2, sub-clause (ii) (*a*) and (*b*) of the said Act. U Aye Kyaw also states that the arrest was made after due investigation.

It is not disputed that this Court has power, in proper cases, to release on bail persons in custody or under detention pending the disposal of an application for directions in the nature of *habeas corpus*. At the present moment there are on the record no materials other than the two affidavits referred to above, the return by the respondents in the main proceedings not having yet been made. The statement of U Aye Kyaw must be accepted at its face value for the purposes of this application. There being no grounds for ordering the release of U Aye Kyi on bail at the present stage of the proceedings, the applicant's application is dismissed.

SUPREME COURT.

† S.C. 1949

Dec. 8.

MAUNG SAN TINT (APPLICANT)

v.

THE DEPUTY COMMISSIONER, PEGU AND ONE (RESPONDENTS).*

Public Order (Preservation) Act 1947, s. 5A (1) (b)—Detention under s. 5 by Deputy Commissioner, Pegu, in Central Jail, Rangoon—Fresh order directing further detention—Jurisdiction.

Where the Deputy Commissioner, Pegu, by order dated the 15th October 1948 directed detention of applicant and the applicant was detained thereafter but nevertheless the Deputy Commissioner, Pegu, passed a fresh order on the 16th July 1949 directing a further detention for five months.

Held: As the Notification under which the Deputy Commissioner passed the later order could be exercised only within his jurisdiction and the applicant was in Rangoon at the time, the order of detention made, was illegal.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

U TUN BYU, J.—This is an application for directions in the nature of *habeas corpus*. The applicant Maung San Tint was, on the 15th October 1948, ordered to be detained by the Deputy Commissioner, Pegu, under section 5A (*1*) (*b*) of the Public Order (Preservation) Act, 1947. The affidavit of the present Deputy Commissioner, Pegu, does not show for what period the applicant was ordered to be detained by his predecessor under the latter's order of 15th October 1948. It is probable that the applicant was ordered to be detained only for a definite period under the order of the Deputy Commissioner of 15th October 1948 because subsequently, a fresh order of detention was, on the 16th July 1949, passed against the applicant by

* Criminal Misc. Application No. 259 of 1949.

† *Present:* MR. JUSTICE KYAW MYINT, U TUN BYU and U SAN MAUNG, JJ.

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the present Deputy Commissioner, Pegu, and the relevant portion of the detention warrant, dated the 16th July 1949, sent to the Superintendent of the Central Jail, Rangoon, reads :

" Whereas San Tint, son of Hla Bu of Alaingni Village, Pegu Township, has been ordered by me, to be further detained in the Rangoon Jail, under section 5A (*1*) (*b*) of the Public Order (Preservation) Act, 1947, with effect from the 31st July 1949 till 31st December 1949.

You are requested to receive the said San Tint into your custody in the said Jail together with this warrant and there carry the aforesaid order into execution according to law."

It appears that the applicant was still detained in the Central Jail, Rangoon, when the order of detention, dated the 16th July 1949, was passed against him. In any case, the " detention warrant," dated the 16th July 1949, suggests that the applicant San Tint must have been detained in the Rangoon Central Jail on the 16th July 1949, otherwise it is difficult to understand why the order for detention which was to take effect only from the 31st day of July 1949, should have been passed as early as the 16th July 1949.

It will also be convenient to reproduce a portion of the affidavit of the Superintendent, Rangoon Central Jail, where the applicant Maung San Tint is detained, and it reads :

" 2. I say that on the 22nd October 1948 a person said to be Maung San Tint, son of U Hla Bu, was brought to the Rangoon Central Jail, from the Town Lock-Up, Barr Street, Rangoon, with orders for detention in jail under section 5A (*1*) (*b*) of the Public Order (Preservation) Act, 1947.

3. I say that the said order was sent by the Deputy Commissioner, Pegu."

Thus the affidavit of the Superintendent, Rangoon Central Jail, shows that the applicant was sent to the

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Rangoon Central Jail on 22nd October 1948, and there is nothing in the proceeding to indicate that the applicant was transferred or taken back to Pegu after 22nd October 1948. It is therefore clear that the applicant Maung San Tint was still detained in the Rangoon Central Jail when the Deputy Commissioner, Pegu, passed the fresh order of detention, dated the 16th July 1949, directing the Superintendent of Jail to detain the applicant for a further period of five months, for the period from 31st July 1949 to 31st December 1949. The relevant part of the Notification (1) under which the Deputy Commissioner passed the order of detention of the 16th July 1949, against the applicant reads :

"No. 519. In exercise of the powers conferred on him by section 7 of the Public Order (Preservation) Act, 1947, as amended by the Public Order (Preservation) (Amendment) Act, 1947, the President directs that any power which is conferred upon him by section 5 *(2)* *(3)* and *(4)*, 5A and 5B of the said Act shall be exercised by all Deputy Commissioners and the Commissioner of Police, Rangoon, within their respective jurisdictions."

Thus, it is clear that the power of the Deputy Commissioner, Pegu, to pass an order of detention under section 5A of the Public Order (Preservation) Act, 1947, is restricted to persons who are within Pegu District and who has been concerned or connected in some activity, inimical to public safety and maintenance of public order in Pegu District. It is difficult to appreciate how any person can be said to be within the jurisdiction of a Deputy Commissioner unless such a person is also in the territorial limit of the Deputy Commissioner who passed the order of detention. The applicant who was in Rangoon, cannot obviously be considered to be a person who was within Pegu

(1) Home Department (Police II Branch) Notification No. 519, published at page 363, Part I, *Burma Gazette*, dated the 21st June 1949.

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District at the time the order of detention of 16th July 1949, was made against him by the Deputy Commissioner, Pegu. The order of detention passed by the present Deputy Commissioner on the 16th July 1949, must therefore be considered to have been made without jurisdiction in that it was made when the applicant was in Rangoon, a place which was outside the territorial jurisdiction of the Deputy Commissioner, Pegu.

The applicant, Maung San Tint, is accordingly ordered to be released.

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Masih v. *Masih*, I.L.R. (1940) All. 802 ; *Patrick Norman Dwyer* v. *Harriet Mary Cecilia Dwyer and another*, 66 I.C. 494, followed. The wife under these circumstances is also entitled to alimony *pedente lite* and the fact that the husband is suing for divorce on the ground that wife has committed adultery or did not obey a decree for restitution of conjugal right does not make any difference and such alimony can be granted even after a decree *nisi* has been pronounced. *Thomas* v. *Thomas*, (1896) I.L.R. 23 Cal. 913 ; *Bowen* v. *Bowen*, (1909) I.L.R. 36 Cal. 1018 ; *Welton* v. *Welton*, (1927) P.D. 162, followed. *Held further :* Order granting costs to the wife for defence and also granting alimony are appealable. *Robert Cameron Chamarette* v. *Mrs. Phyllis Ethel Chamarette*, A.I.R. (1937) Lah. 176 ; *Noble Millicans* v. *Mrs Gladys Millicans*, A.I.R. (1937) Lah. 862, followed.

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BURMA MUNICIPAL ACT, s. 52—*Bassein Municipal Provident Fund Rules—Clauses (4), (5) and (6) of Bye-law—Family—Member of—Competition between wife and nephews—Whether rules* ultra vires. Bye-laws of Bassein Municipality relating to Provident Funds provide in clause (4) that a subscriber can only nominate a member of his family and in clause (5) that if he has no family he can nominate an outsider " provided that such nomination will be valid so long as he has no family." *Held :* That the proviso to clause (5) of bye-laws of Bassein Municipal Provident Fund Rules was not *ultra vires*. S. 52 of the Municipal Act under which the bye-laws were made provided for fixing the circumstances and the conditions under which payment may be made out of the fund. The word " family " in Bye-laws 4 and 5 does not ordinarily include a nephew when a man has a wife. *Ma Kyway* v. *Ma Mi Lay and another*, 6 Ran. 682 ; *Mt. Hurmat Bibi and another* v. *Mt. Kaz Banu and others*, A I.R. (1932) Sind 115, referred to.

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BURMA NATURALIZATION ACT, s. 7 (*1*)—*Certificate granted under—Union of Burma (Adaptation of Laws) Order, 1948 effect of deletion—Union Citizenship (Election) Act, 1948, whether a naturalized Chinese entitled to Certificate of Citizenship. Held :* That a Chinese who was naturalized under the Burma Naturalization Act and obtained a certificate under s. 7 (*1*) of that Act, was *deemed* to be a British subject and was entitled to all the rights, privileges and capacities of a British subject born within British Burma. The Burma Naturalization Act was repealed by the Union of Burma (Adaptation of Laws) Order, 1948. A person naturalized under the Burma Naturalization Act did not come within clauses (i), (ii) and (iii) of s. 11, Constitution of Burma. Under s. 11 (iv) of the Constitution of Burma and s. 3 of Union Citizenship (Election) Act, a person in order to be entitled to apply for a Certificate of Citizenship must be a person " born in any of the territories which at the time of his birth was included within His Britannic Majesty's Dominion." As the applicant did not satisfy this test, he was not entitled to apply for the Citizenship of the Union of Burma, even though he was naturalized under the Burma Naturalization Act. The s. 11 (iv) of the Constitution of Burma and s. 3 of the Union Citizenship (Election) Act have abrogated the rights acquired by the applicant under the Burma Naturalization Act.

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of the Code of Civil Procedure. Rule 10 of Order 22 relates to the continuation of a suit in case of assignment creation or devolution of any interest during its pendency and does not apply to an application by the legal representative of a decree-holder. In such a case Rule 16 of Order XXI and s. 146 of the Code apply. The order is one under s. 47 and an appeal lies under s. 96. *A. K. Talukdar and others* v. *S. L. Pal*, (1925 26) 30 CWN 735; *Venkatachalam Chetti* v. *Ramaswamy Servai and three others*, (1932) I.L.R. 55 Mad. 352 (F.B.), referred to. A decree for sale of mortgaged property is not a decree against a debtor for payment of his debt. It is only when the decree holder seeks a personal decree for the balance that the necessity of production of Letters of Administration or a Succession Certificate arises under s. 214 (*b*) Succession Act. *B. N. Das* v. *S. Das*, (1895) I.L.R., 22 Cal. 143; *Saw Chong Gye and another* v. *Hafiz Bibi*, (1934) I.L.R. 12 Ran 690, referred to. That the leave of the court under s. 4 (*1*), Liabilities (War-Time Adjustment) Act, 1945, is not necessary for an enquiry into the alleged nullity of the decree.

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CODE OF CIVIL PROCEDURE—*Order for the return of the plaint under Order 7, Rule 10, instead of rejecting the plaint under Order 7, Rule 11* (d)—*Appeal to District Court—District Court remanded the case—Appeal filed against the order of remand under Order 43, Rule 1* (d)—*S. 16, Urban Rent Control Act, 1948—General Clauses Act, s. 5* (c)—*Whether Certificate of Controller necessary.* In a suit for rent, the Trial Court held that the suit was not maintainable without a certificate from the Controller of Rent certifying the standard rent of the premises and the learned Judge directed the return of the plaint under Order 7, Rule 10 of the Code to be presented to the Court after obtaining the necessary certificate. The plaintiff appealed to the District Court, and the learned District Judge set aside the order and directed that the plaint should be represented and that the suit should be decided according to law. An appeal was filed in the High Court against the order of remand. *Held*: That an appeal lies under Order 43, Rule 1 (*u*) of the Code. The Trial Court was wrong in returning the plaint under Order 7, Rule 10, as the Court had jurisdiction to entertain the suit. The proper order he should have passed was to reject the plaint under Order 7, Rule 11 (*d*). Such order of rejection of plaint would be a decree within the meaning of s. 2 (2) of the Code of Civil Procedure. In substance therefore, the appeal to the District Judge was an appeal from the decree and his order of remand is under Order 41, Rule 23 and as such appealable under Order 43, Rule 1 (*u*) of the Code. The application to convert the appeal to Revision was filed *ex-abundanti cautela* under the authority of *Sakeena Bibi and others* v. *C. Stephens*, (1926) I.L.R. 4 Ran. 221, referred to. S. 16 of the Urban Rent Control Act of 1946 provided that no plaint for the recovery of rent which had become due after the enactment of the Act of 1946 could be accepted by a Civil Court without certificate of standard rent. That Act was repealed by the Urban Rent Control Act of 1948 and s. 16 was re-enacted with slight modification. But the new section applies only to suits "for recovery of rent which become due after the enactment of this Act" *i.e.*, after the 17th January 1948 and has no application to the present suit which is for rent prior to 1948. S. 16 of 1948 simply regulated procedure for, it provided "No Court shall accept a plaint, etc." s. 5 (*c*) of the General Clauses Act which provides that repeal of an enactment will not affect any right, privilege, obligation, or liability which has already accrued, has

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provided that the Act would cease to be in force on the expiry of six months from the termination of war. (ii) The Notification under the present War Termination Act, 1946, fixed the 1st February as the date on which the war terminated. Therefo e normally the Defence of Burma Act came to an end on the 31st July 1947. The object of the Defence of Burma (Repealing) Act, 1947, was not to make any part of the Act permanent but only to repeal such parts of the Act and Rules as could safely be dispensed with even before the date on which the Act would ordinarily expire, *i.e.*, the 31st July 1948. *Held :* A rule or regulation validly made under the Act should be regarded as though it was a provision in the Act itself. *Rex* v. *Walker*, (1875) L.R. 10 Q B. 355 ; *Wicks* v. *Director of Public Prosecution*, L.R. (1947) A.C. p. 362 ; *Willingale* v. *Norris*, (1909) 1 K.B 57 ; *Rex* v. *Wicks*, (1946) A.E.L.R., Vol. 2, p. 531, followed. Repeal of an Act abrogates all rules and bye-laws made under the Act unless they are preserved by the Repealing Act by means of a saving clause or otherwise. *Watson* v. *Winch*, L.R. (1916) 1 K.B. 688. followed. Rule 8 saved by the Defence of Burma (Repealing) Act expired with the Defence of Burma Act, 1947 on the 31st of July 1947 and an accused person who is alleged to have committed an offence under Rule 8 (4) on or after the 1st August cannot be tried and convicted for that offence. *Per* CHIEF JUSTICE.—Where one Bench has laid down the law in a certain sense, it is not competent to another Bench of equal standing to refuse to follow the earlier de ision or to give the language used therein a meaning contrary to its usual sense The proper course in such a case open to the later Bench is to refer the question in dispute to a Full Bench. *King-Emperor* v. *Nga Lun Thoung*, 1935) I.L.R. 13 Ran. 570, followed. *Per* U TUN BYU, J.—S. 5 of Burma General Clauses Act applies only to an Act which has been repealed by another Act and not to a temporary Act which has expired. In case of a temporary Act the extent of the restrictions imposed and the duration of provisions are m tters of construction. *Kalyan Dass* v. *The Crown*, 15 Lah. 782 ; *Rex* v. *Wicks*, (1946) 2 A.E.L.R. 531, followed. *Stevenson* v. *Oliver*, 151 E.R. 1024, referred to. *Per* U SAN MAUNG, J.—It is an elementary rule that construction is to be made of all parts (of an Act), together and not of one part only by itself . . . Such a survey is often indispensable even when the meaning of the words is plainest ; for the true meaning of any passage is that which (being permissible) best harmonises with the subject and with every other passage in the statute. Maxwell on Interpretation of Statutes, 9th Edn. 0, followed

DEFENCE OF BURMA ACT, 1940—*Rules 78 and 96 of Defence of Burma Rules Clause 13 of the Requisitioning (Claims and Compensation) Order, 1947. Held :* In view of the fact that the Defence of Burma Act, 1940, Defence of Burma (Repealing) Act 1 47, Defence of Burma Rules and Orders iss ed under such Rules, expired on the 31st July 1947, no claim under Rule 78 of Defence of Burma Rules or under clause 6 of the Requisitioning (Claims and Compensation) Order, 1947 (which had been issued under Rule 96 of Defence of Burma Rules) could be entertained after the 31st July 1947. *The Union of Burma* v. *Maung Maung and two others*, (1949) Bur. L.R., followed. With the lapse of Defence of Burma Ru es and Defence of Burma Act, the Requisit ning (Claims and Compensation) Order, 1947, has lso come to an end.

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That when no date for payment is fixed in the document for repayment of debts and it is not repayable "ON DEMAND" but when needed then the period of limitation starts from the date of the execution of the document *T. C. Bose* v. *Obedur Rahman Chowdhury*, (1928) I.L.R. 6 Ran. 297 ; *Gaya Din and others* v. *Jhuman Lal and others*, (1915) I.L.R. 37 All. 400 at p. 405 ; *Ruomal Kodumal and another* v. *Mt. Janat*, (1941) A.I.R. Sind. 158, followed. *Nilkanth Balwant Natu and others* v. *Vidya Narsing Bharati and others*, (1930) I.L.R. 54 Bom. 445 (P.C.); *Tan Soon Thye and others* v. *L. E. DuBern*, (1933) I.L.R., 11 Ran. 328, distinguished. The word "Void" used in s. 51 of the Rangoon Insolvency Act means voidable. *Re : Hart, Ex-parte Green*, (1912 L.R. 3 K.B.D. 6 ; *Henderson & Co.* v. *Williams*, (1895) L.R. 1 Q.B.D 521 at pp. 528-529, followed. Where the transferee under a transfer voidable at the instance of the Official Assignee, transfers that property before the transfer is avoided to a *bona fide* purchaser of value, such purchaser gets a good title against the Official Assignee. When Official Assignee failed in duty and as a consequence of such failure a person has acquired title to a property for value. Official Assignee is estopped from claiming the property from such purchaser. *Mercantile Bank of India, Ltd.* v. *Central Bank of India, Ltd.*, (1938) A.C. 287, followed. *Henderson* v *Williams*, (1895) 1 Q.B.D. 521, distinguished.

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EVIDENCE ACT, s. 92—*Interpretation of the terms of a deed of partition—Rules to be followed. Held :* Oral evidence of the intention of parties to a document is not admissible for the purpose of construing the deed or ascertaining the intention of the parties. The question before the Court is not what the parties may have intended to do by entering into the deed but what is the meaning of the words used in the deed. *Balkishen Das and others* v. *Legge*, 27 I A 59 ; *Maung Kyin* v. *Ma Shwe La*, 44 I.A. 236 at p 243; *Feroz Shah* v. *Sohbat Khan and others*, (1933) I.L.R. 14 Lah. 466 (P.C.) at p. 471 ; *Maharaja Manindra Chandra Nandi* v. *Raja Sri Sri Durga Prasad Singh*, 21 C.W.N. 707 at p. 710; Ch. *Rickman and another* v. *Carstairs*, 110 E.R. 931 at p. 935, followed. *Monypenny* v. *Monypenny*, 9 H.L.C. 114 (140) (1861) ; *Dungannon* v. *Smith*, 12 Cl. and F. 547 (599) (1846) ; *Pearks* v. *Mosely*, 5 App. Cas. 714 (719) 1880) ; *Leader* v. *Duffey*, 13 App. Cas. 294 (301) (1888), referred to. Proviso 6 of s. 92 of the Evidence Act provides for the admission of such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. This can arise only when the terms of documents require explanation. *Baijnath Singh* v. *Haiee Vally Mohamed Hajee Abba*, (1925) I.L.R. 3 Ran. 106 (P.C), followed. *Martand Trimbak Gadre* v. *Amritrao Raghojirao Dhamale and another*, (1925) I.L.R. 49 Bom. 662 at p. 671 ; *Ganpatrao Appaji Jagtap* v. *Babu Bin Tukaram and others*, (1920) I.L.R, 44 Bom. 710 at pp. 717, 718 and 719 ; *Tsang Chuen* v. *Li Po Kwai*, (1932) A.C 715 at p. 727 728 ; *Shore* v. *Wilson*, (1842) 9 Cl. and F. 355, 565 ; *The North Eastern Railway Company* v. *Lord Hastings*, (1900) A C. 260, referred to. *Held further :* That the document in this case gave only the

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Faharuddin Mohamed Ahsan v. *The Official Trustee of Bengal*, I.L.R., Vol. 10, Cal. 538, followed. *Har Narain Lal* v. *Mathura Prasad*, I L.R. (1940) All. 517, referred to. In a fit and proper case the High Court can allow an appeal to be converted into a petition for revision where the appeal does not lie *L. A. Krishna Ayyar* v. *Arunachalam Chettiar*, I.L.R. 58 Mad. 972 at p. 987, followed *Ramchandra Kustoorchand* v. *Balmukaund Chaturbhuj*, I.L.R. 39 Bom. 71, distinguished. The District Judge granted leave under s. 5 of Liabilities (War-Time Adjustment) Act, 1945, without any enquiry in disregard of the section. He had no power to delegate the decision of the matter to the Registrar of the Court. The order was therefore set aside.

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LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1945, s 4 (1)—That the leave of the Court under s. 4 (1) Liabilities (War Times Adjustment) Act, 1945 is not necessary for an enquiry into the alleged nullity of the decree.

LIMITATION ACT, ARTICLES 7 AND 102 OF SCHEDULE I—*Meaning of the word labourer in Article 7* The Respondent was employed at a salary of Rs. 115 per mensem to take milk from the appellant and others and deliver the same to Tea Shops in Rangoon. He had to give statements as to the milk. A suit for Rs. 640 for wages or salary was decreed in both the lower Appellate Court and the trial Court and the contention that he was a labourer and that Article 7 of the Limitation Act was applicable was negatived. *Held :* That labourer is one who performs physical labour as a service or for a livelihood. A salesman appointed by a dealer to assist him in the sale of goods is not merely a labourer and his suit for wages is governed by Article 102. In the present case the work performed by the Respondent was not merely that of a coolie but in addition that of a salesman. *Musa Meah Sawdagar* v. *Shirazulla*, A.I.R. (1935) Rang. 235 ; *Mutsaddi Lal* v. *Bhagwandas*, I.L.R. (1926) All. 161, referred to.

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LIMITATION ACT—*Ss. 5 and 4 (2)—Article 181—Application for final decree—Courts (Emergency Provisions) Act, 1943, s 7—Loss or destruction of records if grounds for not making application for the final decree.* Article 181 of the Limitation Act governs the application for a final decree in mortgage suit for sale and period of limitation is three years from the time when the right to make the application accrued. *M.A.L.M. Chettiar Firm* v. *Maung Po Hmyin and others*, I.L.R. 13 Ran. 325 and *Maqbut Ahmed and others* v. *Pratap Narayan Singh and others*, I.L.R. 57 All. 242 (P.C.), followed. S. 5 of the Limitation Act does not apply to an application for a final decree inasmuch as no enactment has been made making that section applicable to an application for final decree. S. 14 (2) also does not apply as the application for reconstruction of the records was not filed in a Court which had no jurisdiction, and it was not in fact rejected Though provisions of Limitation Act impose certain arbitrary time limits, yet the Act must be construed strictly. *Udaypal Singh* v. *Lakshmi Chand*, I.L.R. 58 All. 161 at p. 268, followed. There is no judicial discretion which would enable the Court to relieve from the operation of Limitation Act in case of hardship, except in case where s. 5 of the Act applies. *Maqbul Ahmed and*

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is a question of fact, in each case. Though a person according to his own evidence cannot be strictly called a guilty associate, his conduct immediately preceding a murder and afterwards can show him to be an accessory after the fact. The statements that the witnesses accompanied appellant Kyaw Hla Aung to the side of the creek or some distance from the village, that they went across the creek to the side further away with the murdered persons, and that they did not run away at the time of the murder or after the murder, but helped to dispose of the dead body make the witnesses as accessories after the fact. As such, their evidence requires independent corroboration, and it would be very unsafe to accept the evidence alone and convict on it. *Brijpal Singh* v. *Emperor*, A.I.R. (1936) Oudh 413 at 415; *Ramaswami Gouden* v. *Emperor*, (1904) 27 Mad. 271; *Emperor* v. *Kallu*, A.I.R. (1937) Oudh 259 at 261, considered. *Nga Pauk* v. *The King*, A.I.R. (1937) Ran 513, distinguished. Corroboration means independent evidence, not mere tainted evidence but fresh untainted evidence, *Aung Pe* v. *King-Emperor*, (1937) 9 R.L.R. 110; *The King* v. *Nga Myo*, (1938) R.L.R. 190, followed. *Aung Hla and others* v. *King-Emperor*, (1931) 9 Ran 404, referred to. *Nawal Kishore Rai and others* v. *Emperor*, A.I.R. (1943) Pat. 146, approved. Before a witness makes use of a document to refresh his memory the Court should be satisfied that the provisions of s. 159. Evidence Act, are strictly complied with. When a charge is framed under s. 302 (*1*), Penal Code, the relevant clause of the sub-section should be mentioned in the charge. The accused must know which of the three sub-clauses he is charged with.

PENAL CODE, s. 396—*True meaning of the word murder "in the course of dacoity." Held by Chief Justice* (agreeing with U Aung Tha Gyaw, J.): Where the dacoits take one or more hostages to ensure their safe retreat and the hostage is murdered before the dispersal of the gang, murder is committed in the course of the dacoity. In order to commit dacoity it is necessary not only that the dacoit should get booty away but that he should get away with the booty and if in getting away with the booty he commits a murder he is guilty of offence under s. 396. In view of s. 3 of the Penal Code and Criminal Procedure (Temporary Amendment Act, 1947, and General letter No 20 of 1947, dated 31st October 1947 of the High Court of Judicature at Rangoon, no direction that an accused should be shot is necessary. *Queen-Empress* v. *Sakharam Khander*, (1900) 2 Bom L.R. 325; *Vitti Thevan* v. *Vitti Thevan*, (1906) 17 M.L.J. 118-5 Cr.L.J. 201, followed. *Lashkar and others* v. *The Crown*, (1921) I.L.R. 2 Lah 275; *Karam Baksh* v. *Emperor*, (1924) 25 Cr.L.J. 319, *Sundar* v. *Emperor*, (1924) 25 Cr.L.J. 709; *Monoranjan Bhattacharjya and others* v. *Emperor*, (1932) 33 Cr.L.J. 722; *Tha Nge Gyi and one* v. *The King*, (1946) R.L.R. 229, referred to.

PENAL CODE, s. 483—*Meaning of the word Trade Mark—Held*: In order to be a Trade Mark within the meaning of s. 478 of the Penal Code the mark must be "distinctive" in the sense of being adapted to distinguish the goods of the proprietor of the Trade Mark from those of other persons. Where the mark merely describes the quality or origin of the article and is such as is commonly used in the trade, to define goods of particular

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the title passed to the purchaser. Though there is provision of grant of Sale Certificate yet the Sale Certificate does not transfer title, but is merely the evidence of sale. *Basir Ali* v. *Hafiz Nasir Ali*, I.L.R. 43 Cal. 124, followed. Though in sales under the Code of Civil Procedure the title vests only on the confirmation of the sale yet once the sale is confirmed, it takes effect not from the date of its confirmation but from the date of the actual sale. *Bhawani Kunwar* v. *Mathura Prasad Singh*, I.L.R. 40 Cal. 89 (P.C.), followed.

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URBAN RENT CONTROL ACT, 1946, AS AMENDED BY ACT 26 OF 1947—S. 14 (1)—*Order staying execution of decree for ejectment subject to regular payment of rent—Appeal by decree-holder dismissed—Judgment-debtor's failure to comply with terms—Whether rights of parties suspended by appeal—Code of Civil Procedure, Order 41, Rule* 5 (1). *Held :* That where under s. 14 (*1*) of the Urban Rent Control Act, 1946, as amended by Act XXVI of 1947, Court ordered stay of execution of a decree for ejectment of a tenant subject to his regular payment of rent by particular dates, and the decree-holder appealed against the order, such appeal does not exonerate the judgment-debtor from complying with the terms imposed by the Court. On judgment-debtor's failure to comply with the terms of the Stay Order, the decree-holder is entitled to execute the decree by ejecting the tenant. If the decree-holder had not executed the decree even on the failure of judgment-debtor to comply with the terms imposed in the Order of Stay but awaited the result the matter might have stood on a different footing. So long as the appeal is not disposed of the decree-holder has every right to execute the decree, and wording of Order 41, Rule 5 (1) of the Code of Civil Procedure is general in its terms and applies equally whether the plaintiff or the defendant appeals. *Abdul Rashid Mandal* v. *Shaharaei Molla*, (1919) I.L.R. 46 Cal. 1032, followed. *Noor Ali Chowdhuri* v. *Koni Meah and others*, (1886) I.L.R. 13 Cal. 13 ; *Ram Narain Singh* v. *Lala Roghunath*, (1895) I.L.R. 22 Cal. 467 ; *Thamal Marap* v. *Rani Abhoyessuri Debi*, (1908-09) 13 C.W.N. 1060 ; *Rup Chand and others* v. *Shamsh-ul-Jehan*, (1889) I.L.R. 11 All. 346, distinguished.

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URBAN RENT CONTROL ACT, s. 11 (*1*) (*c*)—*Nuisance or annoyance to the adjacent neighbouring occupiers—What constitutes. Held :* That the allegation that a tenant has been guilty of conduct which is a nuisance or annoyance to the adjacent or neighbouring occupiers should be considered and decided having regard to all surrounding circumstances. The test to be applied in such case is whether the nuisance complained of was actionable. The principle is that those acts for the common and ordinary use and occupation of a house may be done, if conveniently done, without subjecting those who do them to an action The convenience of such a rule may be indicated by calling it "a rule of give and take, live and let live." Every person is entitled as against his neighbour to comfortable and healthful enjoyment of the premises occupied by him and the point to be determined is whether the act complained of is an annoyance materially interfering with the ordinary physical comfort of human existence not merely according to elegant and dainty modes and habits of living but according to plain and sober and

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simple notions. An act which might not ordinarily be a nuisance may still be a nuisance if repeated at very short intervals from some whim or caprice on purpose to annoy neighbours. Circumstances and the character of the locality also are material factors. *Bamford* v. *Turnley*, 122 E.R, 27 ; *Vanderpant* v. *Mayfair Hotel, Co., Ltd.*, (1930) L.R. 1 Ch. D. 138 at pp. 165-166 ; *Muhammad Jalil Khan and others* v. *Ram Nath Katua and others*, (1931) I.L.R. 53 All. 484 at p. 491, followed. *Held further* : If the act be not done maliciously then mere singing of song in chorus cannot constitute a legal nuisance. *Christie* v. *Davey*, (1893) L.R. 1 Ch. D. 316, followed.

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URBAN RENT CONTROL ACT, s. 14 (*a*)—*Stay of execution on certain condition—Failure to perform the condition. Held* : That where the tenant has obtained order for stay of execution of a decree for ejectment on certain condition, he cannot, after he has broken that condition, apply again for stay of execution under s. 14 (*1*) of the Act.

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URBAN RENT CONTROL ACT, 1946, 1947, 1948—*S. 14* (*1*)—*Distinction—Meaning of "tenant"—The arrears in s. 14 whether applicable both to rent and mesne profits—Mesne profits by whom payable. Held* ; A comparison of the wordings of sub-s. 1 of s. 14 of the Urban Rent Control Act before and after amendment show that (1) before the amendment the Court could impose any condition if thought reasonable as a condition precedent to the discharge or rescission of an order of ejectment whereas after the amendment the order must be in regard to payment of *arrears* of rent or mesne profits but not future rent or mesne profits (2), before amendment it was discretionary on the part of the Court whether to rescind or not to rescind an order for ejectment even if conditions imposed by the Court have been complied with ; but after the amendment if the condition as to the payment of arrears of rents or mesne profits has been complied with, the Court has no discretion in the matter. The Court shall rescind the order. Under the new sub-section it would be illegal for the Court to impose any condition other than payment of arrears of rent or mesne profits. The would "arrears" refers both to rent and mesne profits. Under the Urban Rent Control Act, 1948, even if tenancy has been determined the tenant continues to be tenant and therefore *rent* is payable by a person whose tenancy has been terminated but who is still in occupation of his premises. Mesne profits is payable by person who has been permitted to occupy under s. 12 (*1*) of the Act. When respondent does not appeal against the part of the decree which is against him, the Court will not help him.

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WHETHER BARREL OF A RIFLE IS AN "ARM" WITHIN THE MEANING OF THE PROVISO ADDED BY S. 2 OF THE ARMS (TEMPORARY AMENDMENT) ACT, 1947 TO S .19 OF THE ARMS ACT—*Whether*

G.U B.C.P.O.—No. 80, H.C.R., 26-9-52—1,740—11

FULL BENCH (CRIMINAL).

Before U Thein Maung, Chief Justice, U Tun Byu and U San Maung, JJ.

THE UNION OF BURMA

v.

MAUNG MAUNG AND TWO OTHERS.*

H.C. 1948

Nov. 19.

Defence of Burma Act, 1940—Rules 8 (4)—Conviction under—Whether legal after 31st July 1947—Defence of Burma (Repealing) Act (Burma Act IV of 1947), s. 4—Effect of.

Held: (i) S. 1 (4) of the Defence of Burma Act, provided that the Act would cease to be in force on the expiry of six months from the termination of war.

(ii) The Notification under the present War Termination Act, 1946, fixed the 1st February 1947 as the date on which the war terminated.

Therefore normally, the Defence of Burma Act came to an end on the 31st July 1947.

The object of the Defence of Burma (Repealing) Act, 1947, was not to make any part of the Act permanent but only to repeal such parts of the Act and Rules as could safely be dispensed with even before the date on which the Act would ordinarily expire, *i.e.*, the 31st July 1948.

Held: A Rule or regulation validly made under the Act should be regarded as though it was a provision in the Act itself.

Rex v. *Walker*, (1875) L.R. 10 Q.B. 355; *Wicks* v. *Director of Public Prosecution*, L.R. (1947) A.C. p. 362; *Willingale* v. *Norris*, (1909) 1 K.B. 57; *Rex* v. *Wicks*, (1946) A.E.L.R., Vol. 2, p. 531, followed.

Repeal of an Act abrogates all rules and bye-laws made under the Act unless they are preserved by the Repealing Act by means of a saving clause or otherwise.

Watson v. *Winch*, L.R (1916) 1 K.B. 688, followed.

Rule 8 saved by the Defence of Burma (Repealing) Act expired with the Defence of Burma Act, 1940, on the 31st July 1947 and an accused person who is alleged to have committed an offence under Rule 8 (4) on or after the 1st August cannot be tried and convicted for that offence.

Per CHIEF JUSTICE.—Where one Bench has laid down the law in a certain sense, it is not competent to another Bench of equal standing to refuse to follow the earlier decision or to give the language used therein a meaning contrary to

* Criminal Reference No. 62 of 1948 of the High Court, Rangoon, being a reference made by the Hon'ble Justice U San Maung in Criminal Revision No. 60B of 1948.

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its usual sense. The proper course in such a case open to the later Bench is to refer the question in dispute to a Full Bench.

King-Emperor v. *Nga Lun Thoung*, (1935) I.L.R. 13 Ran. 570, followed.

Per U TUN BYU, J.—S. 5 of Burma General Clauses Act applies only to an Act which has been repealed by another Act and not to a temporary Act which has expired. In case of a temporary Act the extent of the restrictions imposed and the duration of provisions are matters of construction.

Kalyan Dass v. *The Crown*, 15 Lah. 782; *Rex* v. *Wicks*, (1946) 2 A.E.L.R. 531, followed.

Stevenson v. *Oliver*, 151 E.R. 1024, referred to.

Per U SAN MAUNG, J.—It is an elementary rule that construction is to be made of all parts (of an Act), together and not of one part only by itself . . . Such a survey is often indispensable even when the meaning of the words is plainest ; for the true meaning of any passage is that which (being permissible) best harmonises with the subject and with every other passage in the statute.

Maxwell on Interpretation of Statutes, 9th Edn. 30, followed.

The order of reference to a Full Bench was made by

U SAN MAUNG, J.—In Criminal Revision Case No. 36 of 1948 of the Sessions Judge, Hanthawaddy, the learned Sessions Judge, who on his own motion called for the proceedings of the 9th Additional Magistrate, Rangoon, in his Criminal Regular Trial No. 427 of 1947 for the purpose of satisfying himself as to the legality of the convictions of the accused, Maung Maung, Saprao and Narana under Rule 8 (4) of the Defence of Burma Rules, 1940, has recommended to this Court that the convictions and sentences on these accused persons be set aside on the ground that the Rules framed under the Defence of Burma Act, 1940, had expired on the 31st of July 1947 at the same time as the expiration of the Defence of Burma Act, 1940, owing to the provisions of sub-section (4) of section 1 of the Act. The alleged offence took place on the 23rd September, 1947, and Rule 8 of the Defence of Burma Rules 1940, is one of the Rules mentioned in the Second Schedule to the Defence of Burma (Repealing) Act, 1947 (Burma Act IV of 1947). The question therefore which directly arises in this case is whether this Rule is still in force notwithstanding the expiration of the Defence of Burma Act, 1940, in view of section 4 of Burma Act IV of 1947. This section reads :

" Notwithstanding anything contained in this Act, the repeal of the said Act shall not effect or render invalid any Rules made under the said Act or any Orders made

> under the said Act or Rules before the commencement of this Act, in so far as they were made under the provisions of the said Act or Rules specified in the Schedules, except that the said Rules shall continue to be in force subject to the modifications set out against them in column 2 of the Second Schedule."

This is a difficult question of law which, in my opinion, should be decided by a Full Bench of this Court. A similar question as to whether section 4 of Burma Act IV of 1947 had the effect of preserving the Rules referred to in that section and enumerated in the Second Schedule of the Repealing Act arose in the case of *Ranglal and three others* v. *The King* (1) and was answered in the affirmative by a Divisional Bench of the late High Court consisting of Sir Ba U and Gledhill, JJ.

A negative answer was, however, given by another Bench consisting of Goodman Roberts C.J. and Blagden J. in a later case of *The King* v *P. Ranga Lall and another* (2) where the question referred to the Bench by E Maung J., was :

> " Can an accused person who is alleged to have committed an offence under Rule 115A of the Defence of Burma Rules prior to the 31st July 1947 be tried for and convicted of that offence on or after the 1st August 1947 ?"

The views thus expressed by two Divisional Benches of the late High Court being in conflict, an attempt was made by Sir Ba U J. to solve the difficulty by having the matter referred to a Full Bench of the late High Court : See *P. Ranga Lall and another* v. *The King* (3). The reasons for referring the matter to the Full Bench have been fully set out by Sir Ba U J. in the order of reference in that case. Unfortunately, when the matter came up for hearing before a Full Bench of this Court consisting of the Chief Justice U Tun Byu J. and myself, no decision could be arrived at, as Criminal Regular case No. 36 of 1947 of the 1st Additional Magistrate, Rangoon, which gave rise to Criminal Revision No. 231B of 1947 of the late High Court, was withdrawn

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(1) Criminal Revision No. 154B of 1947 of the High Court of Judicature at Rangoon.

(2) Criminal Reference No. 99 of 1947 of the High Court of Judicature at Rangoon.

(3) Criminal Revision No. 231B of 1947 of the High Court of Judicature at Rangoon.

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by the Government *vide* diary order dated the 22nd March 1948, in Criminal Reference No. 115 of 1947 of this Court. As the question regarding the effect of section 4 of the Defence of Burma (Repealing) Act, 1947 (Burma Act IV of 1947), has arisen again and as a decision on this point would have far-reaching effect in future, I am of the opinion that a Full Bench should be constituted as soon as possible after the Long Vacation and, with this end in view I would refer the following question to a Full Bench such as my Lord the Chief Justice may constitute :

> " Can an accused person who is alleged to have committed an offence under Rule 8 (4) of the Defence of Burma Rules on or after the 1st August 1947, be tried and convicted for that offence notwithstanding the fact that the Defence of Burma Act, 1940, has ceased to be in force after the 31st July 1947 owing to the provisions of sub-section (*4*) of section 1 of the Act ? "

Chan Htoon (Attorney-General) for the Union of Burma.

No appearance for the respondents.

P. K. Basu, Kyaw Din and *E. C. V. Foucar* amicus curiæ.

U THEIN MAUNG, C.J.—The Defence of Burma Act, 1940, was a temporary Act. The preamble shows that it was enacted as an emergency had arisen and it was necessary on account thereof "to provide for special measures to ensure the public safety and interest and the Defence of British Burma and for the trial of certain offences " ; and sub-section (*4*) of section 1 provides "It shall be in force during the continuance of the present war and for a period of six months thereafter." So it would have expired on the midnight of the 31st July 1947, in accordance with Judicial I Branch Notification No. 48, dated the 5th February 1947, by which the Governor declared, under section 2 of the present War Termination

(Definition) Act, 1946, that the first day of February 1947, should be treated as the date of the termination of the war.

Section 2, which appears in Chapter II under the heading Emergency Powers, gave the Governor power to make rules; the Defence of Burma Rules are among the rules made by the Governor in exercise thereof; and they would have expired with the Act on the 31st July 1947, See *Willingale* v. *Norris* (1) at page 64 of which Lord Alverstone C.J. has observed:

"If it be said that the regulation is not a provision of an Act, I am of opinion the *Rex* v. *Walker* (2) is an authority against that proposition. I should certainly have been prepared to hold apart from authority that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done."

See also *Wicks* v. *Director of Public Prosecutions* (3) at page 365 of which Viscount Simon has observed :

"There is, of course, no doubt that when a statute like the Emergency Powers (Defence) Act, 1939, enables an authority to make regulations, a regulation which is validly made under the Act, *i.e.*, which is *intra vires* of the regulation making authority, should be regarded as though it were itself an enactment. As the Court of Criminal Appeal in its judgment has pointed out [(1947) L.J.R. 191, 192], that was decided by the Divisional Court in the case of *Willingale* v. *Norris* (1), and it appears to me that that decision is perfectly correct."

However, the Defence of Burma (Repealing) Act, 1947, came into force on the 11th January 1947, and two Benches of the late High Court of Judicature at Rangoon disagree as to the effect thereof on the Defence of Burma Rules which are set out in the

(1) (1909) 1 K.B. 57. (2) (1875) L.R. 10 Q.B. 355.
(3) L.R. (1947) A.C. p. 362.

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Second Schedule thereto. One Bench held on the 27th October 1947 in *Mr. Ranglal and three others* v. *The King* (1) that section 4 of the Defence of Burma (Repealing) Act is " a saving section keeping the Rules set out in the Second Schedule as still being alive " and that " the Rules so preserved will remain in force so long as section 4 remains unrepealed." A single Judge of the same High Court, who was probably unaware of the said decision, referred the following question (*inter alia*) to another Bench stating in his order of reference dated the 5th November 1947 " Rule 115A had expired—it had not been repealed—on the 31st July 1947 "

" Can an accused person who is alleged to have committed an offence under Rule 115A of the Defence of Burma Rules prior to the 31st July 1947 be tried for and convicted of that offence on or after the 1st August 1947 ?"

[See *P. Ranga Lall and another* v. *The King* (2).]

Rule 115A is one of the Defence of Burma Rules set out in the Second Schedule to the Defence of Burma Repealing Act, 1947; and that other Bench has held in the said reference :

At midnight of the 31st July/1st August 1947 the surviving parts of the Defence of Burma Act and the Defence of Burma Rules died a natural death.

[See *The King* v. *P. Ranga Lall and another* (3).]

The present reference is in respect of Rule 8 (4) which also is one of the Defence of Burma Rules set out in the Second Schedule to the Defence of Burma (Repealing) Act, 1947.

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(1) Criminal Revision No. 154B of 1947 in the High Court of Judicature at Rangoon.

(2) Criminal Revision No. 174 of 1947 in the High Court of Judicature at Rangoon.

(3) Criminal Reference No. 99 of 1947 in the High Court of Judicature at Rangoon.

The object of the said Act, as set out in the preamble, is " to repeal the Defence of Burma Act 1940 and to withdraw the rules thereunder ". There is nothing in the preamble to indicate that it was the intention of the legislator to make any part of the Defence of Burma Act, 1940 and the rules thereunder permanent; and there does not appear to have been any reason to make any part of the special emergency legislation permanent.

A bird's eye view of the Repealing Act shows that the object of the legislator was to repeal such parts of the said legislation as could be dispensed with safely even before the technical termination of the war in view of the fact that actual hostilities had ceased, the emergency was over and only the aftermath thereof remained.

Sections 4, 5, 6, 7, 8, 9, 10, 11 and 12, *i.e.*, sections relating to (1) Special Powers to control civilian personnel employed in connection with His Majesty's Forces (2) enhanced penalties, (3) Temporary Amendments, of Acts and (4) Special Tribunals, are repealed but the other sections " shall continue and be deemed to be in force as if this (Repealing) Act had not been enacted until the Governor shall, by notification, declare the aforesaid provisions of the Act to be no longer in force or until the date, whichever is earlier, on which the Defence of Burma Act, 1940, would ordinarily, but for the provisions of section 2 hereof, have ceased to be in force under the provisions of sub-section (*4*) of section 1 of the said Act." (*See* section 3 of the Repealing Act). It must be noted in this connection that no section of the principal Act has been repealed and re-enacted so as to make it permanent. The sections set out in the First Schedule to the Repealing Act are to continue to be in force as if the Repealing Act had not been enacted, and section 1 (*4*) of the

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principal Act which provides for its expiry after a period of six months from the termination of the war is among the sections so retained. In fact the legislator even felt that it might be feasible to do away with some or all of the sections, so retained, before the date for their expiry. So he has given the Governor power to declare by notification before that date that they shall no longer be in force.

In this connection it must be noted (1) that Rules are made under section 2 of the principal Act which is retained with some modifications, (2) that in the words of an *amicus curiæ* (Mr. E. C. V. Foucar) the meat of the principal Act is in the Rules and (3) that the expiry or repeal of section 2 and the other surviving sections, for which careful provision has been made, as stated above, will be more or less futile if any of the Rules are to remain in force thereafter. Besides Rules are usually allowed by the legislature to expire with the enactment under which they have been made; and " when a by-law is made under an Act of Parliament, the repeal of the Act abrogates the by-law, unless the by-law is preserved by the Repealing Act by means of a saving clause or otherwise." [See *Watson* v. *Winch* (1).]

Now the sections of the Repealing Act which provide for continuation to be in force of the rules and for their cancellation and amendment are sections 4 and 5 which read:

" 4. Notwithstanding anything contained in this Act, the repeal of the said Act shall not affect or render invalid any Rules made under the said Act or any Orders made under the said Act or Rules before the commencement of this Act, in so far as they were made under the provisions of the said Act or Rules specified in the Schedules, except that the said Rules shall continue to be in

(1) L.R. (1916) 1 K.B. 688.

force subject to the modifications set out against them in column 2 of the Second Schedule.

5. Nothing contained in this Act shall be deemed to derogate from the Governor's powers, which he possessed before this Act came into force, to cancel or amend any Rules specified in the Second Schedule, or any Orders made under the provisions of the said Act or Rules specified in the said Schedules, or from making any new rules or orders under the aforesaid provisions of the said Act or Rules, so long as the provisions of the Defence of Burma Act, 1940, specified in the First Schedule continue to be in force."

The first part of section 4 appears to have been enacted *ex abundanti cautela*. When sections 2 and 3 are read together and Schedule I to the Act is referred to, it is perfectly clear, as has already been stated above, that section 2 of the principal Act under which the Rules are made has not been repealed at all. It has been allowed to remain in force with certain modifications.

The present reference is in connection with Rule 8 which is one of the Rules mentioned in the Second Schedule to the Repealing Act and section 4 expressly provides "that the said Rules shall *continue* to be in force subject to the modifications set out against them in column 2 of the Second Schedule."

It is quite clear from the wording of section 4 that "the repeal" of the principal Act, *i.e.*, the repeal of certain sections thereof and the amendment of other sections "shall not affect or render invalid" any of the Rules in the said Schedule and that they shall *continue* to be in force, subject to the modifications, for their normal span of life under the principal Act. They are not made nor enacted by the Repealing Act so as to give them a fresh lease of life. They are just to *continue* to be in force as if nothing has happened.

This view is quite consistent with the provisions of section 5 of the Repealing Act. In fact this section also appears to have been inserted *ex abundanti cautela*.

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Section 2 of the principal Act under which the Rules are made having been retained, though with some modifications, the Governor would have power under section 21 of the General Clauses Act to add to, amend, vary or rescind any Rule or Order ; and section 1 (*4*) of the principal Act having been retained, the Rules would expire with the principal Act as amended.

It has been contended that the provision in section 5 of the Repealing Act that the Governor was to have power " to cancel or amend the Rules and to make new Rules and Orders under the principal Act only so long as the provisions of the Defence of Burma Act, 1940, specified in the First Schedule continue to be in force " is an indication of the legislator's intention that the Rules should remain in force on a permanent basis thereafter.

However, we are of the opinion having regard to all the circumstances of the legislation that the said clause is really indicative of the period during which only the Rules are intended by the legislator to remain in force. After the said period the Rules would expire with the parent Act, no one would have power to make new Rules or Orders thereunder and there could be no question of cancelling or amending them.

The Rules set out in the Second Schedule to the Repealing Act have been saved by retention of section 2 of the principal Act and also by express provision in section 4 of the Repealing Act. But they remain Rules made under the principal Act, their span of life has not been increased in any way and in the absence of any provision to the effect that its expiry shall not affect them, they must fall with it.

We have not allowed our judgment to be influenced in any way by the nature of subsequent legislation. However, we find that the legislator himself also took

the same view as we do regarding the life of the said Rules and proceeded to re-enact such of them as were still necessary—with or without modifications—on or about the 1st August 1947. For instance on the 1st July 1947, Rules 76, 76A and 96 were re-enacted in the Requisitioning (Emergency Provisions) Act, 1947, and section 5 thereof provides :

" 5. Notwithstanding anything contained in any other law, all requisitions of property or things made or purported to have been made under Rule 76 and Rule 79 of the Defence of Burma Rules before the commencement of this Act shall be deemed to have been made under the provisions of this Act, as if this Act were in force at the time the requisitions were made * * * "

On the 1st August, 1947, Rule 84 was re-enacted in the Imports and Exports Control Act, 1947 ; Rules 115 and 115A were re-enacted in the State Property Protection Act, 1947 ; and Rules 81, 83 and 83A were re-enacted in the Essential Supplies and Services Act, 1947, section 9 of which also provides that several orders which had been made under Rule 81 (2) " shall be deemed to continue to be in force as if the said orders had been made under the provisions of this Act." On the 6th September 1947, the Custodian of Enemy Property Act, 1947, was enacted ; and section 2 thereof provides :

" Notwithstanding the declaration made under section 2 of the Present War Termination (Definition) Act, 1946, Rule 114 and Rule 114A of the Defence of Burma Rules and the Enemy Property Order, 1939, shall, as from the 31st July 1947, continue to have the same force as if the Defence of Burma Act, 1940, had not expired."

So our answer to the question under reference is (1) that Rule 8 was saved by the Defence of Burma (Repealing) Act, 1947 only for the rest of its original span of life, (2) that the Rule has expired with the

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parent Act (as amended by the Repealing Act) on the 31st July 1947 and (3) that an accused person who is alleged to have committed an offence under Rule 8 (4) on or after the 1st August 1947 cannot be tried and convicted for that offence.

It is a pity that the second Bench of the late High Court of Judicature at Rangoon did not refer the matter to a Full Bench. Page C.J. has observed in *King-Emperor* v. *Nga Lun Thoung* (1) at pages 586-587 :

" Before parting with the case I desire to add, and to emphasize, that it is a fundamental of the constitution of the Court that where one Bench of the Court in unambiguous terms has laid down the law in a certain sense it is not competent for another Bench of equal standing to refuse to follow the earlier decision, or to give to the language used therein a meaning contrary to that which the words used would naturally bear. The proper, and the only available, course open to the later Bench in such circumstances is to refer the question upon which there is a difference of opinion for determination by a Full Bench of the Court."

And we respectfully endorse his remarks.

U TUN BYU, J.—The question under reference is as follows :

" Can an accused person who is alleged to have committed an offence under Rule 8 (4) of the Defence of Burma Rules on or after the 1st August 1947, be tried and convicted for that offence notwithstanding the fact that the Defence of Burma Act, 1940, has ceased to be in force after the 31st July, 1947 ?"

The answer to the above question will depend on the construction which is to be given to the provisions of section 4 of the Defence of Burma (Repealing) Act, 1947, which is as follows :

" 4. Notwithstanding anything contained in this Act the repeal of the said Act shall not affect or render invalid any Rules

(1) (1935) I.L.R. 13 Ran. 570.

made under the said Act or any Orders made under the said Act or Rules before the commencement of this Act, in so far as they were made under the provisions of the said Act or Rules specified in the Schedules, except that the said Rules shall continue to be in force subject to the modifications set out against them in column 2 of the Second Schedule."

The Defence of Burma Act, 1940, was passed in February, 1940, and Rules had been made under the provisions of that Act. The Defence of Burma Act, 1940, was repealed on the 11th January 1947, by section 2 of the Defence of Burma (Repealing) Act, 1947, which is as follows :

" 2. Subject to the provisions hereinafter contained, the Defence of Burma Act, 1940, hereinafter called the said Act is hereby repealed."

The purport of sections 2, 3 and 4 of the Defence of Burma (Repealing) Act, 1947, was to do away with certain parts of the Defence of Burma Act, 1940 and certain Rules made under that Act, which were not mentioned in either the First or the Second Schedule to the Defence of Burma (Repealing) Act, 1947. It appears to be clear when the provisions of sections 2 and 3 of the Defence of Burma (Repealing) Act, 1947, are read together that substantial parts of the Defence of Burma Act, 1940, were not, in effect, repealed, but that they were to continue to remain in force for the period mentioned in section 3 of that Act. The expression " shall continue and be deemed to be in force as if this Act has not been enacted " in section 3 shows that what was being done under section 2 of that Act was to repeal only a part of the provisions of the Defence of Burma Act, 1940, which was not mentioned in the First Schedule to the Defence of Burma (Repealing) Act, 1947 ; and it would be convenient here to reproduce

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also section 3 of the Defence of Burma (Repealing) Act, 1947, which is as follows :

" 3. Notwithstanding anything contained in section 2, all provisions of the said Act specified in column 1 of the First Schedule to this Act, and subject to the modifications set out therein against them in column 2 thereof shall continue and be deemed to be in force as if this Act had not been enacted, until the Governor shall, by notification, declare the aforesaid provisions to the said Act to be no longer in force or until the date, whichever is earlier, on which the Defence of Burma Act, 1940, would ordinarily, but for the provisions of section 2 thereof, have ceased to be in force under the provisions of sub-section (4) of section 1 of the said Act."

The Governor by virtue of the powers which were conferred upon him under the Present War Termination (Definition) Act, 1946, declared the 1st day of February, 1947, as the end of the war which was referred to in section 1 (4) of the Defence of Burma Act, 1940. There is no dispute that if the Defence of Burma (Repealing) Act, 1947, had not been enacted, the Defence of Burma Act, 1940 and the Rules made under that Act would all cease to be operative from the midnight of the 31st July, 1947. The question then is, what is the effect of section 4 of the Defence of Burma (Repealing) Act, 1947, when it is read with other provisions of that Act. In construing the provisions of section 4 it is only proper to assume that the legislature, when enacting the Defence of Burma (Repealing) Act, 1947, enacted it in the light of the law which existed at the time. One of the rules of law is that rules which are framed under an Act cease ordinarily to be in force with the expiry of the main Act under which they were made. Where however an Act is repealed, the Act and Rules made under it can be considered to be still operative for the purposes of section 5 of the Burma General Clauses

Act. In the case of *Kalyan Dass* v. *The Crown* (1) it was held that section 6 of the Indian General Clauses Act, which is equivalent to section 5 of the Burma Act, was not applicable to a *temporary* statute, but that it applied only to a statute which had been repealed by another Act ; and the Lahore case, with respect, laid down a correct proposition of law ; and that this is the correct law appears also to be clear from the recent decision in the case of *Rex* v. *Wicks* (2), where it is observed as follows :

" Considering the position, first, at common law as to the expiration or repeal of a statute in our opinion the position may be taken as now settled. The leading authority is *Stevenson* v. *Oliver* (3). In that case, Parke, B., said (8 M. & W. 234, at p. 241) :

> ' There is a difference between temporary statutes and statutes which are repealed ; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed ; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction.'

That passage was considered and approved by Roche J. in *Spencer* v. *Hooton*, and in our opinion, is a correct statement of the law. It is worth observing that in *Stevenson* v. *Oliver* (3) there are dicta both by the Chief Baron and by Alderson, B. which go further, and appear to say that in any case where a man offends against a temporary statute he can be convicted and punished after its expiration, but, in our opinion, this is contrary to the older cases which were not cited to the judges, in particular, *Miller's* case and *R.* v. *McKenzie*."

The case of *Stevenson* v. *Oliver* (3) had been cited in support of a contrary proposition. The case of *Stevenson* v. *Oliver* was however commented upon in the recent case of *R.* v. *Wicks*, and it therefore requires

(1) I.L.R. 15 Lah. at p. 782. (2) (1946) A.E.L.R., Vol. 2 at p. 531.
(3) 151 E.R. 1024.

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no further comment. The provisions of section 5 of the Burma General Clauses Act cannot accordingly be extended to apply to a temporary Act ; and it appears to me that parts of the Defence of Burma Act, 1940, hi ch remained in force after the Defence of Burma (Repealing) Act, 1947, was passed, were only temporary provisions in view of the explicit provisions of section 3 of that Act.

It has been argued that the words " the said rules shall continue to be in force " in section 4 of the Defence of Burma (Repealing) Act, 1947, should be construed to mean that the Defence of Burma Rules mentioned in the Second Schedule were to remain in force even after the expiry of the remaining provisions of the Defence of Burma Act mentioned in the First Schedule, and that, if it was intended that the Rules were to cease to be in force with the expiration of the main Act, the wording of section 4 of the Defence of Burma (Repealing) Act, 1947, should be the same as in section 3. The words " the said Rules shall continue to be in force " towards the end of section 4 of the Defence of Burma (Repealing) Act, 1947, do not necessarily indicate that they were intended to state that the Rules, which remain in force after the Defence of Burma (Repealing) Act, 1947, was enacted, should remain in force even after the provisions of the Defence of Burma Act, 1940, had all ceased to be operative, because if that was the intention, that intention should have been expressed more clearly and in unmistakable words.

It will be observed that most of the Defence of Burma Rules contained penal provisions or, at least, provisions which enable the Governor to restrict or encroach on the civil rights of the citizens given to them under the ordinary law of the country. It will accordingly be only proper to insist on the existence of

clear words to that effect in the Repealing Act, if it is to be construed that the legislature intended to allow the Rules mentioned in the Second Schedule to the Defence of Burma (Repealing) Act, 1947, to remain in force after the provisions of the Defence of Burma Act had all ceased to be in force. I am unable to see any such clear indication in the provisions of section 4 of the Defence of Burma (Repealing) Act, and any doubt which might exist on this point must be thrown in favour of the subjects. The fact that the wording of sections 3 and 4 of that Act is not the same does not necessarily imply that the legislature in enacting that Act entertained a different intention, in view of the fact that it ought to be presumed that the legislature must have had the proposition of law that ordinarily the rules cease to have effect with the expiry of the Act under which they were made in mind when the Defence of Burma (Repealing) Act, 1947, was enacted. Moreover it appears to me that the words " except that the said Rules shall continue to be in force subject to the modifications set out against them in column 2 of the Second Schedule " at the end of section 4 of the Defence of Burma (Repealing) Act, 1947, could be construed to mean that the legislature purported in those words to do nothing more than to state that the Rules mentioned in the Second Schedule should remain in force for the same period in which the remaining provisions of the main Act will remain in force but that they should continue to be in force only in the form in which they had been modified in the Second Schedule.

The Defence of Burma Rules might be likened to a complicated mechanism which is capable of operating in various ways, through which the Defence of Burma Act, 1940, operates. The expiry of the Defence of Burma Act on the midnight of the 31st July, 1947, can

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therefore serve no useful purpose, unless, at least, some of the Defence of Burma Rules specified in the Second Schedule to the Defence of Burma (Repealing) Act, 1947, are also repealed or rendered inoperative. It has been suggested in the course of the arguments that it is likely that the legislature might have thought that it would require certain space of time after the expiry of the main Act within which it was to consider which of the Rules in the Second Schedule ought to be retained, and which Rules ought to be repealed. If this were the intention of the legislature one would have expected it to express its intention more or less clearly as was done in the case of *Rex* v. *Wicks* (1), where section 11 (3) of the Emergency Powers (Defence) Act, 1939, provides as follows :

> " The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done."

Moreover if it was the intention of the legislature to keep the Rules alive after the Defence of Burma Act had ceased to operate, it is difficult to appreciate why the words " so long as the provisions of the Defence of Burma Act, 1940, specified in the First Schedule, continue to be in force " were inserted towards the end of section 5 of the Defence of Burma (Repealing) Act, 1947. One would have expected, if the Rules were to remain in force after the provisions of the main Act ceased to be in force, that the Governor would also have been invested with power to annul the Rules which were thought to be unnecessary after the provisions of the main Act had all ceased to be in force ; and it ought to be remembered that the Governor was invested with such a power under the Defence of Burma Act, 1940, and also under section 5

(1) (1946) A.E.L.R., Vol. 2 at p. 531.

of the Defence of Burma (Repealing) Act, 1947. It will certainly be most inconvenient if an Act had to be passed every time some of the Rules are considered to be unnecessary. The purpose of section 5 of the Repealing Act was apparently to make it clear beyond all doubt that the Governor retained the power to alter or delete the Rules mentioned in the Second Schedule to that Act, which he enjoyed previous to the passing of the Repealing Act. It might even be said that the provisions of sections 4 and 5 of the Defence of Burma (Repealing) Act, 1947, were enacted *ex majore cautela* probably in order to prevent any misconception about the effect of the provisions of sections 2 and 3 of that Act.

I, therefore, respectfully agree with the conclusion arrived at by a Bench of the High Court of Judicature at Rangoon in the case of *The King* v. *P. Ranga Lall and another* (1) and also with the observation of E Maung J. in the case of *P. Ranga Lall and another* v. *The King* (2) that the Defence of Burma Rules expired on the midnight of the 31st July 1947 when the remaining provisions of the Defence of Burma Act ceased to be operative. The answer to the question propounded is accordingly in the negative.

U SAN MAUNG, J.—While I am in general agreement with the Judgment of My Lord the Chief Justice, which I have had the advantage of reading, I would like to add a few words to it owing to the importance of the matter now under reference.

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(1) Criminal Reference No. 99 of 1947 of the High Court of Judicature at Rangoon.

(2) Criminal Revision No. 174B of 1947 of the High Court of Judicature at Rangoon.

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THE UNION OF BURMA v. MAUNG MAUNG AND TWO OTHERS.

U SAN MAUNG, J.

The so-called Defence of Burma (Repealing) Act, 1947 (Burma Act IV ot 1947), should be regarded as a whole as :

" . . . it is an elementary rule that construction is to be made of all the parts together and not of one part only by itself . . . Such a survey is often indispensable, even when meaning the words are the plainest ; for the true meaning of any passage is that which (being permissible) best harmonises with the subject and with every other passage of the statute."

(*See* Maxwell on Interpretation of Statutes, 9th Edition, at page 30.)

When thus construed Burma Act No. IV of 1947 appears to me to be really an act to amend the Defence of Burma Act, 1940, in the guise of a Repealing Act. Sections 2 and 3 of the Act are as follows :

" 2. *Subject to the provisions hereinafter contained* the Defence of Burma Act, 1940, hereinafter called the said Act, is hereby repealed.

3. *Notwithstanding anything contained in section 2* all provisions of the said Act specified in column 1 of the First Schedule to this Act, and subject to the modifications set out therein against them in column 2 thereof, *shall continue and be deemed to be in force as if this Act had not been enacted*, until the Governor shall, by notification, declare the aforesaid provisions of the said Act to be no longer in force or until the date, whichever is earlier, on which the Defence of Burma Act, 1940, would ordinarily, but for the provisions of section 2 hereof, have ceased to be in force under the provisions of sub-section (4) of section 1 of the said Act."

The italicized are mine. The portions italicized in these two sections clearly show that only certain sections of the Defence of Burma Act, 1940, were intended to be repealed and a reference to these repealed sections shows that they relate to special powers to control civilian personnel employed in connection with His Majesty's forces, enhanced

penalties, temporary amendments of Acts and Special Tribunals. These sections were clearly no longer necessary owing to the fact that hostilities had in fact ceased although nominally the war had not yet terminated. The words italicized in sections 2 and 3 of Burma Act No. IV of 1947 leave no room for doubt that the sections of the Defence of Burma Act, 1940, enumerated in the First Schedule continue to remain in force not because of Burma Act No. IV of 1947 but in spite of it, except that the modifications set out in column 2 of the First Schedule owe their sanction to Burma Act No. IV of 1947.

As regards the "Defence of Burma Rules" so called because of Rule 1 of these rules, it is clear that they should be regarded as though they form part of the Defence of Burma Act, 1940, and therefore repealed without any express provision therefor being made in the Repealing Act if the Defence of Burma Act, 1940, is repealed thereby. However, as I have already stated, Burma Act No. IV of 1947 is not, in fact, a Repealing Act such as would repeal all the provisions of the Defence of Burma Act, 1940, and the rules thereunder. The effect of the Burma Act No. IV of 1947 is such that the Defence of Burma Act, 1940, as amended by the deletion of the sections not appearing in the First Schedule and by the amendment of sections 2 and 14 in the manner set out in column 2 of the First Schedule, remain in full force. Therefore all the rules made under section 2 except those made under the items deleted from this section would also remain in full force even if section 4 of Burma Act No. IV of 1947 had not been enacted. The first part of section 4 of this Act appears to have been enacted *ex abundanti cautela* and the Second Schedule to the Act appears to have been inserted mainly for ready reference as regards the rules which remain intact and

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the rules which have been modified in the manner set out in column 2 thereof. As for the second part of Rule 4, *viz.*,- "except that the said rules shall continue to be in force subject to the modifications set out against them in column 2 of the Second Schedule," the whole emphasis appears to be upon the fact that certain of the rules enumerated in column 1 of the Second Schedule continue to remain in force only in the manner modified in column 2. It does not appear to connote that the rules should remain in force even if what remains of the section of the Defence of Burma Act, 1940, had ceased to be in force owing to the provisions of sub-section (*4*) of section 1 of that Act. If the legislator had intended that the rules enumerated in the Second Schedule to Burma Act No. IV of 1947 should continue to remain in force even after the sections of the Defence of Burma Act, 1940, enumerated in the First Schedule had ceased to be in force under the provisions of sub-section (*4*) of section 1 of the Defence of Burma Act, 1940, surely an express provision to this effect would have been made in section 4. The only reasonable inference for the failure to make such a provision as this in this section is that the rules referred to in the section should expire with the Act. The legislator could hardly have been unmindful of the well known principle of law that the rules which are *intra vires* of the rule making authority should be regarded as though they are themselves part of an enactment and that the repeal of an Act abrogates the rules thereunder. [Cf. *Watson* v. *Winch* (1).]

Section 5 of the Act, instead of providing an argument in favonr of the proposition that the rules enumerated in the Second Schedule were intended

(1) L.R. (1916) 1 K.B. at p. 688.

to remain in force after what remains of the Defence of Burma Act, 1940, has expired owing to the provisions of sub-section (*4*) of section 1 of that Act, is really indicative of the legislator's intention that these rules should expire with the Act. This section appears to have been enacted *ex abundanti cautela* owing to the existence of section 21 of the General Clauses Act, which, when read with section 2 of the Defence of Burma Act, 1940, as modified in the manner set out in column 2 in the First Schedule to Burma Act No. IV of 1947 gives ample powers to the Governor for the purpose sought to be achieved by the legislator. If it was intended that the rules enumerated in the Second Schedule should remain in force even after the Defence of Burma Act, 1940, had expired, surely an express provision would have been made in this section regarding the authority who will have the power to cancel or amend these rules when the Governor no longer has that power. The absence of any such provision in section 5 clearly connotes that the rules enumerated in the Second Schedule should expire at the same time as the sections [especially section (2)], enumerated in the First Schedule.

It is unfortunate that the two Benches of the late High Court of Judicature at Rangoon have disagreed as to the effect of Burma Act No. IV of 1947 on the Defence of Burma Rules set out in the Second Schedule thereto. This disagreement was apparently the result of the unhappy language in which this Act was drafted and the fact that either by accident or by *design* what was, in fact, an amending Act took on the guise of a Repealing Act.

My answer to the question propounded is in the negative.

FULL BENCH (CIVIL).

Before U Thein Maung, Chief Justice, U Tun Byu and U San Maung, JJ.

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Nov. 29.

CHAN EU GHAI (DECREE-HOLDER)

v.

LIM HOCK SENG (*a*) CHIN HUAT (JUDGMENT-DEBTOR).*

Transfer of Property (Restriction) Act, 1947—Ss. 2 (a) and 3—Sale—Transfer of Property Act, s. 54—Sale in execution—If a transfer "made by any person"—General Clauses Act, s. 2 (44).

Held: Under s. 2 (*d*) of the Transfer of Property (Restriction) Act, 1947, the word "sale" must have the meaning assigned to it in the Transfer of Property Act, *viz.*, a transfer of ownership in exchange for a price paid or promised or part paid and part promised. Sale in execution of a decree is within the mischief of s. 3, Transfer of Property (Restriction) Act, 1947. The non-reference to s. 2 (*d*) in s. 54, Transfer of Property Act, makes no difference.

Sale is effected when the offer of the highest bidder is accepted by the officer conducting the sale. Under Rule 271, Original Side Rules, the Registrar merely confirms the sale, and grants the certificate "specifying the property sold and the name of the person, who at the time of the sale is declared to be the purchaser." The Sale Certificate is evidence of the transfer. As the sale is by an officer, and an officer is a person as defined in s. 2 (*44*), General Clauses Act, he cannot sell immoveable property to a foreigner and such sale will be void under s. 5.

Mohamed Yacoob v. *P.L.R.M. Firm and others*, (1931) I.L.R. 9 Ran. 608; *Basir Ali* v. *Hafiz Nasir Ali*, (1916) I.L.R 43 Cal. 124, referred to.

Per U TUN BYU, J.—Under Rules 258 and 260 of the Original Side Rules the highest bid at the auction sale is not placed before the Presiding Judge for acceptance. The provisions of Order 21, Code of Civil Procedure making acceptance by a Judge before the contract for sale can be confirmed does not apply to sales in the High Court.

Mohamed Yacoob v. *P.L.R.M. Firm and others*, 9 Ran. 608; *Maung Ohn Tin* v. *P.R.M.P.S.R.M. Chettyar Firm and others*, I.L.R. 7 Ran. 425, referred to.

The Court sale on the Original Side must be considered to be a sale by the Bailiff. The purpose of the Transfer of Property (Restriction) Act, 1947, is to prevent any immoveable property being transferred to a foreigner and a sale by the Bailiff comes within the mischief of s. 3.

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* Civil Execution No. 23 of 1947 of High Court, Rangoon.

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Wan Hock for the decree-holder.

Ba Sein (Government Advocate) amicus curiæ.

U THEIN MAUNG, C.J.—The question that has been referred to us is :

"Can a foreigner within the meaning of section 2, clause (*a*), of the Transfer of Property (Restriction) Act, 1947, purchase immoveable property within the meaning of clause (*b*) of the said section at a sale in execution of a decree of a Court ?"

Now section 3 of the Transfer of Property (Restriction) Act, 1947, provides :

"Notwithstanding anything contained in any other law for the time being in force, no transfer of any immoveable property or lease of immoveable property for any term exceeding one year, shall be made by any person in favour of a foreigner or any person on his behalf, by way of sale, gift, mortgage or otherwise."

Under section 2 (*d*) of the Act, the word "sale" must have the meaning assigned to it in the Transfer of Property Act ; and "sale" according to the Transfer of Property Act is "a transfer of ownership in exchange for a price paid or promised or part paid and part promised." So a sale, even though it be in execution of a decree, is a sale within the mischief of section 3 of the Transfer of Property (Restriction) Act, 1947. The mere fact that section 54 of the Transfer of Property Act does not under section 2 (*d*) thereof, apply to any transfer in execution of a decree does not make any difference. Apart from the provision that "lease", "sale", "gift" and "mortgage" shall have the same meaning as has been assigned to them in the Transfer of Property Act, the Transfer of Property (Restriction) Act has been enacted separately from and independently of the said Act. As a matter of fact the preamble thereof reads "whereas it is expedient to restrict the

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transfer of immoveable property to foreigners" and section 3 commences with the phrase "notwithstanding anything contained in any other law for the time being in force."

The only other question for consideration is whether a sale in execution of a decree is a transfer "made by any person."

A Court executing a decree merely orders that the property be sold and the sale thereof is conducted by the Bailiff, Deputy Bailiff or some other officer under Order XXI, Rule 65 of the Code of Civil Procedure or, in the case of the High Court, under Rule 268 of the Original Side Rules.

The sale itself is effected when the offer of the highest bidder is accepted by the officer conducting the sale. [See *Mohamed Yacoob* v. *P.L.R.M. Firm and others* (1).]

Under Order XXI, Rule 92 of the Code of Civil Procedure the Court and, under Rule 271 of the Original Side Rules, the Registrar merely confirm the sale and under Order XXI, Rule 94 thereof the Court merely grants "a certificate specifying the property sold and the name of the person who *at the time of the sale* is declared to be the purchaser." (*See* also the form of the Certificate of Sale of land at page 285 of the Burma Code, Volume VII.) Besides, as has been pointed out in *Basir Ali* v. *Hafiz Nasir Ali* (2) "the sale certificate does not transfer the title; it is evidence of the transfer."

Under these circumstances it is clear that the sale in execution of a decree is by the Bailiff, Deputy Bailiff or some other officer; such officer is a "person" as defined in section 2 (44) of the General Clauses Act; he is bound by section 3 of the Transfer of Property (Restriction) Act, 1947, not to sell any immoveable

(1) (1931) I.L.R. 9 Ran. 608. (2) (1916) I.L.R. 43 Cal. 124.

property to a foreigner ; and a sale by him of any such property to a foreigner will be void under section 5 thereof.

So our answer to the question under reference is in the negative.

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U TUN BYU, J.—I respectfully agree with the conclusion which the learned Chief Justice arrived at in the judgment delivered by him, of which I have had an opportunity of reading it. I would however like to say a few words. The answer to the question under consideration will depend on the construction which is to be placed on the provisions of section 3 of the Transfer of Property (Restriction) Act, 1947, the relevant portion of which reads :

" 3. Notwithstanding anything contained in any other law for the time being in force, no transfer of any immoveable property or lease of immoveable property for any term exceeding one year, shall be made by any person in favour of a foreigner or any person on his behalf, by way of sale, gift, mortgage or otherwise."

It has been contended on behalf of the decree-holder that in a Court sale, the sale should be considered to have been made by the Court itself and not by the Bailiff or any other officer, who actually conducted the sale, and that the provisions of section 3 of the Transfer of Property (Restriction) Act, 1947, will not apply to such a sale in that the Court cannot be considered to be a person within the meaning of section 3. In order to ascertain whether a sale, which is made in pursuance of a final mortgage decree, comes within the provisions of section 3 of the Transfer of Property (Restriction) Act, 1947, it will be necessary in each case to examine the provisions of law and the circumstances under which the sale was made. Under Rule 268 of the High Court

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Rules and Orders it is a Bailiff who conducts the sale, and there is nothing in the High Court Rules and Orders to indicate that such a sale will have to be confirmed by the Court itself before it becomes effective. The observation of Page C.J. in the case of *Mohamed Yacoob* v. *P.L.R.M. Firm and others* (1), with respect, sets out correctly the law that is applicable in Burma, and which is as follows :

"I am of opinion that the ruling of Mr. Justice Chari in *Afauzuddin* v. *Howell* that when property is 'knocked down' to the highest bidder there is a conditional offer to purchase the property by the bidder, which he is at liberty to withdraw unless and until his bid is accepted by the Court, was wrongly decided, and must be regarded as overruled. Of course, if there is a rule of practice in the Court that the officer conducting the sale shall not be entitled to accept a bid or conclude the sale, and that such officer is given authority merely to record the bids, and forward the bid sheet to the Court in order that the Court may accept or reject the bids or any of them, it follows that no sale takes place until the Court has accepted the bid. Such a practice appears to obtain in Bihar and Orissa, but there is no such practice in Burma."

The observation made in the case of *Maung Ohn Tin* v. *P.R.M.P.S.R M. Chettyar firm and others* (2) is also apposite for the purpose of this reference, and which is :

"Under Rule 258 of the Rules of this Court published at page 126 of the High Court Rules and Orders sales of immoveable property in execution of a decree for money are to be conducted by the Bailiff under the direct supervision of a Registrar. There is no provision in the Rules which requires a Judge to accept a bid. Under Rule 259 if the highest bid be equal to or higher than the reserved price (if any), the Bailiff shall make an entry in the sale-book to the following effect :

'I declare.....to have been the highest bidder for the purchase of the property above set forth (or of lot No.) for the sum of Rs .....'

(1) (1931) I.L.R. 9 Ran. 608. (2) I.L.R. 7 Ran. 425.

And under Rule 260 an application for an order confirming a sale of immoveable property is not necessary. If no application to set aside the sale is made within the period allowed therefor a Registrar may pass an order confirming the sale. It is quite clear therefore that the rules of procedure on the Original Side of this Court do not contemplate the highest bid at an auction sale being placed before the presiding Judge for acceptance, nor does it seem to us that the provisions of Order XXI of the Code of Civil Procedure require a bid to be accepted by a Judge before the contract of sale can be held to be complete."

Thus a contract of sale in a case like the present case can be considered to be a sale made by the Bailiff in the absence of any specific rule of law, which in effect provides that the sale shall not be considered to be effective until it is accepted by the Court.

The sale certificate issued by the Court does not really purport to transfer the title in the immoveable property which had been sold, and in the case of *Basir Ali* v. *Hafiz Nasir Ali* (1), it was observed as follows:

"But a sale certificate merely records an already accomplished fact, and states what has been sold. In execution sales there is no warranty by the Court that the title is good. The quantity and nature of the right and interest existing in the debtor at the time of attachment and advertisement of sale, alone pass by the sale In mortgage suits, the right, title and interest both of the mortgagor and the mortgagee pass. In all sales whether by the Court or under the Court or by direction of the Court out of Court, the purchaser is bound to satisfy himself of the value, quantity and title of the thing sold, just as much as if he were purchasing the same under private contract. I do not see what the difference is. The sale certificate does not transfer the title. It is evidence of the transfer."

The purport of the Transfer of Property (Restriction) Act, 1947, is to prevent any immoveable property being transferred to a foreigner, with power to exempt

(1) (1916) I.L.R. 43 Cal. 124 at p. 129.

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any transfer in suitable cases, which the President might think proper, from the operation of that Act; and a sale by the Bailiff in a case like the present case will have to be considered to come within the mischief of section 3 of the Transfer of Property (Restriction) Act, 1947; and thus the answer to the question under consideration is in the negative.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice and U San Maung, J.

M. E. O. KHAN (APPELLANT)

v.

M. H. ISMAIL (RESPONDENT).*

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July 1.

Code of Civil Procedure, s. 148—Whether applies to time for doing an act fixed by a decree—Decree originally made not objected to—Whether can be challenged in execution.

A decree for ejectment passed on 20th December 1946 was later under s. 14 (3) of the Urban Rent Control Act altered. This alteration was embodied in a fresh decree. The effect of such alteration was that the decree was to stand unexecuted so long as the judgment-debtor paid regularly in advance rent due by the 5th of each month. In appeal the order was confirmed. The judgment-debtor made default in respect of rent for December 1947. Upon application by decree-holder execution by way of ejectment was granted. It was contended that the Lower Court should have extended the time provided in the decree and that there could be no perpetual order for ejectment.

Held on appeal: That s. 148 of the Code of Civil Procedure does not apply where time is allowed by a decree.

Hukam Chand and others v. *Hayat and others*, (1912) Punjab Record, Volume 47, 343; *Dharmaraja Ayyar and another* v. *K. G. Srinivasa Mudaliar and four others*, 39 Mad. 876; *Maslahuddin* v. *Ram Kishen and another*, A.I.R. (1928) Oudh 32; *Kshetra Mohan Ghose and another* v. *Gour Mohan Kapali*, 147 I.C. 1025, followed.

Held further: That it was not open in the execution stage to question the validity of the order. If the judgment-debtor had any objection he should have filed cross-objections in the main appeal.

Kyaw Htoon for the appellant.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Civil Regular No. 1176 of 1946 of the Rangoon City Civil Court the respondent M. H. Ismail sued the appellant M. E. O. Khan for his ejectment in respect of two rooms in house No. 290/292, Mogul Street, Rangoon, and a decree for ejectment

* Civil Misc. Appeal No. 7 of 1948 against the order of the City Civil Court, Rangoon, in Civil Execution No. 815 of 1947, dated the 19th February 1948.

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was passed on the 20th December, 1946, by the then Chief Judge of the City Civil Court (U Myint Thein). On the 8th August, 1947, his successor (Mr. Rajagopaul), acting under the powers conferred upon the Court by sub-section (3) of section 14 of the Urban Rent Control Act, 1946, as substituted by Burma Act No. XXVI of 1947, altered the order dated the 20th December, 1946, in the following terms :

"On the J/D paying to the D/H or depositing in Court within ten days from the date of this order the sum of Rs. 800 said to be due by way of rent for the period February to May 1946 and the costs of the suit in C.R. 1176 of 1946 the order for ejectment passed on 20-12-46 shall stand unexecutable for so long as the J/D continues to pay regularly in advance by the 5th of each month the rent due for the use of the suit rooms, the rent to commence from the date on which occupation is restored to him by virtue of this order."

The judgment-debtor mentioned in the above order is the appellant M. E. O. Khan and the decree-holder the respondent M. H. Ismail. On an appeal being preferred to this Court against the order of the Chief Judge of the City Civil Court, dated the 8th August, 1947, by M. H. Ismail who felt aggrieved thereby, the appeal was dismissed and the order of the Chief Judge of the City Civil Court confirmed by a Bench, of which we were members. No cross-objection was taken by M. E. O. Khan against the manner in which the order for his ejectment was altered in the manner set out above. In the meantime the appellant M. E. O. Khan made a default in respect of the rent payable for December, 1947. Accordingly, on the 13th December, 1947, an application was made by the respondent M. H. Ismail for the execution of the decree for ejectment. On a notice being issued to the appellant, a written objection was filed on his behalf on the 2nd January, 1948. Therein, the appellant explained

that his failure to deposit the rent on the due date was because he had been in police custody since November, 1947, that therefore he should be given a chance to pay the rent due for the months of December and January, 1948, by the 20th January, 1948, and that upon this payment being made, the execution proceedings against him be closed. The appellant's objection was overruled by the learned Chief Judge of the City Civil Court by a diary order, dated the 2nd January, 1948, which reads :

"It is clear from the objections filed that the rent for December has not been paid as required by the order of the 8th of August 1947. It is understood that the decision in Civil Regular No. 1176 of 1946 is now the subject matter of an appeal, but no stay of execution has been applied for or obtained from the High Court.

In the circumstances, in view of the admitted default the decree-holder is entitled to have his decree executed.

The application is granted."

A warrant for ejectment returnable on the 2nd February, 1948, was then issued. In the meantime the appellant filed another application for permission to continue paying into Court the rents as ordered on the 8th August, 1947, and to recall the ejectment warrant. This application was objected to by the respondent and on the 19th February, 1948, the application was dismissed by the learned Chief Judge of the City Civil Court (U Si Bu). The present appeal by M. E. O. Khan is against the order of U Si Bu, dated the 19th February, 1948.

The first contention raised by the learned Advocate for the appellant is that the Chief Judge of the City Civil Court should have granted to the appellant enlargement of time for the payment of the rent due and that he was wrong in making an order that the execution should proceed. In support of his contention

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the learned Advocate relies upon section 148 of the Civil Procedure Code, which enacts that where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired. However, there is ample authority for the proposition that this section does not apply where time is allowed for doing an act by a decree in a suit. In the case of *Hukam Chand and others* v. *Hayat and others* (1) it was held by the learned Chief Judge of the Chief Court of Punjab that the general provisions of section 148 of the Civil Procedure Code, 1908, relate only to proceedings antecedent to the passing of a final decree and are not intended to give a Court power to alter the terms of a decree already passed, that the period fixed in a decree for the payment of a certain sum of money consequently cannot be extended under this section, that the Court passing the decree was *functus officio* as an original Court and that the general rule is that no executing Court can vary a decree except by consent of parties. In *Dharmaraja Ayyar and another* v. *K. G. Srinivasa Mudaliar and four others* (2) a Bench of the Madras High Court held that section 148 of the Civil Procedure Code does not enable a Court to extend time for doing acts allowed by a decree. Similarly, in *Majahuddin* v. *Ram Kishen and another* (3) a Bench of the Chief Court of Oudh held that the jurisdiction with which a Court is invested by the provisions of section 148 of the Civil Procedure Code in the matter of enlargement of time is restricted to cases where time for doing an act is fixed by the Court, otherwise than by its

(1) (1912) 47 P.R. 343 (Civil Judgts. 99). (2) 39 Mad 876.
(3) A.I.R. (1928) Oudh at p. 32.

decree in a suit. In *Kshetra Mohan Ghose and another* v. *Gour Mohan Kapali* (1) a Bench of the Calcutta High Court held that where the Court makes an order in a decree that unless certain payment be made within a fixed date, the case would stand dismissed, it is not open to the Court to vacate the order and extend time for payment. Therefore, the learned Chief Judge of the City Civil Court (Mr. Rajagopaul) had no other option than to pass the order which he did on the 2nd January, 1948, that the application for execution be granted, and his successor (U Si Bu) had no other option than to pass the order dated the 19th February, 1948, dismissing the appellant's application to recall the ejectment warrant and to allow the appellant to continue paying into Court the rents as ordered on the 8th August, 1947.

A further contention raised by the learned Advocate for the appellant is that the order of the learned Chief Judge of the City Civil Court dated the 8th August, 1947, in which he altered the order dated the 20th December, 1947, in the manner already set out above, is bad in law as it is tantamount to making a perpetual order for ejectment of the appellant. However, it is not open to the appellant at this stage to question the validity of the order dated the 8th August, 1947. If he had any objection to the form or to the substance of that order he should have filed a cross-objection when the respondent M. H. Ismail filed the appeal which was dealt with by this Court in Civil Miscellaneous Appeal No. 47 of 1947.

In the result the appeal fails and must be dismissed. As the learned Advocate for the respondent has not appeared before us to argue this appeal, we shall make no order as to costs.

(1) 147 I.C. 1025.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice and U San Maung, J.

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Aug. 2.

U KHIN (APPELLANT)

v.

M.S.A. ALAGAPPA CHETTYAR (RESPONDENT).*

Code of Civil Procedure, Order 22, Rule 10—Ss. 47 and 96, Code of Civil Procedure—Decree for sale of mortgaged property—Whether certificate necessary under s. 214 (b), Succession Act—Liabilities (War-Time Adjustment) Act, 1945, s. 4 (1).

Held: That an order granting an application by the legal representative of the decree-holder for execution is not an order under Order 22, Rule 10 of the Code of Civil Procedure. Rule 10 of Order 22 relates to the continuation of a suit in case of assignment, creation or devolution of any interest during its pendency and does not apply to an application by the legal representative of a decree-holder. In such a case Rule 16 of Order XXI and s. 146 of the Code apply. The order is one under s. 47 and an appeal lies under s. 96.

A. K. Talukdar and others v. *S. L. Pal*, (1925-26) 30 C.W.N. 735; *Venkatachalam Chetti* v. *Ramaswamy Servai and three others*, (1932) I.L.R. 55 Mad. 352 (F.B.), referred to.

A decree for sale of mortgaged property is not a decree against a debtor for payment of his debt. It is only when the decree-holder seeks a personal decree for the balance that the necessity of production of Letters of Administration or a Succession Certificate arises under s. 214 (*b*), Succession Act.

B. N. Das v. *S. Das*, (1895) I.L.R. 22 Cal. 143; *Saw Chong Gye and another* v. *Hafiz Bibi*, (1934) I.L.R. 12 Ran. 690, referred to.

That the leave of the court under s. 4 (*1*), Liabilities (War-Time Adjustment) Act, 1945, is not necessary for an enquiry into the alleged nullity of the decree.

C. H. Campagnac for the appellant.

P. N. Ghosh for the respondent.

U THEIN MAUNG, C.J.—This is an appeal under section 96 read with section 47 of the Code of Civil Procedure. The circumstances under which the appeal has arisen are as follows. M.S.N. Chinan Chettyar,

* Civil 1st Appeal No. 26 of 1948, against the order of the District Court of Pyapôn in Civil Execution No. 11 of 1941, dated the 11th February 1948.

who had obtained a final decree for sale of mortgaged properties applied for execution of the decree through his agent, Mutiya. The judgment-debtors objected to the application on the ground that the decree was a nullity inasmuch as M.S.N. Chinan Chettyar was already dead at the time of the institution of the suit. The Court then decided to hold an inquiry as to whether he was dead at the time of the institution of the suit or at any time before the passing of the preliminary decree. Subsequently, the Court granted Mutiya's application for a commission for examination of M.S.A. Chinan Chettyar and certain other persons in India. However, the commission could not be issued on account of the war.

After the war, M.S.A. Allagappa Chettyar applied through his agent, Venkataswami, that the execution case be "revived and proceeded with from the stage it reached at the time of the general evacuation," claiming that he is the sole heir and legal representative of M.S.A. Chinan Chettyar who died on the 15th June, 1944. The first judgment-debtor objected to the application stating, *inter alia*, he "is not in a position to admit the sole heirship or any relationship of the petitioner to the original plaintiff and puts the petitioner to strict proof of his *locus standi.*" The present appeal is from the order granting the application of M.S.A. Allagappa.

The learned Advocate for Allagappa has raised a preliminary objection to the effect (1) that the appeal does not lie under sections 47 and 96 of the Code of Civil Procedure as his application itself was under Order 22, Rule 10 of the Code as stated in paragraph 14 thereof and (2) that the appeal lies only under Order 43, Rule 1 (1) of the Code.

However, the reference to Order 22, Rule 10 in the application is erroneous. The rule, which relates to

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continuation of a suit in case of assignment, creation or devolution of any interest during its pendency, is not applicable at all. In view of Order 22, Rule 12 of the Code and the rulings in *A. K. Talukdar and others* v. *S. L. Pal* (1), and *Venkatachalam Chetti* v. *Ramaswamy Servai and three others* (2) the application must be treated as one under section 146 and Order 21, Rule 16 of the Code. So the appeal does lie under sections 47 and 96 thereof.

The learned Advocate for the judgment-debtors (appellants) has argued that the respondent's application should have been rejected as he has not obtained leave of the Court under section 4 (*1*) of the Liabilities (War-Time Adjustment) Act, 1945. Now the said sub-section reads :

"Notwithstanding anything contained in any other law for the time being in force, no person shall, save as provided by this Act, be entitled, except with the leave of the Court, for the purpose of realising or enforcing his security in any manner or for any other purpose whatsoever, to exercise any remedy which is available to him under any such law or to execute any decree or order of any Court against any property of the judgment-debtor."

So the respondent is not entitled except with the leave of the Court, to exercise any remedy or to execute any decree or order against any property of the judgment-debtor.

However, the learned Advocate for the respondent, while admitting that the leave of the Court will have to be obtained before he can exercise any remedy or execute the decree against the appellant's property, submits that an inquiry has yet to be held to find out whether the decree-holder died before the institution of the suit and whether the decree is a nullity for that

(1) (1925-26) 30 C.W.N. 735. (2) (1932) I.L.R. 55 Mad. 352 (F.B.).

reason as alleged by the appellants and that no leave of the Court is necessary just for the purpose of the inquiry ; and the learned Advocate for the respondent says that he would be satisfied if the order of the lower Court be modified to make it clear that the leave of the Court must be obtained before the decree is executed against any property of the judgment-debtor.

The learned Advocate for the appellants has also contended that the application should have been dismissed under section 214 (*b*) of the Succession Act as the respondent has not produced any certificate, probate or letters of administration. Now, section 214 (*b*) provides that no Court shall proceed upon an application of a person, claiming on succession to be entitled to the effects of a deceased person, to execute against a debtor of the deceased person a decree or order for the payment of his debt. However, it has been held in *B. N. Das* v. *S. Das* (1) that a decree for sale of mortgaged property is not a decree against a debtor for payment of his debt ; and it has been pointed out in *Saw Chong Gye and another* v. *Hafiz Bibi* (2), that a mortgaged suit is a suit to realize an interest in immoveable property and that—" it is only when the mortgage decree-holder seeks a personal decree for the balance found to be due to him after the sale of the property that the necessity for the production of letters of administration or a succession certificate arises." So it is not necessary for the respondent to produce any certificate, probate or letters of administration yet inasmuch as his application is just to continue proceedings on Mutiya's application for execution " by sale of the mortgaged properties."

The learned Advocate for the appellants has further contended that the lower Court should not have

(1) (1895) I.L.R. 22 Cal. 143. (2) (1934) I.L.R. 12 Ran. 690.

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allowed the respondent's application without making an inquiry as to whether he is the sole heir and legal representative of the decree-holder; and the learned Advocate for the respondent agrees that the case should be remanded to the lower Court for disposal after such inquiry.

We accordingly remand the case to the lower Court for disposal after inquiry as to whether the respondent is the sole heir and legal representative of M.S.N. Chinan Chettyar. In passing final orders on the respondent's application the lower Court should bear in mind that although inquiry as to whether the decree-holder died before the institution of the suit and whether the decree is a nullity for that reason can be made and commission for examination of witnesses can be issued without the respondent having obtained the leave of the Court under section 4 (*1*) of the Liabilities (War-Time Adjustment) Act, 1945, the decree cannot be executed against any property of the judgment-debtors without such leave. It should also bear in mind that a succession certificate, probate or letters of administration will be necessary if and when the respondent seeks a personal decree for such balance as may be found due to him after the sale of the mortgaged properties.

The parties shall bear their own costs of the application and the appeal as the order of the lower Court has been modified mainly by consent of their learned Advocates.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

DAW HLA AND ONE (APPELLANTS)

v.

DAW KIN KIN LAT AND ONE (RESPONDENTS).*

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June 30.

Conversion—What amounts to.

Held : That dealing with goods in a manner inconsistent with the right of the true owner amounts to conversion provided it is also established that there is an intention in so doing to deny the owner's right or to assert a right which is inconsistent therewith.

Lancashire and Yorkshire Railway Company, etc. v. *MacNicoll*, (1919) 118 T.L.R. 596 at p. 598 ; *Oakley* v. *Lyster*, (1931) 1 K.B.D. 148 at p. 153 ; *Caxton Publishing Company Limited* v. *Sutherland Publishing Company*, L.R. (1939) A.C. 178 at p. 181, referred to and followed.

The proposition of law that any person who however innocently, obtains possession of the goods of a person who has fraudulently been deprived of them and disposes of them, whether for his own benefit or for that of any other person, is guilty of conversion as laid down in : *Francis Hollands and others* v. *George Fowler and others*, (1874-75), Vol. VII, English and Irish Appeal Cases 757 does not apply to a case where the plaintiff has not been fraudulently deprived of his property. Where during the period of Japanese occupation plaintiff lent his car to a friend and the car with the tacit knowledge of the plaintiff had been registered in the name of the friend and the friend lent it to the defendant who took it *bona fide* without any idea that the car belonged to the plaintiff and the car was later seized by the Japanese from the defendant, the defendant could not be held guilty of conversion.

V. S. Venkatram for the appellants.

P. K. Basu for the respondents.

U TUN BYU, J.—The brief facts in this case are that the plaintiff-appellants T. Wan Hock and Daw Hla, who are husband and wife, owned a Morris Twelve Saloon Car, No. RC 6669, which T. Wan Hock purchased in 1941 in the name of his wife Daw Hla. After the Japanese military occupation of Burma, Dr. Thein Maung, who is dead, met T. Wan Hock in Rangoon in August, 1942, and obtained a loan of the

* Special Civil 1st Appeal No. 45 of 1947 against the decree of the Chief Judge, City Civil Court of Rangoon in Criminal Regular No. 1062 of 1946, dated the 24th June 1947.

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Morris Twelve Saloon Car from T. Wan Hock for the purpose of making a tour in Upper Burma, and Dr. Thein Maung promised to return the car to T. Wan Hock on the former's return from tour to Rangoon. Dr. Thein Maung was at that time the Finance Minister in the Government set up during the Japanese military occupation of Burma. The evidence shows, however, that Dr. Thein Maung left the Morris Twelve Saloon Car with his wife Daw Kin Kin Lat, who is the first defendant-respondent, at Maymyo, and did not bring it back to Rangoon on his return from tour in Upper Burma. When T. Wan Hock, the second plaintiff-appellant saw Dr. Thein Maung in September, 1942, Dr. Thein Maung told him that the car had been left in Maymyo with his wife Daw Kin Kin Lat to enable her to come to Rangoon in it; and Dr. Thein Maung promised to return the Morris Twelve Saloon Car on the arrival of Daw Kin Kin Lat in Rangoon. In November, 1942, T. Wan Hock saw Dr. Thein Maung again, and the latter told him that his wife Daw Kin Kin Lat had not arrived in Rangoon. T. Wan Hock appears to have done nothing to get back his Morris Twelve Saloon Car from Dr. Thein Maung otherwise than seeing Dr. Thein Maung and obtaining from him an explanation that his wife Daw Kin Kin Lat had not arrived in Rangoon. Dr. Thein Maung is said to have left Rangoon for Japan as Burmese Ambassador in September, 1943, and, even after Dr. Thein Maung had left for Japan, it does not appear that T. Wan Hock sent anybody to Maymyo to get back the car from Daw Kin Kin Lat. The evidence shows that T. Wan Hock saw Daw Kin Kin Lat only in the middle of 1944. She was then in Rangoon Daw Kin Kin Lat informed T. Wan Hock that she had given over the Morris Twelve Saloon Car to the second defendant-respondent Sein Hla Oo for temporary use, and that

Sein Hla Oo had not returned it. It might be mentioned at once that, according to the second defendant-respondent Sein Hla Oo, the Morris Twelve Saloon Car was seized by the Japanese in January, 1945, and the car was never seen again. There is nothing in the evidence to show why Sein Hla Oo's evidence on this point ought not to be accepted because it was well-known at that time that the Japanese were likely to seize cars for their retreat which had already begun.

The plaintiff-appellants' case as against the second defendant-respondent Sein Hla Oo is set out in paragraph 7 of their plaint, which is as follows :

" 7. Dr. Thein Maung died on his way back to Rangoon from Tokyo and the first defendant is his wife and legal representative. She is sued personally because by her action the said motor car has been lost to the plaintiffs and they have suffered loss thereby. She is also sued as legal representative of Dr. Thein Maung because the latter took the loan of the said motor car and promised to return the same, which was never done. The second defendant is liable because he took the loan of the motor car knowing it to be the property of the second plaintiff, and he had no right to retain the same and refused to return the same when demanded and subsequently caused the same to be lost to the plaintiffs."

Thus, it is difficult to see how the plaintiff-appellants can in this case obtain any relief against the second defendant-respondent Sein Hla Oo unless there was a conversion by the latter. A number of cases has been cited to show what the expression " conversion " in law means. Atkin J., in the case of *Lancashire and Yorkshire Railway Company, etc.* v. *MacNicoll* (1), observed as follows :

It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided it is also established that there is an intention

(1) (1919) 118 T.L.R. 596 at p. 598.

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on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right."

The observation of Atkin J. in the case of *Lancashire and Yorkshire Railway Company Limited, etc.* v. *MacNicoll* (1) was quoted with approval in the case of *Oakley* v. *Lyster* (2). The observation of Atkin J. referred to above was again referred to in the case of *Caxton Publishing Company Limited* v. *Sutherland Publishing Company* (3), and, with respect, the observation of Atkin J. appears to express exactly what the expresssion " conversion " means in law.

T. Wan Hock, the second plaintiff-appellant, in his examination-in-chief, stated as follows :

" In September I came to Rangoon again and found Dr. Thein Maung. He told me that he had left my car in Maymyo to enable his wife to come down in it. He promised that the car would be returned to me on her arrival. In November I came to Rangoon again and was informed by Dr. Thein Maung that his wife had not arrived.

It went on like this and I did not get back my car. In September 1943, Dr. Thein Maung was sent to Japan as the Burmese Ambassador.

In the middle of 1944, hearing that Mrs. Thein Maung was in Rangoon I came to see her. She told me that my car had been given temporarily to the second defendant U Sein Hla Oo and that he had not returned it as yet."

There is also nothing in the evidence to indicate that either of the plaintiff-appellants ever made any attempt to send any one to Maymyo for the purpose of obtaining back their Morris Twelve Saloon Car, while it was at Maymyo with Daw Kin Kin Lat. It cannot, in the circumstances, be said, when the car was being detained at Maymyo, especially in view of the fact that

(1) (1919) 118 T.L.R. 596 at p. 598. (2) (1931) 1 K.B.D. 148 at p. 153.
(3) (1939) A.C. 178 at p. 181.

the car was being impliedly retained with the consent of T. Wan Hock, that Dr. Thein Maung or Daw Kin Kin Lat was, in retaining the car, denying the right of the plaintiff-appellants in the Morris Twelve Saloon Car, or that they were doing something which was inconsistent with the plaintiff-appellants' right as the owners of the Morris Car. The statement of T. Wan Hock referred to above shows that he had acquiesced in his car being used by Daw Kin Kin Lat until she returned to Rangoon. It could not, in the circumstances, be said that the possession of the Morris Twelve Saloon Car at Maymyo by Daw Kin Kin Lat, after Dr. Thein Maung's return to Rangoon on the completion of his tour in Upper Burma in 1942, was not lawful possession.

Sein Hla Oo, the second defendant-respondent, stated in his evidence that after he received the letter, Exhibit 1, dated the 11th March, 1943, from Dr. Thein Maung, he went up to Maymyo and handed it over to Daw Kin Kin Lat and received the Morris Twelve Saloon Car for use. It appears that Sein Hla Oo received the car in April, 1943, and this was at a time when that car was, as indicated above, in lawful possession of Daw Kin Kin Lat. The endorsement on the back of Exhibit 1 letter shows that the car was made over to Sein Hla Oo for temporary use. The evidence of Daw Kin Kin Lat, who was examined as a witness for the plaintiff-appellants, also shows that the Morris Twelve Saloon Car was made over to Sein Hla Oo for temporary use only.

Sein Hla Oo does not appear to have done anything to suggest that he was denying the plaintiff-appellants' right to the ownership of the Morris Twelve Saloon Car, even impliedly. According to T. Wan Hock, he met Daw Kin Kin Lat some time in the middle of 1944, when she told him that the car had been lent to Sein Hla Oo. T. Wan Hock said that he obtained

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Sein Hla Oo's address from Daw Kin Kin Lat and wrote a letter to Sein Hla Oo, but there is nothing on the record to indicate that the letter was received by Sein Hla Oo, and it was easy in those days of war for a letter to go astray. There is also no evidence to show that the plaintiff-appellants ever sent any one to Upper Burma to demand back the Morris Twelve Saloon Car from Sein Hla Oo, or that Sein Hla Oo ever refused to return the car to the plaintiff-appellants while it was in his possession.

The plaintiff-appellants must in an action for conversion, if they are to succeed also prove that they were deprived of the use and possession of the movable property in question, but it is difficult to conceive how the plaintiff-appellants can properly be said to have been deprived of the use or possession of their Morris Twelve Saloon Car during the period when they allowed it to be retained by Daw Kin Kin Lat in Maymyo, apparently for use until she returned to Rangoon, and when, in fact, she did not return to Rangoon until about the middle of 1944. In the absence of any evidence to show that Sein Hla Oo had done something to the car, which was inconsistent with, or adverse to, the plaintiff-appellants' right of ownership in the Morris Twelve Saloon Car, the case against the second-respondent Sein Hla Oo must be considered to have been properly dismissed. No demand was made from Sein Hla Oo for the return of the car by either of the plaintiff-appellants, or by anybody on their behalf, for the return of the said car. There was, in fact, no evidence to show that Sein Hla Oo knew that the Morris Twelve Saloon Car, either when he took it over for use from Daw Kin Kin Lat or while it was in his possession, belonged to the plaintiff-appellants. There is also no evidence to show that Sein Hla Oo would not have returned the car to the plaintiff-

appellants, if the latter had demanded the return of the car from him while it was in his possession.

The facts in the case of *Lancashire and Yorkshire Railway Company, etc.* v. *MacNicoll* (1), referred to on behalf of the plaintiff-appellants, were that the Railway Company received fourteen drums of phenol to be sent to certain consignees. The goods were, by mistake and without any authority from the real consignee, delivered to the defendant who appropriated six of the fourteen drums to his own use. It appears that MacNicoll must have known that the six drums of phenol, which he had used, could not have been part of the consignment of twenty-five casks of creosote, which he was expecting to receive, as casks and drums were not quite the same thing and, moreover, the quantity which MacNicoll took delivery of was not the same quantity as that which he was expecting to receive from his consignor. Thus, there was in that case clearly a conversion within the meaning expressed by Atkin J. at page 598, of the Law Report. In the present case under appeal, the Morris Twelve Saloon Car had the registered No. 000587 on it at the time it was made over for use to Sein Hla Oo, and which number apparently represented a military number as no car which was registered by a civilian was registered with a number commencing with a zero in Burma. Sein Hla Oo said that the Morris Twelve Saloon Car also had a placard attached to it with Japanese characters, showing Dr. Thein Maung's name and there is no reason why Sein Hla Oo's statement on this matter ought not to be accepted. It also does not appear that anyone informed Sein Hla Oo when he received the car from Daw Kin Kin Lat that it belonged to the plaintiff-appellants. It must on the evidence

(1) (1919) 118 T.L.R. 596 at p. 598.

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also be held that Sein Hla Oo had no knowledge, at any time, while the car was in his possession that it belonged to the plaintiff-appellants.

The decision in the case of *Francis Hollands and others* v. *George Fowler and others* (1), also does not help to advance the case of the plaintiff-appellants. The facts in that case are different from the facts in the present case now under appeal. The first paragraph of the headnote in that case is as follows :

" Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion. "

In the present case now under appeal, there is no evidence by which it can properly be said that the plaintiff-appellants had been fraudulently deprived of the possession of the Morris Twelve Saloon Car by Dr. Thein Maung or his wife, at any time before the car was made over to Sein Hla Oo for temporary use. It is difficult to conceive how any fraud was committed by Dr. Thein Maung or his wife in making over the car to Sein Hla Oo for temporary use at a time when the car was legitimately in their possession, and at a time when they had the use of the car, at least, with the implied, if not the express, consent of T. Wan Hock the second plaintiff-appellant. The answer whether there is a conversion or not will depend on the facts of each case. The contention of the plaintiff-appellants that there was a conversion in the present case as soon as the Morris Twelve Saloon Car was not returned to the plaintiff-appellants after Dr. Thein Maung got to Rangoon on the completion of his tour in Upper Burma in 1942 cannot be accepted. Such a conclusion is

(1) (1874-75) Vol. VII, English and Irish Appeal Cases, 757.

clearly not warranted in the circumstances of the present case. The appeal is accordingly dismissed with costs. As Daw Kin Kin Lat has not appealed against the decision of the Chief Judge of the Rangoon City Civil Court, the decision in this appeal will not affect the decision passed against her in the Rangoon City Civil Court.

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U AUNG THA GYAW, J.—I agree.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1948

June 30.

MAUNG THA YAN AND TWO OTHERS (APPELLANTS)

v.

U MYAT MAUNG (RESPONDENT).*

Buddhist Law—Succession to the estate of a deaf mute person—Whether mere relation who is not a co-heir can succeed on the ground that he supported the deaf mute person—Suit for possession on the basis of title lies without any offer to pay the money due on an invalid mortgage of the land.

Held : That only a co-heir looking after a deaf mute person can inherit to the exclusion of other co-heirs ; but a mere relation or an outsider looking after a deaf mute person, cannot exclude his natural heirs.

S. (iii) of Vol. I of *ex*-Kinwun Mingyi's Digest, *Ma Saw Win* v. *Ko Maung Gyi and four*, I.L.R. 2 Ran. 328 and *Mi Kan Yon* v. *Nga Pwe*, 5 B.L.T. 61, followed.

Inaccuracy in Richardson's Translation of Section Book of *Manugye* pointed out.

When a mortgage is invalid, the owner of the land can sue for possession on the basis of title without any offer to pay the money payable under the invalid mortgage.

Ma Kyi v. *Ma Thon*, I.L.R. 13 Ran. 274 (F.B.), followed.

Ba Sein and *Thein Maung* for the appellants.

Hla Pe (alias) *Arthur H. Paul* for the respondent.

U SAN MAUNG, J.—This is an appeal by Maung Tha Yan, Maung Nyo Lon and Maung Aung Ban against the judgment and decree of the District Judge of Magwe in Civil Appeal No. 24 of 1947 in which the learned District Judge reversed the judgment and decree of the 2nd Assistant Judge, Taungdwingyi, in Civil Regular Suit No. 6 of 1947, and granted a decree to the respondent U Myat Maung for recovery of possession of the land in suit, on the ground that

* Civil 2nd Appeal No. 158 of 1947 against the decree of the District Court of Magwe in Civil Appeal No. 24 of 1947, dated the 15th September 1947.

U Myat Maung, as an heir of the deceased U Myat Hmwe, was entitled to inherit U Myat Hmwe's estate.

As the facts of the case have been clearly set out in the judgment appealed against it is not necessary for me to repeat them here. Only two points arise for decision in this appeal, *viz.* (1) whether the learned District Judge was justified in coming to the conclusion that the respondent U Myat Maung was the sole heir of the deceased U Myat Hmwe, and (2) if he was the heir, whether he could obtain possession of the land without repaying the amount for which the land was mortgaged to U Tha Yan.

As U Myat Maung was the elder brother of the deceased U Myat Hmwe *prima facie* he was entitled to inherit U Myat Hmwe's estate in preference to the appellant Maung Nyo Lon who was only a nephew. However, the Judge of the trial Court held that the deceased U Myat Hmwe who was somewhat mentally deranged was looked after during his life-time by Maung Nyo Lon and that, therefore, Maung Nyo Lon was entitled to inherit U Myat Hmwe's estate to the exclusion of U Myat Maung. For this he relied upon the ruling in the case of *Ma Saw Win* v. *Ko Maung Gyi and four* (1) where it was held by Duckworth J. that at Buddhist Law, on the death of a deaf-mute, his estate devolves on the co-heir who supported him during his life-time. The learned District Judge thought that the law as propounded in that case would be applicable to the case before him if it was proved that U Myat Hmwe was looked after by Maung Nyo Lon, but held that there was no satisfactory evidence in support of Maung Nyo Lon's contention that he had to look after U Myat Hmwe. In fact, the learned District Judge observed that U Myat Hmwe died in his old age in the jungle not looked after by anybody,

(1) I.L.R. 2 Ran. 328.

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that it was only after his death his dead body was brought back to the village and the funeral rites performed by the plaintiff U Myat Maung and other relatives, that the *soonthut* ceremony was performed in the house of U Myat Maung, and that U Myat Maung who was about eighty-one years old at the time of U Myat Hmwe's death was not failing in his duties towards U Myat Hmwe as he himself needed looking after.

In my opinion, the case cited by the learned Judge of the trial Court is clearly distinguishable from the present case. Both in the case of *Ma Saw Win* v. *Ko Maung Gyi and four* (1) as well as in *Mi Kan Yon* v. *Nga Pwe* (2) which was relied upon by Duckworth J. it was held that a co-heir who maintained and looked after a deaf-mute or a lunatic in his life-time, was entitled to inherit the estate of the deaf-mute or lunatic on the latter's death. The authorities relied upon by Duckworth J. and the learned Judicial Commissioner for Upper Burma are the rules contained in section 111 of Volume I of *ex*-Kinwun Mingyi's Digest, especially the passage from *Manugye* which reads :

"Of the children born in lawful wedlock, if one is physically defective or dumb, or is suffering from an incurable disease or an incapacitating physical deformity, the due share of inheritance shall be allotted to such child, who shall be taken care of by one of the co-heirs. On the death of such co-heir, his or her share of inheritance shall be obtained by the co-heir who supported and maintained the deceased."

The other two useful passages from this section are these :

"If a co-heir is physically defective, dumb, leprous or deformed, the due share of inheritance shall be allotted to him or her, but it shall be taken in trust by one of the co-heirs who shall

(1) I.L.R. 2 Ran. 328. (2) 5 B.L.T. 61.

tend and maintain the invalid. On the death of such co-heir, his or her property shall be obtained by the co-heir who maintained the deceased when living. (*Dhamma.*)

Among brothers and sisters, if one becomes insane, lame, leprous, blind or dumb, he or she shall get an equal share with the others, and the share shall be taken in trust by one of the co-heirs who shall tend and maintain him or her. On his or her death any property left shall be inherited by the supporter. (*Citlara.*)"

The Burmese text of section 36, Book X, of *Manugye* is to the same effect though the translation by Richardson is somewhat misleading as he says,

"If amongst the children of a couple so given in marriage by their parents, one shall have severe disease, shall be unable to walk, shall stutter, or be dumb, let the share such child is entitled to be set aside, and let its relations support it, and at its death let the person who so supports take his share,"

and the word "relations" appearing therein can be misinterpreted as meaning relations other than co-heirs.

In the case now under consideration the appellant Maung Nyo Lon and the respondent U Myat Maung are not co-heirs inasmuch as the brother of a deceased person normally excludes the nephews and nieces from inheritance, the former being much nearer in the order of succession than the latter : *See* General Order of Succession given in Chapter VIII of Lahiri's Principles of Modern Burmese Buddhist Law, 4th edition.

Even assuming for the sake of argument that Maung Nyo Lon was a co-heir with U Myat Maung to the estate of U Myat Hmwe, I am in entire agreement with the learned Judge of the District Court that on the evidence on record it has not been established that U Myat Hmwe was in his lifetime maintained and looked after by Maung Nyo Lon.

Regarding the second point as to whether U Myat Maung was entitled to possession of the suit land

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without paying the amount for which it was mortgaged to U Tha Yan, the ruling in the case of *Ma Kyi* v. *Ma Thon* (1) is apposite. A person cannot sue for redemption of his property under an oral mortgage which by law must be created by a registered instrument, but he can sue for possession relying on his title. He need not make an offer to pay the amount for which the land was mortgaged. As the land in suit was mortgaged to U Tha Yan orally, U Myat Maung is entitled to its possession without paying anything either to U Tha Yan or to U Aung Ban who had redeemed it from U Tha Yan. U Aung Ban having derived his right to possession from U Tha Yan cannot be in a better position than U Tha Yan himself. The learned Judge of the District Court was quite right in granting U Myat Maung a decree for recovery of possession of the suit land as prayed for by the plaintiff.

In the result, the appeal fails and must be dismissed with costs.

(1) I.L.R. 13 Ran. 274 (F.B.).

APPELLATE CIVIL

Before U San Maung, J.

H.C. 1948

Aug. 17.

SANT DEO AHIR (APPELLANT)

v.

SEOBARAN SINGH (RESPONDENT). *

Limitation Act, Articles 7 and 102 of Schedule I—Meaning of the word labourer in Article 7.

The Respondent was employed at a salary of Rs. 115 per mensem to take milk from the appellant and others and deliver the same to Tea Shops in Rangoon. He had to give statements as to the milk. A suit for Rs. 640 for wages or salary was decreed in both the lower Appellate Court and the trial Court and the contention that he was a labourer and that Article 7 of the Limitation Act was applicable was negatived.

Held: That labourer is one who performs physical labour as a service or for a livelihood.

A salesman appointed by a dealer to assist him in the sale of goods is not merely a labourer and his suit for wages is governed by Article 102. In the present case the work performed by the Respondent was not merely that of a coolie but in addition that of a saleman.

Musa Meah Sawdagar v. *Shirazulla*, A.I.R. (1935) Ran. 235; *Mutsaddi Lal* v. *Bhagwan Das*, I.L.R. (1926) 48 All. 164, referred to.

Kyaw Zan U for the appellant.

C. A. Soorma for the respondent.

U SAN MAUNG, J.—The only point which arises for decision in this second appeal is whether the respondent Seobaran Singh was a labourer employed by the appellant Sant Deo Ahir so that Article 7 of the Limitation Act would be applicable to his suit for the recovery of Rs. 640 alleged to be due to him for wages or salary. A "labourer" as defined in Murray's English Dictionary is one who performs physical

* Civil 2nd Appeal No. 56 of 1948 against the decree of the Subordinate Judge's Court of Insein in Civil Regular Suit No. 147 of 1947, dated the 9th October 1947.

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labour as a service or for a livelihood, *e.g.* one who does work requiring chiefly bodily strength or aptitude and little skill or training, as distinguished, *e.g.*, from an artisan. This definition has been adopted by Ba U J. in *Musa Meah Sawdagar* v. *Shirazulla* (1) where he held that a person who was appointed as a salesman by a dealer to assist him in the sale of goods was not merely a labourer and that his suit for wages due to him was governed by Article 102 and not by Article 7 of the Limitation Act. In the case of *Mutsaddi Lal* v. *Bhagwan Das* (2) it was held that a weighman employed to work at a shop was not a household servant, nor an artisan, nor a mere labourer, because he had to count and add up and could also be asked to do other work of the shop when free.

In the present case, the respondent Seobaran Singh, who was employed at a salary of Rs. 115 per mensem had to take milk from the appellant as well as from other persons from Thamaing as instructed by him, and then deliver the milk to such of the tea shops at Rangoon as indicated by the appellant. On return he had to give his statements as to the milk received by him at Thamaing and delivered at Rangoon for the appellant to maintain an account. The tea shop owners no doubt kept their own accounts but it is clear that the appellant himself had to depend for his account on statements supplied by the respondent. Therefore, although it is true that the respondent had to carry milk himself from Thamaing to Rangoon in the manner in which a coolie might have done, he was more than a coolie. He was really a salesman employed by the appellant notwithstanding the fact that he had to carry the milk himself from Thamaing to Rangoon.

For these reasons, I hold that both the learned Subordinate Judge, Insein, and the learned Judge of

(1) A.I.R. (1935) Ran. 235. (2) I.L.R. (1926) 48 All. 164.

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the Lower Appellate Court were right in holding that the respondent was not a labourer and that his suit was governed not by Article 7 of the Limitation Act, but by Article 102 of the Act. The appeal fails and must be dismissed with costs.

APPELLATE CIVIL.

Before U Aung Tha Gyaw, J.

H.C. 1948

July 22.

MAUNG ZAW NYUN & FOUR OTHERS (APPELLANTS)

v.

MA MAI KHA (RESPONDENT).*

Option to re-purchase in agreement—Whether agreement should be registered —Tender when necessary.

Appellant sued for specific performance of a contract for re-sale. The land had been sold on 20th August 1937 for Rs. 200, and the claim was based upon an unregistered agreement signed by the parties by which the appellants were permitted to re-purchase within 3 years from the date of sale. They had offered to re-purchase the property but this was refused on the ground that the appellant had failed to pay a year's rent and the right was therefore forfeited. The Lower Courts dismissed the suit on the ground that the agreement was not registered.

Held on Second Appeal : (1) The agreement giving the vendor an option to re-purchase need not be registered.

Maung Wala v. *Maung Shwe Gon and one*, I.L.R. 1 Ran. 472, followed.

(2) The practice of the courts is not to require a party to submit a formal tender where it appears from the facts of the case that tender would have been a mere form and that it would be refused if made.

Chalikani Venkatarayanim and others v. *Zamindar of Tuni and others*, I.L.R. 46 Mad. 108 ; *Hunter* v. *Daniel*, (1845) 4 Hare. 420, applied and followed.

Maung Ba Kyaw and another v. *Nanigram Jagannath*, I.L.R. 13 Ran. 22 ; *Po Tun* v. *E Kha*, 9 L.B.R. 18 ; *Sumshar Datt Singh and others* v. *Kamta Singh and others*, A.I.R. (1925) Oudh 533, referred to and distinguished.

Kya Gaing for the appellants.

Tin Hla for the respondent.

U AUNG THA GYAW, J.—The appellants sued the respondent for specific performance of a contract of resale in respect of a piece of paddy land which they

* Civil 2nd Appeal No. 303 of 1941 against decree of the Assistant District Court of Bassein in Civil Regular Appeal No. 32 of 1941 arising out of Civil Regular Trial No. 57 of 1940 of the Township Court of Ngaputaw at Bassein, dated the 21st March 1941.

sold to the latter for a sum of Rs. 200 on 20th August 1937. The claim made by the appellants was based upon the unregistered agreement (Ex. A) executed between the vendor and the vendee on the same date under the terms of which the appellants were permitted to repurchase their property within three years from the date of its sale. The appellants alleged in their plaint that they did offer to repurchase the property within the period stated in the agreement, but that their offer was refused by the respondent on the ground that by the appellants' failure to pay a year's rent they had forfeited their right to resale of the land under the terms of the agreement.

In her defence to the suit the respondent contended that the plaintiff-appellants had forfeited their right to obtain the reconveyance of the property and that they had not made any valid and legal tender of the price when they came with some elders to ask for the reconveyance of the property in suit. The defendant-respondent also put up the plea that the agreement, on which the appellants had made their claim, being unregistered, was inadmissible in evidence. The plaintiff-appellants in their reply asserted that in view of the refusal on the part of the defendant-respondent to reconvey the property, the appellants were not bound to make any tender of the price and that the agreement (Ex. A) did not require registration for its validity.

The trial Court was of opinion that the agreement required registration for its validity and that the plaintiff-appellants were not ready and willing to perform their part of the contract by making a proper tender of the price to effect the repurchase and accordingly dismissed their suit. On appeal to the Assistant District Court, the learned Assistant District Judge held the same view both in respect of the

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need for registration of the document in suit as well as the making of the tender of purchase money and accordingly dismissed the appellants' appeal.

These questions are now reagitated in this Court on second appeal and it is clear that on matters pertaining to legal issues a second appeal would lie, and that only in regard to issues of fact, it is incompetent for this Court to interfere with the concurrent findings of the Courts below. In support of the finding that the document in suit required registration for its validity the lower appellate Court cited two irrelevant Indian Rulings, the facts of which could not have any application to the present case. For the correct law on the point, one need not have looked beyond the case of *Maung Wala* v. *Maung Shwe Gon and one* (1) where a Bench of this High Court held that an agreement giving the vendor an option to repurchase need not be registered. The facts on which this decision was made were the same as those met with in this appeal. On the 8th March, 1919, Maung Wala, the appellant in that litigation, sold his land under a registered deed and on the same date an unregistered agreement was drawn up giving the vendor three years' time to buy the property back for the same price. It is thus clear that both the Courts were wrong in the view they took regarding the need for registration of the agreement in suit (Ex. A).

As to whether the appellant had made a proper tender of the purchase money, attention has been drawn to the Privy Council ruling in the case of *Chalikani Venkatarayanim and others* v. *Zamindar of Tuni and others* (2) where it was held in a dispute between the mortgagor and the mortgagee that if the mortgagee unequivocally refused a proposed payment of the

(1) I.L.R. 1 Ran. 472. (2) I.L.R. 46 Mad. 108.

amount due, the mortgagor was not bound to make a formal tender of it, and that the mortgagee could not recover interest accruing subsequently, even if he proved that the mortgagor had not the money or the control of it. Quoting from the judgment in the English case of *Hunter* v. *Daniel* (1) Their Lordships of the Privy Council said :

" The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the Bill or from the evidence it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money."

The case of *Maung Ba Kyaw and another* v. *Nanigram Jaganath* (2) was decided on other facts but involving the same question relating to the liability of a mortgagor to pay interest after the date of tender which was refused by the mortgagee.

In the case of *Po Tun* v. *E Kha* (3) the dispute was in respect of the redemption of a mortgage claimed by a mortgagor. The claim was resisted on the ground that the transaction was an outright sale. The offer to redeem made by the mortgagor was not accompanied by the production of the money. It was held that a mortgagor need not have produced the money in order to validate the offer of redemption made by him. The case of *Sumeshar Datt Singh and others* v. *Kamta Singh and others* (4) dealt with a claim made for reconveyance of property under the terms of a contract of resale, similar to the one now met with. There after pointing out the law on the point well settled in the English cases that where there was a clause or provision in the conveyance for the vendor to repurchase, it was necessary for the party claiming the right to strictly

(1) (1845) 4 Hare. 420.
(2) I.L.R. 13 Ran. 22.
(3) 9 L.B.R. 18.
(4) A.I.R. (1925) Oudh. 533.

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comply with the terms of the agreement, it was, however, pointed out in that case that it was an equally well established rule that the conduct of a creditor may amount to a dispensation with the literal compliance of the conditions set out in the agreement.

How far this principle of law can be applied to the present case must depend upon the actual facts brought out in the evidence. When the appellant Maung Zaw Nyun went to the respondent to ask for reconveyance of the property, he was accompanied by a number of witnesses one of whom, Po Myit (P.W.1.) has stated that he had to accompany Maung Zaw Nyun on these errands and that on both occasions Maung Zaw Nyun had the money wherewith to buy back his property from the respondent. His other witness San Lone who accompanied him heard Zaw Nyun asking his wife to supply him with money on both those occasions. In the cross-examination of the respondent Ma Mai Kha, there occurs this statement, " Plaintiff came with *lugyis* first and came alone for redemption of the land. U San Lone and Po Myit cited by the plaintiff as witnesses came with him at the time. I did not tell him that I would allow redemption if he gave me Rs. 400 there and then. I told him that I could not resell the land as he failed to pay the rent for one year." In view of this admission on the part of the respondent it is clear that it was not incumbent upon the appellant Maung Zaw Nyun to produce the money he brought with him in the presence of the witnesses in making his offer for repurchase of the property from the respondent. It was the respondent's case from the very beginning that in view of the appellant's failure to pay rental paddy for one year, he had forfeited his right to the reconveyance of the property. The agreement (Ex. A) makes no reference to any such condition entailing forfeiture of the appellant's right to

repurchase. At the trial some attempt was made to make out that the respondent was justified in not acting according to the agreement in view of the appellants' intention to sell the land after the repurchase to one U Tet Tun. The information received by the respondent might be distasteful to her, but that could hardly be used as a legal excuse for the failure to keep her part of the agreement. The agreement conferred upon the appellants a right to repurchase the land within the time permitted under the same and after they had exercised their right under the agreement, the appellants were at liberty to dispose of the property to whomsoever they liked.

Thus in the present case the agreement set up by the appellant did not require registration and that no justifiable ground has been set up by the respondent to justify her refusal to comply with the terms of the said agreement. Both the Courts below misdirected themselves on these questions of law involved in the dispute and arrived at erroneous findings.

Accordingly this appeal will be accepted and the judgments and decrees of the lower Courts will be set aside, and the plaintiff-appellants' suit will be decreed with costs in all Courts.

APPELLATE CIVIL

Before U Thoung Sein, J.

H.C. 1948

June 24.

MAUNG THIT MAUNG (APPELLANT)

v.

MAUNG TIN AND THREE ORTHERS (RESPONDENTS).*

Code of Civil Procedure, s. 10—Stay of Suit—Pre-evacuation pending suit whether can be revived only in accordance with Act VI of 1305 (B.E.)—Time limit fixed—Whether valid.

Prior to war plaintiff-respondent instituted Civil Regular Suit No. 2 of 1942 of the Subdivisional Court of Maubin for specific performance of a contract for sale. Japanese Military Administration followed. Act VI of 1305 (1943) was promulgated by the government of the occupation period and it provided that litigants were to revive or reconstruct all cases pending before the evacuation within 90 days of the promulgation of the Act. The plaintiff-respondent however filed a fresh suit Civil Regular Suit No. 9 of 1944 on the same cause of action. Defendant contended that a subsequent suit was not maintainable. After the retreat of the Japanese the latter suit was revived as Civil Regular Suit No. 4 of 1946. Plea that the suit was barred by Act VI of 1305 (B.E.) was negatived in both courts.

Held on Second Appeal : That provisions of s. 10 of the Code of Civil Procedure are mandatory and the courts are bound to stay a subsequent suit if a former suit is pending irrespective of whether a party makes an application for stay or not. If Act VI of 1305 (B.E.) was followed, then it ceased to have legal effect from the date of restoration of Civil Government in 1946. Lost records may be reconstructed at any time by the courts concerned. Moreover it was not within the competence of the Commander-in-Chief of the Japanese Armed Forces to enact Act VI of 1305 (1943).

The King v. Maung Hmin and three, (1946) Ran. 1, applied.

Under Military Ordinance VI of 1942 old courts were continued and no special legislation was necessary for pending cases and the Commander-in-Chief had no right to fix any time limit for reviving or reconstructing such cases.

M. Zakaria for the appellant.

S. Choung Po and *Thein Moung* for the respondents.

U THAUNG SEIN, J.—In Civil Regular No. 2 of 1942 of the Subdivisional Court of Maubin instituted on

* Civil 2nd Appeal No. 1 of 1948 against decree of the District Court of Myaungmya (Maubin) in Civil Appeal No. 3 of 1947, dated the 22nd September 1947.

21st February 1942 the plaintiff-respondents sued the appellant-defendant for the specific performance of a contract of sale of certain lands, a house and 10 heads of cattle. As a result of the Japanese invasion of Burma and the consequent evacuation of the Civil Government to India in 1942, the Courts in the Maubin District were closed down and the above suit remained pending. Then there followed the Japanese Military Administration which revived or reopened all civil and criminal courts which were in existence immediately before the British withdrawal, *vide* Military Ordinance No. 6 of 1942 by the then Commander-in-Chief of the Japanese Armed Forces. It appears that under Act No. VI of 1305 (1943) promulgated by "the Government of Independent Burma" with the approval of the Commander-in-Chief of the Japanese Armed Forces, litigants were given the opportunity of reviving or reconstructing all cases pending before the British evacuation within 90 days of the promulgation of the Act in question. For some unknown reason the plaintiff-respondents did not avail themselves of this opportunity but instead filed a fresh suit, namely, Civil Regular Suit No. 9 of 1944 in the Court of the Subdivisional Judge of Maubin on the same cause of action and against the same defendants.

The defendants contested the suit and pleaded, *inter alia*, that the subsequent suit, Civil Regular Suit No. 9 of 1944, was not maintainable as the plaintiffs had failed to revive the former suit and should therefore be considered to have abandoned their claims. This plea was disallowed by the learned Subdivisional Judge and the suit went to trial. However, before the suit could be decided finally the Japanese Army began to retreat from Burma and once again the civil and criminal court of Maubin and other parts of Burma were closed down. Next, there followed the restoration of the Civil

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U THAUNG SEIN, J.

Government which had been in exile in India and the civil and judicial administration of the pre-evacuation regime were revived. The plaintiff-respondents then applied to the learned Assistant Judge, Maubin, to continue with the hearing of Civil Suit No. 9 of 1944 of the Subdivisional Court of Maubin and their application was allowed and the suit was registered afresh as Civil Regular Suit No. 4 of 1946 of the former Court. The defendants repeated their defence that the suit in question was not maintainable so long as Civil Regular Suit No. 2 of 1942 of the Subdivisional Court of Maubin was pending and that the plaintiff-respondents should be considered to have abandoned the former suit. The learned Assistant Judge refrained from dealing with this plea as the learned Subdivisional Judge of the Japanese regime had already held that Act No. VI of 1305 B.E. was no bar to a fresh suit. He then framed other issues which arose on the pleadings and finally decreed the plaintiff-respondents' claim. The defendant-appellant appealed to the District Court of Maubin but without result and he has now come up to the High Court on second appeal.

The main contention urged by the learned Counsel for the defendant-appellant is that the plaintiff-respondents are debarred from filing a fresh suit so long as Civil Regular Suit No. 2 of 1942 of the Subdivisional Court of Maubin is pending. Now, section 10 of the Code of Civil Procedure clearly lays down that:

> "No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other Court in Burma having jurisdiction to grant the relief claimed."

If Civil Regular No. 2 of 1942 of the Subdivisional Court of Maubin may be considered as pending then, obviously, the plaintiff-respondents cannot be permitted to proceed with the trial of a fresh suit on the same cause of action and against the same defendants. The learned District Judge of Maubin was apparently under the impression that it was for the defendant-appellant to apply to the Assistant Judge, Maubin, to stay the proceedings in the subsequent suits. The provisions of secton 10 of the Civil Procedure Code are mandatory and the Courts are bound to stay a subsequent suit if a former suit is pending irrespective of whether any of the parties makes an application for stay or not.

Civil Regular No. 2 of 1942 of the Subdivisional Court of Maubin was admittedly pending at the time of the evacuation and *prima facie* is still pending at the present day. But the learned Counsel for the defendant-appellant argues that with the withdrawal of the British in 1942 and the setting up of the Japanese Military Administration all pending cases prior to the evacuation must be deemed to have lapsed. According to the learned Counsel these cases could only be revived in accordance with Act VI of 1305 B.E. promulgated by the then "Government of Independent Burma" with the approval of the Commander-in-Chief of the Japanese Armed Forces. All cases not revived in accordance with that Act are said to have lapsed. If what the learned Counsel says be true then, no pending cases of the pre-evacuation period may be revived or reconstructed at the present day. But strangely enough, numerous cases of that period are being reconstructed or revived in all grades of Courts throughout Burma and as far as I am aware no objection has ever been taken that these revivals or reconstructions are barred by Act VI of 1305 B.E. In the first place if Act VI of 1305 B.E. was a valid one,

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that is to say, if it was within the competence of the Commander-in-Chief of the Japanese Armed Forces to issue such legislation then it ceased to have any legal effect from the date of the restoration of the Civil Government in 1945. Now, lost records may be reconstructed at any time by the Courts concerned in exercise of the inherent powers under section 151 of the Code of Civil Procedure and there is no time limit. If after the restoration of the Civil Government the plaintiff had applied to the Assistant Judge, Maubin, for the reconstruction of Civil Suit No. 2 of 1942 of the Subdivisional Court of Maubin which has presumably been lost, I do not see what other alternative could have been open to the learned Assistant Judge except to allow the application. It would have been futile for the defendant-appellant to plead that as the plaintiff-respondents had failed to exercise the option to revive it in accordance with Act VI of 1305 B.E. during the Japanese regime, they can no longer be permitted to reconstruct the lost record.

There can be no doubt that Act VI of 1305 B.E. was in operation during the Japanese occupation period and that the plaintiff-respondents could not have revived the pending suit Civil Regular No. 2 of 1942 of the Subdivisional Court of Maubin except by the method provided therein. The question is whether it was within the competence of the Commander-in-Chief of the Japanese Armed Forces to enact the above legislation. It has been clearly explained in *The King* v. *Maung Hmin and three* (1) that an occupant must obviously establish and maintain Courts of justice and so long as those Courts are constituted in accordance with the Municipal Law of the occupied country they are validly constituted Courts and if the law

(1) (1946) Ran. 1.

administered by these Courts is the Municipal Law of the occupied country their decisions are valid and binding on the lawful Government and the inhabitants of the country and should be given effect to. On the other hand, if the enemy occupant sets up Courts of his own which are not constituted in accordance with the ordinary law of the occupied country and did not administer that law such Courts have no legal status and their decisions are null and void.

Now, the Commander-in-Chief had issued Military Ordinance No. 6 of 1943 which continued the old Courts and administered the law that was in force prior to the evacuation. Such being the case all the pending cases in those Courts could have been revived or continued and no special legislation was necessary for the purpose. The Commander-in-Chief of the Japanese Armed Forces had no right whatsoever to fix any time limit within which those pending cases should be revived or reconstructed as this would have had the effect of extinguishing or destroying the rights and claims of those litigants who had evacuated out of Burma. An occupying power has no right whatsoever to destroy the rights of any citizen for redress in the Civil Courts. In my opinion, the Commander-in-Chief of the Japanese Armed Forces exceeded his powers when he enacted Act No. VI of 1305 B.E. which was clearly *ultra vires*.

On the whole the correct course for the plaintiff-respondents to have adopted was to apply to the learned Assistant Judge of Maubin for reconstruction of Civil Regular Suit No. 2 of 1942 of the Subdivisional Court of Maubin and not to proceed with the hearing of the subsequent suit. Section 10 of the Code of Civil Procedure clearly lays down that the subsequent suit must be stayed and the learned Assistant Judge erred in deciding it finally. This appeal is accordingly

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allowed with costs. The judgments and decrees of both the lower Courts are set aside and Civil Regular Suit No. 4 of 1946 of the Court of the Assistant Judge, Maubin, will be stayed pending the decision of Civil Regular Suit No. 2 of 1942 of the Subdivisional Court of Maubin.

FULL BENCH (ORIGINAL CIVIL).

Before U Thein Maung, Chief Justice, U Tun Byu and U San Maung, JJ.

KEAN ENG & Co. AND THREE OTHERS (APPLICANTS)

v.

THE CUSTODIAN OF MOVEABLE PROPERTIES, BURMA AND ONE (RESPONDENTS).*

H.C. 1948

Dec. 13.

Right to issue writs of certiorari *by the High Court—Ss. 25, 125, 134, 135, 223 and 228 of the Constitution of Burma—Ss. 30 and 31 of the Union Judiciary Act, 1948—Rule 4 of Original Side Rules.*

Held : That the High Court of Judicature at Rangoon used to issue writs of *certiorari* under its inherent jurisdiction as King's Court. That court ceased to exist with the Independence of Burma. The present High Court is a new court established by the Union Judiciary Act and has only such jurisdiction as has been given to it by the Act.

S. 25 of the Constitution of Burma invests the Supreme Court of the Union with the power to issue directions in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari* for enforcement of fundamental rights granted by Chapter II of the Constitution, and by implication powers of the High Court to issue such directions are negatived.

S. 228 of the Constitution refers to old courts existing at the time of Independence of Burma and not to new courts established by a new Act. Ss. 30 and 31 of the Union Judiciary Act, 1948, cannot be invoked as they are to be read subject to the provisions of the Constitution. The present High Court has thus no power to issue writs of *certiorari.*

Under Rule 4 of the Original Side Rules the whole case referred to must be disposed of by the Bench.

Maung Pyu and others, (1940) Ran. L.R. 325 ; *The King* v. *Whitbread*, 99 E.R. 347 ; *Cates* v. *Knight*, 100 E.R. 667 ; *Jacobs* v. *Brett*, 20 Equity Cases 1 ; *Bhaishankar Nanabhai* v. *The Municipal Corporation of Bombay*, (1907) I.L.R. 31 Bom. 604 at p. 609 ; *H. C. Dey* v. *The Bengal Young Men's Co-operative Credit Society*, (1939) Ran. L.R. 50, referred to.

P. K. Basu for the applicants.

Ong Shein Woon (Government Advocate) for the respondents.

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* Civil Misc. Nos. 542, 543, 544 and 545 of 1947 of High Court.

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U THEIN MAUNG, C.J.—The question that has been referred to us is whether the High Court as at present constituted has jurisdiction to issue a writ of *certiorari*.

With reference to the jurisdiction of the late High Court of Judicature at Rangoon it has been held in the matter of *Maung Pyu and others* (1) :

> " The High Court is the King's Court with general jurisdiction throughout Burma, and therefore it must have inherent power to issue the King's writs unless that power has been taken away by His Majesty by express terms. There is nothing in the Letters Patent which in terms deprives this Court of the power to issue the high prerogative writs."

However, the High Court of Judicature at Rangoon became *functus officio* and the present High Court has been established by the Constitution of the Union of Burma which came into force on the 4th January 1948. (*See* sections 134 and 135 of the Constitution and section 2 of the Union Judiciary Act, 1948.)

The present High Court is not the King's Court ; and His Majesty's prerogatives cannot as such be exercised by any authority in the Union. According to the Constitution all judicial powers (*inter alia*) are derived from the people, all the prerogatives of His Majesty now belong to the Union and all the prerogatives of His Majesty have ceased to be exercisable as such by any authority in the Union. (*See* sections 4 and 223 thereof.)

The present High Court is a new Court which has only such jurisdiction as has been given to it by the Constitution and the Union Judiciary Act, 1948. So the rulings like *The King* v. *Whitbread* (2), *Cates* v. *Knight* (3) and *Jacobs* v. *Brett* (4), which relate to the taking away of the jurisdiction that was already there, are not applicable at all.

(1) (1940) Ran. L.R. 325.
(2) 99 E.R. 347.
(3) 100 E.R. 667.
(4) 20 Equity Cases 1.

In the words of Jenkins C.J. in *Bhaishankar Nanabhai* v. *The Municipal Corporation of Bombay* (1):

"In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any; there is no change of the old order of things; a new order is brought into being."

The learned Advocate for the applicants has admitted that writs of *certiorari* are required for the enforcement of economic rights which are conferred by section 23 (*1*) and (*4*) of the Constitution. Section 23 is in Chapter II under the heading "Fundamental Rights" and section 25 which is in the same Chapter provides:

"25. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of any of the rights conferred by this Chapter is hereby guaranteed.

(2) Without prejudice to the powers that may be vested in this behalf in other Courts, the Supreme Court shall have power to issue directions in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* appropriate to the rights guaranteed in this Chapter."

So these clearly are cases in which the Supreme Court has power to issue directions in the nature of *certiorari*. Roberts C.J. stated in the matter of *Maung Pyu* (2) at page 325:

"No matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, and an objection to the jurisdiction of a superior Court of general jurisdiction must show what other Court has jurisdiction, so as to make it clear that the exercise by the superior Court of its general jurisdiction is unnecessary."

So far as the present High Court is concerned, it can be shown that the Supreme Court has jurisdiction to issue directions in the nature of *certiorari* and that it is not necessary for the High Court also to exercise jurisdiction in the matter.

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(1) (1907) I.L.R. 31 Bom. 604 at p. 609. (2) (1910) Ran. L.R. 325.

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The fact that there is the saving clause "without prejudice to the powers that may be vested in this behalf in other Courts" in sub-section (2) of section 25 cannot make any difference as the power to issue directions in the nature of *certiorari* has not been vested in the High Court yet.

Section 228 of the Constitution provides :

"All Courts existing at the date of the coming into operation of this Constitution shall continue to exercise their jurisdiction until new Courts are established by law in accordance with this Constitution. All cases, civil, criminal and revenue, pending in the said Courts, shall be disposed of as if this Constitution had not come into operation."

However, read and construed as a whole, as it should be, the section means that old Courts, which have to continue to exercise their jurisdiction until new Courts are established, must dispose of cases pending in them as if the Constitution had not come into operation. It does not mean that new Courts, which are established by law in accordance with the Constitution, like the High Court, must dispose of all cases pending in the old Courts regardless of the limits to their own jurisdiction. (See *Maung San Myint* v. *U Hla Maung*, Civil Regular Suit No. 30 of 1947 in the High Court of Judicature at Rangoon.)

The provision in section 30 of the Union Judiciary Act, 1948, that the jurisdiction of the High Court shall be the same as immediately before the commencement of the Constitution is expressly subject (*inter alia*) to the provisions of the Constitution and the King's prerogatives have ceased thereunder to be exercisable as such by any authority in the Union. So the High Court does not have jurisdiction to issue the prerogative writ of *certiorari* like the late High Court of Judicature at Rangoon. [*See* section 9 of the Code of Civil

Procedure according to which the jurisdiction of the Courts may by necessary implication be avoided. [Cf. *H. C. Dey* v. *The Bengal Young Men's Co-operative Credit Society* (1).] Section 31 of the Union Judiciary Act, 1948, provides :

"All suits, appeals, revisions, applications, reviews, executions and other proceedings whatsoever pending immediately before the coming into operation of the Constitution in the High Court of Judicature at Rangoon in the exercise of any jurisdiction vested in it by law, shall, subject to any other provision that may be expressly made by law, be continued and concluded in the High Court as if the same had been instituted in the High Court."

However, it is clear from what has been set out above that the applications for writs of *certiorari* must be rejected by the High Court. The applications must be treated as if they had been instituted in the High Court and the High Court has no jurisdiction to issue such writs at all.

The reference having been made under Rule 4 of the Original Side Rules, the learned Advocate for the applicants has submitted that we should not only answer the question under reference but also dispose of the applications themselves.

We accordingly answer the question under reference in the negative and order that the applications be returned to the applicants.

However, the parties must bear their own costs as the applications were originally filed in the late High Court of Judicature at Rangoon, which certainly had jurisdiction to issue writs of *certiorari*.

U TUN BYU, J.—I respectfully agree.

U SAN MAUNG, J.—I agree with my Lord and have nothing to add to his judgment .

(1) (1939) Ran .L.R. 50.

FULL BENCH (APPELLATE CRIMINAL).

Before U San Maung, U Bo Gyi and U Thaung Sein, JJ.

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Oct. 26.

THE UNION OF BURMA (COMPLAINANT)

v.

MAUNG OHN KYAING (ACCUSED).*

Conviction under s. 304, Penal Code—Charge to the jury—Misdirection—Reference under s 434, Criminal Procedure Code—Power of the court.

Held: A charge to the jury must be read as a whole. The view of the trial Judge may not coincide with the view of others who merely read the proceedings. If upon the general view taken, the case has been fairly left within the jury's province, it would not be proper to treat such cases as cases of misdirection.

Channing Arnold v. *Emperor*, I.L.R. 41 Cal. 1023 *equals* 41 I.A. 149, applied.

Misdirection as used in the Code of Criminal Procedure includes not only an error in laying down the law by which the jury are to be guided but also error in summing up the evidence.

Imperator v. *Minhwasayo and others*, 11 Cr. L. J. 13, followed.

It is no misdirection not to tell jury everything which might have been told, but it would be misdirection if the judge had told the jury something which was wrong or which would lead them to a wrong inference.

Rex v. *Stoddar* , (1909) 2 Cr. App. R. 217, 246, followed.

It is also the duty of a judge not merely to narrate evidence but also to direct the jury as to the weight which in his opinion ought to be attached to the evidence called at the trial ; but he must at the same time let the jury consider facts for themselves and form their own opinion and draw their own inference.

The provision of s. 434 of the Code of Criminal Procedure is analogous to clauses 25 and 26 of Letters Patent of the High Courts of Calcutta, Bombay and Madras. Under s. 434 of the Code the High Court has power to review the whole case. If the High Court is satisfied that it is reasonably certain that after the exclusion of the inadmissible or improperly admitted evidence or after the exclusion of matters regarding which there has been misdirection, the jury *would* (*not might*) have convicted the accused or in other words a reasonable jury would have brought a verdict of guilty, then the conviction will be up-held.

H. W. Scott v. *King-Emperor*, I.L.R. 13 Ran. 141, followed.

Imperatrix v. *Pitamber Jina*, I.L.R. 2 Bom. 61 (F.B.) ; *Emperor* v. *Panchu Das*, I.L.R. 47 Cal. 671 (F.B.) ; *Emperor* v. *Puttan Hassan*, I.L.R. 60 Bom. 599 (F.B.), referred to and followed.

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* Criminal Reference No. 68 of 1948 of the High Court, Rangoon.

Ba Sein for the complainant.

Ba Tun for the accused.

The judgment of the Full Bench was delivered by

U SAN MAUNG, J.—At the Third Criminal Sessions of this Court one Maung Ohn Kyaing was tried by Mr. Justice Aung Tha Gyaw with a jury for an alleged offence of murder punishable under section 302 of the Penal Code for causing the death of Maung Nyun on the 30th of March, 1947. He was unanimously found guilty under section 304 of the Penal Code and was sentenced to suffer seven years' rigorous imprisonment. He filed an appeal against the conviction and sentence but subsequently withdrew the appeal. He then filed an application under section 22 of the Union Judiciary Act read with section 434 of the Code of Criminal Procedure, but his application was rejected by the learned trial Judge on the ground that section 22 of the Union Judiciary Act did not apply as no point or points of law arising in the course of the trial had been reserved by him. On appeal to the Supreme Court of the Union of Burma, the question that arose for decision was whether a reference under section 434 of the Code of Criminal Procedure can be made by the presiding Judge either on his own motion or at the instance of a party after the trial was over, if the Judge did not reserve for reference any point or points of law at the time he passed the sentence. This question was decided by their Lordships of the Supreme Court in the affirmative and the case was remitted to the learned trial Judge for disposal of Maung Ohn Kyaing's application in the light of this decision. Accordingly Mr. Justice Aung Tha Gyaw, who then dealt with the application on its merits, has referred for the decision

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of a court consisting of two or more Judges of this Court the following questions of law :

(1) Whether in the charge to the jury the statement " ယခုအမှုအဖြစ်အပျက်များကိုစဉ်းစားကြည့်ပါလျှင်၊သေသူအားတရားခံက မည်သည့်အကြောင်းကြောင့် ဒါးနှင့်ထိုးသွားသည်ဟု သက်သေတယောက်မျှမထွက် ဆိုနိုင်ပါ။ . . . . " implied that it was an established fact that the accused stabbed the deceased but that the motive for the assault could not be gathered from the statements made by the witnesses; and if so, whether it amounted to misdirection ?

(2) Whether the statement " ၎င်းတို့သည်မင်္ဂလာဆောင်မှခဲတိုးရသော ဝိုက်ဆံဖြင့် အရက်များဝယ်၍သောက်ကြပြီးလျှင် ရုတ်တရက်အချင်းချင်း ရန်ဖိုက်ဒေါသဖြစ်ပြီးလျှင် တရားခံက သေသူအား ဒါးနှင့် တချက်ထိုးပြီး ထွက်ပြေးသည်ဟုသာ ၌အမှုတွင်ပေါ်ပေါက်ပါသည်။" was a misdirection in the absence of any evidence to show that the accused and the deceased had a quarrel, and that the accused stabbed the deceased as a result of that quarrel ?

(3) Whether the statement "တရားခံသည်၊ မည်သည့် အတွက်ကြောင့် သေစေရန်အကြံအစည်ဖြင့် ဒါးနှင့်ထိုးခဲ့သည်ဟုမပေါ်ပေါက်ပါ။ . . ." implied that the stabbing by the accused was an established fact, and if so, whether it amounted to misdirection ?

(4) Whether the statement " မောင်ညံ့ကူးအား တရားခံ အုံးကြိုင်က သေသူ မောင်ညွန့်အား ဒါးနှင့်ထိုးသွားပါသည်ဟု သူ့အား မောင်ဘမြင့်က တဆင့်ပြောခဲ့ခြင်းနာတွင်သွားတိုင်ပါသည်။ " in dealing with the first Information Report amounted to misdirection as Maung Ba Myint had only told the informant Maung Nyan Ku that he heard that Ohn Kyaing had stabbed Maung Nyun ?

(5) Whether the statement attributed to Maung Ba Myint " သူကအောက်ရုံးတွင်သေသူမောင်ညွန့်အားအုံးကြိုင်ကဒါးနှင့်ထိုး၍ ဘူတာဘက်သို့ ပြေးသည်ဟု ထွက်ဆိုသည်။ " was a misdirection as Maung Ba Myint had stated that he did not actually see the assault on Maung Nyun ?

(6) Whether the statement attributed to U Po Thant " မောင်ညွန့်အား ဒါးနှင့်ထိုးသောသူကို မောင်ဘမြင့်က လိုက်သည်ဟု သိရပါသည်။ " implied that the assailant's identity was

established; and if so, whether it amounted to misdirection?

(7) Whether the statement regarding Maung Par that "သက်သေမောင်ပါသည်၊ ဆွဲရာတက်သို့ ပါသော်လည်း၊ ပဌမ ကျမ်းကျိန်အစစ်ခံစဉ်အခါက ထွက်ဆိုခဲ့သည့်အတိုင်း မှန်ကြောင်း ဝန်ခံပါသည်။" without any reference to the discrepant statements made by Maung Par in his depositions before the committal court and before the trial Court, and without pointing out to the jury the belated examination of this witness by the investigating officer, amounted to misdirection?

Now, the facts, so far as they are necessary for the purpose of this reference, are these: At about noon on the 30th of March, 1947, there was a marriage ceremony at the house of one Ma E Hmyin in Bayathokdi Street within the jurisdiction of Tamwe Police Station, Rangoon. On the occasion of that marriage alcoholic drinks were served to certain men of that locality at the house of Ma E Hmyin's neighbour Maung Nyan Ku (P.W. 3), who was a stone polisher by profession. These drinks were procured with the money obtained by Maung Nyan Ku as "stone-fees" for these men. Among those partaking them were the deceased Maung Nyun and the accused Ohn Kyaing. When the drinking was over at about 11 a.m., the party left Maung Nyan Ku's house and Maung Nyan Ku himself went to purchase certain goods. His assistant Maung Ba Myint (P.W. 3 in the committal court), who remained behind to polish stones at his house, heard shouts of "ဒါးနှင့်ထိုးတယ်၊ ဒါးနှင့်ထိုးတယ်" or words to this effect and on looking up saw the deceased Maung Nyun in the act of falling down near a "zaung-yar" tree inside Maung Nyan Ku's compound. At that moment the accused Ohn Kyaing was seen walking away on the road at a spot about 20 feet away from Maung Nyan Ku's fencing. He

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was holding a handkerchief. Then the crowd gave chase shouting "Ohn Kyaing, Ohn Kyaing" and the accused Ohn Kyaing then ran towards Mahlwagon Railway Station, and eventually escaped. Maung Ba Myint was one of those who took part in the chase. Later, when Maung Nyan Ku returned from the bazaar, Maung Ba Myint reported to him that he saw Ohn Kyaing running away from a spot one fathom away from the place where Maung Nyun fell, and that he had been told that Ohn Kyaing was the assailant of Maung Nyun. Maung Nyan Ku (P.W. 3) then proceeded to Tamwe Police Station where he lodged the first information report (Ex. ə) to the effect that Maung Nyun had been stabbed by Ohn Kyaing at the wedding house of Ma E Hmyin. The dead body of Maung Nyun, who had immediately succumbed to his injuries, was removed to the General Hospital, Rangoon, the same day and on a post-mortem examination being held the next day by Dr. Ba Than, it was found to have a stab wound on the left side of the chest $\frac{1}{2}''$ below the middle of the collar bone, deep into the chest cavity, penetrating the left lung and injuring the large blood vessels. It was also found to have a lacerated wound, bone deep, on the middle of the lower jaw and a lacerated wound, scalp deep, on the left side of the forehead.

Police investigation was immediately undertaken by Maung Ba Nyein (P.W. 11), the then Sub-Inspector of Police attached to Tamwe Police Station, but the accused Ohn Kyaing, who was found to be absconding, could not be arrested. Action under section 512 of the Code of Criminal Procedure was taken against him, and he was subsequently arrested by Maung Htwe Maung (P.W. 10) on the 21st of November, 1947, and sent up for trial. Maung Ba Myint, who was one of the prosecution witnesses examined in the committal

court, could not be served with summons for his appearance at the trial Court because his whereabouts were unknown. Therefore, his evidence was admitted by the trial Judge under section 33 of the Evidence Act as exhibit (ဃ). So also was the evidence of U Po Thant (P.W 4 in the committal court), who spoke of a quarrel at the marriage *mandat* between Maung Mya and Maung E after the drinking party at Maung Nyan Ku's house; of the taking away of Maung Nyun, Maung E and Tin Hlaing by Maung Nyan Ku, and of the subsequent chase after the man who was pointed out to him by Ba Myint as the assailant of Maung Nyun.

At the trial before Mr. Justice Aung Tha Gyaw, Maung Par (P.W. 12) was one of the most important witnesses for the prosecution. He started by saying that while at about 12 noon of the day of occurrence, he and his friend Maung Ohn Khine were walking in the vicinity of Bayathokdi Street, they heard shouts of "chase, chase" and saw one man being chased by a crowd. He and his friend took part in the vain chase. On return, they found a man lying dead with a stab wound and also heard 4 or 5 persons saying that the deceased was Maung Nyun and that the assailant was Ohn Kyaing. When confronted with the statement made by him in the committal court, this witness admitted that he had formerly stated that he saw Maung Nyun and Ohn Kyaing in the act of struggling with each other and that this struggle took place at the entrance of the compound of the woman who was heard shouting. He also admitted that he had stated that Maung Nyun fell down at a spot 4 or 5 fathoms away from where he had struggled with Ohn Kyaing, and that after Maung Nyun fell Ohn Kyaing ran away in the direction of the top of Bayathokdi Street; on being chased by a crowd

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When cross-examined by the counsel for the accused this witness admitted that he did not actually see Ohn Kyaing and Maung Nyun in the act of struggling, and that the statement to the effect that Maung Nyun fell down at a spot about 4 or 5 fathoms away from where he had struggled with Ohn Kyaing was untrue. He also admitted that he had given chase without knowing the identity of the fugitive. On being re-examined by the Government Advocate, this witness stated that the statements that he saw the deceased and Ohn Kyaing struggling and that the deceased Maung Nyun fell down immediately after the struggle previously made by him in his examination-in-chief were true. However, when questioned by the Foreman of the jury this witness said that although he saw the two men struggling, he did not know who they were and that he only said that they were Ohn Kyaing and Maung Nyun because he was told so by other people after the occurrence had taken place. He also said that he saw the struggle from a distance of about 60 feet, and that accused Ohn Kyaing whom he only knew by sight lived in a street adjacent to his. This witness was examined by the police about two months after the occurrence took place.

Now after the witnesses for the prosecution and the accused Ohn Kyaing (who cited no defence witnesses but gave evidence on behalf of his own defence) was examined, the learned trial Judge proceeded to charge the jury as required by section 297 of the Criminal Procedure Code. He began by telling the jury that in the matter in which the accused Ohn Kyaing was charged with the offence of having stabbed the deceased Maung Nyun it was entirely within their province to come to a decision as to what really took place, as they were the sole judges of fact. As regards the law, he said, it was their duty to be guided by what

was laid down by him He then proceeded to explain the law relating to culpable homicide and murder as contained in sections 299, 300, 302 and 304 of the Penal Code laying particular stress upon the relevant exceptions to section 300 of the Penal Code. Then, without first summing up the evidence for the prosecution he said, "ယခုအမှု အဖြစ်အပျက်များကို စဉ်းစားကြည့်ပါလျှင်၊ သေသူအား တရားခံကမည်သည့်အကြောင်းကြောင့် ဒါးနှင့်ထိုးသွားသည်ဟု သက်သေတယောက်ကမျှ မထွက်ဆိုနိုင်ပါ။ ၎င်းတို့သည် မင်္ဂလာဆောင်မှခဲ့ဘိုးရသော ပိုက်ဆံဖြင့် အရက်များဝယ်၍ သောက်ကြပြီးလျှင် ရုတ်တရက်အချင်းချင်း ရန်ခိုက်ဒေါသဖြစ်ကြ၍ တရားခံက သေသူအား ဒါးနှင့်တချက်ထိုးပြီးထွက်ပြေးသည်ဟုသာ ဤအမှုတွင်ပေါ်ပေါက်ပါသည်။ ဤကဲ့သို့ ဒါးနှင့်ထိုးရမည့် အကြောင်းမှာလည်း တမင်သက်သက် အကြောင်းခဲ့ ရက်ရက်စက်စက်ထိုးခဲ့သည်မထိုးခဲ့သည်အကြောင်းများလည်းသက်သေထွက်ချက်တွင် ဘာမျှမပေါ်ပေါက်ပါ။"

These passages have been objected to by the learned counsel for the accused as a misdirection, on the ground that the Judge must be deemed to have directed the jury as an established fact that it was the accused who had committed the assault, though the motive could not be gathered from the evidence of the witnesses for the prosecution, and that the assault took place as a result of a sudden quarrel following a drink of liquor. We have carefully considered these passages with reference to their context and we are of the opinion that although the language in which they are couched is not happy the learned judge did not mean to direct the jury in the sense indicated by the learned counsel for the accused. What the learned Judge appears to have been anxious to impress upon the jury was that this was not a case of premeditated murder and that although there was no direct evidence as to the motive for the assault there was the fact that the stabbing took place on a sudden quarrel following a drink of liquor by several persons at the house of Maung Nyan Ku. The learned Judge's reference to

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exception 4 to section 300 in the paragraph preceding these passages and again in the paragraph in which these passages occur makes it clear that he was anxious to impress upon the jury that even if the accused Ohn Kyaing was the assailant, it was entirely within their province to say that the offence committed by Ohn Kyaing was not murder but only culpable homicide not amounting to murder within the meaning of exception 4 to section 300 of the Penal Code. Therefore, there was no misdirection on the part of the learned trial Judge in his charge to the jury in regard to these passages.

Similarly, in regard to the passage "တရားခံသည် မည်သည့်အတွက်ကြောင့် သေစေရန်အကြံအစည်ဖြင့် ဒါးနှင့်ထိုးခဲ့သည်ဟု မပေါ်ပေါက်ပါ။" which occurs after the learned Judge had taken pains to explain that even if the offence committed was murder punishable under section 302 of the Penal Code, the maximum penalty under the amended law was transportation for life or rigorous imprisonment for ten years as it was not a case of premeditated murder, we are of the opinion that neither did the learned Judge mean to direct nor did the jury understand him to have directed that it was an established fact that the assailant was the accused Ohn Kyaing.

The proper way of viewing a charge by a judge to the jury has been laid down by their Lordships of the Privy Council in *Channing Arnold* v. *Emperor* (1) as follows :

"A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It

(1) I.L.R. 41 Cal. *equals* 1023 41 I.A. 149.

would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province."

The passages referred to in questions No. 1, 2 and 3 should be read with reference to their context and upon a general view taken of the charge made by Mr. Justice Aung Tha Gyaw, we are of the opinion that he had left the case regarding the identity of the assailant of the deceased Maung Nyun fairly within the province of the jury.

The passages referred to in questions No. 4 and 5 occur in the paragraph relating to the reason why the prosecution had alleged that the accused Ohn Kyaing was the assailant. No doubt, the passage "မောင်ညွှန်းအား၊ တရားခံအုံးကြိုင်က သေသူမောင်ညွှန်းအား ဒါးနှင့်ထိုးသွားပါသည် ဟု သူ့အား မောင်ဘမြင့်က တဆင့်ပြောချ၍ ငွာနာတွင် သွားတိုင်ပါသည်။" and the statement attributed to Maung Ba Myint "သူက အောက်ရုံးတွင် သေသူမောင်ညွှန်းအား၊ အုံးကြိုင်ကဒါးနှင့်ထိုး၍ ဘူတာဘက်သို့ ပြေးသည်ဟု ထွက်ဆိုပါသည်။" are serious misstatements of facts. They must have conveyed to the jury the impression that Maung Ba Myint who was never examined as a witness before them but whose statement in the committal court was merely read out to them two days before, was an actual eye-witness to the stabbing of Maung Nyun by Ohn Kyaing. In fact, what Ba Myint stated in the committal court was that when he looked up on hearing shouts to the effect that a man had been stabbed, he saw the deceased Maung Nyun in the act of falling to the ground and the accused Ohn Kyaing walking away from the vicinity of the scene of occurrence to be subsequently chased by a crowd of persons as the assailant of Maung Nyun. According to Maung Nyan Ku also, Ba Myint did not tell him that he actually saw the stabbing but that he

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was merely told that Ohn Kyaing was the assailant of Maung Nyun. No doubt, while reminding the jury that on a consideration of the whole evidence adduced in the case, it was for them to consider whether the accused was or was not the assailant, the learned trial Judge said, "နေ့လည်ကြီးဖြစ်ပျက်သောကိစ္စ၌ မျက်မြင်သက်သေမရှိဘဲနှင့် တရားခံအားဘယ်အတွက်ကြောင့် လွယ်ကူစွာပစ်ခွဲထားသည်ဆိုသည့် အချက်များကို စဉ်းစားရန် အကြောင်းရှိပါသည်။" thus mentioning the fact that there was no actual eye-witness to the stabbing. However, in our opinion, this was quite insufficient to remove the impression already likely to be created in the minds of the jury that Maung Ba Myint was an eye-witness to the crime. In this latter passage, what the learned trial Judge was trying to stress was not that there was no eye-witness to the occurrence but that the occurrence having taken place in broad day light, a wrong person was not likly to be denounced. As pointed out by the learned Judicial Commissioners of Sind in *Imperator* v. *Minhwasayo and others* (1) the expression "misdirection" as used in the Criminal Procedure Code, includes not only an error in laying down the law by which the jury are to be guided, but also an error in summing up the evidence. In the words of Lord Alverstone C.J. in *Rex* v. *Stoddart* (2):-

> "It is no misdirection not to tell the jury everything which might have been told them. Again, there is no misdirection unless the Judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand."

In this case, the learned trial Judge has told the jury something wrong by saying to them that Maung Ba Myint had stated in the committal court that

(1) 11 Cr. L.J. 13.

(2) (1909) 2 Cr. App. R. 217, 246 [at p. 759 of I.L.R. (1942) Nag. p. 749]

Ohn Kyaing ran away after stabbing Maung Nyun. We therefore consider that there was misdirection inasmuch as the question whether Maung Ba Myint was or was not an eye-witness to the occurrence was an important one.

The statement attributed to U Po Thant "မောင်ညွန်းအား ဒါးနှင့်ထိုးသောသူကို၊ မောင်ဘမြင့်ကလိုက်သည်ဟုသိရပါသည်။" is not really a misstatement of fact as U Po Thant had stated in the committal court thus:

"When I reached the ground I saw Ko Ba Myint standing and Maung Nyun also standing at the entrance of the house compound. I did not see any injury on Maung Nyun. Then Ba Myint asked me to chase after the man who had stabbed Maung Nyun by pointing out his hand."

In fact, U Po Thant had really meant to say that according to Ba Myint, the man who was to be chased was the assailant of Maung Nyun.

Finally, in regard to the statement in the charge relating to Maung Par, the question referred to us is whether there was misdirection on the part of the Judge who told the jury "သက်သေမောင်ပါသည်၊ ဆွဲရာဘက်သို့ ပါသော်လည်း ပဌမ ကျမ်းကျိန်အစစ်ခံစဉ်အခါက ထွက်ဆိုခဲ့သည့်အတိုင်းမှန်ကြောင်းဝန်ခံပါသည်။ . . . ." without laying any stress upon the discrepant statements made by Maung Par in his depositions before the committal court and in the trial court and without pointing out to the jury that Maung Par was only examined by the police two months after the occurrence took place. The evidence of Maung Par has been alluded to, in detail, in the earlier part of this judgment. Considering what a prevaricating witness Maung Par was, the learned trial Judge should, in our opinion, have directed the jury as to the weight which, in his opinion ought to be attached to Maung Par's evidence,

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especially as this is a point telling in favour of the accused. As it is, the learned trial Judge merely observed that although Maung Par wavered from side to side, the fact remained that he had admitted the truth of the statement made by him in the committal court. As pointed out in the case of *H. W. Scott* v. *King-Emperor* (1) :

> "A Judge in charging a jury does not fulfil his duty if he merely reiterates the evidence given by the witnesses, and then leaves the jury to decide the case one way or another. He should direct the jury as to the weight which, in his opinion, ought to be attached to the evidence called at the trial ; but he must at the same time let the jury consider the facts for themselves, and form their own opinion as to the value to be attached to the evidence of the several witnesses and the proper inference that ought to be drawn from the evidence as a whole."

However, the failure to direct the jury as to the discrepant nature of Maung Par's testimony does not, in our opinion, amount to misdirection as to the discrepancy was glaring enough not to have escaped the notice of the jury at the trial. It must be remembered that the Foreman of the Jury himself took great pains to clarify the situation after this witness had been examined, cross-examined and re-examined by the learned Government Advocate and by the learned Counsel for the defence respectively.

In our answer to the questions No. 4 and 5 we have already said that there was misdirection in regard to the evidence of Maung Ba Myint and in regard to what Maung Ba Myint had told Maung Nyan Ku as to the identity of Maung Nyun's assailant. The point which now arises for decision is what order should this Court pass in the circumstances obtaining in this case. The procedure to be followed when question or questions arising in original jurisdiction of the High

(1) I.L.R. 13 Ran. 141.

Court are reserved under the provisions of sub-section (1) of section 434 of the Criminal Procedure Code is laid down in sub-section (2) of that section, the relevant portion of which runs as follows :

"If the judge reserves any such question . . . the High Court shall have power to review the case, or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit."

As this provision is analogous to that contained in Clause 26 of the Letters Patent of the High Courts of Madras, Bombay and Calcutta relating to the procedure to be followed in dealing with point or points of law reserved under Clause 25 for the opinion of the High Court by the Judge exercising original criminal jurisdiction of the Court, the decision of these Indian High Courts in cases under Clause 26 of the Letters Patent afford valuable guidance. Now, in the case of *Imperatrix* v. *Pitamber Jina* (1) a Full Bench of the High Court of Bombay held that the High Court, on a point of law, as to the admissibility of rejected evidence, reserved under Clause 25 of the Letters Patent, 1865, had the power to review the whole case and determine whether the admission of the rejected evidence would have affected the result of the trial and a conviction should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial, *vide* section 167, Evidence Act. The same question was considered by a Full Bench of five judges of the Calcutta High Court in the case of *Emperor* v. *Panchu Das* (2) and it was held that the Court had the power, under Clause 26 of the Letters Patent, to examine the evidence and determine whether, after the exclusion of the inadmissible

(1) I.L.R. 2 Bom. 61 (F.B.) (2) I.L.R. 47 Cal. 671 (F.B.)

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evidence, the residue was sufficient to justify the conviction. Two of the learned Judges composing the Bench (Mookerjee and Chaudhuri JJ.) expressly held that section 167 of the Evidence Act applies to criminal cases as well and makes it incumbent on the Court to investigate whether, independently of the evidence wrongly admitted, there is sufficient evidence to support the verdict of the jury. However, as to the criterion to be observed in making such an investigation, the Full Bench was divided, the majority holding that the Court will not substitute its own finding for the verdict of the jury, and that it must consider whether the evidence improperly admitted was of such a nature that it possibly may have considerably influenced the minds of the jury, and whether it was reasonably certain that the jury *would*, not *might*, have acted on the unobjectionable evidence if the wrongly admitted evidence had not also been presented to them.

In our opinion, section 167 of the Evidence Act cannot in terms apply to cases reviewed by a High Court under sub-section (2) of section 434 of the Criminal Procedure Code. When a question of law is referred to a High Court under sub-section (1) of section 434 by a Judge of the High Court exercising original criminal jurisdiction, the objection regarding the admissibility of evidence is directly raised only before the trial Judge and not before the Court subsequently reviewing the case; and the phrase "If it shall appear to the Court before which such objection is raised" occurring in section 167 of the Evidence Act seems to us to connote that such a question should be directly raised before that Court. A Court reviewing a case under sub-section (2) of section 434 of the Code of Criminal Procedure is not a Court of appeal or revision, which, apart from the Court of original jurisdiction, seem to be the only Courts before which objection

regarding admissibility of evidence can be raised under section 167, Evidence Act.

However, although section 167 of the Evidence Act does not in terms apply to a case reviewed under sub-section (2) of section 434 of the Code of Criminal Procedure the principle underlying that section should be applied to such a case. For analogy see *Emperor* v. *Puttan Hassan* (1) where a Full Bench of the Bombay High Court held that although section 537 of the Criminal Procedure Code does not in terms apply to a case dealt with under Clause 26 of the Letters Patent the principle underlying that section should be applied and that where there has been no illegality in the mode of trial, but some irregularity exists in the process of trial, the Court of review is not entitled to set aside the verdict or judgment unless it is satisfied that the irregularity has led to a miscarriage of justice or has prejudiced the accused.

As observed by Mookerjee J. in *Emperor* v. *Panchu Das* (2) :

"A grave responsibility consequently rests upon the Court when it is called upon to review the case on the evidence under Clause 26 of the Letters Patent read with section 167 of the Indian Evidence Act. The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence, which might on paper appear to the Court sufficient to support the conviction, might have been regarded by them, isolated from the foreign matter improperly introduced, as wholly insufficient to justify an inference of guilt. In such circumstances, the right principle to adopt is to ask ourselves, whether we can feel certain that, on the residue of the evidence, a reasonable jury would have brought in a verdict of guilty."

This observation is not inapposite although we are now dealing with a case of misstatement of fact in the

(1) I.L.R. 60 Bom. 599 (F.B.) (2) I.L.R. 47 Cal. 671 (F.B.)

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charge to the jury and not with admission of inadmissible evidence. The only difference is that instead of totally excluding Ba Myint's evidence, we should consider what would be the effect if the evidence of Ba Myint in the committal court had been correctly summarised to the jury by the learned trial Judge. Adopting the criterion laid down by Mookerjee J. in the case cited above we have come to the conclusion that a reasonable jury *would*, not merely *might*, in the case now under consideration, have brought in a verdict of guilty as against the accused Ohn Kyaing. Considering that the occurrence took place in broad day light the jury would have accepted as substantially true, the evidence given by Maung Par (P. W. 12) in the committal court in spite of the fact that he tried to prevaricate in the trial court. The evidence of Ba Myint correctly presented to them would have served as a strong piece of corroborative evidence. The fact that the accused Ohn Kyaing was chased from the vicinity of the scene of occurrence and that he subsequently absconded would have weighed heavily against him in the minds of the jury.

For these reasons we consider that no interference on our part is called for. The conviction of Ohn Kyaing under section 304 of the Penal Code and the sentence of seven years' rigorous imprisonment are confirmed.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice and U San Maung, J.

H.C. 1948

Dec. 3.

THE SOORTEE BARA BAZAAR Co., LTD. (APPLICANT)

v.

THE UNION GOVERNMENT OF BURMA (RESPONDENT).*

Defence of Burma Act, 1940—Rules 78 and 96 of Defence of Burma Rules—Clause 13 of the Requisitioning (Claims and Compensation) Order, 1947.

Held : In view of the fact that the Defence of Burma Act, 1940, Defence of Burma (Repealing) Act, 1947, Defence of Burma Rules and Orders issued under such Rules, expired on the 31st July 1947, no claim under Rule 78 of Defence of Burma Rules or under clause 6 of the Requisitioning (Claims and Compensation) Order, 1947 (which had been issued under Rule 96 of Defence of Burma Rules) could be entertained after the 31st July 1947.

The Union of Burma v. *Maung Maung and two others*, Bur. L.R. (1949) H.C. 1 (F.B.), followed.

With the lapse of Defence of Burma Rules and Defence of Burma Act the Requisitioning (Claims and Compensation) Order, 1947, has also come to an end.

E. C. V. Foucar for the applicant.

Chan Tun Aung for the respondent.

The judgment of the Bench was delivered by

U THEIN MAUNG, C.J.—The questions which have been referred to us under clause 13 of the Requisitioning (Claims and Compensation) Order, 1947, are :

"(1) Whether under the circumstances of the case, a claim can be preferred before the Arbitrator under section 6 of the Requisitioning (Claims and Compensation) Order, 1947.

(2) Whether the Defence of Burma Act and Rules, and the Requisitioning (Claims and Compensation) Order, 1947, made thereunder have ceased to be in force."

* Civil Reference No. 6 of 1948 made by the Chief Justice, Rangoon City Civil Court, under clause 13 of the Requisitioning (Claims and Compensation) Order, 1947, in Arbitration Case No. 3 of 1948.

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THE SOORTEE BARA BAZAAR CO., LTD. v. THE UNION GOVERNMENT OF BURMA.

U THEIN MAUNG, C.J.

A Full Bench of this Court has held recently in *The Union of Burma* v. *Maung Maung and two others* (1) that the Defence of Burma Act, 1940, the Defence of Burma Rules which are mentioned in the Second Schedule to the Defence of Burma (Repealing) Act, 1947 and the Orders made thereunder have expired on the 31st July 1947.

The Requisitioning (Claims and Compensation) Order, 1947, is an order made in exercise of the powers conferred by Rule 96 of the Defence of Burma Rules, which is one of the Rules mentioned in the said Schedule.

The petitioner's claim is based not only on Rule 96 but also on Rule 78 of the Defence of Burma Rules ; but Rule 78 also is among the Rules which are mentioned in the said Schedule and which have expired on the 31st July 1947.

So the learned Advocate for the petitioner has rightly conceded that the questions under reference must be answered against him in view of the said Ruling.

The first question is answered in the negative ; and the second question is answered in the affirmative. The respondent is entitled to the costs of this reference ; Advocate's fee three gold mohurs.

(1) Bur. L.R. (1949) H.C. 1 (F.B.)

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

MA MA LAY (*a*) MEDIYAN BI (APPELLANT)

v.

NAZIR KHAN AND ANOTHER (RESPONDENTS).*

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Aug. 27.

Maxim quic quid plantatur solo solo cedit ***how far applicable to Burma—Ss. 106 and 110 of Evidence Act—Second appeal to the High Court under s. 100 of the Code of Civil Procedure.***

Held : Narayan Das Khettry v. *Jatindra Nath Roy Chowdhury and others*, I.L.R. 54 Cal. 669 ; *Vallabhdas Naranji* v. *Development Officer, Bandra*, I.L.R. 53 Bom. 589 ; *Thakoor Chunder Poramanick and others* v. *Ramdhone Bhuttacharjee*, (1866) 6 W.R. 228 do not state anywhere that the maxim *quic quid plantatur solo solo cedit* can have no application for any purpose whatsoever in India.

Where a person in possession of a house standing on the land of another claims the house to be his then the burden of proving of the ownership of the house is on the person alleging his ownership when the land admittedly belongs to a third party.

In second appeal where there is a concurrent finding of facts and when the burden of proof has not been misplaced, the High Court has no power to disturb the findings of fact of the District Court.

Ram Coomar Roy v. *Beejoy Gobind Bural and others*, (1867) 7 W.R. 535, followed.

Maung Ba U v. *Bailiff of the District Court, Hanthawaddy*, A.I.R. (1936) Ran. 68, referred to.

Mussummat Durga Choudhrain v. *Jawahir Singh Choudhri*, 17 I.A. 122, followed.

Tun Aung for the appellant.

P. K. Basu for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, J.—The plaintiff-appellant Ma Ma Lay *alias* Mediyan Bi, owns, a piece of land known as Holding No. 2, Block Nos. 322-24, Sein Ban Quarter Mandalay, and she claims to be the owner

* Special Civil Appeal No. 5 of 1948 against the decree of the High Court, Appellate Side, in Civil 2nd Appeal No. 108 of 1947, dated 18th March 1948.

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of the building which was erected on that piece of land. She sues the defendant-respondents for possession of the said building and land and claims Rs. 180 as compensation for use and occupation. The defendant-respondents Nazir Khan and Josami *alias* Josephine, are in occupation and possession of the building and land in question, and their case is that they are the owners of the building and that they had paid ground rent at the rate of Rs. 60 per month to the plaintiff-appellant.

There is thus no dispute about the ownership of the land on which the building stands, and the real question which is to be decided in this case is, who is the owner of the building in dispute. It has been contended on behalf of the defendant-respondents that the burden of proving that the building belongs to the plaintiff-appellant rests upon the plaintiff-appellant, and that this burden had not been discharged in the present case. In this case, it is however admitted that the land on which the building was erected belongs to the plaintiff-appellant, and the question becomes whether the principle underlying the maxim *quic quid plantatur solo solo cedit* ought to be applied for the purpose of considering on whom the burden of proving the ownership of the building lies in a case where there is no dispute as to the ownership of the land on which the building had been constructed.

Certain cases have been cited on behalf of the defendant-respondents to show that the maxim *quic quid plantatur solo solo cedit* has no application in India. The decision in the case of *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury and others* (1) turns on facts which are entirely different from the facts in the case now under appeal, and the

(1) I.L.R. 54 Cal. 669.

first paragraph of the headnote in that case is as follows:

"In India there is no absolute rule of law that whatever is affixed or built on the soil becomes part of it, and is subject to the same rights of the property as the soil itself."

The use of the word "absolute" before the words "rule of law" appears to be important, as it tends to suggest that it is not intended to lay down in that case that the maxim *quic quid plantatur solo solo cedit* has no application in India at all, whatever the circumstances of a case might be.

In the case of *Vallabhdas Naranji* v. *Development Officer, Bandra* (1), the main question to be decided was whether the appellant in that case was entitled to compensation under the Land Acquisition Act in respect of buildings which had been erected by the Government upon the land of the appellant before the declaration under section 6 of the Land Acquisition Act was notified, and there it was held that the appellant who owned the land was not entitled to the value of the buildings because, according to the law in India, the buildings did not form part of the land on which they were erected. In the case of *Thakoor Chunder Poramanick and others* v. *Ramdhone Bhuttacharjee* (2) it was observed at page 299 as follows:

"We think it clear that, according to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil;"

This case also, as well as the case of *Vallabhdas Naranji* v. *Development Officer, Bandra* (1), does not state anywhere that the maxim *quic quid plantatur solo solo cedit* can have no application for any purpose

(1) I.L.R. 53 Bom. 589. (2) (1866) 6 W.R. 228.

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whatsoever in India. It might also be mentioned that in all the three cases referred to above there was no dispute as to the person or persons who had erected the buildings in those cases.

In the case now under appeal the question to be decided is not whether the plaintiff-appellant should be considered to be the owner of the building in question by reason of the fact that she is the owner of the land on which the building stands, even if the defendant-respondents were to prove that they constructed or owned the building in dispute ; and if that had been the question that falls to be decided in the present appeal, the decision in the three cases which have been already referred to would have been most relevant. We are unable to see any good reason why the principle of law which underlies the maxim *quic quid plantatur solo solo cedit* ought not to be applied in a case like the present case for the purpose of ascertaining on which party the burden of proof lies. A person does not ordinarily erect a house on another man's land without a right in some form or another to do so, and if he did construct a house on another man's land, one would have expected him to be able to produce evidence to show that it was in fact constructed by him, or at least to show that he had obtained the consent of the owner of the land to build on the latter's land. It is only proper that a person, who asserts that a building which stands on a land which admittedly belongs to another man, ought to prove that the building had been erected by him or that the building really belongs to him. This appears to us to be a sensible rule, which is consistent with the principle underlying the provisions of section 106 of the Evidence Act.

It has been contended on behalf of the defendant-respondents that, as they are in possession of the

building in question, the burden lies, in view of the provisions of section 110 of the Evidence Act, on the plaintiff-appellant to prove that the building belongs to her, but we do not think this contention can be accepted in view of the fact that the land on which the building was constructed admittedly belongs to the plaintiff-appellant, and in this case there is also evidence to show that the building had already been erected on the land before the defendant-respondents came into it. In the case of *Ram Coomar Roy* v. *Beejoy Gobind Bural and others* (1) it was observed that " when a ryot is holding lands of considerable extent under a zamindar, it is a matter peculiarly within his own knowledge of what that holding consists; and if he alleges that one or two plots occupied by him are held under a different title, it is for him to shew it." The observation made in the case of *Ram Coomar Roy* v. *Beejoy Gobind Bural and others* (1) appears to us, with respect, to be good sense, and can be appropriately applied to the present case. We are, accordingly, of opinion that where a person erects a building on a piece of land which admittedly belongs to another man, the burden of proving that he erected or owns the building will be upon the person who asserts that the building was erected by or belongs to him. We might observe here that we are unable to see anything in any of the cases which have been cited on behalf of the defendant-respondents, which will either indicate that the principle of the maxim *quic quid plantatur solo solo cedit* could not be applied in this country even for any limited purpose whatsoever, or that it would be fundamentally wrong and unjust to apply the principle of that maxim even for a limited purpose in the sense which we propose to do in the

(1) (1867) 7 W.R. 535.

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case now under appeal. The case of *Maung Ba U* v. *Bailiff of the District Court, Hanthawaddy* (1) does not lay down any new principle different from the Bombay case or the Calcutta case which have already been referred to, and, as we have observed before, the plaintiff-appellant in this case does not contend that the building would still by virtue of the maxim *quic quid plantatur solo solo cedit* belong to her even if the defendant-respondents could prove that they or their predecessor in title erected the building in question, or that they own it. We might add that in the case of *Maung Ba U* v. *Bailiff of the District Court, Hanthawaddy* (1) as in the Calcutta and Bombay cases which have been mentioned earlier in this judgment, there was no dispute as to who had, in fact, erected the buildings in those cases.

Section 110 of the Evidence Act expresses a well-known principle of law that possession raises a *prima facie* presumption of ownership, but we do not think that the principle contained in section 110 of the Evidence Act can be applied to a case like the present case where the ownership of the land is admittedly in the name of the plaintiff-appellant Ma Ma Lay, and when it is also clear from the evidence that the building in question was already on the land at the time when the defendant-respondents first came to occupy it. It seems to us only good sense to hold that in the absence of proof by the defendant-respondents in this case to show that they own the building or had erected or must have erected it, and in the absence of any proof that anybody else had owned this building before the defendant-respondents came to occupy it, it ought to be presumed at the outset unless there is evidence to the contrary that the building belongs to the plaintiff-appellant who is the owner of the land. The finding

(1) A.I.R. (1936) Ran. 68.

of the District Court and the Court of the Subordinate Judge that the burden of proving in this case that the house belongs to the defendant-respondents was upon them is accordingly correct; and as both the District Court and the Court of the Subordinate Judge have held that the defendant-respondents failed to prove that they are the owners of the building in question, the appeal which was filed against the judgment and decree of the District Court ought to have been dismissed. The headnote of the case of *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri* (1) is as follows:

"No second appeal lies except on the grounds specified in section 584 of the Civil Procedure Code.

There is, therefore, no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be.

Where there is no error or defect in the procedure the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding."

In view of the fact that we have held that the District Court and the Court of the Subordinate Judge were correct in holding that the burden of proving that the building belongs to the defendant-respondents lay on them, we do not see anything in this case on which the second appeal could have been allowed in the light of the decision of Their Lordships of the Privy Council in the case of *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri* (1).

We do not think it will be necessary to further discuss any other points in this case, but it might in short be mentioned that we do not believe that the plaintiff-appellant had signed the Exhibit 2 in that her alleged signature in Exhibit 2 is entirely different from

(1) 17 I.A. 122.

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her admitted signature. This is apparent even to the naked eyes; and as regards Exhibit 4 there is no evidence to support the first defendant-respondent's statement that it was signed by the plaintiff-appellant. We also do not think we can allow any question as to whether a proper notice had been served upon the defendant-respondents or as to whether the suit can be instituted without a certificate from the Controller of Rents to be agitated for the first time in this special appeal. No issues had been raised in respect of these points, and apparently no discussion had been advanced in connection with these points either in the trial Court or the District Court, or in the second appeal from which this special appeal arises. In the circumstances, it must be considered that the defendant-respondents have waived their objection in so far as those points are concerned. In any case it seems to us that the provisions of section 11 (*a*) of the Urban Rent Control Act, 1946, are provisions which the defendant-respondents can in law waive. It appears to us that the provisions of section 16, which relate to a claim for rent, ought to be read very strictly, and reading it in that light we do not think it should be extended to apply to a case where the defendant asserts an adverse title to the premises in his possession.

The appeal is accordingly allowed with costs. The judgment and decree passed in Civil Second Appeal No. 108 of 1947 of the High Court are set aside, and the judgments and decrees of the District Court and the Court of the Subordinate Judge will be restored.

CIVIL REVISION.

Before U Tun Byu, J.

BENI PRASAD (APPLICANT)

v.

BABULAL FATEH CHAND AND ONE (RESPONDENTS).*

H.C. 1948

Aug. 27.

Code of Civil Procedure, Order 44, Rule 2—Powers of Registrar, District Court—Whether order rejecting application can be revised when no appeal to District Court from Registrar.

Held: Under Order 44, Rule 2 of the Code of Civil Procedure if the applicant for leave to appeal as pauper was allowed to sue as a pauper in the court from whose decree the appeal is preferred no further inquiry as to pauperism shall be necessary unless the Appellate Court directs such inquiry. In the present case, the Registrar did not record any reason for holding the enquiry and the applicant had been allowed to sue as pauper. He therefore acted illegally or without jurisdiction.

The fact that the plaintiff-applicant did not apply to the District Court under Rule 6 of the Rules made under s. 17, clause 2 of the Courts Act, 1945, does not prevent the High Court in a proper case from exercising its power of revision under s. 115 of the Code of Civil Procedure.

A. N. Basu for the applicant.

P. B. Sen for the respondents.

U TUN BYU, J.—The applicant-plaintiff Beni Prasad filed a suit for the recovery of Rs. 2,740 as wages due to him by the defendant-respondents Messrs. Babulal Fateh Chand and Latchmi Narayan Hari Prasad in the Court of the 1st Assistant Judge, Moulmein, where his claim was dismissed with costs. The applicant-plaintiff Beni Prasad then applied to the District Court, Amherst, to be allowed to appeal against the judgment and decree of the Court of the 1st Assistant Judge, Moulmein, as a pauper, but his application to be allowed to appeal as a pauper was dismissed by the Registrar of the District

* Civil Revision No. 60 of 1948 against the order of the District Registrar, Court of Amherst at Moulmein, in Civil Misc. No. 3 of 1948.

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BENI PRASAD v. BABULAL FATEH CHAND AND ONE.

U TUN BYU, J.

Court, Amherst. It has been contended on behalf of the applicant-plaintiff Beni Prasad that the Registrar of the District Court acted illegally and without jurisdiction in holding an inquiry into the pauperism of the applicant-plaintiff in view of the proviso to Rule 2 of Order 44 of the Code of Civil Procedure which is as follows :

"2. The inquiry into the pauperism of the applicant may be made either by the appellate Court or under the orders of the appellate Court by the Court from whose decision the appeal is preferred :

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the appellate Court sees cause to direct such inquiry."

It will be observed that an inquiry into the pauperism of an applicant who has been allowed to sue as a pauper in the trial Court can be inquired into by the appellate Court only if the appellate Court sees any cause to direct such an inquiry. A copy of the judgment of the Court of the 1st Assistant Judge, Moulmein, was filed by the applicant-plaintiff with his application to be allowed to appeal as a pauper, and the last sentence in that judgment shows that anyone reading it must have known that the applicant-plaintiff had been allowed to sue as a pauper in the original Court. In the circumstances it was necessary for the Registrar to have recorded his reason for holding the inquiry into the pauperism of the applicant-plaintiff in this case and in the absence of anything on the record to indicate why the Registrar of the District Court had thought fit to hold the inquiry into the pauperism of the applicant-plaintiff it must be held that he had acted contrary to the proviso to Rule 2 of Order 44 of the Code of Civil Procedure, and he could accordingly be considered to have acted illegally

or without jurisdiction because under the proviso the Registrar had no right to inquire into the pauperism of the applicant-plaintiff unless he had reasons for holding such inquiry, and no reasons had been specified by him for holding that inquiry. The order of the Registrar made on the 13th May 1948 rejecting the applicant-plaintiff's application to be allowed to appeal as a pauper also suggests that the Registrar could have had no good or special reason for directing an inquiry into the pauperism of the applicant-plaintiff because in that order it was stated clearly that the applicant-plaintiff had no means or property to pay the necessary court-fees.

It might be mentioned that the fact that the applicant-plaintiff was earning Rs. 100 per month does not necessarily show, in the absence of any evidence to the contrary, that he could have saved any of that money in these days when the cost of living is undoubtedly high, and there was therefore no proper ground even on the merits on which the application of the applicant-plaintiff to appeal *in forma pauperis* could be rejected.

It might be added that there does not appear to be any substance in the contention that no application lies under section 115 of the Code of Civil Procedure on the ground that the Registrar in holding the inquiry into the pauperism of the applicant-plaintiff was not acting as a Court in view of the fact that the Registrar when he held that inquiry was obviously acting judicially, and the order which he passed was obviously a judicial order as distinguished from the administrative order. It is further contended on behalf of the defendant-respondents that it was fatal to the present application of the applicant-plaintiff in that the latter had not taken the matter to the District Judge before he applied to this Court in revision in view of Rule 6 of the Rules made under section 17 (2) of the Courts

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Act, 1945, which prescribed the duties, powers and functions of the Registrars of the District Courts. I do not see in Rule 6 or in any of the rules to prevent this Court from exercising its power of revision under section 115 of the Civil Procedure Code where the Registrar acted illegally or without jurisdiction. The High Court can of course refuse to entertain the application on the ground that the matter should have first been brought before the District Judge, but this is a matter which has to be decided on the facts and circumstances of each particular case. In the present case, in view of the fact that the order of the Registrar of the District Court is obviously wrong and irregular, even if it could not be said to have been made without jurisdiction, in that he had made an inquiry without conforming to a condition which was required under the proviso to Rule 2 of Order 44 of the Code of Civil Procedure ; and it would, in the circumstances, be only waste of time to direct the applicant-plaintiff to make his application before the District Court, particularly in view of the fact that there also does not appear to be any merit for rejecting the application of the applicant-plaintiff to appeal *in forma pauperis*. The application is accordingly allowed with costs. Advocate's fee five gold mohurs.

CRIMINAL REVISION.

Before U San Maung, J.

THE UNION OF BURMA (APPLICANT)

v.

BET KAI AND FIVE OTHERS (RESPONDENTS).*

H.C. 1948 Aug. 19

Distinction between Special Judge—A Magistrate—Case taken cognizance of by a Magistrate and evidence partly recorded by him—Case later transferred to a Special Judge who does not try de novo*—Effect—Ss. 3 and 5, Special Judges Act, 1946 and s. 3 of Special Judges (Third Amending) Act, 1947.*

Held: That where an offence is taken cognizance of by a Magistrate and the case is partly heard by him, and the case is later transferred to another Magistrate who is also a Special Judge, the Special Judge is bound to take cognizance as a Special Judge and he cannot use the evidence recorded by the Magistrate.

Powers and jurisdiction of a Special Judge and Magistrate are distinct and different. A Magistrate can exercise ordinarily territorial jurisdiction throughout a district or over part of a district under s. 12 of the Code of Criminal Procedure, whereas a Special Judge ordinarily exercises jurisdiction within the Sessions division under s. 3 of Special Judges Act; under s. 4 of Special Judges Act, a Special Judge can try any offence and pass any sentence as provided in the section, whereas a Magistrate even if specially empowered under s. 3 of the Code of Criminal Procedure cannot try offences punishable with death.

S. 5 (3) of Special Judges Act applies only when one Special Judge is succeeded by another.

U SAN MAUNG, J.—Bet Kai and five others were prosecuted by the Armed Police for offences punishable under sections 436 and 395 of the Penal Code, and the case was at first tried by the Additional District Magistrate, Kyaukpyu, in his Criminal Regular Trial No. 14 of 1947. On the 23rd March 1948 it was withdrawn by the District Magistrate, Kyaukpyu, from the file of the Additional District Magistrate and forwarded to the 1st Additional Magistrate, Kyaukpyu, for disposal. At that time the 1st Additional Magistrate, Kyaukpyu,

* Criminal Revision No. 82-B of 1948 being review of the order of the Special Judge of Kyaukpyu, dated the 10th May 1948, passed in Criminal Regular Trial No. 15 of 1948.

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was U Ba Tun, who was a Special Judge appointed under the Special Judges Act, 1948. Thus the District Magistrate, who can only transfer a case before one subordinate Magistrate to another, had no power to transfer the case to U Ba Tun. Nevertheless U Ba Tun took the case on his file and proceeded to try it in his Criminal Regular Trial No. 15 of 1948. He took cognizance of the offence as a Special Judge, and, in fact, he was bound to take cognizance as such. However, instead of trying the case *de novo*, he continued it from the stage where it was left off by the Additional District Magistrate. Apparently he was under the impression that he could act on the evidence partly recorded by the Additional District Magistrate under the provisions of sub-section (3) of section 5 of the Special Judges Act, as added by section 2 of the Special Judges (Third Amendment) Act, 1947. At the conclusion of the trial he convicted Bet Kai, Kha Maung Thee, Maung Ni Ni, Maung Sein Thee, Maung Tun Sein and Shwe Tha Aung under section 436 of the Penal Code and sentenced each of them to four years' rigorous imprisonment. He also convicted Bet Kai, Kha Maung Thee, Maung Ni Ni and Maung Sein Thee under section 395 of the Penal Code and sentenced each of them to four years' rigorous imprisonment, the sentence to run concurrently with that under section 436 of the Penal Code. Only two out of the six accused appealed to the Sessions Judge, Arakan. However, the Sessions Judge took up the case on revision and has recommended to this Court that the trial before the Special Judge, Kyaukpyu, be quashed and that the convictions and sentences on the accused be set aside and a retrial ordered. He also noted that it would not be necessary for him to pass orders on the appeal of two of the accused if his recommendations are accepted by this Court.

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Now, the question which arises for determination is: "Can a Special Judge in taking cognizance of an offence act on the evidence partly recorded by a Magistrate who had taken cognizance of the same offence before he himself took cognizance of it?" The territorial jurisdiction of a Magistrate and that of a Special Judge are entirely different. A Magistrate can only ordinarily exercise jurisdiction throughout the district to which he is appointed or to such part of that district to which his jurisdiction may be specifically limited—*see* section 12, Criminal Procedure Code. On the other hand, a Special Judge appointed under the Special Judges Act, 1946, ordinarily exercises jurisdiction within the sessions division to which he is appointed, although, of course, his jurisdiction may be either limited to part of that sessions division or to embrace two or even more sessions divisions—*see* section 3 of the Special Judges Act, 1946. As regards powers, a Special Judge may try any offence punishable under any law for the time being in force and may pass any sentence which is authorized by law under section 4 of the Special Judges Act, whereas a Magistrate, even though he may be specially empowered under section 30 of the Criminal Procedure Code, cannot try offences punishable with death. Therefore, one cannot envisage a Special Judge being regarded as a successor of a Magistrate within the meaning of the words "is succeeded by" occurring in section 350 (*1*) of the Criminal Procedure Code. Therefore, when sub-section (*3*) of section 5 of the Special Judges Act enacts:

"Notwithstanding anything contained in this Act, the provisions of sub-sections (*1*) and (*3*) of section 350 of the Code of Criminal Procedure, except proviso (*a*) to sub-section (*1*) of the said section, shall apply to the trials before a Special Judge as if the Special Judge were a Magistrate for the purposes of the said sub-sections (*1*) and (*3*) of section 350 of the Code."

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the only cases contemplated are that the provisions of section 350 (*1*) of the Criminal Procedure Code, which allows a Magistrate who succeeds another to act on the evidence partly recorded by his predecessor, should apply to cases where a Special Judge is transferred from a sessions division and is succeeded by another in the same division or where a case is withdrawn from one Special Judge and transferred to another Special Judge. It will be noted that section 6A of the Special Judges Act, 1946, as inserted by section 3 of the Special Judges (Third Amendment) Act, 1947, gives a Sessions Judge of the division the power to transfer a case from one Special Judge in his sessions division to another in the same division.

Therefore, in my opinion, a Special Judge cannot, in taking cognizance of an offence, make use of any evidence recorded by a Magistrate who has taken cognizance of the same offence before he himself took cognizance of it.

For these reasons, the conviction of all the accused in Criminal Regular Trial No. 15 of 1948 of the Special Judge (U Ba Tun) and the sentences imposed on these accused are set aside and the case against them directed to be retried by the Sessions Judge, Arakan, or by such other Special Judge in his division other than U Ba Tun as he may direct.

APPELLATE CRIMINAL.

Before U San Maung, J.

SOE KHIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1948 *Aug. 23.*

Arms Act, s. 19 (1)—Burma Act No. LXIV of 1947—S. 19—Ammunition definition of—Proviso of a section, rules of interpretation.

Appellant was found in possession of 315 empty cartridges without hammer striking marks on the percussion-caps and 13 empty cartridges with hammer striking marks. On examination they were found to be from Vicker and Browning machine-guns and incapable of being reloaded in Burma. The appellant's defence was that he had purchased the cartridges for the sake of brass contained.

Held: Ammunition is defined in s. 4 of the Arms Act and includes all parts of ammunition and therefore includes empty cartridges. Case law on the point considered.

Emperor v. *Ebrahim Alibhoy*, (1905) 7 Bom. L.R. 474 S.C. (1905) C.L.J. 449; *Emperor* v. *Baldeo Singh*, 31 All. 152; *Emperor* v. *Aladin*, 46 All. 107; *Emperor* v. *Bhopal Singh*, A.I.R. (1936) All. 392, followed.

Emperor v. *Amir*, 47 All. 629; *Kallu* v. *Emperor*, A.I.R. (1926) All. 255, not followed

The proper course in construing a section with a proviso is that the section must be construed as a whole, each portion throwing light if need be on the rest. The enacting clause, saving clause and proviso, should be taken and construed together.

Maxwell on Interpretation of Statutes, 9th Edn. 165, referred to.

The expression "ammunition for any of the said guns" occurring in the proviso to s. 19, Arms Act must be deemed to include empty machine-gun cartridges and the appellant was rightly convicted.

The result may be unfortunate in special cases, *e.g.* a man found in possession of a single machine-gun cartridge may be liable to death or transportation for life but this is a matter for the legislature to rectify and not for the court.

Shein Wun (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 10 of 1948 of the First Additional Special Judge of

* Criminal Appeal No. 474 of 1948 being appeal from the order of the 1st Additional Special Judge of Pakôkku, dated 30th April 1948, in Criminal Regular Trial No. 10 of 1948.

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U SAN MAUNG, J.

Pakôkku, the appellant Soe Khin was convicted under section 19 (*f*) of the Arms Act read with the proviso to section 19 of the Act as added by Burma Act No. LXIV of 1947 and sentenced to transportation for life. The appellant admitted having been found in possession of 315 empty cartridges without hammer striking marks on the percussion-caps and 13 empty cartridges with hammer striking marks on the percussion-caps. Ten of these empty cartridges were sent to U Hla Baw, Principal of Detective School at Insein, who when examined on commission gave his opinion that they were from Vicker and Browning machine-guns and were incapable of being re-loaded in Burma. Five of the empty cartridges sent to this witness had percussion-caps which were yet unexploded and on tests being made this witness found that 2 of these caps exploded when fired by him and that 3 did not explode probably because the lead azide compound therein was damp. The appellant's defence, which was probably a true one, was that he had purchased the empty cartridges from one Khin Maung (the appellant in Criminal Appeal No. 475 of 1948 of this court) for the sake of the brass they contained. However, whatever may be his motive it is a matter for consideration whether he had committed any offence for being in possession of empty machine-gun cartridges with unexploded percussion-caps therein. Now, "ammunition" as defined in section 4 of the Arms Act includes among other things, percussion-caps and all parts of ammunition and there is ample authority for the view that the expression "all parts of ammunition" as used in section 4 of the Arms Act includes empty cartridges. In *Emperor* v. *Ebrahim Alibhoy* (1) a Bench of Bombay High Court held that the accused who was

(1) (1905) 7 Bom. L.R. 474 S.C. (1905) C.L.J. 449.

found in possession of the empty cartridge cases was rightly convicted under section 19 (*f*) of the Arms Act but considered that it was a technical offence for which a fine of four annas was sufficient to meet the ends of justice. This ruling was followed by a single Judge of the Lahore High Court in *Emperor* v. *Baldeo Singh* (1) which in turn was followed by a Bench of the same High Court in *Emperor* v. *Aladin* (2). On the other hand, in *Emperor* v. *Amir* (3) where the accused was found in possession of two empty cartridge cases which were of a peculiar kind which were not capable of being re-loaded in India, it was held by Stuart J. that the accused had not committed any offence under section 19 (*f*) of the Arms Act as the empty cartridges could not be considered as ammunitions. However, this decision was criticised by a Bench of the Allahabad High Court in *Emperor* v. *Bhopal Singh* (4) where the learned Judges observed :

"The learned Judge (Sessions Judge) relied on *Emperor* v. *Amir* (3), in which a man was convicted for having two cartridges in his possession, and it was held by a learned Judge of this Court that no offence had been committed because the cartridges could not be re-loaded in India. The decision in that case was followed in *Kallu* v. *Emperor* (5). These decisions are by single Judges of the Court. There is a decision of a Bench of this Court in *Emperor* v. *Aladin* (2), in which it was held that empty cartridge cases come within the definition of ammunition under the Arms Act. It has been argued before us that cartridge cases may come within the definition, but it is necessary to prove as a positive fact that they are capable of being re-loaded before they can be described as ammunition. We are in agreement with the decision of the Bench of this Court to which we have had a reference. A cartridge case is undoubtedly a part of ammunition within the meaning of section 4, Arms Act. No doubt it may be open to a person being in possession of such a case to show that it is no longer ammunition because it is incapable of being

(1) 31 All. 152.
(2) 46 All. 107.
(3) 47 All. 629.
(4) A.I.R. (1936) All. 392.
(5) A.I.R. (1926) All. 255.

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re-loaded and used as a part of ammunition at any future time. There is nothing in the Act which says that part of ammunition shall not be ammunition unless it can be made up and incorporated in ammunition in India or anywhere else."

I am in entire agreement with these observations and I, therefore, hold that empty cartridges are ammunition as defined in section 4 of the Arms Act although they may not be capable of being re-loaded in Burma if they are capable of being re-loaded and incorporated in ammunition in some other country where there are machines and materials for the purpose of such re-loading.

The next question for consideration is whether the offence committed by the appellant is one punishable with death or transportation for life under the proviso to the section 19 of the Arms Act as added by Burma Act No. LXIV of 1947. The empty cartridges complete with percussion-caps which were found in the possession of the appellant were from cartridges capable of being used on Vicker and Browning machine-guns if they were all of the same specimen as those which were sent to U Hla Baw. Now, the proviso to section 19 of the Arms Act reads :

" Provided that where any person commits an offence falling within clause (*e*) or clause (*f*), he shall be punished with death or transportation for life, if the arm, ammunition or military store found in the possession of such person is a machine-gun, bren-gun, tommy-gun, sten-gun or rifle or American carbine, or ammunition for any of the said guns, or a hand-grenade, or any other arms of the description which the Governor may ; by notification, declare in this behalf."

The rule regarding the interpretation of a proviso to a section of an act is that the proviso must be taken and construed together with the main proviso. " There is no rule that the first or enacting part is to be construed without reference to the proviso. The proper course is

to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest. The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail." (*See* Maxwell on Interpretation of Statutes, Ninth Edition, at page 165.)

Therefore, the expression "ammunition for any of the said guns" occurring in proviso to section 19 of the Arms Act must be deemed to include empty machine-gun cartridges. The appellant has been rightly convicted under section 19 (*f*) of the Arms Act read with the proviso thereto and the sentence of transportation for life is the minimum that can be awarded to him under the law now in force. The result of this decision may be unfortunate in that a man found in possession of a single machine-gun cartridge may be liable to death or transportation for life but this is a matter for the Legislature and not for this Court to rectify and I have no doubt that when this decision is brought to the notice of the authorities concerned steps will be taken by them to make such suitable amendment in the law as they may deem expedient.

CIVIL REVISION.

Before U Aung Tha Gyaw, J.

H.C. 1948

Aug. 26.

NAW JESSIE (APPLICANT)

v.

NAW HELEN (RESPONDENT).*

Shan States Manual, s. 12—Succession Act—Orders under orders by Assistant Superintendent, Civil Justice, Taunggyi—Appellate Tribunal—To whom appeal lies.

Application to set aside an *ex-parte* order passed under Indian Succession Act for issue of Succession Certificate was dismissed by the Assistant Superintendent, Civil Justice, Taunggyi. An appeal was filed to the Court of the Resident, Southern Shan States and the appeal was successful.

Held: That Assistant Superintendent of Civil Justice acts in the place of a District Court in Shan States when he acts under s. 384 (*1*) of the Succession Act and appeal from his order therefore lies to the High Court and not to the Court of the Resident.

Kyaw Khin for the applicant.

Lynsdale for the respondent.

U AUNG THA GYAW, J.—The applicant Naw Jessie applied for issue of a succession certificate in respect of debts due to the estate of one Dr. Samuel, deceased, in Civil Miscellaneous No. 46 of 1946-47 of the Court of the Assistant Superintendent for Civil Justice, Taunggyi. The respondent Naw Helen contested the applicant's claim for the certificate applied for, alleging that the latter was not the legally married wife of the deceased and that she, the respondent, as the deceased's legal wife, was entitled to the issue of the certificate. On the date fixed for the hearing of the matter, the 17th December 1947, the respondent

* Civil Revision No. 41 of 1948 against the order of the Resident's Court, Southern Shan States, Taunggyi, in Civil Misc. Appeal No. 1 of 1947-48, dated the 25th February 1948.

Naw Helen failed to attend the Court and, in consequence, the hearing proceeded *ex-parte* against her and orders were duly passed granting a certificate to the applicant. It appears from the diary of the record that two of the respondent's witnesses were present, but were not examined by the learned Assistant Superintendent.

The respondent thereupon applied to the Court of the Assistant Superintendent for setting aside the *ex-parte* order on the ground that she did attend the Court on the day on which the hearing was fixed, but that she was late owing to her services being required to attend a confinement case. The reason advanced by her was found to be insufficient to excuse her absence from Court, and accordingly her application was rejected.

The respondent thereupon filed an appeal in the Court of the Resident, Southern Shan States, against the order of the Assistant Superintendent. This appeal found favour with the learned Resident, who held that the circumstances explained by the respondent in explanation of her non-attendance at the hearing of the matter would justify the setting aside of the *ex-parte* order complained against. It is against this order of the learned Resident that the present application in revision has been made.

The only ground on which the said order of the learned Resident has been attacked is that no appeal properly lay from the Court of the Assistant Superintendent, Civil Justice, Taunggyi, to the Court of the Resident, Southern Shan States, as the Assistant Superintendent, in dealing with applications for succession certificates, acted in the capacity of a District Judge, and, as such, appeals from his orders would rightly lie only to the High Court under section 384 (*1*) of the Succession Act. In the schedule

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U AUNG THA GYAW, J.

appended to section 12 of the Shan States Manual setting out the enactments extended to the Shan States, it appears in the third column at page 25 of the Manual that the Indian Succession Act, 1925, was extended to those areas in the Federated Shan States which have been, or may hereafter be, notified under section 210 of the Burma Municipal Act, 1898, subject to the substitution of the words "Assistant Superintendent" in place of the words "District Judge" wherever they occurred in that Act. The provisions of the Indian Succession Act, 1925, is presumed to have been extended to the Taunggyi municipal area, and it has been contended that the Assistant Superintendent, being the District Judge for the purposes of the Indian Succession Act, any orders passed by him could only be interfered with either on appeal or in revision by the High Court and not by the Resident, who, it is urged, has not been duly empowered in that behalf. The Shan States Manual contains no relevant provision to furnish an adequate answer to this objection. Accordingly, the order passed by the learned Resident setting aside the order of the learned Assistant Superintendent, Civil Justice, in this matter must be held to have been done without jurisdiction and is liable to be vacated.

This application is accepted with costs, three gold mohurs. The order of the Resident will be set aside and that of the Assistant Superintendent restored.

CRIMINAL REVISION.

Before U Aung Tha Gyaw, J.

BA NYUN AND FIVE OTHERS (APPLICANTS)

v.

MAUNG KAUK (RESPONDENT).*

H.C. 1948

Aug. 30.

Criminal Procedure Code, s. 435—Revision to the Sessions Judge whether competent when District Magistrate has called the case on its own motion and refused to interfere—Whether competent.

Held : Under s. 435 (1) of the Criminal Procedure Code Sessions Judge or District Magistrate or Subdivisional Magistrate empowered by the Governor in this behalf may call for proceedings and pass such orders as the justice requires.

Sub-s. 4 of that section provides if application for revision has been made to the District Magistrate and rejected by him a second application to the Sessions Judge will not lie but where no application has been made to the District Magistrate but he on his own motion called for the records and refused to interfere an application to Sessions Judge will lie.

If application has been made to the District Magistrate and he refused to interfere and a subsequent application has been made to the Sessions Judge who thinks that the District Magistrate was wrong he may submit the proceedings to the High Court.

Darbari Mandar v. *Jagoo Lal*, I.L.R 22 Cal. 573 ; *King-Emperor* v. *Po Gyi*, 8 L.B.R. 361, referred to.

Sein Daing for the applicants.

Kyaw Din for the respondent.

U AUNG THA GYAW, J.—The six applicants in this case were prosecuted for an offence under section 382 of the Penal Code before the Headquarters Magistrate at Mônywa in his Criminal Regular Trial No. 72 of 1948 and were discharged by him. Orders were also passed in respect of the properties involved in the charge directing that the same be returned to the applicants. The proceedings were examined by the

* Criminal Revision No. 104B of 1948, review of the order of the Sessions Judge of Sagaing, dated the 5th July 1948, passed in Criminal Revision No. 25 of 1948.

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U AUNG THA GYAW, J.

District Magistrate in his Criminal Revision No. 42 of 1948 in exercise of his powers under section 435 (1) of the Criminal Procedure Code, and were returned with certain remarks as to the impropriety of settling civil disputes in criminal Courts and the want of English equivalent dates against Burmese dates in the depositions.

The complainant Maung Kauk, the respondent in this application, then applied to the Sessions Judge, Mônywa Sessions Division, asking for a further enquiry into the offences alleged against the applicants and for setting aside the order relating to the return of the exhibits to them. The learned Sessions Judge in his Criminal Revision No. 25 of 1948, acting under section 520 of the Criminal Procedure Code, set aside the order regarding the return of the exhibits, and directed, under section 436 of the Code, that a further enquiry be made against the present applicants in respect of the charge brought against them.

The applicants have now contended that this order of the learned Sessions Judge was incompetent in view of the fact that the District Magistrate had already dealt with the matter under section 435 of the Criminal Procedure Code.

Section 435 (1) provides :

"The High Court or any Sessions Judge or District Magistrate, or any Subdivisional Magistrate empowered by the Governor in this behalf, may call for and examine the record of an proceeding before any inferior criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

Sub-section (4) further provides that if an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them. It is clear from this provision that the Sessions Judge and the District Magistrate exercise concurrent jurisdiction in respect of the powers which they may exercise under this section. What the District Magistrate had done in regard to the present matter was not in consequence of any application made to him by the party concerned, and, to that extent, the facts of this case will not appear to fall within the prohibition set out in sub-section (4) of this section. The District Magistrate had, on his own motion, called for and examined the record and passed whatever remarks he thought fit relating more about the irregularities noticed in the proceedings than on the actual merits of the decision passed by the trying magistrate. He had not evidently exercised his mind as to the propriety and correctness of the findings arrived at by the trying magistrate, and the question of the expediency or otherwise of ordering a further enquiry into the charges brought against the applicants was not considered by him. The remarks made by the District Magistrate in his revisional proceedings were not made as a result of any application made under the section, and they would not, therefore, deprive the Sessions Judge of entertaining the application made by the respondent and passing the order now complained against. If any such application had previously been made to the District Magistrate and the latter had refused to order a further enquiry, the Sessions Judge would be incompetent to deal with the matter and order such enquiry under the provisions of this section, but it would, however, be open to him to submit the proceedings to the High Court under the provisions of section 438, Criminal Procedure Code—

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U AUNG THA GYAW, J.

see *Darbari Mandar* v. *Jagoo Lal* (1). The District Magistrate's action in calling for the record was not equivalent to entertaining an application, and there is nothing in section 435 (4) of the Criminal Procedure Code to render the Sessions Judge's order invalid—see *King-Emperor* v. *Po Gyi* (2). This application will accordingly be dismissed.

(1) I.L.R. 22 Cal. 573. (2) 8 L.B.R. 361.

APPELLATE CRIMINAL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

CA GWE (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT). *

H.C. 1948

July 14.

Shan States Manual, Rules 1 and 2 (1) (b) (iii)—Notification under—Conviction under Rule 2 of Shan States Customary Law—Whether an appeal lies to the High Court against the order of the Superintendent of the Southern Shan States.

Held: The Superintendent of Southern Shan States exercises a general control over the administration of Criminal Justice within the Southern Shan States and he in exercise of such control can try and decide any case himself under Notification issued under Rules 1 and 2 (*1*) (*b*) (iii) and where he tries a case under Shan States Customary Law no appeal lies to the High Court. The Superintendent is an officer who exercises general control over the administration of Criminal Justice not only over the State of the Chief concerned but over the whole of the Southern Shan States and therefore no appeal would lie to the Chief of the State. There is no provision for appeal to the High Court and therefore no appeal lies to the High Court.

Sein Bwa for the appellant.

Chan Htoon (Attorney-General) for the respondent.

The judgment of the Bench was delivered by

U THEIN MAUNG, C.J.—The appellant Ca Gwe, who admittedly ran amuck in Mwena village, Kengtung Township, attacked about 13 persons with a *dah*, and caused the death of 3 of them, has been found guilty of an offence under section 2 of the Shan States Customary Law and sentenced to death by the Resident of the Southern Shan States on the 16th December 1947, *i.e.* before the date of the transfer of power.

* Criminal Appeal No. 422 of 1948 being appeal from the order of the Resident, Southern Shan States of Taunggyi, dated the 16th December 1947 passed in Criminal Regular Trial No. 1 of 1947-48.

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CA GWE v. THE UNION OF BURMA.

U THEIN MAUNG, C.J.

The memorandum of appeal which is dated the 19th December 1947 is addressed to the Governor of Burma ; but it has been forwarded to this Court by the Government of the Union of Burma, Ministry of the Shan State, and it has been admitted with the remark "the point whether the case can be entertained can be discussed at the hearing, if necessary." So we have treated the question as to whether there was an appeal from the judgment and sentence passed by the Resident of the Southern Shan States before the transfer of power as a preliminary issue and we have had the valuable assistance of the learned Attorney-General for the Union of Burma in connection with this question.

We are informed that the Resident is the Superintendent of the Southern Shan States who can exercise a general control over the administration of criminal justice within the Southern Shan States and who in exercise of such control can try and decide any case himself under Rules 1 and 2 (1) (*b*) (iii) of the Notification relating to Control over Administration of Criminal Justice, at page 45 of the Shan States Manual. He has tried the case not under the Penal Code but under the Shan States Customary Law. So the Federated Shan States Laws and Criminal Justice Order, 1926, does not apply and there cannot be an appeal under Article 10 (*c*) the second Schedule thereto.

The question as to whether an appeal from the judgment and sentence passed by him under the Customary Law must be determined with reference to Orders modifying the Customary Law in the Federated Shan States at pages 47 to 50 of the Shan States Manual. As a matter of fact the appellant has been convicted and sentenced under Rule 2 of the Rules regarding offences and punishments in the said order. Rule 4 of the Rules of Procedure therein provides that any person sentenced for an offence may appeal to the Chief of the

State. However, this rule must be read with Rule 1 which provides for appointment by the Chief of a State of officers to try criminal cases; and it is quite clear from the context that Rule 4 provides for appeals from sentences passed by such officers only. The Superintendent was an officer who exercised a general control over the administration of criminal justice not only in the State of the Chief concerned but in the whole of the Southern Shan States and there can be no question of an appeal from a sentence passed by him lying to the Chief of the State.

Rule 2 (2) relating to control over administration of criminal justice at page 45 of the Shan States Manual provides that the Superintendent in exercising the powers of general control shall observe the procedure prescribed for Magistrates by the Code of Criminal Procedure as modified by the Shan States Laws and Criminal Justice Order, 1926; but it does not give anyone a right of appeal from sentences passed by him under the Customary Law.

The learned Attorney-General has also submitted that after further consideration of the question he has come to the conclusion that no appeal lay from a sentence passed by the Superintendent under the Customary Law.

For the above reasons we hold that the Secretary, Shan State Government, is right when he says that "a judicial appeal does not lie" and that "the present appeal should be treated as a clemency petition to His Excellency the President under Rule 14 of the Orders modifying the Customary Law in the Federated Shan States."

The memorandum of appeal is accordingly returned to the Government of the Union of Burma, Ministry of the Shan State, for presentation to His Excellency the President of the Union as an application for clemency.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

Nov., 29.

M/S. AHMED EBRAHIM BROS. (APPELLANTS)

v.

BABU MADAN GOPAL BAGLA (RESPONDENT).*

Suit for compensation for use and occupation—Plea that the property was requisitioned by a Navy Officer of the Japanese during the occupation period—Whether valid plea—Japanese Currency Evaluation Act, s. 3 (1)—Applies to debt and contractual obligation—Principles by which the cases not covered by the Act to be governed.

Held : Under the International Law the invading power may only occupy temporarily private lands and buildings for all kinds of purposes demanded by the necessities of the war. In a claim for compensation for use and occupation of a building, the mere proof that a Japanese Officer requisitioned a portion of the building is no defence.

S. 3 (*1*) of the Japanese Currency (Evaluation) Act, 1947 applies to debt and contractual obligations only, it does not apply in specific terms to the case of claim of compensation for use and occupation during Japanese occupation but in assessing damages the Court cannot ignore the principle underlying it especially when the Court has to determine the reasonable amount of damages to be paid in legal currency for an act done during the Japanese occupation.

E. C. V. Foucar for the appellants.

S. N. Sastry for the respondents.

U THEIN MAUNG, C.J.—This is an appeal from a decree directing the appellants to pay Rs. 7,442 to the respondent as compensation for the use and occupation of ten rooms from the 6th December, 1942 to the 31st December, 1944 at the rate of Rs. 300 per mensem.

The learned Advocate for the appellants has given up the grounds of appeal Nos. 1 and 2 wherein he alleged that the respondent failed to prove what portion

* Civil First Appeal No. 32 of 1948 against the decree of the Original Side of the High Court in Civil Regular Suit No. 83 of 1946, dated the 30th April 1948.

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U THEIN MAUNG, C.J.

if any of the suit premises were occupied by the appellants. He has argued the appeal only on two grounds, *viz*: that the trial Court should have held that the premises were lawfully requisitioned for the needs of the Japanese Army or in the alternative that compensation should have been assessed in accordance with the principle underlying the Japanese Currency (Evaluation) Act, 1947.

There is no evidence whatsoever as to the name, rank or authority of the Japanese Officer who is alleged to have requisitioned the rooms. The learned Advocate for the appellants relies on Exhibit E wherein the lawyer for the respondent has described the Japanese Officer as "one Navy Officer of the Japs". However, the description is not at all sufficient to justify the presumption that he was the Commander of the respective area or that he had authority to requisition the rooms.

The Hague Regulations which provide for requisitions in kind and service being made "for the needs of the army of occupation" do not provide for requisitioning immoveable private enemy property. (*See* Articles 46 and 52.)

Lawrence has stated at page 440 of The Principles of International Law "Dealing first with immoveables, we may lay down that as a general rule they are held to be incapable of appropriation by an invader. * * * The profits arising from them are free from confiscation and the owners are to be protected in all lawful use of them. But troops may be quartered in private houses though the inhabitants may not be ejected from their homes to make more room for the soldiery."

However, after referring to Article 46 of the Hague Regulations which expressly enacts that private property must be respected and may not be confiscated,

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Oppenhein has stated at page 319 of his International Law, Vol. II, Fifth Edition, "But confiscation differs from temporary use of private land and buildings for all kinds of purposes *demanded by the necessities of war.*" Pitt Cobbett has also stated in the Cases on International Law, Vol. II, Fifth Edition, "Land and buildings belonging to private owners may be temporarily used by an invader for purposes required by military necessity." So proper military authority might have had power to requisition the rooms for such purposes as might have demanded by the necessities of war.

However, it is clear from the evidence in the case that the rooms were not required for any such purpose at all. According to the appellants' own written statement the rooms were required just for the purpose of dumping their merchandise and goods which were then stored in their own premises.

Besides, the merchandise and goods so dumped were sold after a few days only. (*See* the evidence of Waris Ali, D.W. 2, at page 51 of the trial record.) The appellants then continued to occupy the rooms and to carry on their business there for over two years. (*See* the evidence of Ismail Fateh Mohamed, D.W. 1, at pages 43 and 44 ; *Ibid cp.* the evidence of Kasi Prasad Chowbay, P.W. 1, page 31 r., *Ibid.*)

Ismail Fateh Mohamed, who was one of the managers of the appellants' business was asked "After the goods which were shifted to the suit premises were sold, why did you not shift to some other place ?" and he answered "It depended on our wish." It is true that he corrected his answer by saying "It depended on the Japanese military." However, the Japanese military does not appear to have had any interest in the appellant's business and the witness appears to have spoken the truth in his first answer.

Moreover the respondent's case that the rooms were not requisitioned by the Japanese military authorities and that Barrot, who was a head clerk or one of the managers under the appellants, brought a Japanese officer just to frighten the respondent's agent and tenants is supported to a certain extent by Hajee Oomer, D.W. 2, a clerk in the appellants' firm. He has stated that Barrot was one of the managers of the firm and that Barrot had much influence with the Japanese (*see* pages 64 r. and 68 of the Trial Record). And according to Mohamed Yacoob, Barrot was working in the appellants' office "up to January or March 1944." As regards the Japanese, the learned Advocate for the appellants asked K. P. Chowbey in his cross-examination "And the Japanese did what they liked while they were in Rangoon?" and the answer was "Yes." (*See* page 32 r. of the Trial Record.)

For the above reasons we are of the opinion that the trial Court is right in holding (1) that there was no lawful requisition of the premises by the Japanese and (2) that the appellants must pay compensation for the use and occupation thereof.

The trial Court is also right in fixing the compensation for use and occupation at Rs. 300 per mensem in accordance with the respondent's demand in Ex. 1, dated the 16th April 1943. However, it failed to note that the said demand could have been met by payment in Japanese currency.

Section 3 (*1*) of the Japanese Currency (Evaluation) Act, 1947 does not apply as the case does not relate to any debt or contractual obligation. However in assessing damages we cannot ignore the principle underlying it, inasmuch as we have to determine what will be the reasonable amount in the present legal currency.

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If Rs. 300 per mensem in Japanese currency would have been reasonable compensation in 1942, 75 per cent thereof in the present legal currency must, according to the principle underlying the said section, be reasonable compensation now.

At the same time there is no evidence of any subsequent fall in the rental value of the buildings in the locality and the appellants cannot claim to be put in a better position than a lawful tenant who has obtained a lease at a rent fixed in the present legal currency. So he is not entitled to the benefit of any further depreciation of the Japanese currency after 1943.

We accordingly reduce the rate of compensation from Rs. 300 per mensem to 75 per cent thereof, *i.e.* to Rs. 225 per mensem and modify the decreee of the trial Court by directing that the appellants shall pay Rs. 5,581 instead of Rs. 7,442 to the respondent as compensation for use and occupation. The parties shall bear their own costs in both courts since the claim was for Rs. 13,475 and the defence was total denial of liability.

U SAN MAUNG, J.—I agree.

CRIMINAL REFERENCE.

Before U San Maung and U Aung Tha Gyaw, JJ.

THE UNION OF BURMA (COMPLAINANT)

v.

LU KHANT (ACCUSED).*

1948 Nov. 4.

Whether barrel of a rifle is an "arm" within the meaning of the proviso added by s. 2 of the Arms (Temporary Amendment) Act, 1947 to s. 19 of the Arms Act—Whether he will get enhanced punishment under the proviso of the newly added section.

Held : That the barrel of a rifle is an "arm" within the meaning of the proviso added by s. 2 of the Arms (Temporary Amendment) Act, 1947 to s. 19 of the Arms Act and the accused person is liable to enhanced punishment.

Queen-Empress v. *Javarami Reddi*, I.L.R. 21 Mad. 360.

Harsha Nath Chatterjee v. *Emperor*, I.L.R. 42 Cal. 1153, followed.

P.R.M.P.R. Perichiappa Chettiar v. *Nachiappan*, A.I.R. (1932) Mad. 46, referred to.

Ba Shun (Government Advocate) for the complainant.

U AUNG THA GYAW, J.—In this reference the following question has been referred to us for decision, namely :

"Is the barrel of a rifle an 'arm' within the meaning of the proviso added by section 2 of the Arms (Temporary Amendment) Act, 1947, to section 19 of the Arms Act?"

The appellants in the two appeals out of which this reference has arisen were each found in possession of a rifle barrel complete with a trigger and other fixed parts but without bolt and stock.

In view of the terms of section 14 of the Arms Act read with the plain wording of section 4 of the said Act, there is no doubt that the two appellants had been

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*Criminal Reference Nos. 66 and 67 of 1948 being reference made by the Hon'ble Justice U Bo Gyi in Criminal Appeals Nos. 840 and 841 of 1948 under Rule 13, Appellate Side Rules of Procedure (Criminal).

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properly convicted under section 19 (*f*) of the Act. Besides the two Indian cases cited in the Order of Reference, we have been referred to the cases in *Queen-Empress* v. *Javarami Reddi* (1) and *Harsha Nath Chatterjee* v. *Emperor* (2) where the term "firearm" used in section 14 of the Act was held to include parts of such firearms. The firearm dealt with in *Javarami Reddi*'s case (1) was a revolver with a broken trigger spring rendering it unserviceable for the time being. The Bench held that although the weapon was unserviceable it had not lost its *specific character and had not ceased to be a firearm*. The word "firearms" only means "arms that are fired by means of gunpowder or other explosives" and that, when the Act deals with a particular class of arms such as firearms, section 4 clearly means that the parts of firearms are included in the word "firearms." [See *Harsha Nath Chatterjee* v. *Emperor* (2)], where a large quantity of parts of firearms were found in the possession of the accused person.

Section 14 of the Act read with section 4 of the same thus clearly prohibits the possession of firearms, or part of firearms except under a licence and in the manner and to the extent permitted thereby. On this interpretation the conviction of the two appellants under section 19 (*f*) of the Arms Act would have to follow as a matter of course, since the barrel of a rifle with the trigger and other fixed parts attached retains the specific character of the firearm designated as a rifle.

The question then is to consider whether in view of the terms of the amendment provided in section 2 of the Arms (Temporary Amendment) Act, 1947, they will be liable to the enhanced punishment provided

(1) I.L.R. 21 Mad. 360. (2) I.L.R. 42 Cal. 1153.

therefor. This section of the Amending Act reads as follows:

"So long as this Act (Amending Act) remains in force, section 19 of the Arms Act shall have effect as if the following proviso had been added to the said section, namely:

'Provided that where any person commits an offence falling within clause (*e*) or clause (*f*), he shall be punished with death or transportation for life, if the arm, ammunition, or military store found in the possession of such person is a machine-gun, bren-gun, tommy-gun, sten-gun or rifle or American carbine, or ammunition for any of the said guns, or a hand-grenade, or any other arms of the description which the Governor may, by notification, declare in this behalf.'"

The point is raised that where a person has been convicted under section 19, clause (*e*) or (*f*) he is liable to the enhanced punishment provided in this proviso (only) if the arm with which such person went armed, or of which such person was found in possession is a (complete and serviceable) machine-gun, bren-gun, tommy-gun, sten gun, or rifle or American carbine or (live) ammunition for any of the said guns, or (serviceable) hand-grenade, or any other arms (in similar good order) of the description which the President may, by notification, declare in this behalf. In our considered view, the proviso does not and cannot have this restrictive effect and the words shown in brackets cannot be imported into its meaning. So long as the Arms (Temporay Amendment) Act, 1947, remains on the statute book, the proviso must be deemed to be part of section 19 of the Arms Act and the terms and words occurring in it are not susceptible of being given an interpretation different from the one permissible in the case of the terms and words occurring in the main section itself. The 'arm' referred to in the proviso must necessarily be in respect of firearms or parts of firearms prohibited under sections 13, 14 and 15 of the Act, the contravention of which is punishable under

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section 19 of the Act. The words occurring in section 2 of the Amending Act to the effect, "Section 19 of the Arms Act shall have effect as if the following proviso had been added to the said section . . . ." clearly justifies this view regarding the applicability of section 4 of the Arms Act to the words occurring in the proviso under reference.

It may be readily conceded that on ordinary principles a penal provision in a statute had to be strictly construed, *i.e.*, in favour of the person who is liable to be penalised by the section, but this cannot possibly mean that were the terms and words of a section of a penal statute admit of one reasonable interpretation only, we may not adopt such a reasonable construction on the ground that it might result in some slight violence to the natural meaning of the words. This view is fortified by the words of Maxwell on the Interpretation of Statutes, 9th Edition at page 280 where he says :

"The rule of strict construction, however, whenever invoked comes attended with qualification and other rules no less important, and it is by the light which each contributes that the meaning must be determined. Among them is the rule that that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the Legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are, indeed, frequently taken in the widest sence sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Lord Coke's words, to suppress the mischief and advance the remedy."

Again at page 165 of Maxwell's Interpretation of Statutes, 9th Edition, the rule of interpretation in

respect of a proviso to a section of an Act is given in these words :

'There is no rule that the first or enacting part is to be construed without reference to the proviso. The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest. The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail."

Having regard to the legislative intent evident in the temporary enactment there is really no necessity nor justification for restricting the meaning of the language used in the proviso occurring in section 2 of the said enactment. If the words "machine-gun, bren-gun, tommy-gun, sten-gun or rifle or American carbine, or ammunition for any of the said guns, or a hand-grenade, or any other arms of the description which the President may, by notification, declare in this behalf" are to be construed as meaning firearms and ammunition in good serviceable order, the door will be laid widely open for offenders for the evasion of the law. The firearms named in the proviso are capable of being carried in different parts before being put to actual use and persons found in possession of any of these parts possessing the specific character of any of the said firearms will surely escape the full rigour of the law intended for them in these times of grave emergency, if the words occurring in the proviso are not given the same meaning as those contained in the main section.

"It is a rule of law that a proviso should receive a strict construction. It is not open to the Court to add words to a proviso with a view to enlarge its scope. The proviso must be restricted to the scope reasonably

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conveyed by the words used therein" *P.R.M.P.R. Perichiappa Chettiar* v. *Nachiappan* (1).

In interpreting the words used in the proviso in question it is significant to note that certain varieties of firearms like revolvers, pistols, double barrelled guns have not been mentioned in it, and this omission would clearly imply that the terms used in the proviso merely constitute a description of the specific variety of firearms the possession or use of which the proviso is intended to apply. Thus, the words used in the proviso to denote these different varieties of firearms in respect of which offences under section 19 (*e*) or (*f*) are committed are purely descriptive in character having no reference whatever to their quality or condition. Consequently, if by reason of the definition of "firearms" provided in section 4 of the Arms Act a person has rendered himself liable to conviction under section 19 (*e*) or (*f*) of the Act for being found armed or in possession of part of such firearms, understood in the sense explained above, namely that the specific character of the firearms is retained the proviso would necessarily come into operation and make such accused person liable to the enhanced punishment provided therein if the firearm in question is of the description mentioned in the same, namely machine-gun, bren-gun, tommy-gun, sten-gun or rifle or American carbine, etc.

The question referred to us will, accordingly, be answered in the affirmative.

U SAN MAUNG, J.—I would like to add a few words to the judgment of my learned brother with whom I am in general agreement. Each of the appellants in the two appeals out of which these references have arisen was found in possession of a rifle barrel complete

(1) A.I.R. (1932) Mad. p. 46.

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with trigger and other fixed parts but without its bolt and stock. The question involved is whether the possession of this instrument without a necessary licence contravened section 14 of the Arms Act and therefore punishable under section 19 (*f*) of the Arms Act read with the proviso to section 19 thereof. Section 14 so far as is relevant to this reference reads as follows:

"No person shall have in possession or under his control any firearms except under a licence and in the manner and to the extent permitted thereby."

Whether a particular instrument is or is not a firearm is a question of fact. As held in *Harsha Nath Chatterjee* v. *Emperor* (1) the word "firearms" only means arms that are fired by means of gun-powder or other explosive. Therefore when an instrument or only a part of it is found in the possession of a person without a licence therefor, the question involved is whether it has or has not lost its specific character as a firearm and has therefore ceased to be a "firearm" within the meaning of that word in section 14 of the Arms Act. If it has so lost its specific character, its possession is not prohibited by section 14 of the Arms Act and no offence punishable under section 19 (*f*) of the Arms Act has been committed. (I ought to mention in passing that it has not been brought to our notice that section 15 of the Arms Act has been especially extended to Burma or to any part of Burma.)

In the case now under consideration, the instrument found in the possession of each of the appellants has not lost its specific character either as a firearm or as a rifle. It can be fired as soon as it is cleaned and the bolt affixed to it. On the analogy that a motor car still remains a motor car although some of its essential parts such as battery, dynamo, ignition coil, carburettor

(1) I.L.R. 42 Cal. 1153.

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or sparking plugs are missing from it, a rifle still remains a rifle although it may be without its bolt and stock. The words machine-gun, bren-gun, tommy-gun, sten-gun, rifle or American carbine appearing in the proviso to section 19 of the Arms Act, as added by Burma Act No. LXIV of 1947, should not, in my opinion, be read as if they mean these arms in complete and/or serviceable condition. Otherwise it would mean that if a trigger is missing from any of these firearms its possession without a licence would not be punishable under the proviso to section 19 of the Arms Act even if such a trigger can be easily replaced. The argument that the death penalty having been prescribed for possession of these firearms we must construe the words machine-gun, bren-gun, tommy-gun, sten-gun, rifle or American carbine as if they mean these arms in a complete and/or serviceable condition is quite untenable. Theoretically, under the proviso to section 19 of the Arms Act, the death penalty can be given even for the possession of a single cartridge (ammunition) for any of these firearms. In fact, the death penalty can be given even for the possession of part of such an ammunition as the word "ammunition" appearing in the proviso to section 19 of the Arms Act has been defined in section 4 of the Act as including all parts of ammunition.

I am fully alive to the fact that this decision of ours will cause great hardship in individual cases like the present. However, this is a matter not for this Court, but for the Executive Authorities and the Legislature to rectify.

APPELLATE CRIMINAL.

Before U San Maung and U Aung Tha Gyaw, JJ.

OHN MAUNG (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1948 *Nov. 12.*

High Treason Act, 1948, s. 3 (1)—S. 302 and s. 34 of the Penal Code—Ss. 237 and 238, Criminal Procedure Code—When re-trial to be ordered.

Held: Where it is not established that persons attacking a truck were aware it was a truck carrying a party of Police Officers they cannot be convicted under s. 3 (*1*) of the High Treason Act, 1948, even though murders are committed. Then the accused should be convicted under s. 302 read with s. 34 of the Penal Code.

When the charge is altered it is not always necessary that there should be a re-trial. In this case the alternative charges under s. 302/34, Penal Code and under s. 3 (*1*) of the High Treason Act, 1948, have been rightly framed. As there was no doubt about the evidence on which appellant is being convicted, and the accused has not been prejudiced it is not necessary that there should be a re-trial.

Lala Ojha v. *Queen-Empress*, I.L.R. 26 Cal. 863 ; *Ko Set Shwin* v. *King-Emperor*, (1902-03) U.B.R. P.C. 9, referred to.

Nga Po Kyone v. *King-Emperor*, I.L.R. 11 Ran. 354, followed.

Begu and others v. *The King-Emperor*, (1925) I.L.R. 6 Lah. 226, referred to.

King-Emperor v. *Po Thin Gyi*, I.L.R. 7 Ran 96 ; *Abdul Hamid* v. *King-Emperor*, I.L.R. 14 Ran. 24, distinguished.

Po Aye for the appellant.

Shein Woon for the respondent.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Criminal Regular Trial No. 22 of 1948 of the Second Special Judge (U Hla Nyun) of Pyinmana, the appellant Ohn Maung, who is a youth of about 17 years of age, has been convicted under sub-section (*1*) of section 3 of the High Treason Act,

* Criminal Appeal No. 1036 of 1948 being appeal from the order of 2nd Special Judge of Pyinmana, dated the 15th September 1948, passed in Criminal Trial No. 22 of 1948.

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1948 (Act No. XIV of 1948) and has been sentenced to death.

The facts of the case, briefly put are as follows :—

At about 6 p.m. of the 18th of April, 1948, U Kyaw San (P.W. 5) the then Circle Inspector of Police, Lewè, came with a party of police officers in a police truck to Pyinmana for the purpose of interviewing the then District Superintendent of Police, U Kyaw Myint, at Pyinmana Railway Station. After the interview the party returned to Lewè in the same truck and arrived at Nyobin bridge near Thetkegyin village at about 10 p.m. The truck, which had to slow down owing to the S bend on the road at the site of the bridge, was ambushed by a party of men. Consequently the driver Chit Pe (P.W. 3) had to swerve to the left and thus bring the truck to a stop at a low lying ground by the side of the road. Thereafter, on the face of the incessant firing by the attackers, the police party had to take whatever cover they could before returning the fire. As a result of the encounter, three members of the police party namely, P.Cs. Sein Maung, Saw Po Tu and Aung Din received gun-shot wounds to which they succumed, Aung Din dying almost immediately after he received the injuries. The first information report (Ex. E) relating to the incident was lodged by U Kyaw San (P.W. 5) the same night and on the following morning U Kyaw San revisited the scene of occurrence with S.I.P. Maung Win Maung (P.W. 2) and the Investigating Officer U Thein Nyun (P.W. 6). They found some stumps of cheroots, forty ·303 empty cartridges, nineteen empty Japanese cartridges, eleven empty tommy-gun cartridges, eleven empty sten-gun cartridges, etc., besides marks indicating that several people had sat on the soft ground beside the road. On the morning of the 21st April, 1948, three days after the occurrence, U Ba Maung (P.W. 8)

Subdivisional Police Officer, Pyinmana raided the house of Maung San Gyaw (D.W. 1), the husband of the maternal aunt of the appellant Ohn Maung and there arrested the appellant. Thereafter, a telephone message was sent to U Thein Nyun (P.W. 6) at Lewè about the arrest of Ohn Maung and U Thein Nyun arrived at Pyinmana to find that the appellant was willing to give a confession. The appellant was, therefore, taken to Lewè the same day and was produced before U Saw Lwin (P.W. 1), Township Magistrate of Lewè at about 1 p.m. for the purpose of having his confession recorded. The confession (Ex. A) of the appellant was then recorded by U Saw Lwin in the presence of two witnesses after the appellant was given one hour's time for reflection and after the questions have been put to him with a view to ascertain whether he was giving a confession of his own free will and without any inducement, threat or promise on the part of any person in authority. In that confession, the appellant stated *inter alia* that at about 8 p.m. on the day of occurrence he was at home after having had an attack of fever during the day, one Aung Yin, son of U Po Yaung, came and asked him to come to Nyobin bridge without telling him for what particular purpose. He, therefore, accompanied Aung Yin to the house of Maung Pyu, brother-in-law of Aung Yin, where Maung Pyu lay dead. From that house Aung Yin went with one Maung Shwe to the west and came back with about sixteen other persons. When the party had assembled, one of them Maung Shwe was found to have with him a big gun on a stand, Hla Baw a tommy-gun, Aung Khin a sten gun. Of the rest, some had English rifles and others Japanese. He (Ohn Maung) himself was armed with a Japanese rifle with 15 cartridges. The party then proceeded from the funeral house to Nyobin bridge where they

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separated into two groups, one commanded by Maung Shwe proceeding to the ditch on the east side of the road and the other, comprising of four men only to the west side of the road. While they were waiting, Maung Shwe told them that a car would be coming that way and that if he started shooting others should do likewise. About half an hour later, a car was seen coming from the direction of Pyinmana and a shot was fired at it. Thereupon, the rest of the party concentrated their fire on that car which was then seen to leave the road towards the east side. He (Ohn Maung) himself fired four or five shots from his Japanese rifle after which one Maung Htein relieved him of his rifle. Thereafter, Aung Yin told those who had no firearms with them to flee and he (Ohn Maung) and four others ran back to the village. That night he slept at the house of Ko Shwe Myo and on the next day he left Thetkegyin to come to Pyinmana for the purpose of receiving medical treatment at the house of Ko San Gyaw.

On the confession of the appellant Ohn Maung coupled with the fact that the car which was in fact ambushed by the party, of which the appellant Ohn Maung was one, was a truck carrying police officers from Pyinmana to Lewè and that the villagers of Thetkegyin were in the main either Communist or Communist sympathizers, the learned trial Judge framed two alternative charges against the appellant under section 3 (*1*) of the High Treason Act, 1948, and under section 302 read with section 34 of the Penal Code. The appellant pleaded not guilty to both these alternative charges and gave evidence on behalf of his own defence, which was to the effect that he was induced by U Ba Kyaw (P.W. 10), Sub-Inspector of Police, Pyinmana, to give a confession by holding out to him a promise of pardon, saying that even those

who had assassinated the late U Aung San were pardoned because they gave confessions. In this he is supported by his uncle U San Gyaw (D.W. 1) who stated that U Ba Kyaw had asked him to tell Ohn Maung that even some of the murderers of the late U Aung San were pardoned because of their confession and that U Ba Kyaw himself turned to Ohn Maung to say that if he confessed nothing would happen to him. Maung Thein Maung (D.W. 2), a tonga driver of Thetkegyin, who was the appellant's own brother-in-law, and his friends and neighbours Maung Po Nyan (D.W. 3) and Ko San (D.W. 4) gave evidence in support of the appellant's *alibi* which was to the effect that during the attack on the police truck at Nyobin bridge, they and Ohn Maung had hidden under the granary of U Ye, father of Thein Maung.

On the evidence the learned trial Judge came to the conclusion that the confession was voluntary and true ; that the appellant's *alibi* was unreliable and that an offence under section 3 (*1*) of the High Treason Act, 1948, had been established against the appellant on his own confession and other circumstances appearing in the case.

In this appeal, the learned Counsel for the appellant has strenuously contended that on the evidence adduced in the case, no offence under section 3 (*1*) of the High Treason Act, 1948, has been established by the prosecution as against the appellant Ohn Maung. In our opinion, this contention must be allowed to prevail. The confession of the appellant which, apart from certain corroborative circumstances which will be mentioned later, is the sole evidence against the appellant, is specific in that the appellant was not aware that the car which they were attacking was a truck carrying a party of police officers from Pyinmana to Lewè. This fact must be taken into

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consideration in his favour. From the fact that most of the villagers of Thetkegyin were either Communists or were in sympathy with the Communists and the fact that the police truck which was in fact ambushed had passed through Thetkegyin *en route* to Pyinmana at about dusk on the day of occurrence are in themselves insufficient to warrant a conclusion that the party which had ambushed the police truck intended to attack the police truck (and no other) with a view to disrupt the morale of the police force or even if that had been the intention of the leader of the party, the appellant Ohn Maung, who was only one of the members of the party, had a prior knowledge of the intention of his leader. The most that can be inferred from the confession of the appellant is that he, in common with the rest of the party, had the intention of attacking a car with passengers as it came along the road towards Nyobin bridge with such lethal weapons as tommy guns, stens guns and rifles, and that therefore he had the common intention with the rest of the party to cause the death of the passengers of the car to be attacked. Therefore, if the confession given by the appellant is considered to be voluntary and true the offence with which the appellant should be convicted is one punishable under section 302 read with section 34 of the Penal Code.

As regards the confession, we have no hesitation in coming to the conclusion that it was voluntarily made. The appellant was arrested on the morning of the 21st of April, 1948, and he was produced before the Township Magistrate of Lewè at about 1 p.m. the same day for the purpose of having his confession recorded. It is difficult for any confession to be given more promptly than this. No doubt the appellant and his uncle U San Gyaw would have it that the appellant had been induced by U Ba Kyaw (P.W. 10)

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Sub-Inspector of Police, Pyinmana, to give the confession by promise of pardon, an allegation which U Ba Kyaw has denied. However, it is but natural that the appellant and his uncle should take up this line of defence as this is the appellant's only hope of escaping punishment for his crime. It must have been well known to both the appellant and his uncle U San Gyaw that some of the persons involved in the murder of the late U Aung San were ultimately let off with a lesser penalty and this fact could have weighed in the minds of both without any inducement on the part of the police office As regards the appellant's *alibi*, it is clear that it has been hurriedly concocted with a view to save him. For instance, the evidence of Ko San (D.W. 4), who said that he abandoned his wife and children who remained in hiding under his house in order to go to the granary of U Ye about 10 cubits away from his house, is on the face of it most unconvincing. In time of danger like this it is most improbable that a person would have left his wife and children in order to hide elsewhere. Ko San's evidence must have been produced in order to bolster up the defence story.

The confession is so full of circumstantial details that we have no doubt as to its truth. It is also corroborated in several particulars. Firstly, the appellant said that he had an attack of fever on the day when this case occurred and it is still his case that he was suffering from smallpox at that time. However, he was not so ill as not to be able to come all the way from Thetkegyin to Pyinmana the next day. Secondly, the appellant stated in his confession that the rendezvous was the funeral house of Aung Yin's brother-in-law Maung Pyu. It is an admitted fact that that night there was the funeral of Maung Pyu in Thetkegyin Village. Thirdly, the appellant stated that the attackers

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were armed with Tommy guns, Sten guns, Japanese rifles and English rifles. It is in evidence that when U Kyaw San and other police officers visited the scene of occurrence the next day they found empty '303 cartridges, empty Japanese cartridges, empty tommy gun cartridges and empty sten gun cartridges. The appellant stated that when the car was attacked it suddenly swerved to the east side of the road. The police truck which was attacked in fact swerved to the east side before coming to rest on the low ground by the side of the road.

The question now to be considered is whether we can, in this appeal, alter the finding to one under section 302/34 of the Penal Code or whether we should order a re-trial of the appellant for an alleged offence under these sections. The general trend of judicial opinion is that the Appellate Court can alter the finding if the alternative offence is one for which an accused person could have been convicted under the provisions of sections 237 and 238 of the Code of Criminal Procedure, although it has also been held in some cases that the only restriction on the Appellate Court's power is that the accused is not prejudiced by the alteration of the charge and that the Appellate Court could alter the finding even though the case does not fall within section 237 or section 238 of the Code of Criminal Procedure. See *Lala Ojha* v. *Queen-Empress* (1) and *Ko Set Shwin* v. *King-Emperor* (2). In this case it is not necessary to decide whether we should adopt the extended view taken in *Lala Ojha*'s case because on the facts of this particular case we consider that alternative charges under section 302/34 of the Penal Code and under section 3 (*1*) of the High Treason Act, 1948, have been rightly framed against the appellant by the learned trial Judge under

(1) I.L.R. 26 Cal. p. 863. (2) (1902-03) U.B.R. P.C. 9.

the provisions of section 236 of the Code of Criminal Procedure. The facts proved in the case were not in doubt and the only doubt was as to whether an inference could be safely drawn from these facts that the appellant had prior knowledge that the car which he and his companions were attacking was a truck carrying a number of police officers from Pyinmana to Lewè. In regard to section 236 of the Code of Criminal Procedure, although there is preponderance of authority that this section does not apply where there is any doubt as to the facts but applies where there is a doubt as to the law applicable to certain set of facts which have been proved, we must say that we are considerably attracted by the line of reasoning adopted by Brown J. with whom Das J. concurred in *Nga Po Kyone* v. *King-Emperor* (1). In that case Brown J. after setting out the provisions of sections 236 and 237 of the Code of Criminal Procedure said :

" These sections do not say that they are applicable only when the facts are clear but the law is doubtful. Two illustrations are given under section 236 and in each of those illustrations the facts are clearly doubtful. The facts necessary for the offence of theft are entirely different from the facts necessary for the offence of receiving stolen property. As regards the second illustration, it is quite clear that what is doubtful is not the law applicable but the facts, that is to say, whether the statement in the Sessions Court was true, or the statement before the Magistrate was true. This restricted interpretation of sections 236 and 237 of the Code of Criminal Procedure does not seem to be the interpretation put on those sections by Their Lordships of the Privy Council. In the case of *Begu and others* v. *The King-Emperor* (2) Their Lordships after setting out the provisions of sections 236 and 237 of the Code of Criminal Procedure remarked :

> ' The illustration makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge in respect of

(1) I.L.R. 11 Ran. 354. (2) (1925) I.L.R. 6 Lah. 226.

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it, if the evidence is such as to establish a charge that might have been made.'

In that case the charge was under section 302 of the Indian Penal Code, and Their Lordships decided that a conviction could legally be passed under section 201 of the Indian Penal Code."

Contrary views were expressed in *King-Emperor* v. *Po Thin Gyi* (1) and *Abdul Hamid* v. *King-Emperor* (2).

However, even adopting the narrower view, we do not find any real difficulty in coming to the conclusion that the joinder of the two charges under section 3 (*1*) of the High Treason Act, 1948, and under section 302/34 of the Penal Code in the alternative as against the appellant in this case was justified on the facts proved.

For these reasons we would alter the conviction of the appellant under section 3 (*1*) of the High Treason Act, 1948, to one under section 302/34 of the Penal Code and confirm the sentence of death passed upon him, which is the only sentence permissible by law in view of the fact that the murder was premeditated within the mischief of section 302 (*1*) of the Penal Code as substituted by Burma Act No. XXXIII of 1947.

While we naturally deplore the fact that a sentence of death has perforce to be passed on a youth of 17 years of age who is convicted on the strength of his own confession, we have no doubt that his case will be carefully considered by those upon whom rests the prerogative of mercy.

U AUNG THA GYAW, J.—I agree.

(1) I.L.R. 7 Ran. 96. (2) I.L.R. 14 Ran. 24.

CIVIL REVISION.

Before U Aung Tha Gyaw, J.

MAUNG MAUNG GYI (*a*) M. K. NANJI (APPLICANT)

v.

NOORALLY JOOMABHAI AND ONE (RESPONDENTS).*

H.C. 1948 — *Aug. 30.*

Code of Civil Procedure, Order 1, Rule 3—Misjoinder of parties.

Held : Where plaintiff alleges that a sum of money was paid to two defendants for the purchase of goods on his behalf and the defendants were to bring them to Rangoon and defendants failed to do so and that it was later agreed as between the defendants that each one should pay a particular sum towards the claim—one suit against both the defendants is not bad for misjoinder of parties. Order 1, Rule 3 of the Code of Civil Procedure covers such a case.

Payne v. *British Time Recorder Company*, L.R. (1921) 2 K.B. 1 ; *Harendra Nath Singh Ray* v. *Purna Chandra Goswami*, 55 Cal. 164 at 171, followed.

P. K. Basu for the applicant.

R. K. Roy for the respondents.

U AUNG THA GYAW, J.—This is an application in revision brought under section 25 of the Rangoon City Civil Court Act questioning the legality and propriety of the order passed by the 3rd Judge of the City Civil Court in his Civil Regular No. 2156 of 1947, returning the plaint to the applicant with the direction for its amendment on the ground of multifariousness.

The applicant brought a suit against the two respondents claiming recovery of two separate sums of Rs. 939 from the one and Rs. 1,000 from the other as monies due by them as their respective shares of an agreed liability towards satisfaction of a

* Civil Revision No. 59 of 1948 against the order of the 3rd Judge, City Civil Court of Rangoon in Civil Regular No. 2156 of 1947, dated the 31st May 1948.

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debt of Rs. 2,578 alleged to have been jointly due by them in the following circumstances.

In about June 1946, the applicant sent to the respondents in India a sum of Rs. 12,000 for them to buy goods for the applicant. They failed to send the goods as promised but returned to the applicant a sum of Rs. 9,422 in two instalments leaving a balance of Rs. 2,578. As this sum had been jointly spent by them, the two respondents agreed between themselves that they would each pay to the applicant Rs. 1,289 and towards the satisfaction of this agreed liability, the 1st respondent had paid in a sum of Rs. 350 leaving a balance of Rs. 939 and the second respondent had paid in a sum of Rs. 289 leaving a balance of Rs. 1,000. These two sums the applicant sought to recover from the respondents by bringing the present suit in which the two respondents were joined as party-defendants.

The 1st respondent denied the allegations made by the applicant in his plaint and contended that the suit was bad for multifariousness. An issue to that effect was framed by the learned trial Judge along with the other issues involved in the pleadings and without the preliminary issue as to the defect of multifariousness being first enquired into the whole suit was tried on the merits and only at the date fixed for delivery of the judgment, the learned Judge tried the issue on the question of misjoinder of causes of action and held that the suit was bad for multifariousness and directed the applicant-plaintiff to make the necessary amendment.

It is now contended that there was no question of any misjoinder of defendants and causes of action in the case, that the failure of the respondents to press for a decision of the preliminary issue as to misjoinder had the effect of a waiver of their plea, that there was no

novation of contract as held by the learned trial Judge to justify the applicant being driven to file separate suits against the respondents and that the view adopted by the trial Judge was highly technical and had no merit in law.

The objection raised by the applicant regarding the plea of waiver cannot be sustained. In his written statement the 1st defendant-respondent had set out clearly that the suit was bad for misjoinder of causes of action and parties and on this objection raised on the respondent's behalf a definite issue was framed in the suit as to whether the suit was bad for multifariousness. The subsequent conduct of the proceedings was a matter resting entirely in the discretion of the Court. Where the remaining issues of fact would not involve a protracted hearing the Court should, as a general rule, try the preliminary issue along with the remaining issues fixed in the case. The Court's exercise of discretion in the matter must, however, depend on the circumstances of the case before it ; where as in the case before him, it was considered that the defect could be cured by mere amendment, the trial Court was justified in trying the whole case at the same time.

The applicant appears to stand on surer ground when he raises the next objection that the allegations made by him in the plaint could not result in misjoinder of defendants and causes of action. Reliance in this regard is placed on the terms of Order 1, Rule 3, namely :

" All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons, any common question of law or fact would arise."

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According to the applicant a sum of money was paid to the two respondents for the purchase of goods on his behalf and that the respondents failed to keep their promise but had each appropriated part of the sum received by them and that in regard to their liability for the return of these sums spent by them, they had between themselves agreed to share this liability in an equal share. The issues fixed on the pleadings would cover the question as to whether one or both of the defendants had received the money from the applicant, whether the stated sum was due by both of them to the applicant and whether in regard to the mode of repayment of the sum they had agreed to incur separate liabilities. If separate suits were brought against them, there is no doubt that, these common questions of fact would arise in the attempt to determine the applicant's right to relief as against them. The applicant's right to relief arose out of the same transaction by which he had advanced a sum of money to both the respondents. Quoting the English case of *Payne* v. *British Time Recorder Company* (1), Mukerji J. in *Harendra Nath Singh Ray* v. *Purna Chandra Goswami* (2) said :

"Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried."

In the present case in view of the common question of facts alleged against the two respondents as to their liability for the different sums claimed against them, separate trial of the claims would result in the

(1) (1921) 2 King's Bench, p. 1. (2) 55 Cal. 164 at 171.

applicant being put to additional trouble and expense, a disadvantage which Order 1, Rule 3, is intended to prevent. Accordingly, the order of the lower Court directing the applicant-plaintiff to amend his plaint will be set aside with the direction that the suit be further disposed of on the merits. Costs, 5 gold mohurs.

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MAUNG MAUNG GYI (a) M. K. NANJI v. NOORALLY JOOMABHAI AND ONE.

U AUNG THA GYAW, J.

APPELLATE CRIMINAL.

Before U Bo Gyi, J.

H.C. 1948

Sept. 23.

KYIN HOKE (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Code of Criminal Procedure, s. 162 (2), s. 302 (2), Penal Code—Mode of proof of statement made to the Police—Evidentiary value of denunciation made by the deceased.

Held: That when prosecution or defence seek to contradict a witness or impeach his credit in pursuance of the provisions of s. 162 of the Code of Criminal Procedure as amended, the Police Officer concerned must not be examined in the midst of the examination of the witnesses for the purpose of proving the statement of the witness to the police. Without proving such statement the witness may be cross-examined on the lines indicated in s. 145 of the Evidence Act. The attention of the witness must be called to those parts of his statement to the Police which are to be used for the purpose of contradicting him. Thereafter the Police Officer should be examined.

Denunciation made by a deceased person should be treated with caution. Three essential points should be borne in mind :—

(i) Danger of perjury in fabricating declarations, the truth or falsity of which it is impossible to ascertain.

(ii) Danger of letting in incomplete statements.

(iii) The experienced fact is that implicit reliance cannot in all cases be placed on the declaration of a dying person.

Nga Ba Thein v. *King-Emperor*, 1 B.L.T. 84, followed.

C. C. Khoo for the appellant.

O. S. Woon (Government Advocate) for the respondent.

U BO GYI, J.—Appellant Kyin Hoke, a Sino-Burman of Thôngwa, has been convicted under section 302 (2) of the Penal Code, as amended, for the alleged murder of one Maung Mya Maung of Nyaungni at that village

* Criminal Appeal No. 914 of 1948 being appeal from the order of the 6th Special Judge of Hanthawaddy, dated the 16th August 1948, passed in Criminal Regular Trial No. 11/12 of 1948 (amalgamated).

which is a few miles distant from Thôngwa on the night of the *lagwe of Taboung* last (9-3-48) and has been sentenced to seven years' rigorous imprisonment.

Before proceeding further, I would note that the learned Special Judge should never set out the words "Intentionally (or knowingly)" in a charge of murder. There is another matter that calls for comment, which is that where either the prosecution or the defence seek to contradict a witness or impeach his credit in pursuance of the provisions of section 162 of the Code of Criminal Procedure, as amended, the police officer concerned must not be examined in the midst of the examination of the witness for the purpose of proving the statement of the witness to the police. The prosecution will naturally have access to police papers, while on the other hand, the accused may under section 162 (2) of the Criminal Procedure Code, as amended, request the Court to see that copy of the witness's statement to the police is supplied to him. Then, *without at first proving such statement*, the witness may be cross-examined on the lines indicated in section 145 of the Evidence Act. ***The attention of the witness must be called to those parts of his statement to the police which are to be used for the purpose of contradicting him.*** Then, and then only, the copy of the recorded statement can be proved, and this may be done by examining the police officer, when his turn comes, as to whether the copy before the Court is a "True" copy of the witness's statement to the police and whether the original statement as recorded has been made by the witness and accurately recorded. ***The copy should then be marked as an exhibit in the case, an appropriate letter or number, as the case may be, being given to it.***

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[The learned Judge then discused the evidence in great detail and proceeded as follows :]

In *Nga Ba Thein* v. *King-Emperor* (1) in which also the basis of the conviction was the denunciation alleged to have been made by the deceased, it was held that such denunciations should be treated with caution. The head note to the report runs : "In considering the weight to be attached to dying declarations it is necessary to bear in mind three things—

(1) the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain,

(2) the danger of letting in incomplete statements,

(3) the experienced fact is that implicit reliance cannot in all cases be placed on the declaration of a dying person."

No doubt dying declarations are on the whole useful and necessary. But at the same time in basing a conviction on a dying declaration the above considerations must be steadily borne in mind.

Now, the facts of the case put in a nut-shell are that while the deceased and his companions were proceeding to Aye Maung's house along with the appellant and his companions as well as some other villagers, the deceased received a mortal wound in the lane in front of Aye Maung's house. It was a dark night. Nobody saw the actual assault. No one can give evidence as to the circumstances which immediately led to the assault. The most the witnesses could say was that they heard shouts. Shortly afterwards the deceased was found lying in front of Maung Kywet Oh's house a short distance from Aye Maung's house. U Po Kyai states that the deceased denounced the

(1) 1 B.L.T. p. 84.

appellant. But he is contradicted by Kyaw Lay and Tun Hlaing and also by his own conduct. He went to the headman to report, but obviously he did not report to the headman that the deceased had denounced the appellant. Actually, the headman arrested Kyaw Lay on the charge of murder and sent him in custody to the police-station.

In view of the above, I am of opinion that at first Kyaw Lay was suspected of the murder and was accordingly reported to the headman. Kyaw Lay is however a resident of the village and has apparently relatives and friends there, and it was only after he had been sent off to the police-station that it occurred to U Po Kyai and others to implicate the appellant, a resident of Thôngwa.

For all the above reasons I find that the prosecution have not proved that it was the appellant who stabbed the deceased. The conviction and sentence are accordingly set aside and the appellant will be acquitted and released so far as this case is concerned.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1948

Dec. 10

P.L.M.C.T.K. KRISHNAPPA CHETTYAR (APPELLANT)

v.

P.L.M.C.T. KASIVISWANATHAN CHETTYAR (RESPONDENT).*

Evidence Act, s. 92—Interpretation of the terms of a deed of partition—Rules to be followed.

Held: Oral evidence of the intention of parties to a document is not admissible for the purpose of construing the deed or ascertaining the intention of the parties. The question before the Court is not what the parties may have intended to do by entering into the deed but what is the meaning of the words used in the deed.

Balkishen Das and others v. *Legge*, 27 I.A. 59; *Maung Kyin* v. *Ma Shwe La*, 44 I.A. 236 at p. 243; *Feroz Shah* v. *Sohbat Khan and others*, (1933) I.L.R. 14 Lah. 466 (P.C.) at p. 471; *Maharaja Manindra Chandra Nandi* v. *Raja Sri Sri Durga Prashad Singh*, 21 C.W.N. 707 at p. 710; Cp. *Rickman and another* v. *Carstairs*, 110 E.R. 931 at p. 935, followed.

Monypenny v. *Monypenny*, 9 H.L.C. 114 (146) (1861); *Dungannon* v. *Smith*, 12 Cl. and F. 547 (599) (1846); *Pearks* v. *Moseley*, 5 App. Cas. 714 (719) (1880); *Leader* v. *Duffey*, 13 App. Cas. 294 (301) (1888), referred to.

Proviso 6 of s. 92 of the Evidence Act provides for the admission of such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. This can arise only when the terms of documents require explanation.

Baijnath Singh v. *Hajee Vally Mahomed Hajee Abba*, (1925) I.L.R. 3 Ran. 106 (P.C.), followed.

Martand Trimbak Gadre v. *Amritrao Raghojirao Dhamale and another*, (1925) I.L.R. 49 Bom. 662 at p. 671; *Ganpatrao Appaji Jagtap* v. *Babu Bin Tukaram and others*, (1926) I.L.R. 44 Bom. 710 at pp. 717, 718 and 719; *Tsang Chuen* v. *Li Po Kwai*, (1932) A.C. 715 at p. 727-728; *Shore* v. *Wilson*, (1842) 9 Cl. and F. 355, 565; *The North Eastern Railway Co.* v. *Lord Hastings*, (1900) A.C. 260, referred to.

Held further: That the document in this case gave only the "right to use the land for all purposes." This phrase cannot be interpreted to give the right to enter the western half of the building by two doors and the right of way over the court-yard of the appellant.

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* Special Civil Appeal No. 6 of 1948 against the decree of the appellate side in Civil 2nd Appeal No. 275 of 1941 arising out of Civil Appeal No. 17 of 1941 of the District Court, Myaungmya, and Civil Regular Suit No. 8 of 1939 of the Subordinate Judges' Court, Wakema.

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The facts out of which this appeal arises may be thus briefly stated :

Appellant and respondent were two brothers. They jointly owned a building in Wakèma Town. There was a general partition of all the properties between two brothers. The house was divided into two parts—western and eastern halves. The eastern part fell to the share of the respondent and the western part to the appellant. There was a lane on the western side of house. This lane leads from the main road to the back drainage space and on the western side of the house were two doors. The deed of partition stated that the respondent will have "the right to use the said lane for all purposes." The respondent claimed that those words in the deed gave him the right of user of the doors on the western side of the house and to pass through those doors and through the court-yard of the appellant to the eastern portion of the house allotted to him. When one of the doors was closed by the appellant for safety, the respondent filed a suit for injunction to restrain the appellant from closing the doors and claiming the right of user of both these two doors. The trial court dismissed the suit holding that on the interpretation of the document it could not be said that the respondent was given the right of user of the doors and the court-yard. On appeal the District Court set aside that judgment and granted a decree for injunction in a modified form. The appellant appealed to the High Court and the High Court confirmed the decision of the District Court but after the decision the learned Judge granted leave to file an appeal under s. 20 of the Union Judiciary Act, 1948.

P. K. Basu for the appellant.

V. S. Venkatram for the respondent.

U THEIN MAUNG, C.J.—The deed of partition between the parties contains the following clauses :

"146. The eastern half portion all along the length in all that piece of parcel of land known as Lot Nos. 88 and 89 in Block No. 15 in the Town of Wakèma belonging to the said S.V.P.L.M. Firm and bounded on the—

North by the Myoma Road ;
East by the house belonging to Ko Ba Chan ;
South by the Municipal lane, and
West by the house belonging to Ma Pan Bu

together with the same share in the eastern half portion of the two storied pucca building built and standing on the said land except that the path leading to the kitchen and thence to southern boundary of the compound shall be common to both parties.

The lane to the east and leading to the said building is allotted to and shall be the exclusive and absolute property of the first party. The said lane is not now available for use for the first

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party and should it be available for use for the first party and should it be available for use at any time in future then the first party shall have exclusive and absolute use and enjoyment of the same and from such date he shall cease to have any right for the use of the lane to the west of the building.

The lane in the west and leading to the building is allotted to and shall be the exclusive and absolute property of the second party but the first party shall have the right to use the said lane for all purposes except that as and when the lane on the eastern side becomes available for use for him the first party then he shall cease to have any right for the use of this lane on the western side.

13. The first party shall have the use and enjoyment upto and not later than the end of February 1939 the latrine situate in the share of the second party and the second party shall have the use and enjoyment upto and not later than the end of February 1939 the kitchen situate in the share of the first party.

The parties hereto shall have partition made at the middle from North to South in the front hall in the down floor in the verandah in the first floor above the hall at the back side and also in the hall in the first floor above the kitchen and they shall bear the costs therefor equally.

The Municipal-tax and Government revenue for the entire property shall be contributed equally by both the parties but the receipts for such payment shall be retained by the first party.

The sale deed No. 495 of 1924 of the office of the Sub-Registrar of Wakèma obtained from P.L.M.K.R. Firm of Wakèma retaining to rights in the said land shall remain in the possession of the second party.

The original lease of the land dated 7th July 1913 issued in the name of P.L.M. Palaniappa Chettyar by the Deputy Commissioner of Myaungmya being Serial No. 121 of 1913-14 as also the tax tickets obtained shall remain in the possession of the first party.

Valued at Rs. 10,000." (*See* Exhibit C.)

And the only question for decision in the present appeal, which is one under section 20 of the Union Judiciary Act, 1948, is whether "the right to use the said lane (*i.e.*, the lane in the west) for all purposes" includes (1) the right to enter the western half of the

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building, which has fallen to the share of the appellant, by two doors in the western wall thereof, (2) the right of way from one of the said doors across the said part of the building to the bath-room in the eastern part of the building, which has fallen to the share of the respondent, and (3) another right of way from the other door across the appellant's part of the building to the respondent's kitchen.

At first the respondent based his claim to the right of entry by the said doors and the rights of way not only on the interpretation of the said clause but also on their being easements of necessity. However as the said lane leads to the sweeper's lane at the back of the building, the trial Court held that they were not easements of necessity, observing in the course of his judgment :

"However that may be, the plaintiff's story that the doors are absolutely necessary as an easement of necessity is not wholly supported by the testimony of his witnesses. Mr. A. K. Ghose, a Sanitary Inspector of Wakèma Town, deposed that he had seen his next door neighbour A.L.V.R.P. Firm allowing all manner of servants to make use of the front door for carrying water and other purposes. And he had seen water for another firm R.M.V.E.S.V. being carried through the back door by using the sweeper's lane and also through the front door. According to him, he had seen the old firm S.V.P.L.M. before the present building were constructed, water and other things being carried through the front door. The other witness Chokalingam (5 P.W.) had conceded that the V.A.V. Firm and S.P.R.N. Firm had the water carried through the front door, the only excepted person not allowed to use the front door is the hair-cutter. It is therefore clear that water and other things are carried through the front door if there is no side lane. And in the case of the hair-cutter, the last witness stated that he could avoid all trouble by having the hair-cut on the *panatchut* of the house. In the house in question, if people so wish, they can make use of the front door and the sweeper's lane for carrying water or for allowing the menials to come into the house. If they use the sweeper's lane they came in to the house through the door K marked on the plan (Exhibit B)."

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We do not propose to deal with the claim that they are easements of necessity as the respondent has not filed any cross-objection and his learned Advocate has not attempted to support it at all. They now rely solely on the interpretation of the words "for all purposes" in the said clause.

Oral evidence of intention is not admissible for the purpose of construing the deed or ascertaining the intention of the parties. [(*See* section 92 of the Evidence Act and *Balkishen Das and others* v. *Legge* (1) ; *Maung Kyin* v. *Ma Shwe La* (2) ; *Feroz Shah* v. *Sohbat Khan and others* (3).]

As Their Lordships of the Privy Council have pointed out in *Maharaja Manindra Chandra Nandi* v. *Raja Sri Sri Durga Prashad Singh* (4), "in construing the terms of a deed, the question is not what the parties may have intended, but what is the meaning of the words which they used ; " [Cp. *Rickman and another* v. *Carstairs* (5)] and Mukerjee J., whose judgment was confirmed by Their Lordships, observed in the course thereof :

" The course pursued by the Subordinate Judge contravenes the elementary test laid down by Lord Wenslydale in *Monypenny* v. *Monypenny* (6) : 'The question is not what the parties to a deed may have intended to do by entering into the deed, but what is the meaning of the words used in the deed—a most important distinction in all cases of construction, and the disregard of which often leads to erroneous conclusions.' This vital distinction was emphasised by Baron Parke in *Dungannon* v. *Smith* (7) and by Lord Selborne in *Pearks* v. *Moseley* (8) and was concisely summed up by Lord Halsbury in *Leader* v. *Duffey* (9) in the following terms : 'You will be arguing in a vicious circle if you begin by assuming an intention

(1) 27 I.A. 59.
(2) 44 I.A. 236. at p. 243.
(3) (1933) I.L.R. 14 Lah. 466 (P.C.) at p.471.
(4) (21) C.W.N. 707 at p. 710.
(5) 110 E.R. 931 at p. 935.
(6) 9 H.L.C. 114 (146) (1861).
(7) 12 Cl. and F. 547 (599) (1846).
(8) 5 App. Cas. 714 (719) (1880).
(9) 13 App. Cas. 294 (301) (1888).

apart from the language of the instrument itself, and having made that fallacious assumption, you bend the language in favour of the assumption so made.' (*See* p. 708 of the C.W.N.)

In the words of Their Lordships in *Balkishen Das* v. *Legge* (1) at page 65 of the Report, the case must therefore be decided on a consideration of the contents of the partition deed itself "with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts." (*Cp.* proviso 6 to section 92 of the Evidence Act); *see* also *Baijnath Singh* v. *Hajee Vally Mahomed Hajee Abba* (2) at page 125 of which Their Lordships have observed:

"Section 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances."

At the same time evidence of circumstances surrounding a document is admissible only for the purpose of throwing light on its meaning. [See *Martand Trimbak Gadre* v. *Amritrao Raghojirao Dhamale and another* (3).] And Macleod C.J. who remarked that proviso 6 to section 92 of the Evidence Act "is one of the provisos which is the despair of the judge and the joy of the lawyers" has stated:

"That appears to me to show that where a document itself is a perfectly plain, straight forward document, no extrinsic evidence is required to shpw in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required, and it will therefore be admitted. But it can only be in such cases *where the terms of the documents themselves require explanation*, and then evidence can be led within the restrictions laid down by the proviso."

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(1) 27 I.A. 59. (2) (1925) I.L.R. 3 Ran. 106 (P.C.)
(3)(1925) I.L.R. 49 Bom. 662 at p. 671.

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[See *Ganpatrao Appaji Jagtap* v. *Bapu Bin Tukaram and others* (1).]

Their Lordships of the Privy Council have also stated in *Tsang Chuen* v. *Li Po Kwai* (2) :

" Tindal C.J.'s statement of the law on this subject in *Shore* v. *Wilson* (3) has never been departed from. It may be useful to recall his words : 'The general rule,' he says, 'I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves ; and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it ; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself'."

The said clause (Exhibit C) contains detailed provision as to how the property is to be partitioned and even as to how Municipal-taxes and Government revenue are to be paid:and who was to keep the receipts therefor and the title-deeds for the property. It also provides " that the path leading to the kitchen and thence to the southern boundary of the compound shall be common to both parties." The clause appears to have been thought out well and the respondent's agent has deposed, " It took some 15 to 20 days to draft the deed. * * * * The parties and myself and Annaswamy Iyer gave instructions for drawing up the deed. These instructions

(1) (1920) I.L.R. 44 Bom. 710 at pp. 717, 718 and 719.

(2) (1932) A.C. 715 at p. 727-728.

(3) (1842) 9 Cl. and F. 355, 565.

were given to Mr. Cowasji and Ankelsaria." Messrs. Cowasji and Ankelsaria were members of a leading firm of lawyers in Rangoon. And yet the clause does not contain any reference whatsoever to any door in the western wall of the building or to any right of way from any such door across the appellant's part of the building to the respondent's bath-room or kitchen or anywhere in his part of the building. The right of entry by the said doors and the rights of way across one part of the building to another are so important that they could not have been omitted by an oversight on the part of all concerned. In fact, if such rights were meant to be conferred, they would have defined the rights of way as "easements of way must not be vague or indefinite." (*See* Peacock on the Law Relating to Easements, Third Edition, at page 103) and made detailed provisions for arrangements regarding the right of entry as the doors cannot always be kept open. In this connection it must be noted that they have made detailed provisions even for custody of Municipal-tax and Government revenue receipts and that the learned District Judge, who set aside the decree of the trial Court, has to admit "The defendant cannot be compelled always to keep the door at D open or restrain for ever from closing the door at E."

The clause expressly provides "that the path leading to the kitchen and thence to the southern boundary of the compound shall be common to both parties"; and according to the map (Exhibit B) this path leads not only to the respondent's kitchen but also to his bath-room. So it is not a case in which no provision has been made for access to the respondent's kitchen and bath-room. In fact it appears to be a case in which the maxim *expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of another) should be applied.

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With reference to the contention that " the right to the use of the said lane for all purposes " includes the right of entry by the said doors and the rights of way from them to the respondent's bath-room and kitchen, the subject matter of a grant must not be confused with the purposes for which it may be used. What has been granted by the said clause is the right to use the lane—and not the right to use anything else. The mere fact that he can use the lane " for all purposes " does not add anything to the subject matter of the grant. His right to use the lane is not restricted in any way, but that does not mean that he can, by virtue thereof, claim to have the use of anything else.

The lane is only two feet wide at a point to the south of the door marked E in the western wall of the building. But it is only eight inches narrower there than at its widest part and it is wide enough for a man to pass through. (*See* the map Exhibit B.)

The Court of 2nd Appeal has observed that the sweeper's lane " is flooded during high tides and is dirty and wet as it must be, during the rains." However it is not unusable throughout the day and the respondent's own witness A. K. Ghose has deposed :

> " I know the house occupied by R.M.V.E.S.V. Firm in Myoma Road on the west of the building in suit. I have seen water being carried for that house both through the back door by using sweeper lane and through the front door."

So the lane, the use of which has been granted to the respondent, cannot be absolutely useless even though he has no right of way through the appellant's part of the building.

It may be more convenient to the respondent if he has the rights of way claimed by him ; but these rights of way will be very onerous to the appellant ; and the circumstances are not such as to lead us to the

conclusion that the said rights must have been granted by necessary implication. As has been pointed out by Blagden J. in *Afshar M. M. Tacki* v. *Dharamsey Tricamdas* (1), the test as to whether a term is implied is this :

"* * * let it be supposed that at the time of contracting the question of expressly including the term sought to be implied had arisen. If the Court is satisfied that the parties would both — not one, but both —have said, 'We need not bother about that, it is too obvious '—then the term should be implied : but otherwise it cannot be."

A variety of circumstances has been insisted upon to alter the construction which the words in the said clause naturally bear, but we are unable to see that either in the language used or on the construction of the whole clause—in the light of the surrounding circumstances—there is any room for doubt that the grant of the right to use the lane, although it is for all purposes, does not include any grant of the right to enter the appellant's part of the building by the doors beside the lane or the rights of way across the said part from the said doors to the respondent's bath-room and kitchen. [Cp. *The North Eastern Railway Co.* v. *Lord Hastings* (2) and see the first two paragraphs of the judgment of the Earl of Halsbury L.C., at page 263 of the Report.]

The appeal is allowed. The decree under appeal is set aside and the decree of the Subdivisional Court dismissing the respondent's suit is restored. The respondent must bear the appellant's costs in all Courts.

U SAN MAUNG, J.—I entirely agree.

(1) A.I.R. (1947) Bom. 98 at p. 102. (2) (1900) A.C. 260.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H.C. 1949

Jan. 4.

CYONG AH LIN (APPELLANT)

v.

DAW THIKE (*a*) WONG MA THIKE (RESPONDENT). *

Buddhist Law—Sino-Burman Buddhist—Whether has power to make a will.

Held: That a Sino-Burman Buddhist is a Buddhist and therefore he has no right of making a will.

Tan Ma Shwe Zin and others v. *Koo Soo Chong and others*, (1939) R.L.R. (548) P.C., followed.

A custom or usage to obtain the force of law must be ancient, certain and reasonable and being in derogation of the general rules of law must be construed strictly.

Hurpurshad v. *Sheo Dyal*, (1876) L.R. 3 I.A. 259; *Thein Pe* v. *U Pet*, 3 L.B.R. 175 (F.B.) at p. 178, followed.

Fone Lan's case (1903) 2 L.B.R. 95; *Yin Win Lin and others* v. *Ma Kyin Sein and others*, (1940) R.L.R. 685; *Phan Tiyok and another* v. *Lim Kyin Kauk and others*, (1930) I.L.R. 8 Ran. 57 (F.B.); *Ma E Kywe* v. *Tan Chong Kee and others* A.I.R. (1930) Ran. 192, not followed.

Maung Dwe and others v. *Khoo Haung Shein and others*, (1925) I.L.R. 3 Ran. 29 at p. 35; *Yup Soon E* v. *Saw Boon Kyaung* (1941) R.L.R. 285, distinguished.

Ma Yait v. *Maung Chit Maung*, (1921-22) 11 L.B.R. 155, (P.C.); *Ma Tin* v. *Doop Raj Barna*, Chan Toon L.C., Vol. 1 at p. 370, referred to.

Saw Hla Pru for the appellant.

T. K. Boon for the respondent.

U THEIN MAUNG, C.J.—This is an appeal against probate of the late Cyoung Lone Shwe's will being granted to the respondent. Cyoung Lone Shwe was admittedly a Sino-Burman Buddhist who was born in Burma of Sino-Burman parents. The appellant, who is his son by a previous wife, objected to the probate being granted to the respondent, who is his widow,

* Civil 1st Appeal No. 42 of 1948 against the decree of the High Court, Original Side in Civil Suit No. 288 of 1947, dated 2nd June 1948.

stating "My late father and his parent were Sino-Burmese Buddhists; therefore they were governed by the Burmese Buddhist Law; so the will was invalid. Only pucca Chinese can make the will in accordance to the ruling of the Privy Council." In her reply to this objection the respondent merely stated "The deceased, although a Sino-Burman Buddhist, can make a will according to the present state of law in Burma."

On the said objection and reply the learned Judge on the Original Side framed the issue "Had the deceased the power of testamentary disposition when he made the will?" and decided it in the affirmative on the ground that a Sino-Burman Buddhist is a Chinese Buddhist and can make will as such. In the learned Judge's own words "The fact of his being a Sino-Burman is not a deciding factor nor the fact of the deceased having more Burmese blood than Chinese will remove him from the fold of Chinese Buddhists."

In *Tan Ma Shwe Zin and others* v. *Koo Soo Chong and others* (1) Their Lordships of the Privy Council held:

"*Prima facie* inheritance to the estate of a Chinaman who was domiciled in Burma and was a Buddhist is governed by the Buddhist law of Burma and the burden of proving any special custom or usage varying the ordinary Buddhist rules of inheritance is on the person asserting the variance."

In the course of the judgment therein, Their Lordships observed:

"But while the policy or general purpose of the Legislature in prescribing 'the Buddhist law in cases where the parties are Buddhists' is not in doubt, and has full effect upon the general population of Burma, it is not open to the Courts to adopt some other law for particular classes of Buddhists by reason that the prescribed method will not in such cases attain the desired result. The statute has made such exceptions to the enforcement

(1) (1939) R.L.R. 548.

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of Buddhist law as were considered necessary, including a highly important saving as to custom, and it does not admit of being interpreted in such a sense that Buddhist law is only to be applied to Buddhists if it be the law prevailing in the country of their origin. The historical considerations to which Their Lordships have alluded do not suggest that the intention of the sub-section is to prescribe for each Buddhist whatever law is found to govern him, but rather that all Buddhists shall be governed by a religious law which is deemed to be theirs as Buddhists.

* * * *

Their Lordships find themselves in agreement with the view which was taken by the Judicial Commissioner, Mr. Burgess, in the case of a Buddhist native of Chittagong who had settled in Burma, that '*prima facie* as a Buddhist deceased would come under the Buddhist law of the country at large, and the burden of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance' [*Ma Tin* v. *Doop Raj Barna* (1)]. In *Fone Lan*'s case (2) Sir Charles Fox cited these words and added, 'If by the words 'country at large' he meant 'the province of Burma' I venture to doubt the proposition'; but Their Lordships think that the proposition is well founded. As a question of construction this view is greatly to be preferred to the view that there is really no such law as Buddhist law but only Burmese Buddhist Law; and the consequences which it entails are not less reasonable or convenient than are arrived at by applying to a Chinese Buddhist in the name of justice, equity and good conscience, those English principles of succession from which the Indian Succession Act exempted Buddhists."

In *Yin Win Lin and others* v. *Ma Kyin Sein and others* (3) a Bench of the late High Court of Judicature at Rangoon followed the above ruling and held :

" *Prima facie* inheritance to the estate of a Chinese Buddhist domiciled in Burma is governed by the Buddhist Law of Burma in view of section 13 (*1*) of the Burma Laws Act.

It is however open to a person to establish by clear evidence that the law applicable in such a case is the Chinese Customary

(1) *Chan Toon*, L.C., Vol. 1 at p. 370. (2) (1903) 2 L.B.R. 95.
(3) (1940) R.L.R. 685.

Law which is prevalent in Burma. The burden of proving such special custom or usage opposed to the ordinary rules of the Burmese Buddhist Law of inheritance is on the person asserting that variation."

However, so far as Chinese Buddhists are concerned the custom or usage according to which they can make wills has received judicial recognition long ago. Their Lordships of the Privy Council observed in *Maung Dwe and others* v. *Khoo Haung Shein and others* (1), "though the whole theory of succession depends upon the strict Buddhist view that intestacy is compulsory, this has so far been impinged upon that a Chinese Buddhist is allowed to test." And a Bench of the late High Court of Judicature at Rangoon has held in *Yup Soon E* v. *Saw Boon Kyaung* (2):

"A will is not recognized under Buddhist Law, but the custom or usage varying this strict rule in the case of a Chinese Buddhist has received the recognition of the highest judicial authority for Burma, and therefore a Chinese Buddhist can make a will."

The question as to whether there is a special custom which enables Chinese Buddhists to make wills has been settled. But Sino-Burmans are not Chinese. They are as the name indicates half Chinese and half Burmese. To treat them as Chinese would be like treating an alloy of gold and some other metal as pure gold. Their domicile of origin is not China and the learned Advocate for the respondent has admitted that many Sino-Burmans have adopted Burmese customs and manners and have become Burmans for all purposes. In our opinion Sino-Burman Buddhists form a class or community by themselves. [*Cp.* the case of Kalais in *Ma Yait* v. *Maung Chit Maung* (3).]

(1) (1925) I.L.R. 3 Ran. 29 at p. 35. (2) (1941) R.L.R. 285
(3) (1921-22) 11 L.B.R. 155 (P.C.)

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If they claim that there is special custom or usage prevalent among them varying the strict rule of intestacy under the Buddhist Law, they must allege its existence and prove it by clear evidence.

In the present case the respondent has not even alleged the existence of such special custom and usage ; and in the absence of such allegation and proof the ordinary rules of Buddhist Law must apply.

The learned Advocate for the respondent has invited our attention to *Ma E Kywe* v. *Tan Chong Kee and others* (1). That, however, is a case in which *Phan Tiyok and another* v. *Lim Kyin Kauk and others* (2) was followed. The Full Bench held :

"That Burmese Buddhist Law does not govern the succession to the estate of a Chinese Buddhist born in China but who was domiciled and died in Burma."

But it has been overruled by Their Lordships of the Privy Council in *Tan Ma Shwe Zin and others* v. *Koo Soo Chong and others* (3). Besides, in the present case there is ample evidence of Cyoung Lone Shwe having adopted the Burmese form of Buddhism. He not only *shinpyued* his son but also went to the extent of putting on the yellow robe himself.

The learned Advocate has also suggested that the case might be remanded under Order 41, Rule 25 of the Code of Civil Procedure after framing an issue as to whether there is the special custom or usage among Sino-Burman Buddhists.

However, after reading this Rule with Order 14, Rule 3, as we must, we cannot say that the learned Judge on the Original Side has omitted to frame or try any issue on the materials which were before him. As we have stated above even after the appellant had pleaded

(1) A.I.R. (1930) Ran. 192. (2) (1930) I.L.R., 8 Ran. 57. (F.B.)
(3) (1939 R.L.R., 548 (P.C.)

expressly in his objection "Only pucca Chinese can make the will in accordance to the ruling of Privy Council" the respondent merely replied "The deceased although a Sino-Burman Buddhist can make a will according to the present state of law in Burma." Law and custom are two different things and the respondent never suggested the existence of any custom or usage to vary the law. In fact she actually relied on the law without any reference whatsoever to custom. Under these circumstances we do not see any reason to remand the case at all.

Incidentally Mr. Choon Foung, Government Advocate, who is a Sino-Burman himself has deposed, "Sino-Burmans have been making wills and in fact I know many cases of prominent Sino-Burmans leaving wills just like the deceased Taw Sein Kho, Mr. Chan Chor Pine and Sir Lee Ah Yain." However, he has not stated that there is a custom prevalent among Sino-Burmans according to which they can make wills; and in the absence of any allegation as to the existence of such custom we cannot treat his evidence as evidence of such custom at all. Moreover it cannot by any means be regarded as sufficient evidence. What is required under section 13 (*1*) of the Burma Laws Act is evidence of "custom having the force of law" and such custom is:

> "A rule which in a particular family or in a particular district has from long usage obtained the force of law. It must be ancient, certain, and reasonable and, being in derogation of the general rules of the law, must be construed strictly." [See *Hurpurshad* v. *Sheo Dyal* (1); cp. *Thein Pe* v. *U Pet* (2).]

We hold that the late Cyoung Lone Shwe had no right to make a will and that probate of his will cannot be granted.

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(1) (1876) L.R. 3 I.A. 259. (2) 3 L.B.R. 175 (F.B.) at p. 178.

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CYONG AH LIN v. DAW THIKE (a) WONG MA THIKE.

U THEIN MAUNG, C.J.

The appeal is allowed and the decree under appeal is set aside with costs. Advocate's fee ten gold mohurs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

K. S. ABDUL KADER (APPELLANT)

v.

SRI KALI TEMPLE TRUST (RESPONDENT).*

H.C. 1949

Jan. 27.

Urban Rent Control Act, s. 14 (a)—Stay of execution on certain condition—Failure to perform the condition.

Held: That where the tenant has obtained an order for stay of execution of a decree for ejectment on a certain condition, he cannot, after he has broken that condition, apply again for stay of execution under s. 14 (*1*) of the Act

N. Bose for the appellant.

V. S. Venkatram for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from the order of the 2nd Judge of the Rangoon City Civil Court by which he directed execution of a decree for ejectment of the appellant from certain premises to proceed as the appellant had failed to comply with the condition which was prescribed on his application under section 14 (*1*) of the Urban Rent Control Act, 1948.

The condition so prescribed for stay of execution was that he should pay the rents due on the 7th of each month ; and he has admittedly failed to comply with that condition. It has been suggested that he could not comply with the condition as he was not aware of the fact that the Official Receiver had ceased to be Receiver of the Estate to which the premises belong. However, if he was not aware of this fact he should have offered the rents to the Official Receiver and he admittedly did not do so.

* Civil Misc. Appeal No. 27 of 1948 against the order of the 2nd Judge of the City Civil Court, Rangoon, in Civil Regular Case No. 374 of 1946.

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The only question for consideration is whether a tenant who has obtained an order for stay of execution of a decree for his ejectment on a certain condition, can, after he has broken that condition, apply again for stay of execution under section 14 (*1*) of the Act. We are very clearly of the opinion that he cannot. Execution, which was ordered to be stayed on acertain condition, must be allowed to proceed when there is a breach of that condition. The tenant cannot file one application after another and claim a concession upon concession. Otherwise prescription of the condition will be nothing but a farce and the tenant will be able to have execution postponed indefinitely by a series of applications without complying with the conditions prescribed on any of them. *Reductio ad absurdum* !

The appeal is dismissed with costs. Advocate's fee two gold mohurs. The interim order for stay of execution is discharged.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

U LON AND THREE OTHERS (APPELLANTS)

v.

THE OFFICIAL ASSIGNEE, HIGH COURT, RANGOON AND OTHERS (RESPONDENTS).*

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Jan. 28.

Election of remedies—Official Assignee taking one of the two remedies open to him—Whether debarred from enforcing the other remedy—Suit against a dead person—Whether legal representatives could be made party by subsequent amendment of the plaint—Limitation when no date for payment fixed in the deed of mortgage—Article 132 of Limitations Act—Rangoon Insolvency Act, s. 55—Word "void" means voidable— Bona fide *purchaser for value before transfer sought to be avoided by Official Assignee.*

Held : When the insolvent had executed a deed of transfer which was voidable at the instance of the Official Assignee, on the avoidance of transfer by the Official Assignee, he has an election of two remedies—

(1) he may proceed against the transferee if he had realized the debt or

(2) he may file a suit against the mortgagor.

But he cannot have both the remedies. Where the Official Assignee elected to take a decree for accounts, against the transferee on the allegation that the transferee had realized the mortgage-debt he cannot file another suit against the mortgagor.

Benjamin Scarf v. *Alfred George Jardine*, L.R. (1881-82) 7 A.C. 345 ; *Taylor* v. *Hollard*, L.R. (1902) 1 (K.B.) 676 ; *Morel Bros., & Co., Ltd.* v. *Earl of Westmoreland and Wife*, L.R. (1903) 1 (K.B.) 64 ; *U Po Sein and another* v. *E. M. Bodi*, (1935) I.L.R. 13 Ran. 189, followed.

Held : That if the suit is only against a defendant who was dead then the suit is a nullity and his legal representatives cannot be brought on record. But if the suit was against more than one defendant and would be competent against the defendant who is alive, the court is to see as to whether the deceased person was a necessary party. If he was a *proforma* party the suit may proceed against the living defendant in the ordinary way but if he was a necessary party then the court should see whether the amendment of the plaint can be allowed to bring the heirs on the record, and if this cannot be allowed, it should determine whether the suit can proceed against the other defendants.

Veerappa Chetty and others v. *Tindal Ponnen and others*, (1908) I.L.R., 31 Mad. 86 ; *Rampratab Brijmohandas* v. *Gavrishanker Kashiram*, (1923) 35 Bom. L.R. 7; *Roop Chand* v. *Sardar Khan and others* (1928) I.L.R. 9 Lah. 526; *Firm of Pala Mal Narayan Mal* v. *Fawja Singh*, (1926) A.I.R. Lah. 153, followed.

* Civil 1st Appeal No. 27 of 1948 against the decree of the 1st Assistant Judge's Court of Pyapôn in C.R. Suit No. 20 of 1947, dated 19th February 1948.

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Held further : That when no date for payment is fixed in a document for repayment of debts and it is not repayable " ON DEMAND " but when needed then the period of limitation starts from the date of the execution of the document.

T. C. Bose v. *Obedur Rahman Chowdhury*, (1928) I.L.R. 6 Ran. 297 ; *Gaya Din and others* v. *Jhunman Lal and others*, (1915) I.L.R. 37 All. 400 at p. 405; *Rupomal Kodumal and another* v. *Mt. Janat*, (1941) A.I.R. Sind. 158, followed.

Nilkanth Balwant Natu and others v. *Vidya Narsing Bharati and others*, (1930) I.L.R. 54 Bom. 495 (P.C.) ; *Tan Soon Thye and others* v. *L. E. DuBern*, (1933) I.L.R. 11 Ran. 328, distinguished.

The word " Void " used in s. 51 of the Rangoon Insolvency Act means voidable.

Re : Hart, Ex-parte Green, (1912) L.R. 3 K.B.D. 6 ; *Henderson & Co.* v. *Williams*, (1895) L.R. 1 Q.B.D. 521 at pp. 528-529, followed.

Where the transferee under a transfer voidable at the instance of the Official Assignee, transfers that property before the transfer is avoided to a *bona fide* purchaser for value, such purchaser gets a good title against the Official Assignee.

When Official Assignee failed in duty and as a consequence of such failure a person has acquired title to a property for value, the Official Assignee is estopped from claiming the property from such purchaser.

Mercantile Bank of India, Ltd. v. *Central Bank of India, Ltd.*, (1938) A.C. 287, followed.

Henderson v *Williams*, (1895) 1 Q.B.D. 521, distinguished.

P. K. Basu for the appellants.

M. M. Nair for the 1st respondent.

U THEIN MAUNG, C.J.—This is an appeal from a mortgage decree for recovery of Rs. 8,800 on a registered mortgage (Exhibit A), dated the 26th March, 1929, which was executed by U Tha Ko (since deceased), his second wife Ma Pwa Shwe (the second respondent), and his children by the first wife, *viz.*, Ma Kyin (since deceased), Ma Thin (since deceased), and Maung Mya Maung (the 17th respondent) in favour of T.S.M.R.K.R.M. Firm of Pyapôn.

The circumstances under which the decree has been passed in favour of the Official Assignee

(the first respondent) against the appellants are as follows :

The said mortgage was of Holding No. 9, measuring 125·20 acres in Kundaing North *Kwin*, Pyapôn Township, for Rs. 2,500 with interest at $1\frac{3}{4}$ per cent per mensem. On the 19th October, 1929, the mortgagee T.S.M.R.K.R.M. Firm assigned the mortgage (*inter alia*) to M.R.M.S. Chettyar Firm by a deed which was registered on the 18th June, 1930. (*See* paragraphs 4 and 5 of Exhibit II.)

On the 10th March, 1930, T.S.N. Firm of Rangoon was adjudicated insolvent by the late High Court of Judicature at Rangoon in Insolvency Case No. 14 of 1930 therein.

About four days after the adjudication, the Official Assignee (Mr. Hormasjee) deputed U Ba Than (P.W. 3) to take charge of the account-books and documents of T.S.M.R.K.R.M. Firm, Pyapôn, probably because he was then of the opinion that the order of adjudication affected that firm also. U Ba Than actually took charge of the account books and documents as directed by the Official Assignee ; but the latter not only returned all of them to Palaniappa Chettyar who was then agent of that firm but also directed Palaniappa Chettyar " to collect the debts due to the firm, to pay up the debts of the firm and to hand over the balance left over to him. "

On the 7th August, 1930, U Tha Ko partitioned his assets and liabilities with his children Ma Kyin, Ma Thin and Maung Mya Maung as per registered deed (Exhibit B). At the said partition Ma Kyin got the whole of the mortgaged property and Holding No. 8 measuring 80·78 acres in Kundaing South *Kwin*, Pyapôn Township ; and she was to bear an equal share of the liabilities which then amounted to Rs. 53,500 in all. (*See* Exhibit VI.)

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On the same date, *i.e.* the 7th August, 1930, Ma Kyin and her husband Ko Than Pe (the 5th respondent) mortgaged both the holdings that she got at the partition to Ko Tun and Ko Thaung for Rs. 15,000 with interest at 1½ per cent per mensem as per Exhibit VI; and she subsequently redeemed the mortgage under Exhibit A from Palaniappa. The recitals in Exhibit VI show that she was not aware of the mortgage having been assigned to M.R.M.S. Firm; and Palaniappa, who accepted the money on redemption, returned the mortgage deed (Exhibit A) with an endorsement in an Indian language which has since been translated as "Received principal and interest due on this bond. (Sd.) A.P.L. Palaniappa Chettyar for M.R.M.S. (Dated) 14-8-1930."

On the 1st September, 1930, Ma Kyin and her husband Ko Than Pe sold a portion of Holding No. 9, *viz.*, Holding No. 9/A measuring 78·84 acres to U Lon and Daw Shwe Yin (the first two appellants) for Rs. 14,980 free from the mortgage under Exhibit VI in favour of Ko Tun and Ko Thoung with their consent as per Exhibit V.

On the 22nd June, 1932, Ma Kyin and her husband Ko Than Pe sold the rest of Holding No. 9, *viz.*, Holding No. 9 (B) measuring 46·36 acres to Ma Sein Yin and Ma Tin Nyun (the 3rd and 4th appellants) for Rs. 4,867 as per Exhibit VII which shows that the mortgage under Exhibit VI, on account of the principal of which Rs. 10,000 had been paid out of the sale proceeds under Exhibit V, was fully redeemed with the sale proceeds under it.

On the 29th September, 1933, Mr. P. B. Sen, the learned Advocate for the Official Assignee, issued notices to all debtors of the insolvent firm including U Tha Ko to pay up their debts to the Official Assignee;

but on the 25th January, 1934, the Official Assignee himself cancelled Mr. Sen's notices.

Thereafter the Official Assignee took no further action in the matter till the 9th March, 1937. On that date he filed an application, of which Exhibit II is a certified copy, against M.R.M.S. Chettyar Firm and A.P.L. Palaniappa Chettyar. Therein he stated *inter alia*, that he had been informed of M.R.M.S. Chettyar Firm having fully realized the mortgage debt under Exhibit A [*see* paragraphs 4 (*e*) and 21 of Exhibit II], and asked not only for declaration that the assignment of the mortgage under Exhibit A was void and of no effect as against him but also for declaration that "the respondents are liable to your petitioner for wrongful conversion for which an account be taken for determining the loss occasioned to the petitioner." [*See* paragraph 21 of and prayers (*a*) and (*c*) in Exhibit II.]

M.R.M.S. Chettyar Firm then pleaded that T.S.M.R.K.R.M. Firm had not been adjudicated insolvent and that the transfers to it had been made in good faith for valuable consideration. At the same time it admitted that it had received in full the debts due from U Tha Ko, Ma Pwa Shwe, Ma Kyin, Ma Thin and Maung Mya Maung. (*See* its written objection Exhibit III.)

The Official Assignee's application (Exhibit II) was granted. The High Court of Judicature at Rangoon actually declared the assignment of the mortgage under Exhibit A void as against him under section 55 of the Rangoon Insolvency Act and directed an account to be taken of monies received by M.R.M.S. Firm. (*See* Exhibit IV which is a copy of the formal order dated the 15th December, 1937.) Palaniappa appealed from the said order in Civil Miscellaneous Appeal No. 5 of 1938 in the High Court of Judicature at Rangoon;

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but his appeal was dismissed (*see* Exhibit J); and M.R.M.S. Chettyar Firm did not appeal at all.

It appears from the evidence of U Ba Than that the High Court held in its judgment dated the 15th December, 1937, that T.S.M.R.K.R.M. Firm was also "involved in the insolvency of T.S.N. Firm" as three out of the four partners in T.S.N. Firm were partners in T.S.M.R.K.R.M. Firm although this fact has not been published in any newspaper or *Gazette* yet.

Ultimately on the 25th March, 1941, the Official Assignee (U On Pe) instituted the suit out of which the present appeal has arisen. The suit as originally instituted, however, was against the original mortgagors only.

The plaint has been amended first on the 28th April, 1941, to bring on record the legal representatives of U Tha Ko, Ma Kyin and Ma Thin who died long before the institution of the suit and then on the 25th June, 1941, to make the present appellants, who claimed to be in possession of the mortgaged property as *bona fide* transferees for value without notice, parties defendants to the suit.

The first ground of appeal which has been urged strenuously before us is that the Official Assignee who has elected to get an order for accounts in respect of monies realized by M.R.M.S. Chettyar Firm in full satisfaction of the mortgage debt as against M.R.M.S. Chettyar Firm itself is estopped from suing the mortgagors and their successors-in-title on the mortgage or at all. The Official Assignee's right to sue the mortgagors (and their transferees) on the original mortgage and his right to proceed against M.R.M.S. Firm for recovery of the monies that the Firm had realized in full satisfaction of the mortgage were alternative rights; and he has elected to have his

remedy against M.R.M.S. Firm. So the question is whether he can go back on his election and sue the mortgagors and their transferees on the mortgage. In *Benjamin Scarf* v. *Alfred George Jardine* (1), the customer, who might at his option have sued the late partner or the members of the new firm but could not sue all three together and who had elected to sue the new firm, could not afterwards sue the late partner. In the course of his judgment therein, Lord Blackburn observed (at page 360) :

" Now on that question there are a great many cases ; they are collected in the notes to *Dumpor*'s case (2), and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, *when once he has made his election it cannot be retracted, it is final and cannot be altered.* 'Quod semel placuit in electionibus, amplius displicere non potest.' That is *Coke* upon *Littleton* (3), and I do not doubt that there are many older authorities to the same effect ; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things you cannot retract it and do the other thing ; the election once made is finally made."

In *Taylor* v. *Hollard* (4), it was held that a plaintiff, who had elected to take a foreign judgment in discharge of his whole cause of action, could not afterwards sue for the residue of the original judgment debt in England. Jelf J. observed in the course of his judgment therein (at pages 681-2) :

" What he wants to do is to take from the foreign Court the judgment which that Court gave for the whole cause of action, and treat it as a part-payment and sue for the residue here. To do this would be to approbate and reprobate, or, in more homely language, to blow hot and cold, which neither law nor common sense will allow. See *Barber* v. *Lamb* (5), where Erle C.J. says :

(1) L.R. (1881-82) 7 A.C. 345.
(2) 1 Sm. L.C. 8th ed. 47, 54.
(3) 146 *a*.
(4) L.R. (1902) 1 (K.B.) at p. 676.
(5) 29 L.J. (C.P.) 234 ; 8 C.B. (NS) 95.

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'It would be contrary to all principle for the party, who has chosen such tribunal and got what was awarded, to seek a better judgment in respect of the same matter from another tribunal'."

In *Morel Brothers & Co., Ltd.* v. *Earl of Westmoreland and Wife* (1), it was held—

> "that the signing of judgment against the wife was a conclusive election by the plaintiffs to rely on her liability, and they could not afterwards insist on the liability of the husband."

On appeal from the said judgment the House of Lords held :

> "In such a case judgment against one of the defendants is conclusive evidence of an election not to proceed against the other." [See *Morel Brothers & Co., Ltd.* v. *Earl of Westmoreland* (2).]

In *U Po Sein and another* v. *E. M. Bodi* (3), a Bench of the late High Court of Judicature at Rangoon held :

> "Where the plaintiff in a suit claims relief against two defendants not jointly but in the alternative, and elects to take a decree against one of them, he cannot claim on appeal that a decree ought to be passed against the other defendant." [Cf. *U Po Sein* v. *E. M. Bodi* (1935) I.L.R. 13 Ran. 186.]

It has been suggested that M.R.M.S. Chettyar Firm is a fictitious firm. However, Dunkley J. has stated in the course of his judgment in Civil Micellaneous Appeal No. 5 of 1938 (in which the Official Assignee and M.R.M.S. Chettyar Firm were respondents) that the Official Assignee had established at the hearing of his application Exhibit II "that the M.R.M.S. Firm is a one-man firm called into existence on the 17th October." (*See* Exhibit J at page 33 of the main file.) So the Official Assignee has obviously elected to get an order

(1) (1903) L.R. 1 (K.B.) 64. (2) (1904) A.C. 11.
(3) (1935) I.L.R. 13 Ran. 189.

for accounts against the firm with full knowledge of the nature and constitution of the firm. That M.R.M.S. Firm was not a fictitious one also appears from the fact that there was actual litigation between that firm and the Official Assignee in 1936 before the latter filed his application Exhibit II. [See *M.R.M.S. Chettyar Firm* v. *The Official Assignee, Rangoon*—1936-37 (I.L.R. 14) Ran. 652.] The mere fact that Chidambaram Chettyar has, as recorded in Exhibit K, dated the 26th April, 1938, admitted that he has no beneficial interest in properties which then stood in the name of M.R.M.S. Chettyar Firm cannot make any difference in view of the order as per Exhibit IV, dated the 15th December, 1937. In fairness to the then Official Assignee (Mr. Hormasji) we must add that having regard to all the circumstances of the case and especially in view of the facts that the mortgaged property had not only been redeemed but also changed hands as per registered deeds Exhibits B, VI, V and VII before he filed his application Exhibit II, his election could not be said to have been an unwise one.

So we hold that the Official Assignee is precluded by his previous election from suing the mortgagors and their successors-in-title.

It is hardly necessary for us to discuss the other grounds of appeal. However, we proceed to do so as they involve interesting questions of law.

The suit as originally instituted was against the five mortgagors and three of them, *viz.*, U Tha Ko, Ma Kyin and Ma Thin had died long before the institution thereof. So the learned Advocate for the appellants has contended that legal representatives of those, who were already dead at the time of the institution of the suit, could not be made parties defendants by subsequent amendment of the plaint or at all.

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It has been held in *Veerappa Chetty and others* v. *Tindal Ponnen and others* (1):

"There is nothing in the Code of Civil Procedure to authorize the institution of a suit against a deceased person and the Courts have no jurisdiction to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased, even when the suit is instituted *bona fide* and in ignorance of the death of the defendant." (See also *Mahatap Bahadur* v. *A. C. Mitra and another*—24 I.C. 112.)

In *Rampratab Brijmohandas* v. *Gavrishankar Kashiram* (2), Mulla J. observed (at page 11):

"The suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit, by whomsoever accepted, is also a nullity. Similarly, any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought *bona fide* and in ignorance of the death of such person: *Mohun Chunder* v. *Azeem Gazee* (1899—12 W.R. 45); *Veerappa Chetty* v. *Tindal Ponnen* (1)."

However, the above authorities relate to cases against dead persons only. As regards cases against dead persons jointly with those who are still alive, it has been held in *Roope Chand* v. *Sardar Khan and others* (3):

"The proper order for the Court to pass is to strike off the name of the dead person from the record and then to see whether the suit can or cannot proceed against the other defendants because of the non-joinder of the representatives of the deceased." (See also *Firm Pala Mal Narain Mal* v. *Fawja Singh* A.I.R. 1926, Lahore, 153.)

The learned Assistant District Judge must have misread the judgment in *Roop Chand*'s case (3) since

(1) (1908) I.L.R. 31 Mad. 86. (2) (1923) 25 Bom. L.R. 7.
(3) (1928) I.L.R. 9 Lah. 526.

he has stated in his judgment on the preliminary issue dated the 22nd September, 1941, that the Lahore High Court held " that if a suit is against several defendants one of whom is found to have died before the institution, the suit should not be dismissed, but that it should proceed against the other defendants and the legal representatives of the deceased should be joined if they are necessary parties. In this case it is clear that the legal representatives of the deceased persons are necessary parties to this suit as the suit cannot proceed without them. I am therefore inclined to adopt the view taken by the Lahore High Court." What Tek Chand J. observed in the course of his judgment therein is, " if the deceased was a mere *pro-forma* party, the suit might proceed against the other defendants in the ordinary way. If, however, the deceased was a necessary party, the Court should see whether amendment of the plaint can be allowed to bring his heirs on the record, and if this cannot be allowed, it should determine whether the suit can proceed against the other defendants. It cannot dismiss the suit forthwith without examining this aspect of the case."

At the time of the institution of the suit only Ma Pwa Shwe and Maung Mya Maung were alive. The Court could have proceeded with the suit against them after striking out the names of U Tha Ko, Ma Kyin and Ma Thin who were dead. But the suit would have been infructuous since the personal remedy against Ma Pwa Shwe and Maung Mya Maung was time-barred and they did not then have any right, title nor interest in the mortgaged property. So the learned Assistant District Judge should have considered whether amendment of the plaint could be allowed to bring the heirs of U Tha Ko, Ma Kyin and Ma Thin on record.

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Now the question as to whether the plaint could be allowed to be amended is bound up with the question as to whether the suit was time-barred as against the legal representatives of U Tha Ko, Ma Kyin and Ma Thin on the 28th April, 1941, *i.e.* the date of the first amended plaint. In fact the mere addition of the legal representatives would not have served any useful purpose as U Tha Ko, Ma Kyin and Ma Thin also had ceased to have any right, title or interest in the mortgaged property long before the institution of the suit. So the question is further bound up with the question as to whether the suit was time-barred on the 25th June, 1941, when the present appellants were made parties defendants.

The mortgage deed (Exhibit A) contains the clause " မြန်မာအလိုရှိသောအခါမှာထည်းအတိုးအရင်းပါ အပြေဆပ်ပါမည် " and the learned Assistant District Judge is of the opinion that the mortgage debt is repayable not " on demand " but " when needed." But he has also added that in his opinion it was clearly the intention of the parties that there should be a demand before the liability to pay arose ; and he has actually found that the suit was not time-barred as no demand for payment had ever been made.

We do not see any real difference between " on demand " and " when needed " and a Bench of the late High Court of Judicature at Rangoon has held in *T. C. Bose* v. *Obedur Rahman Chowdhury* (1) :

" Whether the loan is personal or secured by a mortgage, if it is payable on demand, time runs from the date of the loan and not from the date of demand."

The Bench observed in the course of the judgment therein :

" It has been suggested that as the money was payable on demand, it would not become due until a demand had been made,

(1) (1928) I.L.R. 6 Ran. 297.

but on this point we are of opinion that the view taken in the case of *Perianna Goundan* v. *Muthuvira Goundan and another* (1897 21 Mad. 139) is correct. As pointed out in that case under Article 59 of the Limitation Act, limitation in the case of money lent under an agreement that it shall be payable on demand runs from the time when the loan is made and it would be anomalous if limitation ran from a different time in a case where the money was lent on an agreement that it should be payable on demand but is also secured by a mortgage deed. We agree that it is not necessary in cases like the present that an actual demand should be made for limitation to commence under Article 132."

The learned Assistant District Judge has held on the authority of *Nilkanth Balwant Natu and others* v. *Vidya Narasing Bharati and others* (1) and *Tan Soon Thye and others* v. *L. E. DuBern* (2) that the cause of action could not arise until the demand for payment of the mortgage debt was made by the mortgagee and refused by the mortgagors (or their transferees) and that the suit was not time-barred as no such demand had ever been made.

However, as Banerji J. has pointed out in *Gaya Din and others* v. *Jhumman Lal and others* (3) the question as to when the mortgage money becomes due within Article 132 of the Limitation Act is one which depends in each case upon the construction of the particular mortgage-deed ; and the said rulings are easily distinguishable on facts.

Nilkanth Balwant Natu's case has been distinguished in *Rupomal Kodumal and another* v. *Mt. Janat* (4) on the ground that the " decision was upon its own special facts in a case under a Bombay Regulation "; and the learned author, Rustomji, has stated at page 1158 of the Law of Limitation, fifth edition :

" But it is submitted that their lordships' observations must be confined to the facts of that particular case, and they do not

(1) (1930) I.L.R. 54 Bom. 495 (P.C.)
(2) (1933) I.L.R. 11 Ran. 328.
(3) (1915) I.L.R. 37 All. 400 at p. 405.
(4) A.I.R. (1941) Sind, 158.

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lay down any proposition of general application. Ordinarily, when no time is fixed for payment, the mortgage money is 'due' (within the meaning of Article 132) on the date of the execution of the mortgage."

Tan Soon Thye's case, as the head note to the ruling shows, was a case in which :

"The debtor was indebted to his creditor on an on demand promissory note, and in consideration of the creditor not suing him immediately on that note the debtor executed a mortgage in favour of the creditor for the debt, and covenanted therein to pay the debt 'on demand'."

So it was held :

"That, having regard to the context and the common intention of the parties that the debtor should have further time in which to pay the debt, the debtor's promise to pay the debt 'on demand' meant that unless and until the mortgagee made a demand for payment the debtor's obligation to pay would not arise. Hence the period of limitation would run from the dateon which a demand was made by the creditor, and not from the date when the document was executed."

Page C.J. also observed in the course of his judgment therein :

"In my opinion, although *prima facie* a sum payable on 'demand' is repayable forthwith and the words 'on demand' are superfluous, in each case the question whether or not the parties intended that the words 'on demand' should be treated as an integral and operative part of the agreement depends upon the true construction of the agreement into which the parties entered."

In the present case there is nothing in the mortgage deed to show that it was the common intention of the parties to render the money due only on or after actual demand. So we hold that the suit was time-barred when the Official Assignee filed amended plaints making the legal representatives and the present appellants parties defendants thereto.

The amendments ought not to have been allowed and the mere fact that they have been allowed cannot make any difference in view of section 22 of the Limitation Act.

The learned Advocate for the appellants has also contended that the first Assistant Judge who decided the case ultimately should have held that they are *bona fide* purchasers for value without notice. The learned Assistant Judge held that they were not such purchasers as they must be deemed to have had at least constructive notice of the mortgage by Exhibit A which is a registered document. He did not take into consideration the facts (1) that Ma Kyin, one of the original mortgagors has redeemed the mortgage from the assignee of the mortgage and got the mortgage deed back with an endorsement of the mortgage having been redeemed, (2) that Ma Kyin had redeemed the mortgage with the money which she had raised by mortgaging the same property with Ko Tun and Ko Thaung, (3) that she had redeemed the mortgage in favour of Ko Tun and Ko Thoung with the sale proceeds of the same property which she received from the present appellants, (4) that all these transactions took place long before the Official Assignee sought by his application (Exhibit II) to have the assignment of the mortgage set aside under section 55 of the Rangoon Insolvency Act and (5) that the present appellants were not made parties to the said application although the Official Assignee must be deemed to have had notice of the transfers to them inasmuch as they were by registered documents and they must also have been in possession of the respective shares of the property after the said transfers.

Although section 55 of the Rangoon Insolvency Act provides that certain transfers shall be "void as against the Official Assignee" they are merely voidable. [*See* Mulla's Law of Insolvency, pages 434-435.

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Cf. *In re Brall, Ex-parte Norton* (1893) L.R. 2, Q.B.D. 381.] And it has been held in *In re Hart, Ex-parte Green* (1) that—

"A purchaser for value from the donee under a voluntary settlement, without notice of an act of bankruptcy comitted by the settler, is entitled to hold the property as against the trustee in bankruptcy of the settler even though the purchase is subsequent to the act of bankruptcy, to which the title of the trustee relates back." (*See* also *Bonnamai Ammal* v. *The District Official Receiver and another*, 51 M.L.J. 228.)

In the present case there is nothing to show that the appellants and their predecessor-in-title Ma Kyin were aware of the order of adjudication in respect of T.S.N. Firm of Rangoon having affected T.S.M.R.K.R.M. Firm of Pyapòn also or of the assignment of the mortgage by T.S.M.R.K.R.M. Firm to M.R.M.S. Firm having been "a voluntary transfer." In fact the circumstances are such as to indicate that they were not aware of these facts at all.

Moreover, Ma Kyin would not have redeemed the mortgage from Palaniappa Chettyar if he had not been in possession of the mortgage deed; and Ko Tun and Ko Thoung would not have accepted a mortgage of the same property and the appellants would not have purchased it subsequently from her if she had not got the mortgage deed from Palaniappa.

Palaniappa could allow redemption of the mortgage as he was in possession of the mortgage-deed and he was in possession thereof either because the Official Assignee returned it after it had been seized by U Ba Than or because the Official Assignee left it with him with instruction to collect the debt in spite of section 58 (*1*) of the Rangoon Insolvency Act.

(1) (1912) L.R. 3 (K.B.D.) 6.

Besides, T.S.N. Firm was adjudicated insolvent on the 10th March, 1930, and yet the Official Assignee did not apply to have the assignment of the mortgage set aside under section 55 of the Rangoon Insolvency Act till the 9th March, 1937. He should have filed the application within a reasonable time, and had he filed it before the 1st September, 1930, the first two appellants would not have purchased one portion of the property; and if he had filed it before the 22nd June, 1932, the last two appellants would not have purchased the other portion of the property.

The Official Assignee has failed in his duty under the Rangoon Insolvency Act; and it is but fair that he should take the consequences thereof. Lord Halsbury observed in the course of his judgment in *Henderson & Co.* v. *Williams* (1):

"I think that it is not undesirable to refer to an American authority, which, I observe, was quoted in the case of *Kingsford* v. *Merry* (1 H. & N. 503, Vol. I, 1895); *Root* v. *French* (13 Wend. 570, and see Kent's Comm. ii. 514), in which in the Supreme Court of New York, Savage C.J. makes observations which seems to be well worthy of consideration. Speaking of a *bona fide* purchaser who has purchased property from a fraudulent vendee and given value for it, he says: 'He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer, who, by his indiscretion, has enabled such third person to commit the fraud'."

It is true that in *Mercantile Bank of India, Ltd.* v. *Central Bank of India, Ltd.* (2) Their Lordships of the Privy Council have adopted Lord Sumner's view in modification of the above rule that the principle of estoppel depends upon a duty; but here in the

(1) (1895) L.R. 1 (Q.B.D.) 521 at p. 528-529. (2) (1938) A.C. 287.

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present case the Official Assignee has failed in his duty as we have stated above.

So we hold that the appellants are *bona fide* purchasers for value without notice, that the assignment of the mortgage having been declared void after their respective purchases does not affect their title to the property and that they cannot be sued on the mortgage at all.

The appeal is allowed. The judgment and decree under appeal are set aside and the Official Assignee's suit is dismissed with costs.

Costs awarded against the Official Assignee are payable out of the insolvents estate.

U SAN MAUNG, J.—While I am in general agreement with my Lord the Chief Justice, whose judgment I have had the opportunity of reading, I would like to add a few words to his judgment in respect of the first ground of appeal the decision upon which this appeal is really concluded in favour of the appellants. M.R.M.S. Firm against which the respondent had obtained an order directing the Insolvency Registrar of the late High Court to make an enquiry and to take an account of the monies or other movable or immovable property which had been received by the firm or by its principal M.R.M.S. Chidambaram Chettyar or by its agent Palaniappa Chettyar, was not a fictitious one although it might have been a one-man firm called into existence on the 17th of October 1929. Therefore what the Official Assignee had done in obtaining the order dated the 15th of December 1937 from the High Court in Insolvency Case No. 14 of 1930 was to elect to hold M.R.M.S. Firm responsible for the receipt of the amount due on the registered mortgage dated the 26th of March 1929 (Exhibit A) as this is one of the mortgages dealt with in that order. Although

the assignment of this mortgage to M.R.M.S. Firm was declared to be void in the same order, it is clear that the Official Assignee did not then elect to sue the mortgagors and/or their representatives in interest for the amount due on the mortgage.

Now in the case of *Benjamin Scarf* v. *Alfred George Jardine* (1) where a firm of two partners dissloved; one (Benjamin Scarf) retired and the other (W. H. Rogers) carried on the business with a new partner (Beech) under the same style. A customer of the old firm sold and delivered goods to the new firm after the change but without notice of it. After receiving notice he sued the new firm for the price of the goods and upon their bankruptcy proved against their estate, brought an action for the price against the late partner. It was held by the House of Lords, reversing the decision of the Court of Appeal, that the liability of the late partner was a liability by estoppel only, and not jointly with the members of the new firm; that the customer might at his option have sued the late partner or the members of the new firm but could not sue all three together; and that having elected to sue the new firm he could not afterwords sue the late partner. In the course of his judgment in that case, the Lord Chancellor observed (at page 350):

"Now it appears to me that the real question which your Lordships have to determine is not as it was treated in the [Court below—in I think both the Courts below—namely, the question of what is called 'novation'; but it is this, whether in that state of circumstances there was a concurrent joint liability of the three persons, Scarf, Rogers, and Beech upon the principles which I have stated; or whether the plaintiff had a right to make his choice whether he would sue those who were liable by estoppel, or sue those who were liable upon the facts. Put it as I can I am unable to understand how there could have been a joint liability of the three.

* * * *

(1) (1881-82) 7 A.C. at p. 345.

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Therefore it appears to me that if the plaintiff chose to go upon the facts and to make the persons who actually ordered and got the benefit of the goods his debtors (which he had a plain and certain right to do), he entirely disavowed the estoppel and could no longer set it up. If on the other hand he chose to go upon the estoppel, then Beech being a stranger to the liability upon that footing, he could only sue Scarf and Rogers."

In the case under appeal the original mortgagors of the registered deed of mortgage (Exhibit A) and/or their representatives in interest would, in the circumstance of the assignment of the mortgage to M.R.M.S. Firm having been declared to be void, be liable to pay the sum due on the mortgage to the Official Assignee upon whom vested the assets of T.S.M.R.K.R.M. Firm of Pyapôn. Theirs was the liability upon the facts. As regards M.R.M.S. Firm, its liability arises by estoppel. This firm by being a party to the deed of assignment has held itself out to be a firm capable of giving a valid discharge of the mortgage evidenced by Exhibit A after receiving payment therefor. It is now estopped from denying that in the event that has happened, namely, the declaration of the assignment of the mortgage as void, it was not competent to give a valid discharge to the mortgagors of the mortgage evidence by Exhibit A, and therefore not liable to account to the Official Assignee for the sum wrongfully received from the mortgagors.

Therefore the Official Assignee, having chosen to go upon the estoppel by holding the M.R.M.S. Firm liable to account for the sum wrongfully received by them from the mortgagors, cannot now set up the facts and sue the mortgagors and/or their representatives in interest for the sum of money due upon the registered mortgage (Exhibit A).

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

U MAUNG MAUNG (APPELLANT)

v.

DAW THEIN (RESPONDENT).*

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Dec. 6.

Japanese Currency (Evaluation) Act, 1947, s. 3—Its true meaning—S. 4 of the Negotiable Instruments Act—Whether a promissory-note executed in consideration of Japanese Currency could be valid promissory-note.

Held: In view of s. 3 of the Japanese Currency (Evaluation) Act, 1947, the remarks in the Full Bench decision of *Ko Maung Tin* v. *U Gon Man*, (1947) Rangoon Law Reports 149 that Japanese Currency Note was not money and therefore the promissory-note executed in consideration of such money was not a promissory-note is no longer good law in Burma. Such a promissory-note is a negotiable instrument within the meaning of s. 4 of Negotiable Instruments Act.

The decision in *Ko Maung Tin* v. *U Gon Man*, (1947) R.L.R. 149, distinguished.

Messrs. Leong and *Thein* for the appellant.

Tun Maung for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, J.—The plaintiff-respondent Daw Thein May sued the appellant-defendant U Maung Maung on a promissory-note, dated the 22nd December 1944, executed during the Japanese occupation of Burma to recover a sum of Rs. 2,000, and her claim was decreed with costs. It is contended that, as the sum of Rs. 5,000 mentioned in the promissory-note was paid in Japanese currency, the so-called promissory-note of the 22nd December 1944 cannot be considered

* Civil 1st Appeal No. 40 of 1948 against the decree of the 3rd Judge, City Civil Court, Rangoon, in Civil Suit No. 2666 of 1947, dated the 24th May 1948.

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in law to be a promissory-note within the meaning of section 4 of the Negotiable Instruments Act, and this is the only point which is argued during the hearing of the appeal. The case of *Ko Maung Tin* v. *U Gon Man* (1) was referred to, to show that the Japanese currency was not a legal currency in Burma, that a loan in Japanese currency notes was not a loan of money, and that a promissory-note executed in consideration of such notes was invalid in law; and it is further submitted on behalf of the appellant U Maung Maung that the decision in the Full Bench case of *Ko Maung Tin* v. *U Gon Man* (1) applies fully to the case under consideration. This contention appears to us to have overlooked the effect of section 3 of the Japanese Currency (Evaluation) Act, 1947, which is as follows :

"3. (1) Notwithstanding anything contained in any other law for the time being in force, where any debt had been incurred or contractual obligation entered into during the period of the Japanese occupation, which could have been discharged by payment in Japanese currency notes, and if any such debt or contractual obligation, or any part thereof remained unsatisfied or undischarged at the time of the British Military reoccupation of the area where such debt or contractual obligation was incurred or entered into, the said debt or obligation, or such part thereof, as shall have remained unsatisfied or undischarged as aforesaid, shall be satisfied or discharged by payment in legal currency notes or coins to be calculated in accordance with the value of the Japanese currency notes in column III as indicated in the corresponding value of legal currency notes or coins set out in column II, in respect of the debts or contractual obligations incurred or entered into during the corresponding period specified in column I of the Schedule hereunder."

The question then becomes, does the promissory-note in question come within the expression "where any debt had been incurred or contractual obligation

(1) (1947) R.L.R. at p. 149.

entered into during the period of the Japanese occupation" in section 3 referred to above. It appears to us that the expression "contractual" obligation is sufficiently wide in meaning to cover money payable under a promissory-note.

The observation of E Maung J. in the Full Bench case of *Ko Maung Tin* v. *U Gon Man* (1), which appears to give the reason why a promissory-note executed during the Japanese occupation of Burma was not a promissory-note within the meaning of section 4 of the Negotiable Instruments Act, might be reproduced here, which is:

> "If then the enemy in occupation had no right to set up an additional system of currency and to relate it to the system established by the lawful Government it follows that a 'promissory-note' in terms of such currency established by the occupying power does not satisfy the test for a promissory-note within the meaning of section 4 of the Negotiable Instruments Act. A promissory-note within the meaning of the Act must contain an unconditional undertaking to pay a certain sum of money only."

However, as the money payable under a promissory-note executed during the Japanese occupation of Burma comes within the expression 'any . . . . . contractual obligation entered into during the period of Japanese occupation" within section 3 of the Japanese Currency (Evaluation) Act, 1947, we are of opinion that the provisions of section 3 of the Japanese Currency (Evaluation) Act, 1947, have in effect rendered a promissory-note executed during the Japanese occupation of Burma into a promissory-note to pay a certain sum of money within the meaning of section 4 of the Negotiable Instruments Act. In the circumstances, the promissory-note dated the 22nd December 1944 must be considered to be a

(1) (1947) R.L.R. at p. 149.

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promissory-note to pay a sum of Rs. 2,000 in notes which are current in Burma at the present in view of section 3 of the Japanese Currency (Evaluation) Act, 1947. The decision of the City Civil Court on this point must accordingly be considered to be correct and the appeal is dismissed with costs.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

H.C. 1949 Jan. 17.

U OHN KHIN (APPLICANT)

v.

DAW SEIN YIN (RESPONDENT). *

Judgment within the meaning of s. 5 of the Union Judiciary Act, 1948—Order setting aside the appointment of Receiver by the Appellate Court whether comes within its purview—"Final order" meaning of.

Held: That the final order in s. 5 of Union Judiciary Act is a final order in relation to a suit and not in relation to an interlocutory order which leaves the rights of the parties in a suit to be determined by the Court in the ordinary way. Where the Trial Court appointed a Receiver, order of the Appellate Court setting aside of such order is not a judgment or final order within the meaning of s. 5 of the Union Judiciary Act, 1948.

Benoy Krishna Mukherjee v. *Satish Chandra Giri*, I.L.R. 55 Cal. 720 at p. 724; *A.R.A. Arumugam Chettyar and one* v. *V.K.S.K.N.M. Kanappa Chettyar*, I.L.R. 5 Ran. 99; *Mengha Singh* v. *Sucha Singh*, I.L.R. 3 Ran. 307; *Abdul Gaffoor* v. *The Official Assignee*, I.L.R. 3 Ran. 605, referred to.

Abdul Rahman v. *D. K. Cassim & Sons*, I.L.R. 11 Ran. 58 at p. 64; *Dayabhai Jiwandas and others* v. *A.M.M. Murugappa Chettyar*, I.L.R. 13 Ran. 457, followed.

Yeo Eng Byan v. *Beng Seng & Co. and others*, I.L.R. 2 Ran. 469 at p. 473; *P.K.P.V.E. Chidambaram Chettyar and one* v. *V.N.A. Chettyar Firm*, I.L.R. 6 Ran. 703, also followed.

Chan Htoon for the applicant.

E. C. V. Foucar for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, J.—This is an application under section 5 of the Union Judiciary Act, 1948, for a certificate to appeal to the Supreme Court against the decision of this Court passed in Civil Miscellaneous Appeal No. 17 of 1947 whereby the order of the lower

* Civil Misc. Application No. 49 of 1948 being application under section 5 of the Union Judiciary Act for leave to appeal to the Supreme Court against the judgment and decree in Civil Misc. Appeal No. 17 of 1947 of the High Court, Rangoon.

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court appointing the applicant U Ohn Khin as receiver was set aside. The brief facts of the case are that the applicant U Ohn Khin was the husband of the deceased Daw Sein Tin who died at Dedayè on the 6th June 1944, and he sued for possession of certain properties which were alléged to belong to the estate of the deceased Daw Sein Tin at the time of her death. The case of the respondent Daw Sein Yin is, in effect, that there was a divorce between U Ohn Khin and Daw Sein Tin before the latter's death, that a deed of divorce was in fact executed for that purpose and that U Ohn Khin was not entitled to any property belonging to the estate of the deceased Daw Sein Tin as she died, after the divorce had been effected, in the house of the respondent Daw Sein Yin.

It might be mentioned that when the applicant instituted Civil Regular No. 17 of 1944 in the court of the then Additional Divisional Court of Pyapôn he also applied for the appointment of an interim receiver, but which application was dismissed. Subsequently a fresh application was made whereby the applicant was appointed a receiver, which became the subject of the appeal in Civil Miscellaneous Appeal No. 17 of 1947 of this Court.

The question which falls for consideration in the present application is whether the decision made by this Court in Civil Miscellaneous Appeal No. 17 of 1947 on the 4th May 1948 can be considered to be a "judgment, decree or final order" referred to in section 5 of the Union Judiciary Act, 1948. The relevant portion of Order XL, Rule 1 of the Code of Civil Procedure is—"1 (1). Where it appears to the Court to be just and covenient the Court may by order—

(*a*) appoint a receiver of any property whether before or after the decree."

Thus it is clear that the decision of the lower court appointing the applicant U Ohn Khin a receiver in Civil Regular No. 17 of 1944 of the Additional Divisional Court of Pyapôn was clearly an order. The observation made at the end of the judgment of the Privy Council in the case of *Benoy Krishna Mukherjee* v. *Satish Chandra Giri* (1) suggest that the order appointing a receiver is in the nature of an interlocutory order, with which we respectfully agree. In the case of ***Abdul Rahman*** v. *D. K. Cassim & Sons* (2), it was observed as follows :

> " Lord Cave in delivering the judgment of the Board laid down, as the result of an examination of certain cases decided in the English Courts, that the test of finality is whether the order ' finally disposes of the rights of the parties,' and he held that the order then under appeal did not finally dispose of those rights, but left them ' to be determined by the Courts in the ordinary way.' * * * * The finality must be a finality in relation to the suit."

Thus it is clear that the order of this Court passed on the 4th May 1948, setting aside the order appointing the applicant as receiver is not a final order.

In fairness it might be mentioned that it has not been contended that the order of this Court dated the 4th May 1948, was a final order. It has, however, been contended on behalf of the applicant U Ohn Khin that the decision of this Court made on the 4th May 1948, was a judgment within the meaning of section 5 of the Union Judiciary Act, 1948. The expression " judgment " has been considered by the various High Courts in India as well as by the High Court of Judicature at Rangoon, the latest decision of which is

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(1) I.L.R. 55 Cal. 720 at p. 724. (2) I.L.R. 11 Ran. 58 at p. 64.

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the case of *In re Dayabhai Jiwandas and others* v. *A.M.M. Murugappa Chettiyar* (1), where Sir Arthur Page, C.J., at page 475 observed as follows:

"I am of opinion that in the Letters Patent of the High Courts the word 'judgment' means and is a decree in a suit by which the rights of the parties at issue in the suit are determined.

* * * *

A final judgment is a decree in a suit by which all the matters at issue therein are decided. A preliminary or interlocutory judgment is a decree in a suit by which the right to the relief claimed in the suit is decided, but under which further proceedings are necessary before the suit in its entirety can be determined.

All other decisions are 'orders' and are not 'judgments' under the Letters Patent, or appealable as such."

It was observed at the end of the judgment in that case that the earlier decisions of the High Court of Judicature at Rangoon, which were inconsistent with the decision arrived at in that Full Bench case, were to be treated as being overruled, and thus the earlier ruling of the High Court of Judicature at Rangoon must have been cited in respect of the point which was decided during the hearing by the Full Bench. It is, however, contended on behalf of the applicant that the construction given to the expression "judgment" *In re Dayabhai Jiwandas* (1) should not be applied to the construction of section 5 of the Union Judiciary Act, 1948, because, if that was done, the expression "judgment" in section 5 would be a mere superfluity. It has further been urged on behalf of the applicant that the expression "judgment" in section 5 of the Union Judiciary Act, 1948, ought to be given the meaning assigned to it in the case of *A.R.A. Arumugam Chettyar and one* v. *V.K.S.K.N.M. Kanappa Chettyar* (2) so as to include all orders which are appealable under

(1) I.L.R. 13 Ran. 457. (2) I.L.R. 5 Ran. 99.

Order XLIII, Rule 1 of the Code of Civil Procedure. The decision in *A.R.A. Arumugam Chettyar*'s (1) case, was said to have been based on the decisions made in *Mengha Singh* v. *Sucha Singh* (2) and *Abdul Gaffur* v. *The Official Assignee* (3), and it will accordingly be necessary to refer to those two cases. In *Mengha Singh*'s case (2), the Court to which the application was made ordered the defendant under Order XXXVIII, Rule 5 of the Code of Civil Procedure to furnish security before judgment, and it was held that such an order was not a "judgment" within the meaning of Clause 13 of the Letters Patent. In the judgment it was, however, observed as follows (page 309):

> "The question would have been different if an order under Order XXXVIII, Rule 6, had been made, because an appeal from such an order is actually given by the Code and it might be argued that orders against which an appeal is given by the Code ought to be regarded as 'judgment' within the meaning of the Letters Patent."

This observation appears to be *obiter dictum* as the matter which came before the Court on appeal was in connection with an order made under Order XXXVIII, Rule 5, Code of Civil Procedure (which was not appealable under Order 43, Rule 1); moreover, no reasons have been given why all the orders which are made appealable under Order XLIII, Rule 1, Code of Civil Procedure should be considered to be "judgments" to come within the expression "judgment" in Clause 13 of the Letters Patent. It might be observed that no reason was also given in *A.R.A. Arumugam Chettyar*'s case (1) other than that it purported to follow the two earlier rulings mentioned in the judgment of that case. In the case of *P. Abdul Gaffur* v. *The Official Assignee* (3), it was observed that for an

(1) I.L.R. 5 Ran. 99. (2) I.L.R. 3 Ran. 307
(3) I.L.R 3 Ran. 605.

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order made in the ordinary Original Civil Jurisdiction on the Original Side to be appealable it should come within the meaning of the expression "judgment" in Clause 13 of the Letters Patent, or come under Order XLIII, Rule 1 of the Code of Civil Procedure, but it is clear from the judgment of that case that the expression "judgment" within the meaning of Clause 13 of the Letters Patent does not necessarily include the orders which are appealable under Order XLIII, Rule 1 of the Code of Civil Procedure; and the observation of Sir Sidney Robinson, C.J., in the case of *Yeo Eng Byan* v. *Beng Seng & Co. and others* (1), which was cited with approval in the case of *P. Abdul Gaffur* v. *The Official Assignee* (2), is as follows :

> "I agree that a decision which affects the merits of the question between the parties by determining some right or liability may rightly be held to be a 'judgment'; and I think that an order which merely paves the way for the determination of the question between the parties cannot be considered to be a 'judgment'; nor can a mere formal order merely regulating the procedure in the suit, or one which is nothing more than a step towards obtaining a final adjudication."

In the Full Bench case of *P.K.P.V.E. Chidambaram Chettyar and another* v. *V.N.A. Chettyar Firm* (3), the earlier cases were apparently considered, and it was held in that case that the expression "judgment" applies only to such orders as will put an end to the suit or the proceeding in the Court in which it was pending, or where its effect will put the suit or the proceeding to an end, if the order is not complied with. It is not and cannot be disputed that the order of this Court in respect of which a certificate is being applied for can in no way be said to be an adjudication

(1) I.L.R. 2 Ran. 469 at p. 473. (2) I.L.R. 3 Ran. 605.
(3) I.L.R. 6 Ran. 703.

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which will put an end to the suit, nor will it in any way affect the merits of the case, which will be in issue between the parties. If we are to concede to what has been submitted during the argument on behalf of the applicant, it would mean that all sorts of interlocutory orders would be appealable, which will in effect nullify altogether the meaning of the words "final order" in section 5 of the Union Judiciary Act, 1948. It appears to us that the word "judgment" ought to be attributed a meaning which will not be repugnant to the expression "final order" appearing in section 5. We are thus of the opinion that the word "judgment" in section 5 of the Union Judiciary Act, 1948, does not apply to the decision of this Court made on the 4th May, 1948, as that decision will in no way affect the merits of the case, nor will it in any way put an end to the suit, whether directly or otherwise. That decision does not also disturb any right which the applicant possessed and enjoyed at the time of the institution of the Civil Regular Suit No. 17 of 1944. The application is accordingly dismissed with costs, advocate's fee five gold mohurs.

APPELLATE CIVIL.

Before U Tun Byu, J.

H.C. 1948 — Dec. 24.

U PHAN AND ONE (APPELLANTS)

v.

DAW AH MYAING AND TWO OTHERS (RESPONDENTS). *

Maxim quicquid plantatur solo, solo cedit—*Whether an absolute rule of law in Burma.*

Held: That the maxim *quicquid plantatur solo, solo cedit, i.e.*, things attached to the soil become part of the soil, does not form the absolute rule of law in India and Burma.

Thakoor Chunder Paramanick and others v. *Ramdhone Bhuttacharji*, Weekly Reporter (1886) Vol. 6, p. 228; *Shib Dass Banerjee* v. *Bamun Doss Mookerjee*, Weekly Reporter (1871) Vol. 15, p. 360; *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury and others*, I.R.L. 54 Cal. at p. 669; *Vallabhdas Naranji* v. *Development Officer, Bandra*, I.L.R. 53 Bom. at p. 589, followed.

S.P.L.S. Chettyar Firm v. *Ma Pu*, distinguished.

Kyaw Khin for the appellants.

Ba Tu for the respondents.

U TUN BYU, J.—The plaintiff-respondents, Daw Ah Myaing, Ma Nyun Nyun and Aung Tha Nyun filed a suit in the Court of the Assistant Judge, Sandoway, for eviction of the defendant-appellants U Phan and Daw Shwe Hme from a house and the land on which it is situated and for possession of the same, and the suit of the plaintiff-respondents was dismissed with costs. The plaintiff-respondents instituted an appeal in the District Court against the judgment and decree of the Court of the Assistant Judge, Sandoway. The District Court on the 19th November 1947 referred the case back to the Court of the Assistant Judge on the three issues specified by him, and the Assistant Judge thereafter

* Civil 2nd Appeal No. 43 of 1948 against the decree of the District Court of Akyab in Civil Appeal No. 5 of 1947, dated 28th February 1948.

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recorded his findings on those three issues and returned the proceedings to the District Court. The District Court on the return of the proceedings from the Court of the Assistant Judge set aside the judgment and decree of the Court of the Assistant Judge and allowed the appeal of the paintiffs-respondents with costs.

The evidence shows that the land on which the house in the present suit is situated belonged originally to one U Shwe Tha and Daw Loke, who are both dead. U Shwe Tha and Daw Loke were the parents of one Daw Boke Htone and her sister Daw Shwe Hme, who is the second appellant in the present appeal. U Phan, the first appellant, is the husband of Daw Shwe Hme. It was found in this case that the house in question belonged to Daw Boke Htone and her deceased husband U Zeint, that Daw Boke Htone and her husband lived in that house for a few years, that they subsequently allowed one U Tha Zan to live in it and that after U Tha Zan left the place they permitted the defendants-appellants U Phan and Daw Shwe Hme to live in it, and that the defendants-appellants have continued to be in occupation of the house in question. There appears sufficient evidence on which both the lower Courts could have arrived at the findings which they did.

The evidence shows that Daw Boke Htone on the 30th January 1947 executed a registered deed of gift, which has been made Exhibit "A" in this case, in favour of plaintiff-respondents Daw Ah Myaing and her two children Ma Nyun Nyun and Aung Tha Nyun, who are the second and third respondents in this appeal. Daw Ah Myaing is the widow of one Po Nyun, a deceased son of Daw Boke Htone and U Zeint. It has been contended in this case that there is evidence to show that some material in the shape of posts from the old house, which originally stood on this land, had been

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used by Daw Boke Htone and her husband in the construction of the house in question, and that the house in question ought accordingly to be considered to belong to the estate of U Shwe Tha and Daw Loke, who were the parents of Daw Boke Htone and Daw Shwe Hme. It is however not possible to accept this contention in view of the finding of facts which have been arrived at by the lower Courts, and moreover there is no evidence to show that those old posts had not been abandoned by their previous owners or had not been given tacitly to Daw Boke Htone and U Zeint when the latter constructed a new house in the place of the old house on the land in question. It has also been urged on behalf of the defendants-appellants that as the land on which the house is situated originally belonged to U Shwe Tha and Daw Loke the house in question ought to be considered as belonging to the estate of U Shwe Tha and Daw Loke in view of the maxim *quicquid plantatur solo, solo cedit, i.e.*, things attached to the soil become part of the soil. It does not appear that there is any absolute rule of law in Burma that whatever is built into the soil becomes part of the soil, making it subject to the same right as the soil itself. The provisions of clause (*h*) of section 108 of the Transfer of Property Act makes it clear that a person who is in occupation of a land could after the termination of his right to occupy it remove the building which he has constructed on it, provided he leaves the land in the condition in which he first came into possession. The house in question is a wooden house, and it could accordingly be easily removed in accordance with the provisions of clause (*h*) of section 108 of the Transfer of Property Act. The case of *S.P.L.S. Chettiar Firm* v. *Ma Pu* was cited to show that the English maxim had been applied in that case ; but the circumstances in that case are entirely different to the circumstances

in the present case. It does not appear that that case can be said to indicate that the English maxim has become an absolute rule of law in Burma. The cases of *Thakoor Chunder Poramanick and others* v. *Ramdhone Bhuttacharjee* (1) ; *Shib Doss Banerjee* v. *Bamun Doss Mookerjee* (2) ; *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury and others* (3), and *Vallabhdas Naranji* v. *Development Officer Bandra* (4), show that the English maxim of *quicquid plantatur solo, solo cedit* does not form an absolute rule of law in India at the time Burma formed part of India, and this appears to be still the law in Burma.

Next and most important point to be considered is whether it could in this case be properly said that it was intended that the gift made under Exhibit "A" registered deed was to take effect only after the death of the donor Daw Boke Htone. It has been argued that there are expressions in the Exhibit "A" which indicate that that deed was a deed of gift by way of inheritance, thereby implying that the gift purported to be made under Exhibit "A" was to take effect only after the death of the donor Daw Boke Htone and the deed Exhibit "A" was accordingly invalid in law. There does not appear to be much substance in this contention, because there are express words in the deed itself indicating that the donees Daw Ah Myaing and Aung Tha Nyun were to enjoy the property given under the said deed at once. The fact that the deed mentioned that the property was given by way of inheritance does not necessarily mean that it is to take effect only after the death of the donor. We must also look at the other circumstances to see whether the deed

(1) Weekly Reporter (1886) Vol. 6, p. 228.
(2) Weekly Reporter (1871) Vol. 15, p. 360.
(3) I.L.R. 54 Cal. at p. 669.
(4) I.L.R. 53 Bom. at p. 589.

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of gift Exhibit "A" can be construed in the manner contended on behalf of the appellants-defendants. Exhibit "B" is very important in so far as this point is concerned. It was a notice sent on behalf of the donor Daw Boke Htone to the defendants-appellants U Phan and Daw Shwe Hme wherein it was specifically mentioned that U Phan and Daw Shwe Hme should give over possession of the house in question to the plaintiff-respondents Daw Ah Myaing and her two children as the same had been given over to them. Exhibit "E" reply sent by U Phan and his wife Daw Shwe Hme does not allege anywhere that the alleged gift of the house in question to the plaintiffs-respondents were merely a sham gift to take effect only after the death of Daw Boke Htone. It is suggested on behalf of the defendants-appellants that there is no evidence to show that the Exhibit "B" was actually sent on behalf of the donor Daw Boke Htone. It is not possible to accept this contention in view of the evidence of U Tone Shein who wrote the Exhibit "B" and who was not cross-examined to suggest that he did not have the authority of Daw Boke Htone to send the notice Exhibit "B" to the defendants-appellants, U Phan and Daw Shwe Hme. It is further urged on behalf of the defendant-appellants that the donor Daw Boke Htone had herself in her examination stated that she did not intend to give away the property in question to the plaintiffs-respondents before her death. Her evidence on this point is contradictory. She appears to be a very old lady of about 77 years of age, and her evidence should be considered in the light of other circumstances in this case. In any case the Exhibit "B" notice sent on her behalf by U Tone Shein shows clearly, besides the internal evidence of the deed of gift itself, that Daw Boke Htone had given over possession of the house in question to the donor

Daw Ah Myaing and her two children. The decision of the District Court in this case must be considered to be correct, and the appeal is accordingly dismissed with costs.

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APPELLATE CIVIL.

Before U San Maung, J.

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Dec 11.

M. M. SHERAZEE (APPELLANT)

v.

DAW KHIN SAN (RESPONDENT). *

Upper Burma Land Revenue Regulation, ss. 41 (1) (d) and 42 (1), Rules 156, 170, 171 and 173—Sale of land for land revenue—Title of purchaser when vests—Is proof of confirmation necessary.

Held : Where immovable property has been sold by the Assistant Collector under Rule 156 (2) of the Rules made under the Upper Burma Land and Revenue Regulations (1889) such sale is subject to confirmation by the Collector under Rule 170. The combined effect of s. 42 (1) of the Regulation and Rule 173 (2) and Rule 171 (2) is that after the sale takes place such sale, unless set aside, shall be confirmed by the Collector.

In the absence of proof of setting aside of sale, it will be presumed that the title passed to the purchaser.

Though there is provision of grant of Sale Certificate yet the Sale Certificate does not transfer title, but is merely the evidence of sale.

Basir Ali v. *Hafiz Nazir Ali*, I.L.R. 43 Cal. 124, followed.

Though in sales under the Code of Civil Procedure the title vests only on the confirmation of the sale yet once the sale is confirmed, it takes effect not from the date of its confirmation but from the date of the actual sale.

Bhawani Kunwar v. *Mathura Prasad Singh*, I.L.R. 40 Cal. 89 (P.C.), followed.

P. K. Basu for the appellant.

U SAN MAUNG, J.—This is an appeal by M. M. Sherazee under section 100 of the Civil Procedure Code from the appellate decree of the District Judge of Mandalay in his Civil Regular Appeal No. 6 of 1948, wherein he confirmed the judgment and decree of the Court of the 1st Assistant Judge of Mandalay in Civil Regular Suit No. 41 of 1947. Of the several grounds mentioned in the memorandum of appeal, the first three relate to the alleged misplacing of the burden of proof by the learned District Judge

* Civil 2nd Appeal No. 78 of 1948 against decree of the District Court of Mandalay in Civil Appeal No. 6 of 1948.

and the fifth to the contention that the learned District Judge should have held that the suit as framed was not maintainable and should have directed the appellant to withdraw the suit with permission to file a fresh suit properly reconstituted. This latter ground was however not raised before the learned District Judge and was also not pressed before this Court. The other grounds which relate to the finding of fact by the lower Appellate Court were not argued before this Court and in fact they cannot be entertained in an appeal under section 100 of the Civil Procedure Code.

The facts of the case briefly are these: In Civil Regular Suit No. 41 of 1947 of the 1st Assistant Judge of Mandalay, the plaintiff-appellant M. M. Sherazee sued the defendent-respondent Daw Khin San for a declaration that he was entitled to the rents collected by U Tun Pe, Registrar of the District Court of Mandalay, from the cultivators who worked 600 acres of land in Yeboke *kwin* in Amarapura Township during the year 1945-46 on the ground that he was the owner of the lands, and that Ma Khin San was denying his ownership thereof and to his title to the rents for the year 1945-46. Ma Khin San, in her written statement, denied that M. M. Sherazee was the owner of the lands in suit and contended that she had become their owner by virtue of sales by a Revenue Officer (U Soe Ya, Township Officer of Amarapura), in a process for the recovery of arrears of land revenue and that the lands had been subsequently mutated to her name and tax tickets issued in her name for the revenue years 1945-46 and 1946-47. M. M. Sherazee, in his reply to the written statement, admitted the auction sale of his lands by the Township Officer of Amarapura, but contended that the sale had been set aside as illegal by the Additional District Commissioner on payment of the arrears of land revenue and

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10 per cent of the purchase price as compensation to the purchaser. He made no reply as regards Ma Khin San's allegations that the lands had since the date of the auction sale been mutated to her name and that tax tickets issued in her name for the years 1945-46 and 1946-47. To Sherazee's reply, Ma Khin San filed a rejoinder denying that the auction sale had been set aside by the Additional District Commissioner in the circumstances alleged by the plaintiff-appellant. The learned trial Judge [U Maung Gale (2)] at first framed five issues as mentioned in page 23 of his proceedings, but his successor (U Tun Myint) examined the pleaders for both parties and with their consent framed only one amended issue in place of those previously framed by his predecessor. The question involved in the amended issue is as to whether the sale made by the Township Officer of Amarapura had been set aside by the Additional District Commissioner as expressly alleged by the plaintiff or confirmed by the Additional District Commissioner as impliedly contended by the defendant.

Regarding the burden of proof in the case the learned trial Judge observed :

" The burden is on the plaintiff to prove that the sale has been set aside by the Deputy Commissioner. If he fails to prove it, the defendant is still entitled to retain the lands with her though she may not be able to prove that the sale has been confirmed. The burden is therefore heavily placed on the plaintiff."

After discussing the evidence of witnesses for the plaintiff-appellant in regard to the deposit of the purchase price and 10 per cent compensation by the appellant and giving his reasons for disbelieving them he observed :

" In conclusion I have no other alternative than to hold that the plaintiff is not successful to discharge the burden that lay on him. The issue is decided accordingly against him."

The learned District Judge, who was not slow to realize that the question of burden of proof was important, made the following observations in his judgment :

" The first ground of appeal advanced on behalf of the defendant is that the lower Court misplaced the burden of proof on the appellant. True that the burden of proving the first issue was placed on the plaintiff by the lower Court and that the plaintiff has been held to have failed to discharge the burden falling on him. In my view, the burden of proof has been rightly placed on the plaintiff, because if no evidence were produced by either party and if the issue were to be decided in the light of the pleadings only, the issue would have to be answered against the plaintiff. Therefore the first ground of appeal must be held to have no substance in it."

Thereafter, the learned District Judge carefully discussed the evidence of the witnesses for the plaintiff and concurred with the trial Judge's finding on fact in the following terms :

" For all the reasons given above, I cannot help coming to the conclusion that the learned trial Judge was fully justified in coming to the finding that the plaintiff has failed to discharge the burden falling on him of proving the first issue. In the result the appeal is dismissed with costs."

Now, the question of burden of proof raises the difficult question as to whether in a sale of immovable property under clause (*d*) of sub-section (1) of section 41, Upper Burma Land and Revenue Regulation, 1889, by an Assistant Collector the property vests in the purchaser from the date of the sale or from the date on which the sale is confirmed by the Collector under the provisions of sub-rule (3) of Rule 171 of the Rules under the Upper Burma Land and Revenue Regulation, 1889. Sub-section (1) of section 42 of the above Regulation provides that when any immovable

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property is sold under the chapter relating to the collection of revenue for the recovery of an arrear due in respect thereof, all leases, liens and other incumbrances on the property shall be extinguished and all grants or contracts previously made by any person other than the purchaser in respect of the property shall become void as against the purchaser unless the Revenue Officer duly empowered in this behalf has otherwise directed. Under sub-rule (2) of Rule 156 of the aforesaid Rules, an Assistant Collector in charge of a township may enforce the processes described in clauses (*a*), (*b*) and (*d*) of sub-section (1) of section 41, and this includes attachment and sale of immovable property belonging to the defaulter. However, sub-rule (1) of Rule 171 provides that a sale of immovable property by an Assistant Collector under Rule 170 *shall be subject to confirmation* by the Collector. It has been urged by the learned counsel for the appellant that, when immovable property is sold by an Assistant Collector under Rule 170, the property does not immediately vest in the purchaser from the time of the sale, and that the vesting is only contingent on the sale being confirmed under sub-rule (3) of Rule 171. However, this contention, though plausible on a superficial view of the matter, does not seem to bear close analysis. For this purpose it will be necessary to reproduce sub-rule (3) of Rule 170 relating to the sale of immovable property by an Assistant Collector in so far as is relevant for the purpose of this case. The sub-rule runs as follows :

"(3) At the place and on the date fixed in the proclamation the Revenue Officer, if the arrear and costs have not been paid, may sell by public auction the right in the whole of the property or in such part thereof as he may deem sufficient for the realization of the arrear and costs. * * * *. Before the sale the Revenue Officer shall read from the proclamation the description

of the property and the rights to be sold, and if the whole of the property on which the arrear has accrued is not offered for sale he shall describe the part to be sold. If the property is sold the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent on the amount of the purchase money and in default of such deposit the property shall forthwith be put up again and sold. The full amount of the purchase money shall be paid by the purchaser before the office closes on the tenth day after the sale of the property. In default of payment of the balance of purchase money within the period allowed the right in the property may be resold and the deposit forfeited to Government, and thereupon the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which the right in the property may be subsequently sold."

Sub-rule (2) of Rule 171 relating to the setting aside of the sale should also be reproduced. It runs as follows :

"(2) A sale shall not be confirmed until a period of 75 days from the date on which revenue fell due and also a period of one month from the date of the sale have elapsed. At any time before such periods have elapsed the sale shall, and at any time before confirmation the sale may, be set aside by the Collector if the defaulter himself pays, or any person whose interest in the land has been established to the satisfaction of the Collector pays on behalf of the defaulter, the amount of the arrear and costs, together with 10 per cent of the purchase price to be paid as compensation to the auction purchaser, provided that where the payment of the arrear and costs is for any reason accepted more than one month after the date of the sale the Collector may, for reasons to be recorded, require a payment up to 25 per cent of the purchase price as compensation.

If the property has been bought in for Government the purchase price for the purpose of calculating the compensation shall be taken to be the amount of the arrear and costs."

When section 42 (1) is considered together with sub-rule (3) of Rule 170 and sub-rule (2) of Rule 171 quoted above, it is clear that when immovable property is sold by an Assistant Collector under Rule 170 all the consequences mentioned in section 42 will ensue

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immediately, subject, of course, to the sale being confirmed by the Collector after a period of one month had elapsed from the date of the sale because sub-rule (3) of Rule 170 speaks of the property being sold to the purchaser at the time of the sale, and sub-rule (2) of Rule 171 speaks of the sale being set aside by the Collector if the defaulter himself pays, or any person whose interest in the land has been established to the satisfaction of the Collector pays on behalf of the defaulter, the amount of arrear and the costs, etc. In short, if the immovable property is sold, the consequences mentioned in sub-section (1) of section 42 ensue; and the property is, in fact, sold under sub-rule (3) of Rule 170. Otherwise sub-rule (2) of Rule 171 would only provide that the Collector should not confirm the sale in the circumstances mentioned therein, and not that the Collector should set aside the sale. If there had been no sale within the meaning of section 42 (1), the provision that the Collector should set aside the sale would be meaningless. In coming to this conclusion I am not unmindful of the provision of sub-rule (3) of Rule 171, which provides that, on confirmation by the Collector, the sale shall become absolute subject to any orders passed on appeal or revision and that when the sale has become absolute a certificate of sale shall be given to the purchaser in the prescribed form which appears at page 264 of the Upper Burma Land Revenue Manual, 1939. However, it is settled law that a sale certificate does not transfer the title and that it is only evidence of the transfer; see *Basir Ali* v. *Hafiz Nazir Ali* (1). I am also not unmindful of the provisions of Rule 172, which provides that, when a sale of immovable property under Rule 170 to a purchaser other than Government for the recovery of arrear due in respect thereof has

(1) 43 Cal. 124.

become absolute, the Revenue Officer may, on application being made to him, summarily eject any person found in occupation of the property. In my opinion, this latter rule does not necessarily imply that the auction purchaser is only entitled to possession of the property sold to him after the sale has become absolute ; it only provides for the summary ejection of a person found in occupation of the property if an application for this purpose is made by the auction purchaser to the Revenue Officer.

In coming to the above conclusion, I am aware that there is weight of authority against it, if the sale of immovable property in execution of a decree affords an exact analogy. For instance, under the heading " Vesting of property in auction-purchaser " in Mulla's note to section 65 of the Civil Procedure Code (page 264 of the Code of Civil Procedure, 11th Edition, by D. F. Mulla) the following passage occurs :

" In the case of a private sale of immovable property, the property vests in the purchaser from the time when the deed of sale is executed. The reason is that a voluntary sale becomes absolute on execution and delivery of the deed by the vendor. In the case, however, of a Court sale, the property does not vest in the purchaser immediately on the sale thereof. The reason is that a compulsory sale does not become absolute until some time after the sale. A period of at least thirty days must expire from the date of sale before the sale can become absolute. During that period the sale is liable to be set aside at the instance of the judgment-debtor on the ground of irregularity in publishing or conducting the sale, or on deposit by him in Court of the amount specified in the sale proclamation together with a percentage on the purchase money by way of compensation to the purchaser (O. 21, rr. 89-90). The application by the judgment-debtor to set aside the sale in either of these two cases must be made within 30 days from the date of sale. Where no such application is made, the Court must make an order confirming the sale, *and it is upon such confirmation that the sale becomes absolute* (O. 21, r. 92). After the sale has become absolute, a certificate is granted by the

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Court to the purchaser which is called a certificate of sale (O. 21, r. 94). Such certificate bears as date the day on which the sale became absolute. It is only when the sale becomes absolute that the property sold vests in the purchaser. * * * *"

However, a comparison of section 316 of the Code of Civil Procedure, 1882, section 65 of the Code of Civil Procedure, 1908, and sections 41 and 42 of the Upper Burma Land and Revenue Regulation, 1889, reveals that the sale of immovable property in execution of a decree cannot afford an exact analogy to a sale of immovable property for recovery of arrear of land revenue. Section 316 of the Code of 1882 is as follows :

"When a sale of immovable property has become absolute in the manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale ; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before :

Provided that the decree under which the sale took place was still subsisting at that date."

From this it is clear that under the old Code the title of the auction-purchaser to immovable property sold at an execution sale vests in the purchaser from the date of the certificate of sale, that is to say the date on which the sale becomes absolute. The change in the law introduced by section 65 of the new Code is such that, when the sale has become absolute, the title vests in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. Therefore, by necessary implication, no title whatsoever vests in the purchaser until the sale has become absolute, though, when it does vest in him, the vesting of the property relates back to the date of

the sale. On the other hand, by necessary implication, when immovable property is sold under clause (*d*) of sub-section (1) of section 41 of the Upper Burma Land and Revenue Regulation, 1889, the property vests in the purchaser from the time it is sold, and the consequences mentioned in sub-section (1) of section 42 ensue.

As already mentioned above, when immovable property is sold by an Assistant Collector, the actual sale takes place at the time a person who has been declared to be the purchaser has deposited 25 per cent of the amount of the purchase money, and not when the sale is confirmed by the Collector under sub-rule (3) of Rule 171. I am considerably fortified in the view which I take of this matter by the observations of Their Lordships of the Privy Council in *Bhawani Kunwar* v. *Mathura Prasad Singh* (1) where, if I may say so with great respect, Their Lordships appear to have laid down as a general proposition of law that the sale in execution of a decree takes effect not from the date of its confirmation but from the actual date of the sale. In the case herein cited the sale in execution of the mortgage decree took place on the 19th March, 1900, while the Civil Procedure Code, 1882, was in force, and Their Lordships of the Privy Council could not have overlooked the provisions of section 316 of that Code corresponding to section 65 of the Code of Civil Procedure, 1908. In fact, pages 98 and 99 of the report shows that in the arguments of the counsels for the appellants both these sections were mentioned before Their Lordships. Therefore where Rule 170 of the Rules under the Upper Burma Land and Revenue Regulation, 1889, provides for the sale of immovable property in a process for the recovery of arrear of land revenue and Rule 171 of the aforesaid Rules provides

(1) 40 Cal. 89.

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for the confirmation of the sale under Rule 170, it is clear that the sale is with effect from the date of the sale and not from the date of its confirmation.

Sub-rule (1) of Rule 171 is somewhat misleading as it seems to connote that only a sale of property by an Assistant Collector under Rule 170 needs to be confirmed. In fact, all sales by Revenue Officers under Rule 170 have to be confirmed. If the sale is conducted by the Collector, it must be confirmed by himself, whereas if the sale is conducted by an Assistant Collector, it must be confirmed by the Collector, to whom the Assistant Collector is subordinate. Otherwise, section 45 of the Upper Burma Land and Revenue Regulation, which provides for the allocation of the sale proceeds towards payment of arrears of land revenue and the balance of the proceeds towards refund to the defaulters when a sale of property under Chapter IV *has become absolute*, becomes meaningless. The marginal note to section 45 in the Upper Burma Land Revenue Manual, 1939, refers to Rule 171, and it is clear that this is the only rule which deals with the manner in which a sale of immovable property under Rule 170 becomes absolute. From the wording of sub-rule (3) of Rule 171 it is apparent that the sale only becomes absolute on confirmation by the Collector.

Now, a comparison of section 42 and section 45 of the Upper Burma Land and Revenue Regulation, 1889, clearly reveals that, whereas section 42 speaks of the consequences which ensue when immovable property is sold for the recovery of an arrear of revenue, section 45 speaks of the steps to be taken when the sale of property under the same chapter for the recovery of an arrear of revenue has become absolute. If it was intended by the Legislature that the consequences mentioned in section 42 should only ensue when the sale has become absolute, surely words to this effect

would appear in this section. The absence thereof in this section leads to no other conclusion than that the consequences mentioned therein ensue as soon as immovable property is sold for the recovery of an arrear of revenue, and, as already mentioned above, the sale is effective from the date of the sale and not from the date of its confirmation.

It may perhaps be argued that, when the Upper Burma Land and Revenue Regulation, 1889, was enacted, the Civil Procedure Code of 1882 was in force and that the Legislature therefore had in mind the provisions of section 316 of the Code relating to the vesting of the title to the property from the date of the certificate of sale. To reinforce that argument it can be pointed out that in some of the rules, such as Rules 8, 9 and 10 specific references have been made to the Civil Procedure Code, 1882. However, it is not a sound rule of interpretation to construe the provisions of one enactment by reference to those of another not in *pari materia* with it.

For these reasons, I hold that both the learned Judge of the trial Court and the learned Judge of the District Court had correctly placed the burden of proof in the case under appeal upon the plaintiff-appellant, M. M. Sherazee, to prove that the sale made by the Township Officer, Amarapura, had been set aside by the District Commissioner, Mandalay. This is sufficient to dispose of this appeal. However, before I leave this case I would like to mention that, had it been necessary for me to decide the point, I would have held that, on the evidence on record, the sale by the Township Officer, Amarapura, of the lands in suit must be deemed to have been confirmed by the District Commissioner, Mandalay. These lands have since been assessed in the name of the respondent Daw Khin San, and if the evidence of Maung Mya Maung (D.W. 5),

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the Revenue Surveyor who was in charge of Yeboke *kwin* after the British occupation of Burma, be believed —and I see no reason for not accepting his evidence as true—he had reconstructed the register relating to the suit lands in Yeboke *kwin* by a reference to Revenue Proceedings Nos. 72/RA and 73/RA of the Township Officer, Amarapura. The ordinary presumption under section 114 of the Evidence Act would then arise that the Deputy Commissioner, Mandalay, had confirmed the sale, so that when Maung Mya Maung inspected the proceedings the lands still remained in the name of the respondent, Daw Khin San. In the result, the appeal fails and must be dismissed.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

BIN HONG & CO. (APPELLANT)

v.

ABDUL JABAR (RESPONDENT).*

H.C. 1949. Feb. 4.

Workmen's Compensation Act, s. 39 (1)—When appeal lies.

Held: That the Commissioner for Workmen's Compensation is competent to make an order against an employer under s. 8 (*1*) of Workmen's Compensation Act for deposit of compensation when there has been a proper inquiry as provided in rules 19, 20, 21, 23, 24, 25 and 29 made under Workmen's Compensation Act. Where the Commissioner made an irregular order for deposit, such an order does not fall within the provision of s. 39 (*1*) (*a*) of Workmen's Compensation Act and hence is not appealable.

Ba Maung for the appellant.

U SAN MAUNG, J.—This is an appeal by Bin Hong & Co. against the order of the Commissioner for Workmen's Compensation, Rangoon, dated the 30th July 1948, which is in the following terms :

"Inspected the No. 8 Rice Mill at Kanaungtoe and examined the Tindal, Oil-man and the Manager of the Mill. I am satisfied that the accident happened in the course of and arising out of the employment for which Amina Ullah was paid by his employers. Ask Bin Hong Rice Mill Company to deposit compensation of Rs. 2,400 (Two thousand four hundred rupees only) less Rs. 125 (One hundred and twenty five) being advances and funeral expenses."

The circumstances which led the Commissioner for Workmen's Compensation to record such an order in the diary of his proceedings are as follows :

One Amina Ullah who was a punkah-wallah employed by the appellants Bin Hong & Co. of No. 8 Rice Mill, Kanaungtoe, died on the 18th March

* Civil Misc. Appeal No. 32 of 1948 against the order of the Commissioner for Workmen's Compensation, Rangoon, in W.C. No. 31 of 1948, dated the 30th July 1948.

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1948 of an accident alleged to have been met by him in the course of his employment as such punkah-wallah. On the 20th April 1948, the respondent Abdul Jabar filed an application in Form G of the forms annexed to the Workmen's Compensation Rules, 1924, for an order to deposit compensation. In that application he stated *inter alia* that he was a dependant of the deceased workman being his uncle, and that he should be awarded such compensation as he might be entitled to. The Commissioner for Workmen's Compensation then issued a notice to the appellants in Form X wherein it was stated that he had received information that Amina Ullah had died as a result of an accident arising out of and in the course of the appellants' employment, and that the appellants should in accordance with section 10A of the Workmen's Compensation Act, 1923, submit the particulars required in paragraphs 1 and 2 and the particulars required in either paragraph 3 or 4 in Form Y. It was also stated that in the event of the appellants admitting the liability to pay compensation, the necessary deposit must under section 10A (2) of the Act be made within 30 days of the receipt of the notice. The appellants then filed a statement in which they admitted the death of their employee Amina Ullah on the 18th March 1948, as a result of an accident, but disclaimed liability to pay any compensation on the ground that the death did not arise in the performance and discharge of the duties assigned to him. They also pointed out that the respondent Abdul Jabar was on his own showing not a dependant within the meaning of the Workmen's Compensation Act as he was himself an employee of Chip Bee & Co. The Commissioner for Workmen's Compensation then summoned and examined Abdul Jabar and the witnesses cited by him. He also made a local inspection of the

Mill and examined the Tindal, Oil-man and the Manager of the Mill. He then recorded an order which is the subject matter of this appeal. Subsequently on the 9th of August 1948 he sent a notice to the appellants in the following terms :

> "The No. 8 Rice Mill at Kanaungtoe was inspected and the Tindal, Oil-man and the Manager of the Mill were examined. There is ample evidence that the accident arose out of and in the course of the deceased's employment. You are therefore directed to deposit at an early date the compensation due, *viz.*, Rs. 2,400 less Rs. 100 on account of advance payments and Rs. 25 on account of funeral expenses admissible under the Act."

As no deposit was made in pursuance of this notice a reminder was sent on the 24th August 1948. This also failed to achieve the desired result. A third notice was sent on the 2nd of September 1948 in the following terms :

> "You have so far failed to deposit the sum of Rs. 2,400 less Rs. 100 on account of advance payments and Rs. 25 on account of funeral expenses admissible under the Workmen's Compensation Act as directed in the memorandum referred to above.
>
> In the statement filed in this office the Managing Partner, Bin Hong Rice Mill, has stated that the death of Amina Ullah, late punkah-wallah, did not arise in the course of discharge of the duties assigned to him. It was stated in his statement that the deceased went and tinkered with that part of the pulley where he had no business to be. From the evidence available in this office there is no eye witness to support the statement. If you wish to produce witnesses in support of your statements you are at liberty to submit to this Court a list of witnesses within seven days from the date of receipt of this letter.
>
> As regards the distribution of the amount of compensation to the dependants it will be left entirely to

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the Commissioner for Workmen's Compensation, Chittagong, East Pakistan, to disburse the amount in accordance with the provisions of the Workmen's Compensation Act."

To this last notice the appellants replied by filing a petition dated the 6th September 1948 in which they stated *inter alia* that whereas they understood from the Commissioner's first notice that their defence that the accident resulting in the death of Amina Ullah did not arise out of and in the course of his employment was decided against them, his third notice appeared to convey the intimation that their liability to pay compensation had not yet been finally decided and that if this interpretation be correct, they should not be directed to deposit any compensation. On the next day the appellants sent a notice to the Commissioner for Workmen's Compensation that if his diary order dated the 30th July 1948 was to be taken a judgment, they had no option but to take up the matter on appeal to the High Court. To this the Commissioner replied that his diary order dated the 30th July 1948 was an order under section 8 of the Workmen's Compensation Act as he had reasons to believe that the dependant was under a legal disability. He also stated that since nothing had been mentioned in the order as to how the amount to be deposited should be distributed to anybody, his order cannot be construed as one against which an appeal would lie to the High Court under section 30 of the Workmen's Compensation Act. The appellants then deposited the amount required of them by the Commissioner before filing this appeal.

Several grounds have been mentioned in the memorandum of appeal, but these may be condensed into two main grounds :

(1) That the Commissioner for Workmen's Compensation erred in law in not

following the procedure as laid down in Part V of the Workmen's Compensation Rules, 1924.

(2) That the applicant Abdul Jabar had no *locus standi* to file the application as he was not a "dependant" of the deceased Amina Ullah as defined in the Workmen's Compensation Act.

Undoubtedly the respondent Abdul Jabar who was an applicant before the Commissioner for Workmen's Compensation was not a dependant as defined in clause (*d*) of sub-section (*1*) of section 2 of the Workmen's Compensation Act, 1923. In fact he appears to have made his claim on behalf of a minor son of a younger brother of the deceased Amina Ullah, who is also not a dependant of the deceased as defined in that clause. (*See* page 15 of File No. W.C.31/48 of the Office of the Commissioner for Workmen's Compensation). However it is clear that the Commissioner has not regarded him as a dependant because he had issued to the appellants a notice in Form X. Such a notice is only issued when a Commissioner receives information from any source that a workman has died as the result of an accident arising out of and in the course of his employment and not when he receives an application in Form G. When such an application is received, the procedure to be followed is as contained in rules 19 *et seq* of the Workmen's Compensation Rules, 1924. The applicant has to be examined on oath under rule 20 and the Commissioner may for reasons to be recorded in writing summarily dismiss the application under rule 21. If the application is not dismissed under this rule, the Commissioner may for reasons to be recorded, call upon the applicant to produce evidence in support of

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the application before calling upon the opposite party and if upon considering such evidence he is of opinion that there is no case for the relief claimed he may dismiss the application with a brief statement of his reasons (rule 22). If the application is not dismissed under rule 21 or rule 22, the Commissioner must send to the opposite party a copy of the application together with a notice of the date on which he will dispose of the application and may call upon the parties to produce on that date any evidence which they may wish to tender (rule 23). The opposite party may then file a written statement as provided for in rule 24, and if this is done, issues must be framed under rule 25 ; after hearing the witnesses cited by both parties, the Commissioner must pass orders under rule 29 recording concisely in a judgment his finding on each of the issues framed and his reasons for such finding.

It iscl ear from the facts already mentioned that the Commissioner did not follow the procedure laid down in rules 19 *et seq* of the Workmen's Compensation Rules, 1924. It is only when such an enquiry has been made, is the Commissioner competent to issue an order requiring the employer to deposit compensation in accordance with sub-section (*1*) of section 8 of the Workmen's Compensation Act. Of course, if the employer on receipt of a notice in Form X admits his liability to deposit compensation, he may do so within 30 days of the service of the notice. [*See* section 10A (*2*).]

The Commissioner for Workmen's Compensation has in this case exceeded his powers by requiring the appellants to make a deposit after making what may at best be described as a preliminary enquiry into the matter in dispute. The action which he should take is limited to that prescribed in sub-section (*4*) of

section 10A of the Workmen's Compensation Act which reads :

> 'Where the employer has so disclaimed liability, the Commissioner after such enquiry as he may think fit, may inform any of the dependants of the deceased workman that it is open to the dependants to prefer a claim for compensation, and may give them such other further information as he may think fit."

The appellants cannot therefore be blamed for misconstruing the legal implications of the diary order dated the 30th of July 1948. However, this order though irregular is clearly not one falling within the ambit of clause (*a*) of sub-section (*1*) of section 30 of the Workmen's Compensation Act. The appeal must therefore be dismissed as not maintainable in law. There will be no order as to costs of this appeal.

THEIN MAUNG, C. J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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Feb. 4.

THE GOVERNMENT OF THE UNION OF BURMA (APPELLANT)

v.

G. C. MANGAPATHY (RESPONDENT).*

Defence of Burma Rules 96 (1)—Requisition of Motor Lorry—Claim for compensation against the Government for loss of the lorry after the expiry of Defence of Burma Act—Liability of bailee—S. 151 of Contract Act—Order 41, Rule 24 of Code of Civil Procedure—Resettling of an issue.

Plaintiff filed a suit against the Government of the Union of Burma alleging that his two lorries had been requisitioned on hire basis during the war and the defendant as bailee was bound to return the same. The defence was that the lorries had been abandoned at the time of general evacuation. There was no distinct plea or issue regarding the liability of the Government as bailee. But from correspondence and examination of witnesses it was clear that the point regarding the defence, *viz.*, extent of liability as bailee was in the minds of parties. The trial Court granted a decree on the basis that the Government was liable under Rule 96 (1) of the Defence of Burma Rules and not as a bailee. The Government of the Union of Burma appealed and contended *inter alia* that (1) as the Defence of Burma Rules have expired no relief could be given on the basis of that Rule and (2) the Government had taken such care as is required of a bailee under s. 151 of the Contract Act and that the suit must therefore be dismissed.

Held : Though it is true that where a point that might have been taken but was not taken should not generally be allowed to be taken in appeal, on the ground that the matter has not been fully investigated, where the point was taken in the correspondence between the parties and was established by the evidence of the plaintiff himself, the point should be allowed to be taken.

Owners of the Ship "Tasmania" and the Owners of the Freight v. *Smith and others*; *The Owners of the Ship "City of Corinth"* 15 *A.C. 223 at p. 230*; *Rup Narain and another* v. *Mt. Gopal Devi and others*, 36 *I.A. 103*, distinguished.

The Defence of Burma Act and Rules thereunder have come to an end and therefore no relief could be given on the basis of Rules which have lapsed. In such a case the Court will have to apply rules of justice, equity and good conscience and the Rule in s. 152 of the Contract Act should be applied as such a rule.

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* Civil 1st Appeals Nos. 53 and 54 of 1948 against the decree of the Chief Judge of the City Civil Court of Rangoon in Civil Regular No. 270 of 1948, dated the 28th June 1948.

To hold the Government liable for loss in spite of its having taken as much care of the lorries as of its own property, will be tantamount to treatment of the Government as an insurer which it is not.

Issue was resettled and the case decided on the evidence on record.

Mya Thein for the appellant.

P. K. Basu for the respondent.

U THEIN MAUNG, C.J.—These are appeals from the judgment and decree of the Chief Judge of the Rangoon City Civil Court by which he directed the Government of the Union of Burma to pay Rs. 3,000 to G. C. Mangapathy as compensation under Rule 96 (1) of the Defence of Burma Rules for the loss of two lorries.

The Government has appealed on the ground that it is not liable to pay compensation as it was a mere bailee of the lorries and it had to abandon them at the time of general evacuation in 1942 ; and Mangapathy has appealed on the ground that he should have been awarded Rs. 6,000 and not Rs. 3,000 only as compensation for the lorries.

Mangapathy's suit was instituted on the 26th March, 1948, and the Defence of Burma Act, 1940, and the Rules thereunder had expired on the 31st July, 1947. (See *the Union of Burma* v. *Maung Maung and two others*, Criminal Reference No. 62 of 1948 in this Court.) So the suit would not have been maintainable if it had been one for compensation under any of the Defence of Burma Rules. (*The Soortee Bara Bazaar Company, Limited* v. *The Union Government of Burma*, Civil Reference No. 6 of 1948.)

However, the suit, as framed, is not one for compensation thereunder and even the Government does not regard it as such. [*See* its Ground of Appeal (A).] So the mere fact that the learned Chief Judge has awarded compensation under a rule which was no

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longer in force is not enough to dispose of these appeals.

Mangapathy's case according to his plaint is that his lorries were requisitioned *on hire basis* and that "the defendants *as bailees* are liable to return the said lorries or to pay their value to the plaintiff and also to account and pay *hire* to the plaintiff for the actual number of days they used both or either of the lorries" (*see* paragraphs 2 and 5 of his plaint).

The Government's main defence is that it is not liable as the lorries "were abandoned at the time of the general evacuation of Rangoon in 1942".

So it is fairly obvious that Mangapathy's case was against the Government as bailees and that the defence was that it was not liable as it had taken as much care of the lorries as is required by section 151 of the Contract Act.

The correspondence, which passed between the parties before the institution of the suit also throws a flood of light on their attitude. In his letter dated the 22nd July 1943 (Exhibit 3), Mangapathy wrote to the Secretary to the Government of Burma, Simla, "At the time of taking possession of the lorries, I was promised hire at the rate of Rs. 15 per day for each lorry. Hire was promised to be paid once a week. So after one week I went to the Commissioner of Police to receive the hire, etc." He did not state therein that the lorries were taken without his consent nor that he did not agree to accept rent at that rate at all. In Exhibit E dated the 8th May, 1947, the Chief Secretary wrote to Mangapathy's Advocate :

"They had to be abandoned owing to war circumstances and *the contract of hire* between your client and Government therefore became impossible of performance. The loss of the lorries was entirely due to war circumstances which were beyond the control of Government and Government cannot therefore

agree to payment of compensation for the loss of the lorries. Your client's claim may however be lodged with the War Damage Claims Commission, Burma."

Mangapathy framed his suit as one on bailment by hire not long after, and inspite of, his having received Exhibit E.

So it is not open to his learned Advocate to argue—as he has—that it was not a case of bailment at all; and it only remains to consider whether the Government has taken as much care of the lorries as is required by section 151 of the Contract Act.

No issue has been framed on that question but there is an issue as to whether the defendants "are bound to return the said lorries to the plaintiff or to pay him their value"; and in view of the correspondence and the pleadings it cannot be said that the attention of the parties had not been directed to it. As a matter of fact the learned Advocate for the Government has got the following statements made by Mangapathy in the course of his cross-examination :

"I did not protest that Rs. 15 a day per lorry was low and on the other hand I would have accepted this rate had I not evacuated to India.

It is true that when I evacuated I had to leave all my valuable things behind in Burma as I could not carry them with me nor sell them to anyone. I could not have saved them. It is true that even the Government had to leave behind its properties when they evacuated to India. I did not leave behind any agent to deal with my claim."

His statements may be compared with those of U Thein On (D.W. 1). He deposed,

"The general evacuation order took effect from 20th February, 1942, but our Department actually evacuated on the 7th March, 1942. On that date the invading Japanese forces had come to the very gate of Rangoon. So we had to evacuate

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leaving all the vehicles including those belonging to the Government, in Rangoon. It was impossible for us to take with us any of the vehicles owing to the general confusion in the country.

There were also no one to drive these lorries out of Rangoon. In fact I and many others had to leave behind our own personal belongings."

In fact Mangapathy has written to the Chief Secretary to the Government of Burma, Simla, on the 5th August, 1942 :

"I beg to record my claim against the Burma Government for the recovery of the value of two motor lorries which I was compelled to abandon at Rangoon owing to the civil evacuation of that city on the 20th February, 1942. These lorries bore the numbers R.C. 3711 and R.C. 6649 of which I am the legal owner." (*See* Exhibit 4.)

The numbers mentioned by him in that letter are the numbers of the very lorries in question.

Under these circumstances there can be no doubt (1) of there having been a bailment of hire, (2) of the lorries having had to be abandoned in the course of general evacuation, and (3) of their having been lost in spite of the Government having taken as much care of them as of their own properties.

Lord Herschell has observed in the *Owners of the Ship "Tasmania" and the Owners of the Freight* v. *Smith and others* ; *The Owners of the Ship "City of Corinth"* (1) :

"In my opinion it would be wrong, where a point has not been taken that might have been, to run any risk of doing injustice to the party against whom it is afterwards made by acting upon evidence which does not establish beyond doubt that the occurrences, if fully investigated, would have justified the conclusion at which the Court is asked to arrive."

However, as we have stated above the point has been taken in the correspondence before litigation and

(1) 15 A.C., 223 at p. 230.

in the written statement ; and the evidence, including that of Mangapathy himself has established it beyond doubt. *Rup Narain and another* v. *Mt. Gopal Devi and others* (1) is distinguishable as it was a case in which there was neither issue nor evidence relating to the question that was raised late.

Incidentally the result would have been the same if we were to accept the argument of the learned Advocate for Mangapathy. It is (1) that the Government did not take the lorries under a contract of hire as Mangapathy was not a consenting party to any contract, in spite of (*a*) the correspondence, (*b*) the pleading in the plaint to the contrary, (*c*) Mangapathy having claimed and received Rs. 2,210 as rent up to the 20th February, 1942, and (*d*) the suit being one also for recovery of hire for the use of the lorries on and after the 21st February, 1942, and (2) that the Government did not commit a tort in taking the lorries as it then had the right to requisition them. However, he cannot find any authority as to the law which regulates the liability of the Government in such a case. So we shall have to apply the rules of justice, equity and good conscience, and we are of the opinion that the rule in section 152 of the Contract Act should be applied as such a rule. To hold the Government liable for the loss in spite of its having taken as much care of the lorries as of its own properties will tantamount to treatment of the Government as an insurer which it is not.

We accordingly resettle the issues in exercise of our power under Order 41, Rule 24, by framing additional issues as to whether the Government was a bailee of the lorries and whether the Government had taken the amount of care of the lorries described in

(1) 36 I.A. 103.

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section 151 of the Contract Act and finally determine the suit on the evidence upon the record holding that the Government was a bailee and that it has taken the amount of care described in the said section.

The learned Chief Judge erred in holding that the Government was not a bailee and that it was liable to pay compensation for the loss under Rule 96 (1) of the Defence of Burma Rules or at all.

Incidentally in view of the special provisions of Rule 96 (2) and (3) the suit would not have been maintainable even if Rule 96 (1) applied at all.

The Government's appeal is allowed with costs ; the decree under appeal is set aside ; and Mangapathy's cross-appeal is dismissed *without* costs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

MRS. H. J. HEWITT (APPELLANT)

v.

H. J. HEWITT (RESPONDENT).*

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Feb. 16.

Burma Divorce Act—S. 7—Defendant wife, alleged guilty of adultery, whether should get costs of defence from the plaintiff—Whether she is also entitled to alimony—Whether an appeal lies from an order granting costs to the wife and alimony.

Held : Even when husband applies for divorce on the ground of his wife's adultery, she has a right to be put in funds in or der to be able to make a full and satisfactory defence to the charge.

A. A. Garlinge v. *Irene Rebecca Garlinge and Joseph Prior*, 44 All. 745 ; *Ste. Croix* v. *Ste. Croix*, (1917) I.L.R. 44 Cal. 35 at pp. 38-39 ; *Robertson* v. *Robertson*, (1881) 6 P.D. 119 ; *Masih* v. *Masih*, I.L.R. (1940) All. 802 ; *Patrick Norman Dwyer* v. *Harriet Mary Cecilia Dwyer and another*, 66 I.C. 494, follwed.

The wife under these circumstances is also e ntitled to alimony *pendente lite* and the fact that the husband is suing for divorce on the ground that wife has committed adultery or did not obey a decree for restitution of conjugal right does not make any difference and such alimony can be granted even after a decree *nisi* has been pronounced.

Thomas v. *Thomas*, (1896) I.L.R. 23 Cal. 913 ; *Bowen* v. *Bowen*, (1909) I.L.R. 36 Cal. 1018 ; *Welton* v. *Welton*, (1927) P.D. 162, followed.

Held further : Orders granting costs to the wife for defence and also granting alimony are appealable.

Robert Cameron Chamarette v. *Mrs. Phyllis Ethel Chamarette*, A.I.R (1937) Lah. 176 ; *Noble Millicans* v. *Mrs. Gladys Millicans*, A.I.R. (1937) Lah. 862, followed.

Tun I for the appellant.

C. H. Campagnac for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from the order of the District Court, Insein, dismissing the present appellant's application for alimony *pendente lite* and for an order directing her husband, the respondent, who has sued her for dissolution of

* Civil 1st Appeal No. 72 of 1948 against the order of the District Court of Insein in Civil Regular No. 1 of 1947 dated the 30th August, 1948.

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marriage on the ground of her adultery, to put her in funds for her defence.

Her application had been dismissed on a previous occasion by the District Court; but in Civil 1st Appeal No. 38 of 1947 in the late High Court of Judicature at Rangoon, the order of dismissal was set aside and the application was remitted to the District Court. A Bench of the said High Court observed in the course of its judgment therein:

"She was clearly entitled to ask the Court for alimony under section 36 of the Divorce Act, and it will be for the District Judge to consider how much, if any, alimony he can properly order, regard being had to the limitation imposed by the third paragraph of section 36 and to the husband's financial position generally. A right to a deposit by way of security for costs was equally clear, and if authority be needed for the proposition that a wife charged by her husband with so grave a charge as adultery has a right to be put in funds in order to be able to make a full and satisfactory defence to the charge, it would be found in *A. A. Garlinge* v. *Irene Rebecca Garlinge and Joseph Prior* (1)."

The learned District Judge has dismissed the application again after hearing evidence as to the means of the respondent on the ground that although he has immovable property worth Rs. 23,000 in all, he has no income whatsoever as he has been on leave without pay for a long time. Hence this appeal.

The learned Advocate for the respondent has taken a preliminary objection to the effect that the appeal does not lie. He relies on *T.* v. *B. and B1*, 1908, Punjab Records, Volume 44, No. 98, page 486. That, however, was an appeal from an order refusing to strike off the record the name of a person impleaded as co-respondent to a petition for dissolution of marriage and damages in which the Chief Court held that that

(1) 44 All. 745.

order did not "conclusively determine the rights of the parties with regard to all or any of the matters in controversy in the suit, either preliminary or final" and that it was not appealable as a decree.

The order under appeal does conclusively determine the appellant's right to alimony *pendente lite* and to funds for her defence.

No preliminary objection was raised before the Bench of the late High Court of Judicature at Rangoon in the said appeal. A similar objection to an appeal from an order refusing to increase the amount of alimony *pendente lite* was raised in *R.* v. *R.*, 1890 I.L.R. 14 Mad. 88 but was withdrawn after discussion. [*See* page 91 thereof.]

Section 55 of the Divorce Act reads:

"All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force."

With reference to this section generally, Jai Lal J., has observed in *Robert Cameron Chamarette* v. *Mrs. Phyllis Ethel Chamarette* (1) where the appeal was from an order holding that evidence relating to the illegitimacy of children was inadmissible:

"But s. 55, Divorce Act, is clear on this question. It provides that all decrees and orders made by the Court in any suit or proceeding under the Act shall be enforced and may be appealed from in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction. There may be some orders of a formal character against which an appeal would not lie, but this is an order which was passed by the Court after hearing the arguments of the parties, and I am inclined to think that this appeal is competent."

(1) A.I.R. (1937) Lah. 176.

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Coldstream J. also has observed in *Noble Millicans* v. *Mrs. Gladys Millicans* (1):

"The language of s. 55, Divorce Act, appears to me to provide expressly for an appeal from all orders passed by the District Judge. The words 'in the like manner as the decree and order of the Court made in the exercise of its civil jurisdiction are enforced and appealed from under the laws, rules and orders for the time being in force' in s. 55, which is one of the sections dealing with procedure, must, I think, be held to apply only to the procedure to be followed and the Court to which appeals lie."

We respectfully agree with Jai Lal J. and Coldstream J. in their interpretation of section 55 of the Divorce Act. The words "under the laws, rules and orders for the time being in force" appear to have been inserted therein in view of section 7 and section 62 thereof according to which the Courts are to act on certain principles and rules and the High Court has power to make rules.

The result will be very serious if there be no appeal from the order. The High Court of Judicature at Rangoon has pointed out to the District Court on the authority of *A. A. Garlinge* v. *Irene Rebecca Garlinge and Joseph Prior* (2) "that a wife charged by her husband with so grave a charge as adultery has a right to be put in funds in order to be able to make a full and satisfactory defence to the charge". And the Special Bench which decided the said case has observed (at page 747 of the Report):

"Where a petition of this nature is filed by the husband, and the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence, and to obtain such assistance from counsel as is reasonable under the circumstances and the court should have taken upon itself the duty of seeing that this was done."

(1) A.I.R. (1937) Lah. 862. (2) 44 All. 745.

Besides, Sanderson C.J. has observed in *Ste. Croix* v. *Ste. Croix* (1):

"The principle upon which the husband has been directed to make provision for his wife's costs in these cases has been laid down in *Robertson* v. *Robertson* (2), and the passage to which I wish to refer is at page 122. I am now reading from the judgment of Sir George Jessel where he says, 'Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English law, which gave the whole personal property of the wife to the husband and gave him also the income of her real estate, so that in the absence of a settlement (which, as we all know is a comparatively modern introduction) she was absolutely penniless, and therefore the Ecclesiastical Court not only provided for the costs of her defence, but also gave her alimony *pendente lite* so as to provide for her maintenance.' There is another passage at page 123 where the learned Master of the Rolls says, 'I have given what I believe to be the true view of the origin of the liability of the husband; but I am not oblivious to the nobler view, if I may so express it, held in the House of Lords, that no gentlemen, indeed, no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery. Really, if there had not been, as I do believe there is, the common and pecuniary reason for fixing the husband with the costs. I think that that reason ought to be sufficient to all right-minded men.' That principle was endorsed by Lord Justice Brett and also by Lord Justice Cotton at pages 124 and 125."

And yet the learned District Judge has refused to order that the respondent should put the appellant in funds for her defence—not because she has sufficient means to make a full and satisfactory defence—not even because the respondent is too poor to put her in funds—but because the respondent has only immovable property though it is admittedly worth as much as Rs. 23,000.

(1) (1917) I.L.R 44 Cal. 35 at pp. 38-39. (2) (1881) 6 P.D. 119.

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Even in the case of a husband who pleaded inability to pay for the wife's costs on account of poverty, it has been held that the Courts should stay proceedings in the suit until the payment is made. See *Masih* v. *Masih* (1) the headnote whereof reads :

"A husband suing for divorce under the Divorce Act, 1869, is liable to deposit a reasonable sum for the costs and expenses of the wife to enable her to defend herself upon the charge of adultery. This rule is acted upon by the Divorce Courts in England and should, according to section 7 of the Divorce Act, 1869, be followed in India.

Where the husband fails to pay the sum ordered by the court to be paid to the wife for her costs for defending the suit and pleads inability to do so on account of poverty, the court should stay proceedings in the suit until the payment is made."

So if there be no appeal from the order this Court may have to refuse to confirm the decree *nisi* (if any) like the High Court of Allahabad in *A. A. Garlinge* v. *Irene Rebecca Garlinge and Joseph Prior* (2) ; and in that case so much time and money would have been wasted on the hearing of the suit in the District Court. In this connection a Bench of the High Court of Allahabad has rightly observed in *Patrick Norman Dwyer* v. *Harriet Mary Cecilia Dwyer and another* (3) :

"The husband has the control of the purse-strings and it may often happen, if he is not ordered to provide security for the wife's costs, that he may secure a decree in an undefended case, because the wife had no money to defend her honour."

The same remarks apply to the refusal of alimony *pendente lite* "as the object of alimony and maintenance is to support the party without means in the rank of life, to which she has been accustomed, to enable such party to contest the suit and to be

(1) I.L.R. 1940 All. 802. (2) 44 All. 745.
(3) 66 I.C. 494.

supported afterwards, if necessary " (*see* Mital's Statute Law of Divorce in India p. 167 and the cases cited there) ; alimony usually follows as a matter of course, on the application for it, except when the wife has a provision of her own sufficient for her condition in life and proportionate to the means of her husband (*see Ib.* p. 165) ; and the wife will not be able to defend the suit for divorce satisfactorily, if she does not get alimony *pendente lite* " to enable her to live during the progress of the suit ". (*See Ib.* p. 165.)

It has been contended that the appellant is not entitled to alimony *pendente lite* as there is a decree for restitution of conjugal rights against her. However, he got the said decree on the 27th January, 1947, and filed the suit for divorce on the 19th February, 1947, on the ground that she had committed adultery even before he sued for restitution of conjugal rights. The late High Court of Judicature at Rangoon has rightly pointed out in the said appeal " The effect therefore of what the respondent did on the 19th February, 1947, was to make it legally impossible for the present appellant to obey the previous order of the Court, even if she had a mind to do so ". Besides, we are not going to award her alimony for the interval between the date of the said decree and the institution of the suit for divorce at all.

The respondent has stated in his affidavit that the appellant " has means of her own as she is carrying on trade jointly with the co-respondent Madha " and that Madha is supporting her. But he does not say so in his evidence and the appellant has denied his allegations in the course of her evidence.

The fact that the husband is suing for divorce on the ground that she has committed adultery does not make any difference. Alimony *pendente lite* can be granted in such a case even after a decree *nisi* has

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been pronounced. [See *Thomas* v. *Thomas* (1) and *Bowen* v *Bowen* (2).]

Nor does the fact that she has been able in some precarious fashion to maintain herself affect her claim to alimony *pendente lite*. [See *Welton* v. *Welton* (3).]

The learned Advocate for the respondent has admitted that the respondent was getting a monthly salary of Rs. 415 up to September, 1946, and the respondent himself has deposed that he was on leave thereafter for three months on a leave salary of Rs. 271 per mensem. His learned Advocate has also admitted on his instruction that the annual rental value of the house at Insein is Rs. 240 and this amount also must be taken into consideration in calculating the amount of alimony although the house is occupied by him. (*See* Mital p. 170.)

So the respondent's income for the three years next preceeding the date of our order consists of—

	Rs.
Salary at Rs. 415 per mensem for seven months ...	2,905
Leave salary for three months at Rs. 271 per mensem	813
Annual rental value of the house for three years at Rs. 240 per annum	720
Total ...	4,438

His average annual income during that period is Rs. 1,479 and a fifth thereof is about Rs. 300. His learned Advocate has submitted that he has given Rs. 1,400 to her in 1946 and that this payment should be taken into consideration in fixing the amount of alimony *pendente lite*. However, even if it was paid, it was paid in 1946, while they were living together, for their household expenditure. There is nothing to show that she still had any money out of the said

(1) (1896) I.L.R. 23 Cal. 913. (2) (1909) I.L.R. 36 Cal. 1018.
(3) (1927) P.D. 162.

amount when she left the house ; and only payments made after the service of citation are to be deducted from alimony *pendente lite.* (*See* Rattigan's Law of Divorce, 1936, Edn. pp. 403-4.)

The learned Advocate for the appellant claims only Rs. 500 as the fund required for her defence and we are of the opinion that the claim is reasonable.

We accordingly set aside the order under appeal and direct—

(1) that the respondent must pay the appellant Rs. 500 in order that she may be able to defend the suit against her satisfactorily ;

(2) that the suit be stayed till he pays the money into Court, and

(3) that he must also pay her Rs. 25 per mensem as alimony *pendente lite* with effect from the date of her application, *i.e.* the 22nd May, 1947.

The appellant is entitled (1) to the costs of her application in the District Court, (2) to her costs in Civil 1st Appeal No. 38 of 1947 in the late High Court of Judicature at Rangoon (as per judgment therein) and (3) to her costs in this appeal. Advocate's fee for this appeal, four gold mohurs.

SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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Feb. 19.

B. C. NATH AND ONE (APPELLANTS)

v.

SHEIK ABDUL LATIFF (RESPONDENT).*

Urban Rent Control Act, s. 11 (1) (c)—Nuisance or annoyance to the adjacent neighbouring occupiers—What constitutes.

Held: That the allegation that a tenant has been guilty of conduct which is a nuisance or annoyance to the adjacent or neighbouring occupiers should be considered and decided having regard to all surrounding circumstances. The test to be applied in such case is whether the nuisance complained of was actionable.

The principle is that those acts for the common and ordinary use and occupation of a house may be done, if conveniently done, without subjecting those who do them to an action. The convenience of such a rule may be indicated by calling it "a rule of give and take, live and let live." Every person is entitled as against his neighbour to comfortable and healthful enjoyment of the premises occupied by him and the point to be determined is whether the act complained of is an annoyance materially interfering with the ordinary physical comfort of human existence not merely according to elegant and dainty modes and habits of living but according to plain and sober and simple notions. An act which might not ordinarily be a nuisance may still be a nuisance if repeated at very short intervals from some whim or caprice on purpose to annoy neighbours. Circumstances and the character of the locality also are material factors.

Bamford v. *Turnley*, 122 E.R. 27 ; *Vanderpant* v. *Mayfair Hotel Co., Ltd.*, 1930) L.R. 1 Ch.D. 138 at pp. 165-166 ; *Muhammad Jalil Khan and others* v. *Ram Nath Katua and others*, (1931) I.L.R. 53 All. 484 at p. 491, followed.

Held further: If the act be not done maliciously then mere singing of song in chorus cannot constitute a legal nuisance.

Christie v *Davey*, (1893) L.R. 1 Ch.D. 316, followed.

N. Bose for the appellants.

Aung Min for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from a decree for ejectment of the appellants from Room No. 9 of House No. 293/295 in 40th Street, Rangoon,

* Civil 1st Appeal No. 79 of 1948 against decree of the 4th Judge, City Civil Court, Rangoon, in Civil Regular No. 328 of 1948.

which has been passed under section 11 (*1*) (*c*) of the Urban Rent Control Act, 1948, *i.e.* for the reason that the 2nd appellant and other persons residing with him have been "guilty of conduct which is a nuisance or annoyance to adjoining or neighbouring occupiers."

In *Bamford* v. *Turnley* (1) Pollock C.B. observed:

"I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances,—the place where, the time when, the alleged nuisance, what, the mode of committing it, how, and the duration of it, whether temporary or permanent, occasional or continual,—as to make it impossible to lay down any rule of law applicable to every case, and which will also be useful in assisting a jury to come to a satisfactory conclusion. It must at all times be a question of fact with reference to all the circumstances of the case.

Most certainly in my judgment it cannot be laid down as a legal proposition or doctrine, that anything which, under any circumstances, lessens the comfort or endangers the health or safety of a neighbour, must necessarily be an actionable nuisance. That may be a nuisance in Grosvenor Square which would be none in Smithfield Market, that may be a nuisance at midday which would not be so at midnight, that may be a nuisance which is permanent and continual which would be no nuisance if temporary or occasional only. A clock striking the hour, or a bell ringing for some domestic purpose, may be a nuisance, if unreasonably loud and discordant, of which the jury alone must judge; but although not unreasonably loud, if the owner, *from some whim or caprice*, made the clock strike the hour every ten minutes, or the bell ring continually, I think a jury would be justified in considering it to be a very great nuisance. In general, a kitchen chimney, suitable to the establishment to which it belonged, could not be deemed a nuisance, but if built in an inconvenient place or manner, *on purpose to annoy the neighbours*, it might, I think, very properly be treated as one. The compromises that belong to social life, and upon which the peace and comfort of it mainly depend, furnish an indefinite number of examples where some apparent natural right is invaded, or some

(1) 122 E.R. 27.

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enjoyment abridged, to provide for the more general convenience or necessities of the whole community; and I think the more the details of the question are examined the more clearly it will appear that all that the law can do is to lay down some general and vague proposition which will be no guide to the jury in each particular case that may come before them."

Brämwell, B. also observed therein:

"It seems to me that that principle may be deduced from the character of these cases, and is this, *viz.*, that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action * * * *. There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbours land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it *a rule of give and take, live and let live.*"

Luxmoore J. observed in *Vanderpant* v. *Mayfair Hotel Co., Ltd.* (1):

"Before I deal with what the evidence has established, I will state what constitutes an actionable nuisance by noise. Apart from any right which may have been acquired against him by contract, grant or prescription, every person is entitled as against his neighbour to the comfortable and healthful enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among English people: see *Walter* v. *Selfe* (1851, 4 De G. and S. 315, 322) and the remarks of Knight Bruce V. C. It is also necessary to take into account the circumstances and character of the locality in which the complainant is living. The making or

(1) (1930) L.R. I Ch.D. 138 at pp. 165-166.

causing of such a noise as materially interferes with the comfort of a neighbour when judged by the standard to which I have just referred, constitutes an actionable nuisance, and it is no answer to say that the best known means have been taken to reduce or prevent the noise complained of, or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. Again, the question of the existence of a nuisance is one of degree and depends on the circumstances of the case."

A Bench of the Allahabad High Court also observed in *Muhammad Jalil Khan and others* v. *Ram Nath Katua and others* (1):

"But a noise may become a nuisance, public or private. There is no definite legal measure for a noise becoming a nuisance. It is purely a question depending on the facts of each case, including the degree of its intensity, its place, the time, the mode of committing it, its duration and all the surrounding circumstances. The standard of judging it is according to that of men of ordinary habits, and not of men of fastidious tastes or of over sensitive nature, whether due to religious sentiment or not."

So the question as to whether the 2nd appellant and others are guilty of conduct which is a nuisance or annoyance to adjoining or neighbouring occupiers is a question of fact which must be decided in the light of the above observations "having regard to all the surrounding circumstances".

The case for the respondent is that two other tenants, *viz.*, L. Swami, a clerk, who occupies a room directly under the room in question, and A. Radanam, a clerk, who occupies the room adjoining the room in question, have written letters (Exhibits B and C) to him complaining of the noise made by the 2nd appellant and others.

According to him "the noise complained of is the noise caused by their movements on the floor and noise of their speech" but "the noise could not be heard

(1) (1931) I.L.R. 53 All. 484 at p. 491.

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from the ground floor," a room in which is occupied by himself.

L. Swami has written in Exhibit B :

"And this new tenant, being alone, and thinking that the house to be a lodging place, gathered some of his own men, all bachelors, amounting to 14 or 15 members, and pitched his tent in that house. I am not at all worried about this living but the noise and some nuisance that they are making every day forced me to write this application. Moreover, I am a family man, also a sick person and I can't tolerate the noise that they are making."

He did not set out therein what sort of noise they were making but he has stated in the course of his evidence, "I hear foot movements of about 15 persons from 4 a.m. to 8 a.m. on the stairs and on their floor. I hear also the noise caused by cutting firewood. * * * *. As water has to be carried upstairs by buckets water is dropped on the stairs and it flows into my room. From 6 p.m. to 10 p.m. I hear the noise of foot movements on the floor and on the stairs. A heavy noise is caused by these foot movements."

A. Radanam wrote in Exhibit C, "Myself being a family man *with grown up daughters*, I find inconvenience and suffer from sleepless nights due to inconsiderate commotion from the said room". He did not specify the nature of what he described as inconsiderate commotion ; but in his evidence he has stated,

"The walling between my room and the defendant's room is made of wood. At nights, from 7, 8 p.m. to 10 p.m. the occupants of the suit room shouted and sang songs. From 4 in the morning, I cannot sleep because of the noise of their movements in attending to their work. They stand in the verandah sometimes shouting, singing and cracking jokes. I do not like it as I have grown up daughters."

It will thus be seen that the objection of Radanam who occupied the adjoining room on the second floor of the building is to singing songs, cracking jokes,

shouting and "their movements in attending to their work". Swami, whose room is on the first floor and directly below the appellants' room does not even refer to the alleged singing, shouting and cracking jokes at all; and the respondent who occupies a room on the ground floor admits that none of the alleged noises could be heared at the ground floor.

With reference to the alleged singing, shouting and cracking of jokes, it is rather significant that the 2nd appellant was cross-examined in such a way as to elicit the statements, "The occupants number 11 including me. None of us sing. We do not sing *religious songs in chorus*". It is fairly obvious that the learned Advocate for the respondent suggested in his cross-examination that they sang religious songs in chorus which is not quite consistent with Radanam's evidence. Besides, Radanam himself has admitted that the occupants are orderly in the rest of the day and that he owes about four months' rent to the landlord. Under these circumstances we cannot accept the uncorroborated testimony of Radanam about the alleged singing, shouting and cracking jokes.

Moreover, even if they had been singing religious songs in chorus as suggested in cross-examination, there is nothing to show that they have done so maliciously for the purpose of annoying Radanam or any body at all and such singing cannot constitute a legal nuisance. [Cp. *Christie* v. *Davey* (1).]

Swami complains of the "foot-movements of about 15 persons from from 4 a.m. to 8 a.m. on the stairs and on their floor" and of the noise caused by cutting firewood; and Radanam complains of "their movements in attending to their work". Sawmi is not corroborated by any one as to the noise caused by cutting firewood on the floor and the learned

(1) (1893) L.R. 1 Ch.D. 316.

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4th Judge has found that there is no evidence of any deterioration in the premises although there must have been noticeable deterioration if firewood had been really cut there as alleged.

So the question for decision is ultimately reduced to whether "the foot movements on the stairs and on the floor" or "the movements in attending to their work" amount to a nuisance or an annoyance.

There is no allegation (1) of the movements having been made with footwear on, (2) of their having been made unnecessarily, wantonly, maliciously or even unreasonably or (3) of either Swami or Radanam having spoken to the 2nd appellant or any of his men about the alleged "movements" at all. On the other hand the 2nd appellant has deposed, "There is no feeling of enmity between me and them" and there is no suggestion to the contrary by the respondent or either of his witnesses.

According to the 2nd appellant he and four or five other occupants are newspaper hawkers who have to get up between 3 a.m. and 4 a.m. and go out at 4 a.m. to get newspapers and sell them. So their movements must have caused some noise; but these movements are made, in the words of Radanam himself, "in attending to their work" and there is nothing to show that they are made wantonly, maliciously or without cause. [Cp. the judgment of Bramwell, B. in *Bamford* v. *Turnley* (1) at p. 32 of the Report.]

So that the noise caused by such movements must fall within what has been laid down by Bramwell, B. in the said ruling as "a rule of give and take, live and let live". (Cp. S. Ramaswamy Iyer's Law of Torts, p. 197, where the learned author has stated):

"Discomfort caused by a person in the ordinary course of enjoying a house or agricultural land, would not usually be so

(1) 122 E.R. 27.

great as to be an actionable nuisance, *e.g.*, burning weeds clearing cesspools, repairing or pulling down buildings, noise of children or of a piano in a residential house. These disturbances are usually tolerated on the principle of 'give and take, live and let live.'"

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So the decree under appeal is set aside and the appeal is allowed with costs; Advocate's fee three gold mohurs.

SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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Feb. 19.

K. YACOOB ROWTHER AND ONE (APPELLANTS)

v.

V. K. MAIMON BIBI AND OTHERS (RESPONDENTS).*

Suit for declaration that a deed regarding a hotel is void—Application for appointment of Receiver by the defendant for the purpose of running the hotel—Whether lies.

Plaintiff alleged that he was the sole proprietor in possession of the Angora Hotel which was being managed by his manager and that an agreement was obtained from him by the defendants by fraud and misrepresentation and he asked for a declaration that the agreement was void. The defendants alleged that they were co-owners of the hotel and contested the claim of the plaintiff for bare declaration. The defendants did not file any suit for possession and did not make any counter claim, but applied for the appointment of Receiver to take charge of and *run* the hotel as a going concern.

Held: That in this suit possession of the hotel was not a matter of dispute between the parties. Therefore the court should not disturb the possession of parties. Dismissal of the plaintiff's suit would not in any way affect the possession of the hotel.

The Court should not appoint a Receiver to run a hotel as the Receiver may find it impossible to do it.

Amarnath v. *Musammat Tehal Kaur*, (1922) 67 I.C. 383; *Dhumi and others* v. *Nawab Muhammad Sajjad Ali Khan and others*, A.I.R. (1923) Lah. 623, distinguished.

Pana Seenee v. *Ana Mahalingam and one*, 3 B.L.T. (1910) 95, at p. 98, followed.

Per U SAN MAUNG, J.—The subject matter of the suit is the validity of the agreement and not the hotel mentioned in the agreement. The Court may in a suit for mere declaration appoint a Receiver of property forming the subject matter of a declaratory decree, but not when the property is not the subject of dispute.

The defendant without filing a counter claim cannot apply for an injunction against the plaintiff unless the relief sought by the injunction is incidental to or arises out of the relief sought by the plaintiff.

Carter v. *Fey*, (1894) 2 Ch.D. 541, followed.

The same principle should be applied in the case of a Receiver also.

V. S. Venkatram for the appellants.

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* Civil Misc. Appeal No. 5 of 1949 against the order of the City Civil Court, Rangoon, in Civil Misc. No. 255 of 1948.

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K. YACOOB ROWTHER AND ONE v. V. K. MAIMON BI BI AND OTHERS.

U THEIN MAUNG, C.J.—This is an appeal from an order of the 2nd Judge of the Rangoon City Civil Court by which he refused to appoint a Receiver *pendente lite* for a hotel at the instance of the appellants who are defendants in the suit now pending before him.

The suit which was originally instituted by K. Aboo Backer Rowther, since deceased, and which is being continued by the respondents as his legal representatives, is one for declaration that an agreement between him and the two appellants with reference to the hotel is void.

The appellants claim to be joint owners of the hotel with him ; and they have applied for the appointment of a Receiver *pendente lite* for the hotel as a going concern on the ground that according to the said agreement they are to run the hotel for their own profit throughout the current year.

However, K. Aboo Backer Rowther's case is that he was the sole proprietor of the hotel in possession and the business of the hotel is being carried on by M. Pitchay as an employee of K. Aboo Backer Rowther during his life time and as an agent of his legal representatives after his death.

The appellants have not instituted any cross-suit for recovery of possession of the hotel for the current year although it is their case that under the said agreement they are entitled to run it for their own profit.

Under these circumstances, the learned 2nd Judge has held that the petitioners have failed to make out a case for the appointment of an interim Receiver for the hotel.

The learned Advocate for the appellants relies on the rulings in *Amarnath* v. *Musammat Tehal Kaur* (1)

(1) (1922) 67 I.C. 383.

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and *Dhumi and others* v. *Nawab Muhammad Sajjad Ali Khan and others* (1) as authorities for his contention that the learned 2nd Judge should have appointed a Receiver for the hotel.

However, both of them are cases in which the High Court refused to interfere on appeal with orders for appointment of Receivers. In the first case the Bench observed :

"On the question whether this is a fit case for the appointment of a Receiver we have got a clear finding arrived at by a Judge of this Court against the appellant and we must decline to interfere with his discretion in a matter of this character, unless we are satisfied that the discretion has been improperly exercised and contravenes any principle of law."

In the second case also Moti Sagar J. observed :

"It is now for the appellants to show that the Court exercised its discretion improperly. It has been repeatedly held that a Court of Appeal will not, except in an extreme case, disturb an order as to the appointment of a Receiver by the Court below."

Besides, both the cases are distinguishable on facts. The first case is one for declaration that the property in suit was not trust property. However, in a previous suit to which the plaintiff was not a party another reversioner, who would have been entitled to a half share in the suit property, had admitted that it was trust property. So the Bench observed in the course of their judgment therein :

"Confining ourselves strictly to the merits of the application for the appointment of a Receiver we consider that, in view of Jawala Datt Parshad's admission by words and conduct in the suit instituted by him in 1906, one half of the estate, which he might have successfully claimed as one of the two nearest reversioners of the last male owner, should, for the purpose of this application, be regarded as trust property and that the state

(1) A.I.R. (1923) Lah. 623.

of the remaining half must depend upon the result of the appeal pending in this Court. There is, therefore, at least one half of the property which should be administered for the maintenance of religious and charitable endowments and it is the duty of the Court to take suitable steps to preserve these endowments."

In the present case the plaintiff and his legal representatives deny that the appellants are entitled to any share in the property at all.

In the second case a Receiver was appointed to collect rents at the instance of the defendants as about Rs. 36,000 was already due and if the case dragged on for another three years, which in all probability it would, a further sum of about Rs. 40,000 would become due and "no objection has ever been taken by the plaintiffs to the proprietory rights of the defendants and it has always been taken for granted that they have been holding the land merely as tenants under the defendant proprietors". In the present case the appellants' application is not for the appointment of a Receiver just to collect rents but for appointment of a Receiver to run the hotel as a going concern. Besides, the plaintiff and his legal representatives claim to be the sole proprietors of the business. Moreover, the hotel is being run by the same manager as during the life time of the plaintiff and there is no suggestion of his being unfit or incompetent to do so. On the other hand, a Receiver appointed by Court may find it wellnigh impossible to run the hotel.

Moreover, the case of *Pana Seenee* v. *Ana Makalingam and one* (1), in which an order appointing a Receiver was set aside on appeal, is somewhat similar to the present case. In that case Seenee, who was in possession of certain properties, claimed to redeem all of them alleging that Pillay had deceived him and induced him to execute several documents. Pillay

(1) 3 B.L.T. (1910) 95, at p. 98.

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claimed that the properties had been transferred outright to him and that he was entitled to rents from Seenee as his tenant ; but he had not brought a suit to eject him and obtain possession of the properties. A Chettyar to whom Pillay had mortgaged some of the properties was also a party to Seenee's suit. A Receiver was appointed by the lower Court ; but its order was set aside on appeal by the Chief Court of Lower Burma, which observed in the course of its judgment therein :

"A Receiver is not appointed except on special grounds at the instance of a person alleging a mere legal title against another party in possession of immoveable property who also claims to hold by a like legal title.

In the present case there can be no doubt that Seenee was in actual possession of the lands at the time the suit was brought. Pillay has not brought a suit to eject him and obtain possession of the lands. The Chetty defendant has not brought a suit to enforce his mortgage over them. The principal defendant Pillay merely seeks to have Suit No. 56 dismissed with costs, and if he is successful in it he can get nothing else done in this suit. The Court could not in this suit make a decree in his favour for possession of the lands, and it could not order the receiver to deliver over to him the lands or the proceeds of sale of the crops or the rents and profits received. On the dismissal of the suit the Receiver would necessarily be discharged, and since Pillay claims no relief in this suit, the only order that could be made would be an order for the receiver to deliver back the possession of the lands to the person in whose possession they were when the receiver obtained possession, and to deliver over to that person also all that the receiver had obtained in connection with the land."

In the present case also we do not see how the appellants can get any relief as regards possession of the hotel and the rents and profits thereof, even if the suit against them, which is merely one for declaration that the agreement is void, be dismissed after all.

The appeal is dismissed summarily.

U SAN MAUNG, J.—I agree that this appeal must be dismissed.

The learned 2nd Judge of the City Civil Court of Rangoon was clearly right in dismissing the defendant-appellants' application for the appointment of a Receiver *pendente lite* of the Angora Hotel situated at 216/218, Fraser Street, Rangoon. The suit filed by the deceased K. Aboo Backer Rowther now represented by the respondents as his legal representatives, is one for a declaration that the agreement dated the 3rd January 1948 between him and the defendant-appellants was obtained from him by fraud and misrepresentation. Therefore the subject matter in the declaratory suit is really the agreement sought to be declared as void and not the hotel mentioned in the agreement. The case of *Amarnath* v. *Tehal Kaur* (1), which was strongly relied upon by the learned counsel for the appellants, is clearly distinguishable from the present case. It was held by a Bench of the Lahore High Court that a Court is not debarred from appointing a Receiver of property, *forming the subject matter of a declaratory suit*, in which possession of the property is not to be awarded to one party or the other, as the object of the appointment of the Receiver is to protect the property and to maintain the status *quo ante* pending the disposal of dispute between the parties. The subject matter of the present suit being the deed of agreement, the ruling relied upon by the learned counsel for the appellants is clearly not applicable. The observations in *Dhumi and others* v. *Nawab Muhammad Sajjad Ali Khan and others* (2) of Moti Sagar J. who merely followed the ruling in *Amarnath's* case, cannot be of much avail to the appellants.

(1) (1922) 67 I.C. 383. (2) A.I.R. (1923) Lah. 623.

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K. YACOOB ROWTHER AND ONE v. V. K. MAIMON BI BI AND OTHERS.

U SAN MAUNG, J.

No doubt a defendant may in some case move for the appointment of a Receiver as against the plaintiff without filing a counter-claim or issuing a writ in a cross action, but this can only be done in cases where the defendant's claim to relief arises out of the plaintiff's cause of action or is incidental to it. See *Carter* v. *Fey* (1) where it was held that a defendant who has not filed a counter-claim cannot apply for an injunction against the plaintiff, unless the relief sought by the injunction is incident to or arises out of the relief sought by the plaintiff and that if the defendant desires any other relief before the time arrives for delivery of a counter-claim, he must issue a writ in a cross-action. Here, the only relief which the defendant-appellants can claim in the suit filed against them is that the suit for a declaration of the agreement dated the 3rd January 1948 as void be dismissed with costs in their favour. They cannot claim for possession of Angora Hotel as a relief arising out of the plaintiff's cause of action or incidental to it.

The observation of a Bench of the Chief Court of Lower Burma in *Pana Seenee* v. *Ana Mahalingam and one* (2) quoted in the judgment of my Lord the Chief Justice, is entirely conclusive on the point that the defendant-appellants in this case cannot by any means obtain the appointment of a Receiver to take charge of Angora Hotel during the pendency of the suit filed against them.

(1) (1894) 2 Ch.D. 541. (2) 3 B.L.T. (1910) 95 at p. 98.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

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Feb. 21.

K.K.R.M.O. RAMANATHAN CHETTYAR (APPELLANT)

v.

O.K.R.O. UDAYAPPA CHETTYAR (RESPONDENT).*

Liabilities (War-Time Adjustment) Act, 1945—Leave to execute decree granted without enquiry—Whether order appealable—Order not under s. 47 of the Code of Civil Procedure—Revision under s. 115, Code of Civil Procedure.

Held: That an order under s. 5 of Liabilities (War-Time Adjustment) Act, 1945, granting leave to execute the decree is not an order under s. 47 of the Code of Civil Procedure if the Court granting leave was not the Court executing the decree within the meaning of the s. 47.

Fakaruddin Mohamed Ahsan v. *The Official Trustee of Bengal*, I.L.R. Vol. 10, Cal. 538, followed.

Har Narain Lal v. *Mathura Prasad*, I.L.R. (1940) All. 517, referred to.

In a fit and proper case the High Court can allow an appeal to be converted into a petition for revision where the appeal does not lie.

L. A. Krishna Ayyar v. *Arunachalam Chettiar*, I.L.R. 58 Mad. 972 at p. 987, followed.

Ramchandra Kustoorchand v. *Balmukaund Chaturbhuj*, I.L.R. 39 Bom. 71, distinguished.

As the District Judge granted leave under s. 5 of Liabilities (War-Time Adjustment) Act, 1945, without any enquiry in disregard of the section, and he had no power to delegate the decision of the matter to the Registrar of the Court, the order was set aside as irregular.

H. Subramanayam for the appellant.

Ba Tu for the respondent.

U TUN BYU, J.—The respondent O.K.R.O. Udayappa Chettyar obtained a money decree against the appellant K.K.R.M.O. Ramanathan Chettyar in original suit No. 6 of 1942 of the Court of the Sub-Judge of Sivaganga, India. The respondent Udayappa Chettyar applied in Civil Miscellaneous case No. 1 of

* Civil 1st Appeal No. 36 of 1948 against the order of the District Court of Pegu in Civil Misc. No. 1 of 1948, dated the 23rd March 1948.

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1948 of the District Court, Pegu, for leave to execute the said decree under the Liabilities (War-Time Adjustment) Act, 1945, and on the same day, and probably at the same time, he also filed an application for execution of that decree in the District Court, Pegu, which became known as Civil Execution No. 1 of 1948. The appellant judgment-debtor filed an objection against the respondent's application for leave under the Liabilities (War-Time Adjustment) Act, 1945, and the District Court, without holding an enquiry into the question whether the judgment-debtor could in the case before it be said to be a person who was unable immediately to satisfy the decree owing to circumstances arising out of the war, in effect said that the question of the judgment-debtor's inability to satisfy the decree should be decided subsequently at the time when the decree was being executed, and it granted leave to the respondent to execute the decree which he obtained in India. The appellant judgment-debtor now files an appeal against the order of the District Court, dated 23rd March, 1948, granting the respondent decree-holder leave to execute his decree obtained in India, and a preliminary objection has been taken on behalf of the respondent decree-holder that an appeal does not lie against the order of the District Court, dated 23rd March, 1948, passed in Civil Miscellaneous case No. 1 of 1948 granting leave to the respondent decree-holder to execute the decree which he obtained in India.

The points which fall for consideration in connection with this preliminary objection is whether the order of the District Court, dated 23rd March, 1948, can be said to be an order which related to the execution of a decree and, secondly, whether the District Court comes within the expression " the Court executing the decree " in section 47 (1) of the Code of Civil Procedure. It has

been submitted on behalf of the respondent decree-holder that the District Court before which Civil Miscellaneous case No. 1 of 1948, in which the order appealed against was passed, was filed was not the Court which was executing the decree which was sought to be executed by the respondent in that the application for leave to execute the decree under the Liabilities (War-Time Adjustment) Act, 1945, and the application to execute a decree are two different cases, and in that way it is sought to be said that the District Court in dealing with the application for leave to execute the decree and the application for execution constitutes itself into two distinct Courts dealing with different matters. It is true that the District Court when it dealt with the application for leave to execute the decree, which was filed in Civil Miscellaneous case No. 1 of 1948, did not directly deal with the point or points which would fall for consideration in Civil Execution No. 1 of 1948, but it appears to us that an order granting leave to execute a decree under the Liabilities (War-Time Adjustment) Act, 1945, is an order which relates to and is directly connected with the execution of the decree which the respondent obtained against the appellant in India in that the Act of 1945 gives the respondent decree-holder a right to execute his decree against the appellant judgment-debtor in certain circumstances only, which otherwise he would not possess if the order made in Civil Miscellaneous Case No. 1 of 1948, had been in favour of the appellant judgment-debtor. Sections 3 and 5 of the Liabilities (War-Time Adjustment) Act, 1945, therefore give the appellant judgment-debtor a valuable right, if he can bring his case within the provisions of section 5 of that Act. In the case of *Har Narain Lal* v. *Mathura Prasad* (1), which relates to the provisions

(1) I.L.R. (1940) All. at p. 517.

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of section 3 (*1*) of the Temporary Postponement of Execution of Decrees Act, 1937, which are as follows :

"3. (1) All proceedings in execution of any decree for money . . . . . passed by a Civil Court on the basis of a liability incurred before the passing of this Act, in which the judgment-debtor or any one of the judgment-debtors is, at the date of the passing of this Act, an agriculturist shall be stayed during the period this Act shall remain in force, if such judgment-debtor does not pay more than Rs. 250 as land revenue or rent, or more than Rs. 30 as local rate for revenue-free land, or if the total of the revenue, rent and ten times the local rate payable by him or any two of them does not exceed Rs. 250."

It was observed at page 520 :

"That Act conferred upon judgment-debtors who were agriculturists a very valuable right. The right conferred by section 3 was one which was in dispute between the parties *in the execution Court.* The order of the Court proceeded upon a determination of that question. The Court conclusively and finally decided that the judgment-debtor was an agriculturist and entitled to the benefits of section 3 of the Act. Once the judgment-debtor had established that he was an agriculturist then he was of right entitled to stay of the execution of the decree against him. The Court had no discretion in this matter."

The words "in the execution Court" have been italicised by me. It is true that in the Burma Act the word "may" is used and not "shall", but this difference does not appear to be of importance because even in a matter where a Judge has a discretion it is presumed that the Judge concerned will exercise his discretion properly and in a right manner. As sections 3 and 5 of the Liabilities (War-Time Adjustment) Act, 1945, give a valuable right to the judgment-debtor, if he can bring his case within the provisions of section 5 of that Act, the order of the District Court allowing leave to execute the decree against the appellant judgment-debtor could be said to be an order which relates to the execution of the decree.

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U TUN BYU, J.

The point, which next arises, is whether the District Court in passing the order allowing leave to execute the decree can be said to be the Court executing the decree within the meaning of section 47 (1) of the Code of Civil Procedure. In the present case the application for leave to execute the decree, which became Civil Miscellaneous case No. 1 of 1948, and the application for execution of the decree, which became Civil Execution No. 1 of 1948, were filed on the same date and before the same Court. It could accordingly be said that the Court which passed the order dated 23rd March, 1948, allowing leave to execute the decree was in fact, so far as the present case is concerned, the same Court as the Court in which the execution proceedings was pending ; and the Court, which passed the order dated 23rd March, 1948, was therefore, in the present case, the Court which had seizin of the execution proceeding, and was therefore the execution Court.

In the case of *Fakaruddin Mohamed Ahsan* v. *The Official Trustee of Bengal* (1) it was observed that " the Court executing the decree " in the old section 244, which is equivalent to section 47 of the present Code, means the Court executing the decree at the time when the application is made. In the present case now under consideration the District Court was the Court in which an application for execution had been filed and pending when it dealt with the application for leave to execute the decree against the appellant judgment-debtor, and thus it seems to us that the District Court when it passed the order granting leave to execute the decree could also be considered to be the Court which was executing the decree within the meaning of section 47 (1) of the Code of Civil Procedure. An appeal will accordingly lie against the order of the District Court,

(1) I.L.R. Vol. 10, Cal. 538.

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dated 23rd March, 1948, allowing the judgment-debtor leave to execute the decree.

In the case of *L. A. Krishna Ayyar* v. *Arunachalam Chettiar* (1) it was observed :

> " . . . . the appellant asks to be allowed to convert the appeals into civil revision petitions and that, in my view, he ought to be allowed to do, because in view of my opinion on the main question, the lower Court, had no jurisdiction to entertain the respondent's application for the payment out of the money to him, in which view a civil revision petition would clearly lie. "

Thus it is clear that the Court has in a proper case power to allow an appeal to be converted into a revision petition.

The case of *Ramchandra Kustoorchand* v. *Balmukaund Chaturbhuj* (2) was referred to on behalf of the respondent, but in that case no application for execution was pending at the time the order refusing to stay execution of a decree was passed, whereas in the present case under appeal the application for execution had in fact been filed and kept pending while the application for leave to execute the decree under the Liabilities (War-Time Adjustment) Act, 1945, was being considered.

The order of the District Court, dated 23rd March, 1948, granting leave to execute the decree was passed in disregard of the provisions of section 5 of the Liabilities (War-Time Adjustment) Act, 1945. The District Court had no power to delegate the decision of the matter, which would arise under section 5, to the Registrar of his Court, and that was the effect of the District Court's order dated 23rd March, 1948, so far as the matter under appeal is concerned. Section 2 (ii) of the Liabilities (War-Time Adjustment) Act, 1945, shows what Court ought to deal with an application

(1) I.L.R. 58 Mad. 972 p. at 987. (2) I.L.R. 39 Bom. 71.

under sections 3 and 5 of that Act. The order of the District Court, dated 23rd March, 1948, can accordingly be said to be an order which on its face indicates that the District Court has failed to exercise a jurisdiction in a matter which it was asked to decide in view of the provisions of sections 3 and 5 of the Liabilities (War-Time Adjustment) Act, 1945. It cannot be said that this is a case which does not involve any question touching the jurisdiction of the Court. Thus an application for revision would lie against the order of the District Court, dated 23rd March, 1948, even if it were not appealable. The order of the District Court granting leave to execute the decree against the appellant judgment-debtor must therefore be considered to be not only irregular, but to be an order which on the face of it shows clearly that the District Court had refrained from exercising a jurisdiction in a matter which came before it in view of the provisions of section 5 of the Liabilities (War-Time Adjustment) Act, 1945. The order of the District Court dated 23rd March, 1948, passed in Civil Miscellaneous case No. 1 of 1948 is accordingly set aside, and the District Court is directed to hear the matter raised in the written objection and to hear the parties and receive such evidence as the parties might desire to produce, whether oral or documentary, for the purpose of deciding the question whether this is a case where it ought to exercise its discretion in favour of the judgment-debtor in view of the provisions of section 5 of the Liabilities (War-Time Adjustment) Act, 1945.

It might be observed incidentally that as India is a foreign country to Burma from 4th January, 1948, it will be the duty of the Court to see that the provisions of section 44A of the Code of Civil Procedure and the Judicial Department Notification No. 141, dated the 7th March, 1939 (*Burma Gazette*, 1939, Part I, page 254)

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are conformed to before it proceeds to deal with matters directly involved in the execution application. The Union of Burma (Adaptation of Laws) Order, 1948, in effect continues to make the Judicial Department Notification No. 141, dated the 7th March, 1939, in force until it is modified or cancelled. Incidentally, it might be mentioned that it does not appear that any judgment has been filed as required under clause (*c*) of the Judicial Notification No. 141, dated the 7th March, 1939. The decree, which was sought to be executed in Civil Execution case No. 1 of 1948, was obviously not a decree of a District Court or any of the High Court in India.

The appeal is accordingly allowed with costs.

U AUNG THA GYAW, J.—I agree.

APPELLATE CIVIL.

Before U Aung Tha Gyaw, J.

MA KHIN KYI (APPELLANT)

v.

MA THAN TIN (RESPONDENT).*

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Jan. 27.

Burmese Buddhist Law—Kilita *child*—Apatittha *child*—*Both brought up by father*—*Inheritance of the estate*—*Competition between* kilita *step grand-child and* apatittha *child.*

Held : That a *kilita* child would inherit estate of his deceased parent to the exclusion of collaterals, but cannot inherit in competition with widow.

Ma Hnya v. *Ma On Bwin*, 9 L.B.R. 1, followed.

Ma Shwe Zi v. *Ma Kyin Thaw*, 3 B.L.T. 148 ; *Ma Sein Hla* v. *Maung Sein Hnan*, 2 L.B.R. 54, not followed.

But inheritance by a *kilita* child is confined to the properties in actual possession of his or her parent.

A *kilita* child would also exclude an *apatittha* child.

U E Maung's Buddhist Law at p. 225 and 264, followed.

A Burmese Buddhist husband had a *kilita* daughter who was abandoned by her mother, the mistress. The daughter was brought up by both husband and his wife and was given in marriage by the wife after the death of the husband. She died leaving a daughter. The couple had no legal issue but the wife adopted a child in *apatittha* form. Both the child of the *kilita* daughter of the husband and *apatittha* daughter of the wife claimed the estate.

Held : That *apatittha* child is entitled to half of the parental estate when in competition with the collaterals. Though strictly on principle *kilita* child might exclude an *apatittha* child when the claim is by the child of the *kilita* child of husband brought up by husband and wife, for the estate left by the wife and is opposed by *apatittha* child of the wife the decision of the District Court giving each half-share is according to justice, equity and good conscience, and should be upheld.

Maung Gyi v. *Maung Aung Pyo*, I.L.R. 2 Ran. 661 ; *Ma Than Nyun* v. *Daw Shwe Thit*, I.L.R. 14 Ran. 557, referred to.

Ba Than for the appellant.

Win Maung for the respondent.

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* Civil 2nd Appeal No. 92 of 1948 against the decree of the District Court of Tharrawaddy in Civil Appeal No. 2 of 1948, dated the 5th June 1948.

H.C. 1949

MA KHIN KYI v. MA THAN TIN.

U AUNG THA GYAW, J.—The facts of this case have been fully and clearly set out in the judgments of the two Courts below and hardly need any recapitulation. The deceased Daw Shin whose estate is now in dispute was the surviving widow of one U Shwe Din who predeceased her by about 12 years. The couple had no natural heirs born to them. Some years before his marriage with Daw Shin, U Shwe Din had married one Daw Dwe and with her also he had no natural issue. But during their coverture the appellant's father U Tun Pe was said to have been adopted into the family as their son. After the death of Daw Dwe and before his marriage with Daw Shin, U Shwe Din had intimacy with one Ma Mya Lay for whom he built a house in his garden on the outskirts of the town. The respondent's mother Ma Thein Shwe was born of this irregular union. When Ma Thein Shwe was a few years old, her mother Ma Mya Lay left U Shwe Din's protection to go and live with another man and Ma Thein Shwe was taken into U Shwe Din's household and brought up there as a daughter of the house. Ma Thein Shwe was given in marriage by Daw Shin with whom she lived until her death a few years after the respondent was born. It appears from the evidence that the appellant's father U Tun Pe died when she was about a month old and when her mother re-married seven years later she went away with her to her new home but was later brought back to U Shwe Din's household where she was brought up by him and Daw Shin. She lived with the latter until the latter's death and into her hands thus fell the properties belonging to Daw Shin.

The respondent by her next friend Maung Tun Naing thereupon brought a suit for recovery of these properties claiming that she was entitled to the same to the exclusion of the appellant, but the trial Court held

that the respondent was a *kilita* step grand-child of Daw Shin and on the authority of the decision made in the case of *Ma Sein Hla* v. *Maung Sein Hnan* (1), it decided that the respondent could not compete with the child of an *apatittha* adopted son for Daw Shin's inheritance.

The lower Appellate Court on the other hand thought that the respondent's right to share in the inheritance of Daw Shin is at least equal to that of the appellant and accordingly granted her a decree for a half-share in Daw Shin's estate.

It is now contended in this appeal that a grand-child born of a *kilita* daughter cannot inherit the estate of a step grand-parent in competition with a child of an *apatittha* adopted son on the ground that the adoption in whatever form clothes the relationship between the adoptee and the adoptive parent with the quality of legitimacy and that in the presence of a legitimate heir the claim of a person born of a *kilita* child cannot prevail.

The lower Appellate Court has drawn attention to the passage occurring at page 225 of Mr. Justice E Maung's Commentary on Burmese Buddhist Law where it is stated that —

> "Though the *Dhammathats* are silent as regards the right of an *apatittha* child as against a *kilita* child, it seems reasonably clear, from the fact that the *kilita* child excludes collaterals of the deceased parent, that a *kilita* will exclude an *apatittha* child."

The proposition set out above is based on the recognition given in the *Dhammathats* to the rights of a *kilita* child to inherit the estate in the actual possession of his deceased parents. At page 196 of the same commentary quoting from Mr. Justice May Oung's

(1) 2 L.B.R. 54.

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U AUNG THA GYAW, J.

treatise on the subject (at page 264) the following paragraph occurs :—

"It has been stated that, even as against collaterals of the deceased parent, the rights of a *kilita* are restricted to the estate actually in possession of the parent and that the *kilita* is excluded from ancestral property, in which his parent may have become entitled to a share, unless a partition had been effected before that parent's death."

Section 301 of the Digest of the Burmese Buddhist Law (Kinwun Mingyi) and the following sections lay down the rule of inheritance by which the claim of a *kilita* son is governed. The *Dhammathats* cited in the Digest clearly exclude the collaterals from any share in the property left by a deceased person where a *kilita* son survives the deceased. In a number of decisions on the point such a child has been held to be entitled to share the estate of a deceased parent even in competition with the latter's widow. *Ma Shwe Zi* v. *Ma Kyin Thaw* (1) and *Ma Sein Hla* v. *Maung Sein Hnan* (2). This view was however dissented from by the majority of the Judges in the Full Bench case of *Ma Hnya* v. *Ma On Bwin* (3). There can be no question whatsoever that the *kilita* child can inherit the estate of his deceased parent to the exclusion of the latter's collaterals.

But such a right should naturally be restricted to cases where the father had not paid any compensation to the mother and severed his connection with her and the child thereby for good or evil but had taken the child away from the mother and had brought it up in his own household. Section 53 of the *Manukye* evidently refers to cases where a *kilita* child's mother had been paid a lump sum by way of compensation, the father intending thereby to relieve himself of the responsibility

(1) 3 B.L.T. 148. (2) 2 L.B.R. 54. (3) 9 L.B.R.

of the child's upbringing. In the present case the alleged *kilita* child Ma Thein Shwe was abandoned by the mother and was taken into the natural father's family and brought up there as their own child. The degree of natural affection which grew between her and her step-mother Daw Shin is evidenced by the fact that a piece of property was bought in their joint names. Thus in the circumstances found in this case, it can be asserted with some degree of force that had Ma Thein Shwe been alive, she would have excluded her natural father's collaterals from inheritance to his estate.

Although an *apatittha* child is included, according to the *Dhammathats*, within the six classes of sons entitled to inherit, it has been held in the cases of *Maung Gyi* v. *Maung Aung Pyo* (1), and *Ma Than Nyun* v. *Daw Shwe Thit* (2) that in competition with the collaterals of his parents he is entitled to only half of the parental estate.

Thus on the principles laid down in the *Dhammathats* a case might possibly be found for the postponement of the *Apatittha's* claim to that of the *kilita* child in the property of their deceased parent. In this case, however, the contending claims have been made not to the estate of the deceased parent but to the estate of the deceased step grand-parent and in view of the fact that both the child born of the *kilita* daughter and the daughter born of the *apatittha* son had been brought up together in the household of the step grand-parent—circumstances which do not fit in with the contingencies met with either in the case law or provided for in the *Dhammathats*—the rule of justice, equity and good conscience followed by the lower Appellate Court would appear to commend itself as the best means of arriving at a just decision in this case.

Accordingly, this appeal will stand dismissed with costs.

(1) I.L.R. 2 Ran. 661. (2) I.L.R. 14 Ran. 557.

ORIGINAL CIVIL.

Before U Thein Maung, Chief Justice.

H.C. 1949

Feb. 13.

MARIAM BI BI (PETITIONER)

v.

RAHIMA BI BI (RESPONDENT).*

Application under s. 476 of the Criminal Procedure Code for filing a complaint—Objection filed with false verification—Objection to application on ground that application in question not required by law to be verified—Verification false—Whether complaint should be filed.

A purdanashin lady signed two objections at the instance of her husband and those objections were verified and it was subsequently found that the statements in the objections were false.

Held : That where a petition or objection was not required by law to be verified or where an oath is voluntarily taken when it is not necessary that oath should be taken, any statement made in such petition or objection or made on oath should not be made the basis of a prosecution.

Purendar Tha v. *Nunulal Tha*, (1927) I.L.R., 6 Pat. 184; *In the matter of the petition of Kasi Chunder Mozumder*, (1881) I.L.R., 6 Cal. 441, followed.

Prosecution should be instituted only when the interests of public justice demand the same. In this case as the Respondent did not file an affidavit in support of his statement and did not persist in the objections filed, it was not in the interest of justice that she should be prosecuted.

A. Aubert v. *A. W. Murray*, 7 B.L.R. 192 ; *Allahwasaya* v. *Emperor*, 29 Cr. Law Journal, 1044.

Dutt for the plaintiff.

M. I. Khan for the defendant.

U THEIN MAUNG, C.J.—This is an application under section 476 of the Code of Criminal Procedure for prosecution of the respondent for an offence under section 193 of the Penal Code. The case against the respondent is that she filed an objection to the present petitioner's application for reconstruction of a decree which had been passed by the High Court of Judicature at Rangoon in November 1941. The decree was one

* Civil Misc. No. 521 of 1947.

for Rs. 4,500 with costs against the respondent. It was in favour of M. E. Noor Bux, since deceased ; and Mariam Bi Bi, the petitioner is one of the legal representatives of M. E. Noor Bux. In her objection to the application for reconstruction, the respondent stated " It is submitted that there was no suit or decree as stated in the application * * * * As there was no case as alleged there is nothing to be reconstructed." She verified the said statements in her objection as true to her own knowledge. The objection is dated the 6th August 1947 and, on the 17th September 1947, the Registrar, Original Side, pointed out to Mr. Khan, the learned Advocate for the respondent that General Letter No. 19 of 1945 of this Court contemplated that proceedings for reconstruction should be on affidavits. Mr. Khan then stated that he did not desire to file an affidavit and that his client's position was that she did not remember what happened in the past.

Subsequently, on the 21st November 1947, the parties came to an agreement that a decree for Rs. 4,500 with costs had been passed against the respondent in favour of M. E. Noor Bux in November 1941 and that the decree should be reconstructed accordingly. They also agreed that Rs. 3,500 should be paid and accepted in full settlement of the decree. The only difficulty they had then was that they could not definitely state the number of the suit in which the decree was passed. A little later, in the course of the same day, Mr. Khan the learned Advocate for the respondent, obtained a copy of the judgment in the suit and produced it in the Court. It showed that the decree was passed in Civil Regular Suit No. 306 of 1940 on the Original Side of the High Court of Judicature at Rangoon. It was then recorded in the case Diary " The Petitioners who are the legal representatives

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of the decree-holder agree to accept a sum of Rs. 3,500 in full satisfaction ".

Under the circumstances which have been set out above, it is now alleged that the respondent has committed an offence under section 193 of the Penal Code as she verified the statements in her objection which are obviously false as true to her own knowledge.

The respondent's defence to the application is that she is *purdanashin* lady, who does not know English, that she signed the objections at the instance of her husband Abdul Jabbar who did not explain the contents thereof to her, that the copy of the judgment in Civil Regular Suit No. 306 of 1940 was never in her possession and that the application has been made for purposes " Which are vindictive and in order to coerce her to pay the decretal amount at once ".

There can be no doubt that the statements in the objection were false, but one of the main questions for consideration in connection with the application for prosecution of the respondent is whether the objection is a document which is required by law to be verified.

It has been held in *Purendar Tha* v. *Nunulal Tha* (1) that the law does not require a petition for substitution of parties to be verified and, therefore, that the person, who presents to the Court a verified petition for substitution, containing a false statement of the death of the defendant, is not punishable under section 193 of the Penal Code. Compare *In the matter of the petition of Kasi Chunder Mozumder* (2), wherein Garth C.J. even observed :

" An oath voluntarily taken in a proceeding, where an oath is not necessary, would not by the English law support an indictment for perjury, and I should doubt whether under the Penal Code the statement upon oath, when the oath is not necessary, would come within the provisions of section 191. "

(1) (1927), I.L.R. 6 Pat. 184. (2) (1881), I.L.R. 6 Cal. 441.

The learned Advocate for the petitioner has contended that the objection is required by law to be verified inasmuch as section 141 of the Code of Civil Procedure requires the procedure provided in the Code in regard to suits to be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction. However, Order VI, rule 15 of the Code is a special rule requiring pleadings to be verified, and pleadings are defined in rule 1 of the said Order to mean plaints or written statements only. Section 141 of the Code, which merely prescribes the general procedure to be followed in Miscellaneous proceedings cannot be construed to make the special rule about verification of pleadings applicable to objections and other documents which may be filed therein. In this connection it must be noted that the ruling of the Patna High Court relates to a petition for substitution of parties on the ground that the original defendant was dead and that it has been held therein that even such a petition is not a document which is required by law to be verified.

Besides, the object of the law which requires the sanction of the Court before a prosecution for giving false evidence can be entertained is to ensure that such prosecution shall be instituted only when the interests of public justice demand them and that they shall not be allowed to assist private ends of individuals. See *A. Aubert* v. *A. W. Murray* (1). It has also been pointed out in *Allahwasaya* v. *Emperor* (2) that it is inadvisable to prosecute a man under section 193 of the Penal Code if he had reverted to the truth in the course of the trial.

Although the respondent filed an objection containing false statements, which she verified as true to her own

(1) 7 B.L.R. 192.

(2) 29 Cr. Law Journal, 1044.

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knowledge, she did not persist in objecting to the application for reconstruction. She very properly changed her attitude towards the said application, refused to file an affidavit in support of her objection, ultimately admitted that there was a decree for the amount claimed by the petitioner with costs and actually entered into an agreement for adjustment of the decree.

So the Court has not been misled in any way by her objection and the petitioner has not suffered any loss on account thereof. Under these circumstances, I am of the opinion that her prosecution is not at all necessary in the interest of justice even if the objection be required by law to be verified and even if she has committed an offence under section 193 of the Penal Code as alleged by the petitioner.

The application is dismissed accordingly.

FULL BENCH (APPELLATE CIVIL.)

Before U Thein Maung, Chief Justice, U Tun Byu, U San Maung, U Aung Tha Gyaw and U Bo Gyi, JJ.

DAW KHIN PU (APPELLANT)

v.

DR. THA MYA (RESPONDENT).*

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Burmese Buddhist law—Marriage—Automatic divorce when takes place.

Held by the Full Bench : (1) That in the case of desertion and failure to give maintenance or to have any communication in the prescribed period, marriage is not dissolved automatically. Desertion by either party for the prescribed period merely renders the marriage voidable at the option of the deserted spouse. The marriage tie is not dissolved without an act of volition on the part of the deserted spouse showing his or her intention to determine the marriage relation or without conduct revealing a desire for divorce on the part of the deserted party.

Thein Pe v. *U Pet*, (1906) 3 L.B.R. 175, followed.

Ma Nyun v. *Maung San Thein*, (1927) I.L.R. 5 Ran. 537 (F.B.), over-ruled.

(2) A man against whom legal proceedings are instituted by his wife (who at the time of the institution thereof is living separately from him) for maintenance of herself and the child by him, cannot be deemed to have deserted her from the date of the institution thereof, merely because he does not call upon her to return and cohabit with him.

(3) Payment of maintenance allowance to the wife in compliance with a decree or order for payment thereof should be regarded as a contribution to her maintenance within the purview of s. 17 of *Manukye*, Book V.

(4) Maintenance allowance which is realized by execution of a decree or order for its payment also falls within the purview of the said section.

(5) The question as to whether the husband who failed to comply with the order for payment of maintenance can plead his own default and claim that the marriage has been dissolved, does not arise in view of the fact that the right to treat the marriage as dissolved is given to the aggrieved person only and not to offending spouse as well.

Ma Saw Kin and others v. *Maung Tun Aung Gyaw*, (1928) I.L.R. 6 Ran. 79 ; *Ma Nhin Bwin* v. *U Shwe Gone*, (1913) 41 Cal. 887, L.R. 41 I.A. 121 ; *Maung Kywe* v. *Ma Kyin*, I.L.R. (1930) 8 Ran. 411 ; *Ma Hmon* v. *Maung Tin Kauk*, I.L.R. (1923) 1 Ran. 722 ; *Brall* v. *Ex-parte Norton*, (1893) L.R. 2 (Q.B.D.) 381 ; *Re Carter and Kenderdine's Contract*, (1897) L.R. 1 Chan., Div. 776 ; *Re Hart* v. *Ex-parte Green*, (1912) L.R. 3 (K.B D.) 6 ; *Pulford* v. *Pulford*, (1923) P.D. 18 ; *U Thein* v. *Ma Khin Nyunt*, (1948) B.L.R. 108 ;

* Civil Reference No. 1 of 1949 arising out of Civil 1st Appeal No. 78 of 1948, High Court.

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Ma Saw Nun v. *U Aung San*, (1939) 12 R.L.R. 527 ; *N.A.V.R. Chettyar Firm* v. *Maung Than Daing*, I.L.R. 9 Ran. 524 ; *Ma Hnin Zan* v. *Ma Nyaing*, I.L.R. 13 Ran. 491 at p. 492 ; *Ma In Than* v. *Maung Saw Hla*, S.J.L.B. 103 ; *Malins* v. *Freeman*, 4 Bingam N.C. 395 ; *New Zealand Shipping Co., Ltd.* v. *Societe Des Ateliers Et Chantiers De France*, (1919) A.C. 1; *Ma Thin* v. *Maung Kyaw Ya*, (1892—96) 2 U.B.R. 56 ; *Daw Kyin Hmon* v. *Daw Mya Gale*, A.I.R. (1935) Ran. 247 ; *Maung Po Nyun* v. *Ma Saw Tin*, 5 Ran. 841 ; *U Pe* v. *U Maung Maung Kha*, 10 Ran. 261 ; *Nga Aye* v. *King-Emperor*, Criminal Appeal No. 238 of 1935 ; *Maung Hme* v. *Ma Scin*, (1917-18) 9 L.B.R. 191 (F.B.) ; *Daw Pwa May* v. *Ma Thein Mya*, A.I.R. (1937) Ran. 255 ; *Maung Sein* v. *Kin Thet Gyi*, (1904—06) 2 U.B.R. Marriage 5 ; *Ma Ka* v. *Po Saw*, (1907-08) 4 L.B.R. 340 (F.B.) ; *Ko Ong* v. *Ma Yon*, (1893) Printed Judgments of Lower Burma 31; *Maung Lo* v. *Maung Pyaung*, 3 B.L.T. 149 ; *Tola Ram* v. *Ma Kaing*, 5 B.L.T. 98 ; *C.T.P.V. Chetty Firm and others* v. *Maung Tha Hlaing and others*, (1925) I.L.R. 3 Ran. 322 (F.B.), referred to.

The following order of reference to a Full Bench was made by U Thein Maung C.J. and U San Maung J.:

This is an appeal from the judgment and decree of the Assistant Judge, Insein, by which he has declared that the appellant is no longer the respondent's wife and restrained her from recovering any money for her maintenance from the respondent "in any execution proceeding including Civil Execution No. 3 of 1946 of the District Court of Insein in respect of the period subsequent to the 27th April 1942."

Civil Execution No. 3 of 1946 relates to execution of the decree passed in Civil 1st Appeal No. 37 of 1940 in the late High Court of Judicature at Rangoon arising out of Civil Regular Trial No. 8 of 1939 in the District Court of Insein, for payment of Rs. 150 per mensem by the present respondent to the present appellant as her maintenance allowance. He objected her application on the grounds *inter alia* (1) that it was time-barred so far as the period prior to August, 1943, was concerned and (2) that there had been an automatic divorce between them as a result of "continued desertion committed by her since the 26th June, 1938." The learned District Judge held there was no substance in these objections so far as the application for execution was concerned and decided to deal with it on the merits. (*See* Exhibit H, which is a certified copy of the learned District Judge's order dated the 8th March 1947.)

He applied to the late High Court of Judicature at Rangoon to set the order aside in revision ; but the High Court refused to do so, as he had not only got another remedy but was actually

pursuing it, *i.e.* by instituting the suit out of which the present appeal has arisen. (*See* Exhibit J, which is a certified copy of the judgment of the High Court dated the 18th August, 1947, in Civil Revision No. 37 of 1947 in the High Court.)

The suit was instituted on the 25th March, 1947, *i.e.* shortly after the learned District Judge had decided to deal with the application for execution on the merits and while Civil Revision No. 37 was pending in the High Court.

He pleaded in the original plaint that the defendant (appellant) had deserted him and that there had been an automatic divorce on the *1st March, 1943* as she deserted him and he had paid her no maintenance allowance and had no communication with her since the 1st March, 1942. Incidentally he added in the same paragraph of the plaint "Further the plaintiff has inherited properties since about 1943 quite ample to maintain herself." He also pleaded in the alternative that there had been an automatic divorce on the *16th November, 1944, i.e.* on the expiry of one year from the date of his Advocate's letter (Exhibit C). Incidentally (Exhibit C) was a reply to a demand made by the appellant's lawyer for payment of the arrears of the maintenance allowance in which the respondent's advocate stated that the respondent was willing to receive her back. She treated this "offer" with contempt as he had admittedly married his present wife as long ago as August, 1939, *i.e.* shortly after she had sued him for maintenance; and his learned Advocate U Kyaw Din himself regards the "offer" not as a genuine one but as a mere subterfuge to avoid payment for maintenance.

However, he was allowed to file an amended plaint about ten months later, *i.e.* on the 31st January, 1948, in spite of her objection and he pleaded another alternative therein that there had been an automatic divorce on the 27th April, 1942, by "what may be termed as" his desertion of her from the 27th April, 1939, *i.e.* the date of her application to sue him *in forma pauperis* for maintenance of herself and her child by him. He has expressly stated in paragraph 9 (*a*) of the Amended Plaint that this alternative plea is taken "as the defendant denied desertion on her part in the aforesaid suit of hers against the plaintiff for maintenance".

The defendant (appellant) pleaded (*inter alia*) (1) that there was no desertion by her or by him; (2) that he "cannot plead his own laches, negligence or default in not paying maintenance

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monthly regularly to the defendant in his own favour" ; (3) that the plea of automatic divorce is *res judicata* ; (4) that the plea "is not maintainable on account of the position taken up by the plaintiff in November, 1943" *i.e.* in his advocate's letter (Exhibit C) to her and (5) that though the Code of Civil Procedure allows alternative pleas "the desertions by the plaintiff and the defendant are meaningless and cannot be raised ".

The learned Assistant Judge framed the following issues :—

(1) Was there a desertion as alleged in paragraphs 7 and/or 9 of the plaint ?

(2) Is the plaintiff estopped from pleading AUTOMATIC DIVORCE by reason of the contentions raised in paragraphs 5, 12 and 13 of the written statement ?

(3) If there be desertion, does it amount to an AUTOMATIC DIVORCE ?

(4) If so, from what date ?

(5) Did the defendant inherit properties and own and possess properties and means sufficient to maintain herself ? If so, from what date ?

(6) If so, is the defendant entitled to maintenance from the date of inheritance and means aforesaid ?

(7) Is the defendant estopped from pleading *res judicata* or otherwise, by reason of the contentions raised in paragraph 9 of the plaintiff's reply ?

(8) To what relief, if any, is the plaintiff entitled ?

(9) Is the plaintiff's plea of automatic divorce barred by *res judicata* ?

The learned Assistant Judge has held ultimately (1) that the respondent deserted his wife from the 27th April, 1939, *i.e.* the date on which she applied for permission to sue him *in forma pauperis* for maintenance of herself and his child by him ; (2) that there has been an automatic divorce with effect from the 27th April, 1942 ; (3) that the question of automatic divorce is not *res judicata* and (4) that he is not estopped from pleading automatic divorce.

The learned Assistant Judge's reason for holding that he deserted her on the 27th April, 1939, is, in his own words "The plaintiff might at any time have demanded cohabitation of his wife ; but he made no such demand ; therefore he wilfully kept apart from her ". Incidentally, this reason is not quite consistent with his own finding with reference to Exhibit C dated the

16th November, 1943, that "it was the defendant's fault not to have returned to him when offered".

This finding raises the following important questions of law :—

(1) Whether a man, against whom legal proceedings are instituted by his wife (who at the time of the institution of the suit is living separately from him) for maintenance of herself and her child by him, can be deemed to have deserted her from the date of the institution thereof merely because he does not call upon her to return to and cohabit with him ;

(2) Whether payment of maintenance allowance to the wife in compliance with a decree for payment thereof should not be regarded as contribution to her maintenance within the purview of section 17 of *Manukye*, Book V ;

(3) Whether maintenance allowance should not be regarded as such even though it has to be realized by execution of a decree or order for its payment ;

(4) Whether the husband who has failed to comply with such a decree or order can plead his own default and claim that the marriage has been dissolved, and

(5) Whether in case of desertion and failure to give maintenance or to have any communication, the marriage is dissolved automatically without any act of volition on the part of the other spouse.

Their Lordships of the Privy Council pointed out in *Ma Saw Kin and others* v. *Maung Tun Aung Gyaw* (1),

> "There has been much difference of opinion in Burma, and two Full Benches of the High Court have arrived at opposite conclusions, on the question whether, when the husband or wife has left the home, the marriage is put an end to by the fact of the husband's omitting to send the wife anything for three years or one year, as the case may be, or whether there must be some further act of volition showing an intention to determine the marriage relation, such as remarriage or a suit for divorce (2)."

(1) (1928) I.L.R. 6 Ran. 79.

(2) See *Ma Nyun* v. *Maung San Thein*, (1927) 5 Ran. 537 reversing *Thein Pe* v. *U Pet*, (1906) 3 L.B.R. 175.

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Their Lordships expressed no opinion on the question as it did not arise in that case. They merely observed with reference to *Manukye*, Book V, section 17, under which the difference of opinion has arisen,

> "In Their Lordships' opinion, provisions of this kind dealing with such a serious matter as the severance of the marriage tie must be strictly construed and fully complied with."

The ruling in *Ma Nyun* v. *Maung San Thein* (1) reversed the ruling of a Full Bench of the late Chief Court of Lower Burma in *Thein Pe* v. *U Pet* (2). It is also contrary to the views of (1) Mr. Copleston, Judicial Commissioner, in *Ma Thein* v. *Maung Kyaw Ya* (3), (2) U May Oung in his Leading Cases on Buddhist Law at page 86, and (3) U Tha Gywe in his Conflict of Authority on Buddhist Law, Vol. I at page 119. (*See* pages 549—551 of the ruling). Besides U E Maung (now a Judge in the Supreme Court of the Union of Burma) has observed at pages 87 to 89 of his Burma Buddhist Law :

> "It is submitted that Irwin J. in *Thein Pe* v. *U Pet* (2) has put the matter in a true light, when he says of Burmese Buddhists that, ' The law to which they were subject was not, in my opinion, the law of the *Dhammathats*, but the Customary law, for the ascertainment of which the *Dhammathats* are a very important guide, but not the only guide '. On this view of the matter, the conclusions come to by Adamson C.J. in the same case that the dissolution of the marriage tie by desertion alone, without any act of volition on the part of one or other of the parties to the marriage, is inconsistent with the beliefs and customs of Burmans are justified by the evidence. The view that automatic dissolution of marriage by desertion and lapse of time is foreign to modern ideas finds further support from the later unreported case of *Daw Kyin Hmon* v. *Daw Mya Gale* (4). The parties are of good social standing, the husband being a retired Superintendent of Police and the wife, a pleader's daughter. Despite thirty years' living apart following the

(1) (1927) I.L.R. 5 Ran. 537.
(2) (1906) 3 L.B.R. 175.
(3) (1892—96) 2 U.B.R. 56.
(4) A.I.R. (1935) Ran. 247.

taking of a second wife by the husband, it never occurred to the parties or to the witnesses, persons of good social standing well conversant with the facts, that at any time during these thirty years, the parties were other than man and wife.

Anomalies that would arise from the recognition of automatic dissolution of marriage on the lapse of the periods prescribed after desertion are serious. A wife may not divorce her husband at will even on surrendering all her interest in the joint property (1) yet she may by leaving the husband and keeping out of his way for a year obtain a dissolution of the marriage and claim at the expiry of the period partition on the basis of a divorce by mutual consent (2). A decree for restitution of conjugal rights will be illusory ; for if only the party against whom the decree is passed can evade the process of law for the prescribed periods, he or she may then come forward and claim that the decree has become inoperative. That *Ma Nyun*'s case has resulted in loosening the bond of marriage between Burmese Buddhists, undoing the work begun by King Bodawpaya in his Royal Rescript of 1748 A.D. is clear from the case of *Nga Aye* v. *King-Emperor* (3). It was claimed that the wife, who has successfully evaded her husband's enquiries of her whereabouts for one year, is competent to contract a valid marriage with another man ; after *Ma Nyun*'s case the claim is irresistible.".

The present case itself may be regarded as an anomaly. The respondent has been able to plead desertion by him or her in so many alternatives as he has not to allege any definite act of volition on the part of the deserted spouse. In fact he has been able to plead his own desertion of her and his own failure to comply with the decree of the late High Court of Judicature at Rangoon simply because no act of volition on her part is required although it is a fundamental rule of law that no one can benefit by his own wrong.

(1) *Ma Hmon* v. *Maung Tin Kauk*, 1 Ran. 722 ; *Maung Kywe* v. *Ma Kyin*, 8 Ran. 411.

(2) *Maung Po Nyun* v. *Ma Saw Tin*, 5 Ran. 841 ; *U Pe* v. *U Maung Maung Kha*, 10 Ran. 261.

(3) Criminal Appeal No. 238 of 1935.

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The learned Advocate for the respondent appears to have realized this. He stated on the first day of the hearing that he would argue the case on the basis of the wife's desertion and that there was ample evidence of an act of volition on the part of the husband. He actually argued on the second day that the wife deserted the husband on the 27th April, 1939, when she applied for permission to sue him *in forma pauperis* for maintenance. He shifted his ground and fell back on the alternative case of the husband having deserted the wife only when we asked him (1) whether the wife did not have the right to apply or sue for maintenance; (2) if she did have the right, whether exercise of such right by applying for permission to sue *in forma pauperis* and by actually suing the husband for maintenance could amount to any matrimonial offence at all ; (3) whether desertion was not a matrimonial offence ; (4) whether the Court which entertained the application or accepted the plaint could be said to have encouraged the commission of a matrimonial offence by way of desertion ; (5) whether she did not have a right to sue her husband for divorce in accordance with the ruling in *Maung Hme* v. *Ma Sein* (1) since he has admittedly married another wife in August, 1939, without her consent, and (6) whether the fact that she has not sued him for divorce is not good evidence of her unwillingness to dissolve the marriage.

Moreover, Maung Ba J. who wrote the leading judgment in *Ma Nyun and one* v. *Maung San Thein* (2) has brushed aside the argument based on the last clause in section 17 of *Manukye*, Book V, very lightly. That clause reads " Let them have the right to divorce and marry again ; " and Adamson C.J. has observed in *Thein Pe* v. *U Pet* (3) (at page 183),

> " The right given is first to divorce and then to marry again. The right to marry again appears to have been introduced into the section merely as a visible symbol of the fact that the marriage tie has been dissolved. Whether the dissolution can be accomplished by a mere act of volition, as the section seems to imply, or whether it would require some more formal action, is a question which in the present case does not concern us. But it appears to me that the letter of the law requires that there shall be at least an act of volition.

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(1) (1917-18) 9 L.B.R. 191 (F.B.). (2) (1927) 5 Ran. 537.
(3) (1905-06) 3 L.B.R. 175.

In sections 301 and 312 of Volume II of the Digest of Burmese Buddhist Law there are extracts from many *Dhammathats*. They vary in details, but in the main principle they agree. On the one side is the husband or wife who is in fault, on the other is the wife or husband who has been deserted. They give to the party who is sinned against the right to be no longer bound by the marriage tie. But in no case is it suggested that there can be a dissolution of marriage except at the desire of a party to the marriage."

Maung Ba J. has merely observed on the above argument :

" As regards the last phrase ' let them have the right to divorce and marry again ' I do not agree with the learned Chief Judge that it implies that either party has still got to do something to sever the marriage bond. In my opinion it simply means that dissolution of marriage has resulted and that they can take advantage of it." (*See* page 546 of 5 Ran.).

For the above reasons we are of the opinion that the question as to whether there can be an automatic divorce without any act of volition on the part of the deserted spouse should be considered by a Full Bench of this High Court.

The question has been further complicated by the fact that Gledhill J. has stated in *U Thein* v. *Ma Khin Nyun* (Criminal Revision No. 174B of 1946 in the late High Court of Judicature at Rangoon),

" The rule in section 17, Book V of *Manukye* is to be found in the older *Dhammathats* and was formulated by Burmese Jurists who could not have contemplated the existence of a criminal court with powers to make and enforce orders that a husband should pay a monthly sum for his wife's maintenance. It is a rule which provides that subject to conditions indicated, a husband may rid himself of his wife by making it clear that he has no love for her and repudiates his responsibilities towards her. If he is compelled by force or fraud to put her in possession of money for her maintenance, he does not, to my mind ' contribute ' towards her maintenance, in the sense in which that word is used in the rule.

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It was held in *Daw Pwa May* v. *Ma Thein Mya* (1) that acquiescence in the deserted wife occupying and enjoying the rents of part of the estate was a ' contribution ' and I am prepared to go as far as to say that a voluntary payment of an instalment in accordance with an order of Court is a ' contribution, ' but I do not think that the realization of such money by distraint is, and I am positive that neglect to comply with a maintenance order is not a contribution to the wife's maintenance."

(*See* Exhibit F which is a certified copy of his judgment dated the 24th January, 1947. The respondent appears to have amended his plaint on the 31st January, 1947, as stated above to take advantage of the ruling therein.)

The matter does not rest there. Gledhill J. has subsequently commented on the Lower Courts having shown a reluctance to accept his ruling in that case and has actully held in *U Thein* v. *Ma Khin Nyunt* (2) that the marriage between U Thein and Ma Khin Nyunt had been dissolved with effect from the 1st January, 1945, inasmuch as Ma Khin Nyunt, had not been able to recover the maintenance due to her under an order for maintenance under section 488 (1) of the Code of Criminal Procedure since the 1st January, 1942, despite the fact that she had filed four applications for recovery thereof and had according to his own finding in Exhibit F, " done all she could."

So the matter has been pushed to a logical conclusion which appears to be more or less absurd. The combined effect of *Ma Nyun* v. *Maung San Thein* (3) and Gledhill J.'s rulings is as follows. A man who deserts his wife may have an order for maintenance passed against him under section 488 (1) of the Code of Criminal Procedure or a decree for maintenance passed against him in a civil suit. But if he refuses or fails to comply with the order or the decree for a period of three years, the marriage will be dissolved automatically and he will be released from all further liability to pay maintenance allowance even though (1) the wife has done all she could to recover maintenance allowance from him during that period ; (2) maintenance allowance may have been recovered from him in execution of the order or decree, and (3) the wife does not want the marriage to be

(1) A.I.R. (1937) Ran. 255. (2) B.L.R. (1948) 108.
(3) (1927) 5 Ran. 537.

dissolved. They cannot but have the undesirable effect (1) of putting a very high premium on the matrimonial offences of desertion and failure to give maintenance allowance, and (2) of encouraging and rewarding contumacy in the form of non-compliance with orders or decrees for payment of maintenance allowances.

So we are of the opinion that the question as to whether this is really in accordance with Buddhist Law should be referred to a Full Bench of this court.

With reference to the learned Assistant Judge's statement " the plaintiff might at any time have demanded cohabitation of his wife " we must say that he could not have done so after he had married another woman, *i.e.* since August, 1939, which was but a few months after the application to sue him *in forma pauperis* as she then had reasonable cause for refusing to return to him. [Cp. *Maung Sein* v. *Kin Thet Gyi* (1), *Ma Ka* v. *Po Saw* (2), *Maung Kywe* v. *Ma Kyin* (3), and *Daw Kyin Hmon* v. *Daw Mya Gale* (4).]

The question as to whether there has been desertion by the respondent was not in issue in the suit for maintenance. It was not decided by the learned District Judge in the Execution Case as he was of the opinion that it had no substance so far as the application for execution was concerned ; and the late High Court of Judicature at Rangoon refused to interfere with his order in revision as the respondent had actually filed the suit. Under these circumstances the question cannot be *res judicata* at all.

The learned Assistant Judge has not decided issues Nos. 5 and 6 as in his opinion it is not necessary to decide them at all. However, the fact that the respondent has pleaded " that the defendant has inherited properties from her parents and owns and possesses properties and means quite ample to maintain herself and is on that account no more entitled to receive any maintenance from the plaintiff since the year 1943—the year of inheritance and means," will have to be taken into consideration in deciding whether his case is within the purview of section 17 of *Manukye*, Book V.

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(1) (1904-06) 2 U.B.R., Marriage 5.
(2) (1907-08) 4 L.B.R. 340 (F.B.).
(3) (1930) I.L.R. 8 Ran. 411 at p. 418.
(4) A.I.R. (1935) Ran. 247.

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This plea must be taken together with (1) the statement of his lawyer in (Exhibit C) that the decree for maintenance had become useless under the new Burmese regime (during the period of Japanese occupation) ; (2) his offer therein to receive her back, and (3) the fact that he amended his plaint about a week after Gledhill J. had decided *U Thein* v. *Ma Khin Nyun* as per Exhibit F to plead his own desertion of her. All these, when they are considered together, indicate (1) that he did not pay maintenance as he was under the impression after the Japanese invasion that the decree had become invalid as a result thereof and after her father's death that she had inherited property which was " quite ample to maintain her," and (2) that he never meant to desert her and as a matter of fact did not realize that he could be said to have done so till the said judgment was out.

If it was a fact that she had inherited enough property for her maintenance she would not have been entitled to sue for maintenance. See *Ko Ong* v. *Ma Yon* (1). And the question as to whether she would be able to execute the decree for maintenance which she had already obtained appears to be an open question.

There is another aspect of the case. If she had inherited property, he would have had vested interest in one-third thereof. [See *Maung Lo* v. *Maung Pyaung* (2) ; *Tola Ram* v. *Ma Kaing* (3) ; *C.T.P.V. Chetty Firm and others* v. *Maung Tha Hlaing and others* (4).] So he may be said to have allowed her to maintain herself with their joint property (*letletpwa*). [Cp. *Daw Pwa May* v. *Ma Thein Mya* (5).]

For the reasons which we have stated above, we refer the five questions, which have been set out at pages 4 and 5 of this judgment for decision by a Full Bench.

N. K. Bhattacharrya for the appellant.

Hla Pe and Kyaw Din for the respondent.

U THEIN MAUNG, C.J.—We shall deal with question No. 5 first as it is the most important of all the questions under reference.

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(1) (1893) Printed Judgments of L.B. 31.
(2) 3 B.L.T. 149.
(3) 5 B.L.T. 98.
(4) (1925) I.L.R. 3 Ran. 322 (F.B.).
(5) A.I.R. (1937) Ran. 255.

Their Lordships of the Privy Council did not decide this question in *Ma Saw Kin and others* v. *Maung Tun Aung Gyaw* (1) as it did not arise there. However, Their Lordships observed therein :

" According to the ruling of Their Lordships in *Ma Nhin Bwin* v. *U Shwe Gone* (2), the Burmese Law in this and similar questions is to be determined by the *Manukye* or *Dhammathat* of the Laws of *Menoo*, with such assistance as may be derived where necessary from the other *Dhammathats*. As regards the question of divorce, there have been considerable differences of judicial opinion in Burma both as to the proper interpretation of the texts themselves and as to whether some of them should not be considered obsolete."

Their Lordships also observed therein with reference to *Manukye*, Book V, section 17 :

" In Their Lordships' opinion, provisions of this kind dealing with such a serious matter as the severance of the marriage tie must be strictly construed and fully complied with. There has been much difference of opinion in Burma, and two Full Benches of the High Court have arrived at opposite conclusions, on the question whether, when the husband or wife has left the home, the marriage is put an end to by the fact of the husband's omitting to send the wife anything for three years or one year, as the case may be, or whether there must be some further act of volition showing an intention to determine the marriage relation, such as remarriage or a suit for divorce."

So we must construe the *Manukye* strictly " with such assistance as may be derived where necessary from the other *Dhammathats* " and see whether the requirements are fully complied with.

The material part of *Manukye*, Book V, section 17 has been translated by Richardson as follows :—

" 17th. The law when a husband and wife, having no affection for each other, separate.

(1) (1928) I.L.R. 6 Ran. 79. (2) (1913) 41 Cal. 887 ; L.R. 41 I.A. 121.

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Any husband and wife living together, if the husband, saying he does not wish her for a wife, shall have left the house, and for three years shall not have given her one leaf of vegetables, or one stick of firewood, at the expiration of three years, let each have the right to take another wife and husband. If the wife, not having affection for the husband, shall leave (the house) where they were living together, and if during one year he does not give her one leaf of vegetables, or one stick of firewood, let each have the right of taking another husband and wife ; they shall not claim each other as husband and wife ; let them have the right to separate and marry again."

The Full Benches of the Chief Court of Lower Burma and the High Court of Judicature at Rangoon arrived at opposite conclusions on the question as they differed in the interpretation of the provision " they shall not claim each other as husband and wife ; let them have the right to separate and marry again."

The more correct translation of this provision, as Adamson C.J. has pointed out in *Thein Pe* v. *U Pet* (1), is " They may not say ' you are my husband ', ' you are my wife '. Let them have the right *to divorce* and marry again," the Burmese text being " ငါ့ဝင်-ငါ့ဖယား ဖဆိုသာ၊ ကွာဝိုင်ခွင့်ပြုခစေ ; and the defect in the translation appears to have been one of the causes of the difference of opinion.

Fox J. observed in his dissenting judgment in *Thein Pe* v. *U Pet* (1) :

" The imperative words of the text are followed by the words ' let them have the right to separate.' These words no doubt seem to imply that the result of the conduct at the end of the year is merely to give a right to a divorce at the option of either party, and that something must be done by at least one party after the period before the marriage will be actually dissolved.

Reading them however with the rest of the text, I do not think that this is their true meaning. *Prima facie* they are unnecessary, *for the parties have already separated.* The intention

(1) 3 L.B.R. 175 (F.B.) at p. 183.

in inserting them may have been to render lawful after the year what has been unlawful previously. In any case it appears to me that the most important part of the text is the injunction not to claim one another as husband and wife, and the words giving each the right to take another spouse. As in the case of a husband deserting his wife for three years, there is nothing making it compulsory for either the husband or the wife to communicate his or her intention to be no longer bound by the marriage tie, or to do anything indicating such intention."

On the other hand Adamson C.J. observed therein :

" In my view this section does not in any way support the proposition that desertion is *ipso facto* a dissolution of marriage. It merely asserts that desertion gives a right to dissolve marriage. I am unable to follow my learned colleague Mr. Justice Fox in regarding the section as containing a mandate of the lawgiver enjoining a husband and wife who conduct themselves in the manner stated in the section not to consider or claim one another after the periods stated as husband and wife. In my view the section merely directs that the party in fault shall not claim the other against the other's wish. Nor do I think that any such inconsistency as that pointed out by my learned colleague, *viz.* that a woman, although still married to one man, has a right to marry another, can possibly arise under the provisions of the section.

The right given is first to divorce and then to marry again, The right to marry again appears to have been introduced into the section merely as a visible symbol of the fact that the marriage tie has been dissolved. Whether the dissolution can be accomplished by a mere act of volition, as the section seems to imply, or whether it would require some more formal action, is a question which in the present case does not concern us. But it appears to me that the letter of the law requires that there shall be at least an act of volition.

In sections 301 and 312 of Volume II of the Digest of Burmese Buddhist Law there are extracts from many *Dhammathats*. They vary in details, but in the main principle they agree. On the one side is the husband or wife who is in fault, on the other is the wife or husband who has been deserted. They give to the party who is sinned against the right to be no longer bound by the marriage tie. But in no case is it

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suggested that there can be a dissolution of marriage except at the desire of a party to the marriage."

Maung Ba J., who wrote the leading judgment in *Ma Nyun* v. *Maung San Thein* (1) observed :

" As regards the last phrase ' let them have the right to divorce and marry again ' I do not agree with the learned Chief Judge that it implies that either party has still got to do something to sever the marriage bond. In my opinion it simply means that dissolution of marriage has resulted and that they can take advantage of it.

The learned Chief Judge was also influenced by the consideration that the relationship should come to an end by mere desertion though one of the couple might not wish it or might not wish a divorce. The *Manukye* is not without a remedy for such cases. It penalises the party who wishes to separate, *when there is no fault on either side.* (Section 3 of Book 12)."

Incidentally *Manukye*, Book XII, section 3, provides for " *ex-parte* divorce " by surrender of property and it must be deemed to be obsolete in view of the ruling in *Maung Kywe* v. *Ma Kyin* (2). There it was held " that under the personal law of the Burman Buddhist, divorce at the instance of one party to the marriage merely for caprice and without proof of some matrimonial fault is not permissible, even if the party desiring the divorce is prepared to surrender his or her share of the joint property and to pay ' kobo '."

Since there is such difference of opinion over section 17 of *Manukye*, Book V, we must see what assistance we can get from the extracts from other *Dhammathats* which appear along with it in section 312 of Kinwunmingyi's Digest, Volume II.

The extract from *Vilasa* reads :

" If, disliking the husband, the wife leaves him, he shall wait a year, at the expiry of which he may demand restoration of all

(1) (1927) I.L.R. 5 Ran. 537 (F.B.). (2) (1930) I.L.R. 8 Ran. 411.

the bridal presents specifying them, and when he has obtained them he may expel her from the house. So says *Manu*, the Rishi."

The extracts from *Dhammathatkyaw*, *Vannana* and *Rasi* are to the same effect. They all give the husband the right to expel the wife, where the wife is offending party.

The extract from *Manuvannana* reads :

" The husband leaves the wife saying that he does not love her, and remains away for several years. If she marries again publicly she shall not be liable to pay any compensation to her former husband, and he shall be severely punished if he subsequently claims her as his wife and attempts to forcibly resume conjugal relations."

This extract gives the wife the right to marry again where the husband is the offending party.

All the above extracts deal with the case of the husband remaining away from the wife and the case of the wife remaining away from the husband separately.

The extract from *Cittara*, *Raiabala* and *Dhamma* deal with the cases together like the extract from *Manukye*. The extract from *Rajabala* reads :

" If, having no affection for his wife, the husband leaves her and for three years does not send her any means of subsistence, she shall have the right to marry again. If the wife leaves the husband for the same reason and no means of livelihood is sent for a year, he shall have the right to marry again. If either the husband or the wife marries again before the period specified has expired, he or she shall be deprived of all the property belonging to them, and shall be expelled if he or she returns to the house (of the party who is not in fault)."

The extract from *Cittara* is to the same effect as the extract from *Rajabala* ; and it must be noted that these extracts also give the right to the aggrieved party as against the offending party.

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The extract from *Dhamma* reads :

" If after a quarrel, the husband leaves the wife, and for three years does not send any means of maintenance, let her have the right to marry again. If the wife leaves the husband and does not send any means of maintenance for a year, let each have the right to marry again. If the wife marries before the expiry of three years after her husband has left her, the husband shall be entitled to obtain the whole of the property belonging to them. If, on the other hand, the husband marries again before a year has elapsed after his wife has left him, she shall be entitled to the whole of their property. Neither of them shall accuse the other of being guilty of adultery."

In the case of the husband having left the wife, this extract gives the wife the right to marry again ; but in the case of the wife having left the husband, it gives the right to both the husband and the wife. However, this is the only extract which gives the right to the offending party also ; and the provision in it that " neither of them shall accuse the other of being guilty of adultery ", even though that other spouse has married again before the expiry of the prescribed period, is clearly obsolete as bad law.

Sections 301 and 395 of Kinwunmingyi's Digest, Volume II, are also relevant to the question under consideration. These sections contain many extracts from various *Dhammathats* under the respective headings " The wife is free to marry another man after three years' absence of the husband at his parents' house " and " If the husband who lives in the same town or village as the wife, but apart from her, fails to resume cohabitation after the lapse of some time, the wife is entitled to marry again ". These sections may be compared with section 291 of the *Attasankhepa Vannana* which gives the wife the right to marry again under similar circumstances.

So we agree with Adamson C.J. that the *Dhammathats* agree in the main principle of giving the

right to the aggrieved party and against the offending party. In his own words (which we have quoted above) " On the one side is the husband or wife who is in fault, on the other is the wife or husband who has been deserted. They give to the party who is sinned against the right to be no longer bound by the marriage tie. But in no case is it suggested that there can be a dissolution of marriage except at the desire of a party to the marriage."

To hold that divorce is automatic, regardless of the wishes of the aggrieved party, will tantamount to putting a premium on desertion which is a reprehensible matrimonial offence, and that it is not the intention of the *Dhammathats* to confer the same right on the offending spouse as on the offended spouse or to let him benefit by his own wrong may be inferred also from section 305 of Kinwunmingyi's Digest, Volume II, which reads :

" If either the husband or the wife abandons the other, he or she to be criminally punished.

If a man abandons his parents, wife or children without cause, he shall undergo six hundred lashes.

If either the husband or the wife is guilty of desertion, he or she shall undergo six hundred lashes. The corporal punishment shall not be remitted even if the guilty party undertakes to support the other. "

And the second extract therein is from section 30 of *Manukye*, Book IV, itself.

Besides, it has been held in *Ma Hmon* v. *Maung Tin Kauk* (1) :

" That under Burmese Buddhist Law, where both husband and wife had been married before, neither party had the right to insist on a divorce against the will of the other party and without proof of misconduct or default of the other party.

(1) (1923) I.L.R. 1 Ran. 722.

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Semble : The law is the same in case of couples who have not been previously married."

And Heald J. has observed in the course of his judgment therein :

" In my opinion, the right to divorce without fault, like a large number of other rights mentioned in the *Dhammathats* has long been obsolete. It is not supported by custom ; its resurrection in the British Courts for a few years, fifty or sixty years ago, was the result of a mere accident ; if allowed it would defeat the provisions of the law as to the maintenance of wives and would practically destroy marriage as a permanent institution. It is a mere relic of the ages of barbarism. For the past forty years it has been rejected in Lower Burma without objection on the part of the people, and the fact that its recognition in Upper Burma nearly twenty years ago has not been followed by a demand for such divorce shows that it is contrary to the present ideas of the people. "

The right which is conferred on the aggrieved spouse must not be turned into a liability by reading the provisions of the *Dhammathats* as if they are imperative, *i.e.* as if the aggrieved spouse has no option in the matter but is bound to treat the marriage as dissolved.

Adamson C.J. has observed in *Thein Pe* v. *U Pet* (1) (at page 104) :

" I further think that the idea that marriage can be terminated in any way except by death, without the wish of one or the other of the parties is inconsistent with the fundamental principles of the marriage contract. On first principles marriage is a contract that is intended to last during life. Why should it alone of all contracts be terminated by the failure of one of the parties to perform all his obligations, if neither party wishes to terminate it ? If it is perfectly conceivable, in fact it often happens in actual life, that a wife may be deserted, and yet may not wish for a divorce. If she is divorced she may lose social status. She may have not only the consequences to herself to think of, but the consequences to her children. "

(1) 3 L.B.R. 175 (F.B.) at p. 183.

And we are in entire agreement with him. The fault is entirely that of the spouse who has remained away and there is no reason why the other spouse should not have the option to condone the fault or to treat the marriage as dissolved. There certainly is no equity in favour of the offending spouse.

Besides, anomalies that would arise from regarding what merely confers a right or option on one spouse as imperative on both, *i.e.* from treating the marriage as automatically dissolved without the aggrieved party having any choice in the matter are serious as pointed out by U E Maung (now a Judge in the Supreme Court of the Union of Burma) at pages 88-89 of his book on Burmese Buddhist Law.

"Anomalies that would arise from the recognition of automatic dissolution of marriage on the lapse of the periods prescribed after desertion are serious. A wife may not divorce her husband at will even on surrendering all her interest in the joint property (1); yet she may by leaving the husband and keeping out of his way for a year obtain a dissolution of the marriage and claim at the expiry of the period partition on the basis of a divorce by mutual consent (2). A decree for restitution of conjugal rights will be illusory; for if only the party against whom the decree is passed can evade the process of law for the prescribed periods, he or she may then come forward and claim that the decree has become inoperative. That *Ma Nyun*'s case has resulted in loosening the bond of marriage between Burmese Buddhists, undoing the work begun by King Bodawpaya in his Royal Rescript of 1748 A.D. is clear from the case of *Nga Aye* v. *King-Emperor* (3). It was claimed that the wife, who has successfully evaded her husband's enquiries of her whereabouts for one year, is competent to contract a valid marriage with another man; after *Ma Nyun*'s case, the claim is irresistible."

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(1) *Ma Hmon* v. *Maung Tin Kauk*, 1 Ran. 722; *Maung Kywe* v. *Ma Kyin*, 8 Ran. 411.

(2) *Maung Po Nyun* v. *Ma Saw Tin*, 5 Ran. 841; *U Pe* v. *U Maung Maung Kha*, 10 Ran. 261.

(3) Criminal Appeal No. 238 of 1935.

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Fox J. has observed in *Thein Pe* v. *U Pet* (1) (at pages 179-180) :

" The texts quoted in the sections of the Digest deal with two cases, one that of a husband abandoning or deserting his wife, the other that of a wife abandoning her husband. In the first case according to the majority of them, if the desertion continues for three years, the wife is at liberty to marry another husband. None of the texts say that the right is merely to obtain a divorce, or to declare herself divorced, nor do any of them say that the wife must communicate her intention of dissolving the marriage to her husband. In some of the cases stated such communication would be impossible. If then the wife has the right to marry another husband at the end of the three years, it appears to me to follow that the marriage becomes dissolved at the end of that period, for the idea of a woman whilst married to one man having the right to marry another man is as foreign to Burmese Buddhist law as it is to the Christian law."

However, as Adamson C.J. has pointed (at page 183 *ibid*) "The right given is first to divorce and then to marry again. In other words the marriage only becomes voidable at the instance of the aggrieved spouse." With reference to the above observation of Fox J., U May Oung also has pointed out at page 94 of his Leading Cases on Buddhist Law, consistently with the view that the marriage becomes voidable at the instance of the aggrieved party only :

" A possible solution is that the previous marriage is dissolved when the woman makes up her mind to marry again, but that is not an ' expressed act of volition.' Hence the only way out seems to be to discard the expression ' act of volition,' and to lay down that desertion does not *ipso facto*, and without evidence of conduct revealing a desire for divorce on the part of the deserted party, dissolve the marriage tie."

In this connection we would like to refer to *In re Brall* v. *Ex-parte Norton* (2), *In re Carter and*

(1) 3 L.B.R. 175 (F.B.) at p. 183. (2) (1893) L.R. 2 Q.B.D. 381.

Kenderdine's Contract (1), and *In re Hart* v. *Ex-parte Green* (2), wherein even the word "void" in section 47 of the Bankruptcy Act, 1883, has been held to mean "voidable."

Lindley L.J. observed in *In re Carter and Kenderdine's Contract* (1):

"It would be a strange mode of legislation to say that you can impeach a settlement from the date of its execution even as against *bona fide* purchasers for value without notice. Such a legislation would be at variance with the whole spirit of the bankruptcy law ever since we have had one."

Cozens-Hardy M.R. observed in the course of his judgment in *In re Hart* v. *Ex-parte Green* (2):

"In my opinion the true view is that a voluntary settlement is not void, but is only voidable by the trustee, who must apply to the Court for a declaration to that effect and for consequential relief. * * * * I think I am entitled to do what was done by Lindley L.J. in *In re Carter and Kenderdine's Contract* (1), namely, 'to consider what the consequences would be if the other conclusion were arrived at.' No purchaser of shares or stock on the Stock Exchange would be safe if Flora Lomas is to be deprived of her shares. If I may adopt the words of Lindley L.J. 'to my mind good sense is shocked by such a startling construction as that'."

In those cases the Courts had to interpret even the word "void" in a statute as "voidable" by way of historical interpretation in the light of the general principles of property law and in the interests of justice and public policy. In the present case we have been able to interpret the *Dhammathats* as we have indicated above without straining their language and by merely comparing their provisions with one another and examining them in the light of the general principles of the law of marriage.

(1) (1897) L R. 1 Chancery, Div. 776. (2) (1912) L.R. 3 K.B.D. 6.

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The learned Advocate for the respondent has submitted that the ruling in *Ma Nyun* v. *Maung San Thein* (1) should be allowed to stand on the principle of *stare decisis*. However, this ruling itself differed from the ruling in *Thein Pe* v. *U Pet* after the latter had been in force for about 22 years and it is so unjust, unreasonable and inconsistent with the fundamental principles of the law of marriage that we cannot allow it any more, in the words of U E Maung (now a Judge in the Supreme Court of the Union of Burma), to "loosen the bond of marriage between Burmese Buddhists undoing the work begun by King Bodawpaya in his Royal Rescript of 1748 A.D." So we must declare that it is not a correct exposition of the law. (*Cf.* Broom's Legal Maxims, 10th Edition, page 93).

As regards the first question under reference the material part of *Manukye*, Book V, section 17, commences with the words "Any husband and wife living together, if the husband, saying he does not wish her for a wife, shall have left the house, etc." ; the extracts from *Manuvannana* and *Cittara* in section 312 of Kinwunmingyi's Digest, Volume II, will apply only if "the husband leaves the wife saying that he does not love her" and as observed by Their Lordships of the Privy Council in *Ma Saw Kin and others* v. *Maung Tun Aung Gyaw* (2) (at page 85) provisions of this kind dealing with such a serious matter as the severance of the marriage tie must be strictly construed and fully complied with.

The learned Advocate for the respondent has argued on the authority of *Pulford* v. *Pulford* (3) that desertion can commence even after the parties may have innocently ceased for a time to be actually living

(1) (1927) I.L.R. 5 Ran. 537 (F.B.). (2) (1928) I.L.R. 6 Ran. 79.
(3) (1923) P.D. 18.

together, separated by the calls of everyday life or the exigencies of public duty, by the husband taking advantage of the separation and purposely rejecting all subsequent opportunities of coming together again.

However, the principal requirement of the *Dhammathats* appears to be that the husband must inform the wife that he does not love her or that he does not want her as his wife any more in order that there may be no doubt as to his intention in leaving her or as to the date from which time should run against him. The mere fact that the husband does not call upon the wife to return to and cohabit with him, after she has instituted legal proceedings for maintenance against him, does not necessarily indicate that he does not want her as his wife anymore and it cannot have the same legal effect as expressly declaring or informing her that he does not want her as his wife anymore. He may have abstained from doing so for some other reason, *e.g.* because he knows or feels that the wife has a just and sufficient cause for staying away from him.

With reference to the second question we cannot see any reason why payment of maintenance allowance to the wife in compliance with an order or decree for payment thereof should not be regarded as contribution to her maintenance within the purview of section 17 of *Manukye*, Book V, and similar provisions in other *Dhammathats*. In *U Thein* v. *Ma Khin Nyunt* (1), Gledhill J. himself has held that even payment by the father of the husband (out of an allowance made by the husband to his father) with the husband's knowledge and acquiescence in compliance with an order under section 488 (1) of the Code of Criminal Procedure was within the purview of section 17 of *Manukye*, Book V.

The third question has arisen on account of Gledhill J.'s ruling in *U Thein* v. *Ma Khin Nyunt*

(1) (1948) B.L.R. 108.

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Criminal Revision No. 174B of 1946, in the High Court of Judicature at Rangoon. He observed in the course of his judgment therein: "With regard to condition (ii) (*i.e.* the condition regarding contribution towards maintenance)" it has been argued:

"That the existence of the Court's order for maintenance must be regarded as equivalent to actual payment, just as equity regards that as done which ought to have been done. I do not think there is room for the application of this maxim of equity either in proceedings under Chapter XXXVI of the Criminal Procedure Code or at Burmese Buddhist Law as applicable here.

The rule in section 17, Book V of *Manukye*, is to be found in the older *Dhammathats* and was formulated by Burmese Jurists who could not have contemplated the existence of a criminal court with powers to make and enforce orders that a husband should pay a monthly sum for his wife's maintenance. It is a rule which provides that subject to conditions indicated, a husband may rid himself of his wife by making it clear that he has no love for her and repudiates his responsibilities towards her. If he is compelled by force or fraud to put her in possession of money for her maintenance, he does not, to my mind 'contribute' towards her maintenance, in the sense in which that word is used in the rule. It was held in *Daw Pwa May* v. *Ma Thein Mya* (A.I.R. 1937 Ran. 255) that acquiescence in the deserted wife occupying and enjoying the rents of part of the estate was a 'contribution' and I am prepared to go as far as to say that a voluntary payment of an instalment in accordance with an order of Court is a 'contribution', but I do not think that the realization of such money by distraint is, and I am positive that neglect to comply with a maintenance order is not a contribution to the wife's maintenance. I would also say that the payment made under Mr. Justice Wright's stay order of the 25th November 1946 does not affect the position of the parties."

With due respect to Gledhill J. we cannot subscribe to his view at all. We are of the opinion that maintenance allowance, even though it has been realized by execution of a decree or order for its payment, must have the same effect as payment out of Court.

The husband against whom such an order or decree has been passed cannot by any means be said to have been "compelled by force or fraud to put her in possession of money for her maintenance". Such an order or decree is passed by a Court in the course of administering justice; and so long as the order or decree is lawful, realization of money in its execution is lawful and must have the same legal effect as payment out of Court. Gledhill J. appears to have laid too much stress on the word "contribute"; but the actual word used in most of the *Dhammathats* is "ပေး" (give) without any qualification, *i.e.* as to whether the husband should give it voluntarily and we cannot read any such qualification into them. We do not see why we should encourage contumacy or default on the part of the husband or why the wife's right should be prejudiced in any way by her having to take out execution on account of his contumacy or default.

As has been held in *Ma Saw Nan* v. *U Aung San* (1):

> "Marriage, whatever the form of the contract may be, constitutes, if not an express, at all events an implied contract between the parties that the husband shall maintain his wife."

And Dunkley J. has observed in the course of his judgment therein:

> "Moreover, all the *Dhammathats* declare that it is the duty of the husband to maintain the wife. See *Manukye*, Volume V, section 17, and the extracts of the *Dhammathats* collected in *U Gaung*'s Digest, Volume II, sections 208, 236, 244 and 253. It is clear that under Burmese Buddhist law there is a positive duty cast on the husband to maintain his wife or wives. Where, by law, a person is under a duty towards another person, there is vested in that other a corresponding right to have that duty performed."

(1) (1939) 12 R.L.R. 527.

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So failure to pay maintenance allowance—in compliance with an order or a decree or otherwise—is a wrong for which there is a remedy and the husband who is the wrong-doer should not and cannot be allowed to get any advantage over the wife who has to seek remedy for his own wrong by taking out execution.

The fourth question under reference does not arise in view of our answer to the fifth question according to which the party at fault cannot plead that the marriage has been dissolved by his own fault.

So our answers to the questions under reference are as follows :—

Question No. 1.—A man, against whom legal proceedings are instituted by his wife (who at the time of the institution thereof is living separately from him) for maintenance of herself and her child by him, cannot be deemed to have deserted her from the date of the institution thereof merely because he does not call upon her to return to and cohabit with him.

Question No. 2.—Payment of maintenance allowance to the wife in compliance with a decree or order for payment thereof should be regarded as contribution to her maintenance within the purview of section 17 of *Manukye*, Book V.

Question No. 3.—Maintenance allowance which is realized by execution of a decree or order for its payment also falls within the purview of the said section.

Question No. 4.—The question as to whether the husband who has failed to comply with a decree or order for payment of maintenance allowance, can plead his own default and claim that the marriage has been dissolved cannot arise in view of our answer to question No. 5, *i.e.* in view of the fact that the right to treat the marriage as dissolved is given to the

aggrieved spouse only and not to the offending spouse as well.

Question No. 5.—In case of desertion and failure to give maintenance or to have any communication for the prescribed period, the marriage is not dissolved automatically. Desertion by either party for the prescribed period merely renders the marriage voidable at the will of the deserted spouse. The marriage tie is not dissolved without an act of volition on the part of the deserted spouse showing his or her intention to determine the marriage relation or in the words of U May Oung, "Without conduct revealing a desire for divorce on the part of the deserted party."

The cost of this reference shall follow the result of the appeals. Advocate's fee five gold mohurs.

U TUN BYU, J.—I respectfully agree.

U AUNG THA GYAW, J.—I agree.

U SAN MAUNG, J.—I am in general agreement with my Lord the Chief Justice whose judgment I have had the advantage of reading. I would, however, like to add a few words to his judgment in respect of the 5th question under reference. To my mind the difference of opinion between the Full Benches of the Chief Court of Lower Burma and the High Court of Judicature at Rangoon over section 17 of *Manukye*, Book V, is due to the difference in the emphasis which each Bench had placed upon the two phrases "they shall not claim each other as husband and wife" and "let them have the right to separate and marry again" occurring in this section. If, as held by the learned Judges who decided *Ma Nyun* v. *Maung San Thein* (1) the marriage comes to an end without any express act

(1) (1927) I.L.R. 5 Ran. 537 (F.B.).

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of volition on the part of the offended spouse after he or she had been deserted by the other for the prescribed period, the words "let them have the right to separate and marry again" (or more accurately "let them have the right to divorce and marry again") occurring in section 17 of *Manukye*, Book V, would be clearly redundant. However, in my opinion, they are not mere surplusage and the correct emphasis would appear to follow by the mere transposition of the two phrases as follows :

"Let them have the right to separate and marry again ; they shall not claim each other as husband and wife."

Besides, the notion that the offended spouse must acquiesce willynilly to the fact of an automatic divorce having been accomplished by the mere fact of his or her being deserted for the prescribed period by the other spouse seems to run counter to the beliefs and customs of the Burman Buddhists of to-day. As observed by Irwin J. in *Thein Pe* v. *U Pet* (1) the law to which the Burman Buddhists are subject is not the law of the *Dhammathats*, but the customary law, for the ascertaining of which the *Dhammathats* are a very important guide, but not the only guide. In *N.A.V.R. Cheltyar Firm* v. *Maung Than Daing* (2) Page C.J. in speaking of the Burmese Buddhist Law, observed (at page 539) :

"Now, the customary law of the Burmese Buddhists is the common law of Burma, and a fundamental and wholesome characteristic of the common law is that it is not rigid and inelastic like a code, but can be moulded to conform to the customs and needs of the people as they change from age to age. It appears to me that the progress of the Burmese nation along the road to civilization has been so rapid in recent years that the conventions and habits of the people have outrun the principles

(1) 3 L.B.R. 175 at p. 187. (2) 9 Ran. 524.

of law and rules of conduct which embody the customary law of the Burmans, and by which in times gone by Burman Buddhists were content to be governed and controlled. That, no doubt, is a healthy sign of the times, for in the life of a nation as in the life of an individual to stand still is to retrograde. But as Burma progresses the common law should be 'broad-based upon her people's will', and 'from precedent to precedent' adapted to meet new conditions as they arise. At the same time it must be borne in mind that when the law is too far in advance of public opinion it loses its sanction, * * * * "

In *Ma Hmin San* v. *Ma Myaing* (1) also the learned Chief Justice had the following observation to make :—

"Now, the *Dhammathats* are not the sole repository of Burmese customary law, which is also to be ascertained from decided cases and the prevailing customs and practice of Burmans.

Indeed, 'custom is often a better guide than religious law books . . . Much of the text of the latter is inapplicable to the present age, and perhaps was never law at all . . . It would be dangerous then to give weight to a written law where it is opposed to the general custom, and unsanctioned by previous decisions of Judges'." [*Ma In Than* v. *Maung Saw Hla* (2).]

Apart from the *Dhammathats* which appear to agree in the main principle of giving the right to the aggrieved party as against the offending party, the view that automatic dissolution of marriage takes place by desertion and lapse of time seems foreign to the idea of modern Burman Buddhists.

In his book on The Expansion of the Common Law Sir F. Pollock has this to say (at page 107) regarding the Common Law of England :

"If there is one virtue that our books of authority claim for the common law more positively than another, it is that of being reasonable. The law is even said to be the perfection of reason. Not that the meaning of that saying is exhausted by the construction which a layman would naturally put upon it. For,

(1) 13 Ran. at pp. 491-492. (2) S.J.L.B. 103.

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as Coke had to tell King James I, much to his displeasure, there is an artificial reason of the law. Certainty is among the first objects of systematic justice. General principles being once fixed, the only way to attain certainty is to work out and accept their consequences, unless there is some very strong reason to the contrary. In hundreds of cases it is possible to suggest several rules of which, at first sight, any one would serve as well as another; and if we are asked why we have chosen one and rejected the others the answer is that the one we have preferred is deducible from our larger established principles, or at least consistent with and analogous to them, and the others are not."

It would indeed be a sad commentary upon our legal system if we are constrained to admit that in so far as marriage and divorce are concerned the common law which governs the lives of the Burman Buddhists is unreasonable; as indeed it will be if the principle of automatic dissolution of marriage by desertion and lapse of time is admitted. The anomalies arising from treating the marriage as automatically dissolved without the aggrieved party having any choice in the matter are serious. These have been pointed out by U E Maung (now a Judge in the Supreme Court of the Union of Burma), at pages 88-89 of his book on Burmese Buddhist Law and by my Lord the Chief Justice in the order of reference. Therefore, even assuming that section 17 of *Manukye*, Book V, is authority for the proposition that there is automatic dissolution of marriage on the offended spouse being deserted for the prescribed period, we would be justified in following the more equitable principle as laid down in the other *Dhammathats* which merely give the offended spouse the right to treat the marriage tie as dissolved. After all as pointed out by Page C.J. in *Ma Hnin San* v. *Ma Myaing* (1) while great value is attached in Burma to the rulings in the *Manukye*, Burmese Jurists do not regard these *Dhammathats* as sacrosanct.

(1) 13 Ran. at pp. 491-492.

By answering the 5th question in the sense indicated by my Lord, Burmese Buddhist Law relating to marriage and divorce would be entirely in consonance with reason. Marriage amongst Burman Buddhists being a civil and consensual contract it may be dissolved in the following way :—

(*a*) Divorce by mutual consent in which each party to the marriage has simultaneously elected to put the marriage tie at an end.

(*b*) By the desertion of the offending spouse for the prescribed period and the subsequent conduct on the part of the offended party revealing a desire for the dissolution of the marriage. In this case although the offending spouse has elected at the time of the desertion to end the marriage tie, the other party has to wait for the prescribed period before it can exercise the option of having the marriage dissolved ; the intervening period serving as *locus penitentiae* during which the deserting spouse could return to resume conjugal relationship.

(*c*) Divorce granted by a decree of a competent civil Court on proof of misconduct, such as adultery, cruelty, etc.

I therefore agree that question No. 5 should be answered in the sense indicated by my Lord. I also agree to the other answers proposed by him.

U BO GYI, J.—The several points raised in the reference have been so exhaustively dealt with by my Lord that I see little that I can usefully add. Both the letter and the spirit of the Buddhist Law, as will have been seen from the leading judgment, are inconsistent with the view that desertion in the conditions envisaged in *Manukye*, Book V, section 17 works an automatic dissolution of the matrimonial tie. Even if it were otherwise, modern Courts would not

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favour a construction which would enable a defaulting party to take advantage of the conditions brought about by him. In this connection I would draw attention, besides the authorities cited by my Lord, to the rulings in *Malins* v. *Freeman* (1) and *New Zealand Shipping Company, Limited* v. *Societe Des Ateliers Et Chantiers De France* (2). The effect of these decisions has been admirably summarized in Anson's Law of Contract, 17th Edition, where on pages 11 and 12 the learned author says :

> " There may also be cases in which in certain circumstances ' void ' must be practically construed as ' voidable '. A contract or a statute may declare that in a specified event a transaction shall be ' void ' or ' null and void ' ; but a party whose own wrongful act or default has brought about the avoidance of the transaction is never permitted to allege its invalidity and so take advantage of his own wrong. The operation of this rule in effect gives the innocent party an option whether he will or will not insist on the provision in the contract or statute that the transaction shall be void ; and it is therefore for practical purposes equally true to say that the transaction is void as against the party in default or voidable at the option of the other."

These principles are founded on natural justice and are equally valid in the Union of Burma.

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(1) 4 Bingham N.C. 395. (2) (1919) A.C. 1.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

P. ABDUL MOHAMED SHERIFF (APPELLANT)

v.

HAJEE SAHIB HAJEE MOHAMED BROTHERS AND ANOTHER (RESPONDENTS).*

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Jan. 7.

Finder of goods—Conversion by several persons—Release of one of the joint-tort-feasors reserving right to sue the others—Whether discharges the other joint officers—Apportionment of damages whether can be made—Burden of proof—Evidence Act, s. 114 (g).

Held: When several persons combine and without any right take possession of goods belonging to another in a house and treat them as their own they cannot claim to be finders of goods, they are guilty of conversion.

Held further: That a release of one of the joint-tort-feasors expressly reserving his right to sue or without any intention to release, the other joint-tort-feasors amounts only to a partial satisfaction and discharges the others only *pro tanto.*

Duck v. *Mayeu*, (1892) L.R. 2 (Q.B.D.) 511 at p. 514; *Price* v. *Barker*, 4 E. & B. 760 at p. 777; *Bateson* v. *Gosling*, L.R. 7 C.P. 9; *Pollachi Town Bank, Limited* v. *K. L. Subramania Ayyar*, A.I.R. (1934) Mad. 180; *Ramakumar Singh* v. *Ali Husain and others*, (1909) I.L.R. 31 All. 173; *Basharaddeg* v. *Hiralal and others*, A.I.R. (1932) All. 401; *Seth Devendra Kumar* v. *Mrs. Nirmalabai*, A.I.R. (1944) Nag. 292 = I.L.R. (1945) Nag. 349, followed.

Cause of action of damages for wrongful conversion is one and indivisible Inspite of the release of a joint officer the cause of action remains indivisible. In a decree for damages for conversion, damages cannot be apportioned to the defendants.

Ramratan Kapali v. *Aswini Kumar Dutt*, (1910) I.L.R. 37 Cal. 559, distinguished.

Kamala Prasad Sukul v. *Kishori Mohan Pramanik*, I.L.R. (1928) 55 Cal. 666 at p. 673; *Pramada Nath Roy* v. *The Secretary of State for India*, I.L.R. (1926) 63 Cal. 992, followed.

The burden of proving the quantity of goods taken possession of by the joint-tort-feasors is on the tort-feasors themselves. If they do not produce the best evidence or withhold any portion of evidence, the presumption would arise that such evidence if produced would be against them.

Armory v. *Delamirie*, (1721) 1 Stra. 505; *Mortimer and another* v. *Cradock*, 61 Revised Reports, 784, followed.

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* Civil 1st Appeal No. 46 of 1948 against the decree of the High Court, Rangoon, Original Side, in Civil Regular No. 69 of 1946, dated the 28th May 1948.

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P. ABDUL MOHAMED SHERIFF v. HAJEE SAHIB HAJEE MOHAMED BROTHERS AND ANOTHER.

Dr. Thein for the appellant.

P. K. Basu for the respondent No. 1.

H. Subramaniam for the respondent No. 2.

U THEIN MAUNG, C.J.—The plaintiffs-respondents filed a suit for recovery of Rs. 1,12,510 as damages for wrongful conversion of their stock-in-trade which they left in several places at the time of the general evacuation on account of the last war. Their case is that the present appellant, who was the 1st defendant, and the 2nd respondent, who was the 2nd defendant, took possession of the said goods and converted them to their own use together with K. M. Hassan Aliar and S. Ebrahim. However, they instituted the suit against the present appellant and the 2nd respondent only as they have received on their return from India after the termination of the war Rs. 1,100 in cash and goods valued at Rs. 8,900 from K. M. Hassan Aliar through his agent S. M. Shaik Madhar and have in consideration thereof declared by Exhibit R that they have no further claim over K. M. Hassan Aliar and his son-in-law S. Ebrahim reserving their right to take action against the present appellant and the 2nd respondent.

(The learned Chief Justice then set out the particulars of the claim).

The defence of the present appellant and the 2nd respondent is as follows :—

The defendants and their partners K. M. Hassan Aliar and S. Ebrahim never got possession of any of the plaintiffs' goods at Phaungdawthi. All the goods that were left there by the plaintiffs fell into the possession of and were appropriated by *Thakins*. The plaintiffs did not leave so much stock-in-trade in Rangoon and Thingangyun as they claim to have left.

Besides, the plaintiffs' goods at all the places in Rangoon and Thingangyun had been looted under the circumstances of the war and at the beginning of the Japanese invasion and the defendants and their partners got possession of only the remnants, the particulars of which are as follows :—

Goods valued at Rs. 9,520-4-0 at No. 194/196, Edward Street, Rangoon.

Goods valued at Rs. 22,192-2-0 at the other places in Rangoon and Thingangyun.

The defendants and their partners must under the circumstances of the case be treated as finders of the plaintiffs' goods and they cannot be held liable for wrongful conversion. Even if there had been any wrongful conversion, the plaintiffs have received full compensation from K. M. Hassan Aliar and he cannot claim any further compensation from the defendants. In the alternative, the plaintiffs having released K. M. Hassan Aliar and S. Ebrahim, two of the joint *tort-feasors* from their liabilities for the wrongful conversion, they have no further cause of action against the defendants.

The learned Judge on the Original Side has found that the defendants and their partners never got possession of the plaintiffs' goods at Phaungdawthi, that the defendants and their partners converted the plaintiffs' goods at Rangoon and Thingangyun to their own use, and that Exhibit R is only a covenant not to sue K. M. Hassan Aliar and S. Ebrahim which does not have the effect of releasing their joint *tort-feasors* from their liabilities for the conversion. However, he has granted a decree for recovery of Rs. 37,720 only.

(After stating certain further facts the learned Chief Justice proceeded).

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The defendants went into partnership with K. M. Hassan Aliar and S. Ebrahim expressly for the purpose of carrying on business at No. 194/196, Edward Street, Rangoon, *i.e.* the plaintiffs' shop, treating the plaintiffs' goods which were found therein as "capital of the partnership business." (*See* paragraph 7 of Exhibit A which is the deed of partnership dated the 1st of June 1942). They admittedly found the shop under lock and key; they had the plaintiffs' goods from other places in Rangoon and Thingangyun removed to the said shop within a month or two thereafter; and they admittedly sold the plaintiffs' goods as their own. Under these circumstances there can be no doubt of their having committed the tort of conversion in respect of the said goods. They cannot be treated as mere finders of the goods. They went out of their way to get into the plaintiffs' shop, to take possession of the goods therein and to remove the plaintiffs' goods from other places to the said shop with the obvious intention of doing their partnership business with them.

The most important questions for consideration in this appeal are—

(1) * * * *

(2) whether Exhibit R has the effect of releasing all the partners including the two defendants from further liability in respect of the said conversion;

(3) * * * *

(4) whether the liability for damages should be apportioned between the defendants, *i.e.* between the present appellant and the 2nd respondent as contended by the learned Advocate for the appellant.

Exhibit R reads:

"This document of release made on this 11th June 1946 by H. Hajee Mohamed, Managing Partner of H. Hajee Mohamed

Brothers, residing at No. 194/196, Edward Street, Rangoon, witnesseth :—

1. THAT WHEREAS K. M. Hassan Aliar represented by his agent S. M. Shaik Madhar residing at No. 192, Edward Street, Rangoon, has been carrying on business from the 1st day of June 1942 by virtue of a deed of partnership executed on the said date during the absence of the said H. Hajee Mohamed in India under the name and style of H. Hajee Mohamed and Company at No. 194/196, Edward Street, Rangoon, along with three other partners, namely, S. Ebrahim, P. A. Mohamed Shariff and T. O. Hajee Mohamed ;

2. AND WHEREAS the said H. Hajee Mohamed recently returned from India and desired to take possession of the business premises referred to in paragraph 1 hereof ;

3. AND WHEREAS the said S. M. Shaik Madhar as agent of K. M. Hassan Aliar has given possession of the said business premises to H. Hajee Mohamed on the 15th April 1946 ;

4. AND WHEREAS in consideration of obtaining such possession and the receipt of goods to the value of Rs. 8,900 delivered to him by S. M. Shaik Madhar on the 15th April 1946 and cash amounting to Rs. 1,100 paid to him by the said S. M. Shaik Madhar on the 11th June 1946 totalling in all Rs. 10,000 the said H. Hajee Mohamed agrees to grant the present release.

NOW THEREFORE the said H. Hajee Mohamed declares hereby that he has no further claim over K. M. Hassan Aliar and his son-in-law S. Ebrahim one of the partners abovenamed for any transaction done by them or their partners during the Japanese occupation of Rangoon.

The said H. Hajee Mohamed shall, however, have every right to take any action he pleases against the other partners P. A. Mohamed Shariff and T. O. Hajee Mohamed. To enable him to take such action the said S. M. Shaik Madhar shall before the execution of these presents deliver to the said H. Hajee Mohamed the deed of partnership dated 1st June 1942 hereinabove referred to.

IN WITNESS WHEREOF the said H. Hajee Mohamed sets his hands at Rangoon on the day month and year first above written.

(Sd.) H. HAJEE MOHAMED,—11-6-46."

In the presence of—

(Sd.) J. S. MOHAMED ABDULLA.

(Sd.) G. A. OONAR KETAH.

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With reference to a similar document A. L. Smith L.J. has observed in *Duck* v. *Mayeu* (1) :

" A rule of construction for such a document was laid down by the Court of Queen's Bench in *Price* v. *Barker* (2) where it was held that, in determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out, and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release. In the case of *Bateson* v. *Gosling* (3) at *nisi prius*, the same canon of construction was applied, and it was held that, the release being, as it was, limited by a proviso reserving rights against the surety, it must be taken that it was a covenant not to sue, and not a release ; and this ruling was unanimously upheld by the Court of Common Pleas, as reported in L.R. 7 C.P. at p. 9."

Duck v. *Mayeu* (1) has been followed in *Pollachi Town Bank, Limited* v. *K. L. Subramania Ayyar* (4) wherein Venkatasubba Rao J. observed :

" The question then is, whether there was a release granted to the Secretary, for the law is clear that the release of one joint wrongdoer releases all the others : (Salmond's Law of Torts, 6th Edn., 88). But it is equally clear that a *covenant not to sue* one joint tort-feasor does not operate as a release of the other. A transaction, which is in form an actual release, will be construed as being merely an agreement not to sue, if it contains an express reservation of the right to proceed against the other wrongdoers ; for this reservation would be otherwise wholly ineffective : (Salmond's Law of Torts, p. 88). The leading case on the subject is *Duck* v. *Mayeu* (1)."

[*See* also *Ramakumar Singh* v. *Ali Husain and others* (5), *Basharaddeg* v. *Hiralal and others* (6) and *Seth Devendra Kumar* v. *Mrs. Nirmalabai* (7).]

(1) (1892) L.R. 2 (Q.B.D.) 511 at p. 514.
(2) 4 E. & B. 760 at p. 777.
(3) L.R. 7 C.P. 9.
(4) A.I.R. (1934) Mad. 180.
(5) (1909) I.L.R. 31 All. 173.
(6) A.I.R. (1932) All. 401.
(7) A.I.R. (1944) Nag. 292 = I.L.R. (1945) Nag. 349.

Construed in the light of the above rulings it is perfectly clear that Exhibit R is only a covenant not to sue K. M. Hassan Aliar and S. Ebrahim. It is not a deed of release by which K. M. Hassan Aliar and S. Ebrahim were released from liability in respect of the conversion. The plaintiffs right to take any action against the other partners for the conversion is expressly reserved. Under these circumstances the mere fact that it is described as a deed of release cannot make any difference whatsoever.

It is equally clear from the wording of Exhibit R that the plaintiffs did not accept goods worth Rs. 8,900 and a sum of Rs. 1,100 in cash in full satisfaction of their entire claim for damages in respect of the conversion.

So payment of Rs. 10,000 in all in cash and kind by K. N. Hassan Aliar under Exhibit R can only have the effect of a partial satisfaction of the liability of the joint tort-feasors in respect of the conversion and it can discharge the liability of the two defendants only *pro tanto*. [See *Ramratan Kapali* v. *Aswini Kumar Dutt* (1) where it was held that a release of one joint tort-feasor without any intention to release the other joint tort-feasor but only as a partial satisfaction discharges the others only *pro tanto*.]

(After discussing the evidence the learned Chief Justice proceeded.)

The burden of proof as to the quantity and value of the plaintiffs-respondents' goods which were found in the shop at the time of their taking possession of it is on the defendants and if they have withheld any evidence relating to them the well-known maxim *omnia præsumuntur contra spoliatorem* must be applied, and it must be presumed that the evidence if

(1) (1910) I.L.R. 37 Cal. 559.

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produced would be unfavourable to them. [*See* illustration (*g*) to section 114 of the Evidence Act ; *Armory* v. *Delamirie*, 1721, 1 Stra 505, and *Mortimer and another* v. *Cradock*, 61 Revised Reports 784.]

(The learned Chief Justice then discussed the evidence on record and proceeded.)

We accordingly hold that the defendants have produced the best available evidence as to the value of the plaintiffs-respondents' goods which were still there in No. 194/196, Edward Street, when they took possession thereof after the looting, that they have not withheld the list of such goods and that no presumption under section 114 of the Evidence Act can be made against them in respect thereof. We also hold that the value of such goods was Rs. 9,520-14 only as stated by them and their witnesses.

The only question that remains for consideration is whether liability for the conversion should be apportioned between the defendants. Ordinarily the cause of action to recover damages for wrongful conversion is one and indivisible. That is the reason why according to the English Common law release of a joint-tort-feasor has the effect of cancelling the cause of action and releasing all joint-tort-feasors. But the learned Advocate for the appellant has contended on the authority of *Ramratan Kapali* v. *Aswini Kumar Dutt* (1) which has been followed by the Patna High Court in *Tilakdhari Singh and others* v. *Ram Prasad Singh and others*, 62 Indian Cases 25, that the plaintiffs-respondents have, by their own conduct in covenanting as per Exhibit R not to sue Hassan Aliar and S. Ebrahim, split up their cause of action and that they cannot get a joint decree against the defendants. However, the rulings which we have cited in support of the view that the covenant not to sue a joint-

(1) (1910) I.L.R. 37 Cal. 559.

tort-feasor does not release any of the other joint-tort-feasors from the liability for the joint tort are authorities also for the view that the cause of action remains intact, *i.e.* one and indivisible in spite of such a covenant. Both of the rulings cited by the learned Advocate relate to mesne profits and with reference to the first of them Mukerji and Mallik JJ. have observed in *Kamala Prasad Sukul* v. *Kishori Mohan Pramanik* (1):

"In that case it was held that in respect of mesne profits which accrue during the pendency of a suit for possession, the liability of different tenure-holders of the same degree, and of separate under-tenure-holders of different degrees, should be apportioned according to the share of the profits intercepted by each. This decision has been dissented from by Page J. in the case of *Pramada Nath Roy* v. *The Secretary of State for India-in-Council* (2). With great respect, however, I venture to think that the judgment of Mookerjee J. carefully read appears to except from the general rule cases in which the tort-feasors are *not really joint* and are therefore persons to whom the rule does not apply, and in my opinion therefore the judgment is unexceptionable."

Their observation is justified inasmuch as Mookerjee and Tennon JJ. who decided that case actually held that the liability in that case never was joint and several after stating in the course of their judgment (8) at p. 673:

"In cases, therefore, in which the controlling general principle, namely, that where acts of several persons by design, or by conduct, tantamount to conspiracy, contribute to the commission of a wrong, they are jointly liable, is not applicable, the rule of joint liability also ceases to be applicable."

What has been described by them as "the controlling general principle" is clearly applicable in the present case as it is one of combination or conspiracy and the tort-feasors in it are "really joint."

(1) (1928) I.L.R. 55 Cal. 666 at p. 673. (2) (1926) I.L.R. 53 Cal. 992.

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U THEIN MAUNG, C.J.

Besides cases relating to mesne profits may be distinguishable also on the grounds that the defendants were in possession of different tenures or under-tenures and that the amounts of mesne profits as defined in section 2 (12) of the Code of Civil Procedure which were intercepted by them were not only separate but also capable of being determined separately. (Cf. *Makund Singh* v. *Saraswati Bibi*, 1912, 29 C.L.J. 245.)

So we hold (1) that the cause of action remained one and indivisible in spite of the covenant not to sue Hassan Aliar and S. Ebrahim, (2) that the liability of the present appellant and the second respondent remains joint and several, (3) that the appellant is not entitled to have the liability for the conversion apportioned between him and the 2nd respondent, (4) that their liability has only been reduced *pro tanto* and (5) that the plaintiff-respondent is entitled to a decree against them jointly for recovery of the entire damages for conversion *minus* Rs. 10,000 which they have received in cash and kind from Hassan Aliar.

U SAN MAUNG, J.—I agree and have nothing to add.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

J. CHAN TOON (APPELLANT)

v.

THE STEWARDS OF THE RANGOON TURF CLUB BY THEIR SECRETARY (RESPONDENT).*

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Jan. 11.

Turf Club—Decision of Stewards—When can be challenged—Whether court has jurisdiction in the matter—S. 42 of Specific Relief Act.

Held: That if any body of persons burdened with the discharge of some judicial or quasi-judicial duty affecting the rights, liberty and properties of a subject, makes as the result of a just and authorized form of procedure, a decision it has jurisdiction to make, that decision if based on adequate legal evidence, cannot in the absence of some fundamental error be impeached or set aside save upon the ground that the body was interested, biased by corruption or otherwise or influenced by malice in deciding the matter.

Thompson v. *New South Wales Branch of the British Medical Association*, (1924) A.C. 764 at p. 778, followed.

Where honesty is not challenged and the body acts *bona fide* in what they believe to be the discharge of their duty that decision cannot be challenged.

Cp. *Weinberger* v *Inglis and others*, (1919) A.C. 606, followed.

Per U SAN MAUNG, J.—The Stewards of the Rangoon Turf Club is not a body burdened with the discharge of any judicial or quasi-judicial duty affecting the rights or properties of owners of horses in Burma. Such a body can be created either by a statute or contract express or implied between the parties concerned. The Rangoon Turf Club is an Association formed for the purpose of promoting racing in Burma. There is no contract between the club and owners of horses in Burma that all horses which are eligible for racing under rules of the club will be entitled to be measured, classed and aged. If the Stewards of the club fail to perform their duties, they are answerable only to members of the club and not to a court of law.

Russel v. *Duke of Norfolk and others*, The Times Law Reports, Vol. 64 at p. 263, followed.

Tun Aung for the appellant.

Horrocks for the respondents.

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* Civil 1st Appeal No. 45 of 1948 being appeal against the decree of the 2nd Judge of Rangoon City Civil Court in Civil Regular Suit No 2371 of 1948, dated the 24th May 1948.

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U THEIN MAUNG, C.J.—This is an appeal from the judgment and decree of the 2nd Judge of the Rangoon City Civil Court dismissing the present appellant's suit for declaration that his mare "Ma Nyun Kyi is a Burma-bred pony within the meaning of the Rangoon Turf Club Rules."

A Burma-bred pony is defined in Rule 1 of the said Rules as :

> "A pony got and foaled in Burma measuring 14 hands 1 inch or under and classified as such by or under the authority of the Stewards of the Turf Club." (*See* page 3 Exhibit 1.)

The appellant had a filly born out of Yoma by Yalmar on the 9th February, 1940, and this filly was known as Fan Tan. (*See* Exhibit A1 at p. 85 of Exhibit A.) He lost Fan Tan and 45 other animals at his farm in Allanmyo, including foals, brood mares and racing animals, on or about the 1st April, 1942, when the Japanese occupied Allanmyo and took away all the animals from that farm.

On the 18th June, 1947, he claimed that Ma Nyun Kyi which was then in the custody of the Assistant Custodian of Property, Rangoon, was his pony and on the 25th June, 1947, the said officer directed that Ma Nyun Kyi should be handed over to him on payment of maintenance charges and custody fees. (*See* Exhibits C1 and B.)

On the 29th June, 1947, he wrote to the Secretary, Rangoon Turf Club, that he was "desirous of appearing before the Board of Stewards of the Rangoon Turf Club in order to put forth the question of the classification of the mare Ma Nyun Kyi." (*See* Exhibit C.) In that letter he claimed that "Ma Nyun Kyi was foaled at Allanmyo on the 9th February, 1940, and is by Yalmar out of Yoma".

In the meanwhile the Stewards had dealt with two applications in respect of Ma Nyun Kyi. One is Exhibit 4 dated the 7th January, 1947, by Maung Shin who claimed that Ma Nyun Kyi was "a litter of Shwe Si (mother) and Son O'Love (father) born at Seikpyu in 1300 B.E." and actually called Maung Hla Maung the alleged original owner of Ma Nyun Kyi, U San Nyunt and U Aung Khin to prove his claim. The other application is Exhibit 5, dated the 5th May 1947, by U Saw Maung to whom Maung Shin transferred Ma Nyun Kyi after his application, Exhibit 4, had been dismissed by the Stewards. He claimed that Ma Nyun Kyi was really the off-spring of Yalmar and Yoma not of Shwe Si and Son O'Love as stated by his vendor.

This application also was dismissed by the Stewards on the 31st May, 1947, *i.e.* about a month before the appellant made a similar application. (*See* Exhibits 6 and 7.)

In reply to the appellant's application, Exhibit C, the Secretary, Rangoon Turf Club, wrote to him, "I am to inquire whether you can produce any documentary evidence in support of your case as otherwise the Stewards can see no valid reason to alter their previous decision." (*See* Exhibit D.) He also invited the appellant to be present at a meeting of the Stewards on the 31st July, 1947. (*See* Exhibit 2.)

The appellant accordingly went to that meeting, produced his register Exhibit **A** and "explained to the Stewards his reason for being convinced that the mare was one bred by him (by Yalmar out of Yoma) foaled on 9th February, 1940, and named Fan Tan." A final decision however was postponed to a full Board of Stewards which decided on the 4th September, 1947 :

"As no reliable evidence had been produced to prove that the mare was actually the one noted in Mr. Chan Toon's records

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as having been foaled on 9th February, 1940, by "Yalmar" out of "Yoma," it was decided that classification be refused."

The appellant then filed the suit out of which the present appeal has arisen. According to the plaint, the suit is based on mere refusal to classify the mare. It was only in the reply to defendants-respondents' plea in paragraph 6 of the written statement that their "decision is final and legally binding upon the plaintiff and this Hon'ble Court has no jurisdiction to interfere with that decision" that the appellant "denies that the decision was made *bona fide* in that it was made *ex-parte* without any enquiry being held and submits that it is arbitrary and in no manner binding upon the plaintiff (appellant)".

The contention that the defendants (respondents) acted not *bona fide* but arbitrarily is based on the supposition that they came to a decision *ex-parte* and *without any inquiry*. But this supposition is obviously false; and the learned 2nd Judge of the Rangoon City Civil Court has held that the defendants (respondents) in coming to that decision acted *bona fide* and in the exercise of the discretion conferred by the rules.

The learned Advocate for the appellant has rightly conceded before us that the decision was not made *ex-parte* and that it was not made without any inquiry. But he contends that they infringed Rule 9 in Appendix B at page 77 of Exhibit I inasmuch as they did not give the appellant any opportunity to produce oral evidence. The relevant part of the said rule reads:

> "In determining the class of a horse or pony the Stewards shall record the evidence, if any, called for by them, or tendered by the owner or his representative."

This contention is not in accordance with clause (*d*) of his grounds of appeal which reads:

" Because the learned Judge ought not to have accepted the plea of the defendants-respondents that they acted *bona fide* in declining to classify the mare in question inasmuch as it is against the evidence in the case."

Nor is this consistent with the facts that the plaintiff (appellant) has not only failed to state in the course of his evidence that the defendants (respondents) denied him any opportunity to produce oral evidence and that he would have called any particular witness if they had not done so but also deposed "I have produced whatever evidence there is in my possession to prove that this mare Ma Nyunt Kyi is the same mare which was formerly known as Fan Tan."

The learned Advocate's contention that the appellant was not given any opportunity to produce oral evidence is based on Exhibit D; but Exhibit D does not say that oral evidence would not be admitted. The Stewards agreed on the 19th July, 1947, that the appellant "be given an opportunity to produce evidence." (*See* Exhibit 6); and the appellant has not stated in his letter dated the 23rd July, 1947, that he wished to call any witness in support of his claim. He has merely stated therein "I cannot say if Maung Nee will be able to recognize the mare" without mentioning that he wished to call him as a witness and as a matter of fact he has not called Maung Nee as a witness even in his suit.

Besides, Rule 9 merely provides that the Stewards shall record the evidence, if any, called for by them or tendered by the owner or his representative and the learned Advocate has to admit that they have not failed to record any evidence that was tendered by the appellant.

When the learned Advocate was confronted with the above facts, he urged that the Stewards should at least have informed the appellant that they wanted

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further evidence as to the identity of Ma Nyun Kyi ; but this is not what Rule 9 requires them to do and it might not be quite proper for them to go out of their way and give him such information.

According to the very definition in Rule 1 a Burma-bred pony is a pony * * * classified as such by or under the authority of the Stewards ; and according to Rule 34 "if there is any doubt about the class, the Stewards shall determine it."

So classification of the pony is a matter within the jurisdiction of the Stewards and Their Lordships of the Privy Council have stated in *Thompson* v. *New South Wales Branch of the British Medical Association* (1) :

"In Their Lordships' view if any body rightly convened and properly composed is burdened with the discharge of some judicial or quasi-judicial duty affecting the rights, liberties or properties of a subject, makes, as the result of a just and authorized form of procedure, a decision it has jurisdiction to make, that decision if legal evidence be given in the course of the proceeding adequate to sustain it, cannot in the absence of some fundamental error be impeached or set aside, save upon the ground that this body was interested, or biased by corruption or otherwise, or influenced by malice in deciding as it did decide."

Cp. *Weinberger* v. *Inglis and others* (2) at p. 621 of which Lord Buckmaster observed :

"The honesty of the action is not challenged. The Committee acted *bona fide* in what they believed to be the discharge of their duties, and that is to my mind the complete and sufficient answer to the whole appeal."

We have also checked the evidence to see if the finding that there was no reliable evidence of Ma Nyun Kyi's identity was arbitrary and we are satisfied that it is not. The appellant's register Exhibit A1 does not contain any distinctive mark of identification. The appellant himself has deposed "So far as I remember

(1) (1924) A.C. 764 at p. 778. (2) (1919) A.C. 606.

there was only one whorl behind the hind quarters of this mare which was distinctive * * * I do not recollect my filly Fan Tan to have a triple whorl on the forehead, a whorl on the top of the throat or white hairs on the tail." The distinctive marks which he does not recollect are there on Ma Nyun Kyi according to Exhibit 3, dated the 4th January, 1947, and prepared by Mr. W. H. Taylor, Stipendiary Steward (D.W. 2); according to the appellant's own witness No. 2, Maung Aung Myat, the treble whorl on the forehead is more rare than the single whorl on the hind leg (*khweswe*), and he could not have failed to notice and recollect all of them if Ma Nyun Kyi had them at all. Maung Aung Myat has also deposed that there were two other ponies with a *khweswe* whorl on each of them in the appellant's stud farm at Allanmyo whereas Ma Nyun Kyi was the only animal with a treble whorl on the forehead.

For the above reasons we find that the learned 2nd Judge of the Rangoon City Civil Court is right in holding that the Stewards acted not arbitrarily but in good faith and that their decision in the matter of Ma Nyun Kyi's classification cannot be interfered with.

The appeal is dismissed with costs.

U SAN MAUNG, J.—I have had the advantage of reading the judgment of my Lord, the Chief Justice, and I agree that this appeal must be dismissed. Assuming that the Stewards of the Rangoon Turf Club are a judicial or quasi-judicial body burdened with the discharge of the duty affecting the rights or properties of the owners of horses in Burma, the observations of Their Lordships of the Privy Council in *Thompsan* v. *New South Wales Branch of the British Medical Association* (1) quoted by my Lord would be apposite

(1) (1924) A.C 764 at p. 778.

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and the decision of the Stewards of the Rangoon Turf Club cannot in the absence of some fundamental error be impeached or set aside, save upon the ground that they were interested, or biased by corruption or otherwise, or influenced by malice in deciding as they did decide. I also agree that on the facts appearing in evidence, the learned 2nd Judge of the Rangoon City Civil Court is right in holding that the Stewards acted not arbitrarily but in good faith and that their decision in the matter of Ma Nyun Kyi's classification cannot be interfered with.

However, in my opinion, the Stewards of the Rangoon Turf Club do not form a body burdened with the discharge of some judicial or quasi-judicial duty affecting the rights, or properties of owners of horses in Burma. Such a body can only be created by statute or by contract express or implied between the parties concerned. In the case of *New South Wales Branch of the British Medical Association* (1) cited above, there was a contract between the Association and the appellant Thompson as Their Lordships of the Privy Council observed at page 771 of the report :

> " The contract between the appellant and the association was entered into when he became a member of it. By that act he must be held to have agreed to be bound by its rules and regulations and to observe the provisions of the memorandum of association, and the articles of association and regulations."

In the case of *Russell* v. *Duke of Norfolk and others* (2) who were the Stewards of the Jockey Club, it was assumed by the Lord Chief Justice Goddard that there was a contract entitling the plaintiff (Russell) to train horses for a year under the Jockey Club's rules and the

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(1) (1924) A.C. 764 at p. 778. (2) The Times L.R., Vol. 64 at p. 263.

following observations of his Lordship at page 265 are not inapposite :—

" I can find no contract here by which the Stewards were under any duty to the plaintiff to hold an inquiry. It is, however, argued that as they did hold an inquiry they were under a duty to hold it honestly, fairly, and in accordance with natural justice. That seems to me to be a fallacy : if there was no contractual duty to hold an inquiry, how can there be a breach of contract in withdrawing the licence however the inquiry was conducted ? It is admitted that the licence might have been withdrawn without any inquiry. I can see neither ground for implying any condition, nor evidence of a breach of contract. Consequently, there was no case to go to the jury on the cause of action so far as laid in contract. I have had an opportunity of considering all the cases referred to by counsel, and I can find nothing in them which leads to another conclusion. If it is part of a contract that expulsion from a society or the withdrawal of a licence can only follow on an inquiry, or if a statute obliges a professional or other domestic tribunal to make due inquiry, as in the case of the General Medical Council, different considerations at once arise."

Now, the Rangoon Turf Club is an association formed for the purpose of promoting racing in Burma. So far as I can apprehend, there is no contract either express or implied as between owners of horses in Burma and the Rangoon Turf Club, that all horses which are eligible for racing under the rules of racing made by the Rangoon Turf Club shall be entitled to be measured, classed and aged under the rules in Appendix B for the purpose of being entered in the Rangoon races. Therefore, if the Stewards of the Rangoon Turf Club fail to perform their duties in this behalf they are answerable for their conduct not to a Court of law but to the members of the Club whose avowed aim according to the articles of their association is the promotion of racing in Burma.

If the Stewards have acted arbitrarily in any case and the matter is brought to the notice of one of

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the members of the Club, that member if he takes sufficient interest in the matter and can also canvass sufficient support for his views can no doubt question the action of the Stewards at a meeting properly convened for the purpose.

Apart from these considerations, I am of the opinion that the plaintiff-appellant's suit is such as is not maintainable in law. He asks the court to grant him a decree declaring that his mare Ma Nyun Kyi is a Burma-bred pony within the meaning of the Rangoon Turf Club Rules. Now, a Burma-bred pony is defined in Rule 1 of the said rules as :

> "a pony got and foaled in Burma measuring 14 hands 1 inch or under *and classified as such by or under the authority of the Stewards of the Turf Club.*" (The italicized is mine).

Therefore, I fail to comprehend how a Court of law can give a declaration in the sense indicated by the plaintiff-appellant. Such a declaration would involve the exercise by the Court of a discretion which under the very rule relied upon by the plaintiff-appellant is vested entirely in the Stewards of the Rangoon Turf Club.

Besides, the plaintiff-appellant's suit is not one which can come within the ambit of section 42 of the Specific Relief Act on the ground that the defendant-respondents have denied his right as to his property. What the defendant-respondents have said in effect was that they were not satisfied that the mare Ma Nyun Kyi was the one and the same filly Fan Tan which was foaled by "Yalmar" out of "Yoma" and that they, in the exercise of their discretion, cannot classify as a Burma-bred pony within the meaning of that term as defined in Rule 1 of the Rangoon Turf Club Rules. The owner of a pony which is, in fact, got and foaled in Burma has no right under any contract whether express or

implied to have his pony classified as a Burma-bred pony within the meaning of that term in Rule 1, such a classification being within the discretion of the Stewards of the Rangoon Turf Club. Therefore the refusal of the Stewards of that Club to classify the plaintiff-respondent's mare Ma Nyun Kyi as a Burma-bred pony cannot be tantamount to denial by them of any of his rights as to his pony Ma Nyun Kyi.

I agree in the order proposed by my Lord.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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Feb. 15.

MAUNG PAN MYAING AND OTHERS AND MAUNG TUN NYEIN AND OTHERS *v.* MA PWA TIN.*

Gift of immoveable property—Absence of endorsement of acceptance in the deed —Acceptance from surrounding circumstances—Gift by Burmese Buddhist husbands—Wife predeceased the husband—Derogation from grant—S. 43 of Transfer of Property Act—If exhaustive.

Held: That acceptance of a gift may in the absence of endorsement of acceptances in the deed itself, be inferred from the mutation of name and issue of tax tickets for payment or land revenue in the name of donee and enjoyment of rents and profits by her.

When a Burman Buddhist husband makes an absolute gift of a property in favour of a person, and the wife dies after the gift and the husband inherits wife's share, then on the death of the husband his son as his heir could not challenge the gift on the principle that a person cannot derogate from his grant —S. 43 of Transfer of Property Act does not apply to such a case, but the Transfer of Property is not exhaustive.

Leod Levy v. *Horne*, 3 (Q.B.) 757 at p. 766 ; *Poole Corporation* v. *Whitt*, 15 M. and W. 571 ; 2 Shepp. Touchst. by Preston at 286, followed.

Saw Hla Pru for the appellant.

A. N. Basu for the respondent.

U THEIN MAUNG, C.J.—These are appeals from the judgments and decrees of the District Court, Kyauksè, for ejectment of the appellants from certain pieces of land.

The respondent's case is that these pieces of land were given to her by her deceased husband U Saing by the registered deed of gift No. 136 of 1939 in the Registration Office at Myittha. She is unable to

* Civil 1st Appeals No. 77 and 78 of 1948 against the decree of District Court of Kyauksè in Civil Regular No. 8/9 of 1948, dated the 20th September 1948.

produce the registered deed as it has been lost from the custody of Headman U Tha Din after U Saing's death; but she has produced (1) certified copies of maps which show that the pieces of land stand in her names and (2) certified copies of land records which show that the said pieces of land were given to her outright by the registered deed No. 136 of 1939.

The appellant Ma Htwe's case is that the respondent was not a wife of U Saing, that the deed of gift is not valid, that U Saing had a son Maung Shwe Gè by his lawfully married wife Daw Tha Nu, that Maung Shwe Gè inherited the pieces of land from U Saing who died after Daw Tha Nu and that she has inherited them from Maung Shwe Gè who was her lawfully married husband.

The other appellants do not claim any interest in the pieces of land. U Pan Myaing, who is the appellant Ma Htwe's father, was a *le-gaung* under U Saing and the other appellants are mere tenants of the pieces of land.

U Tha Din, Headman (P.W.4), has given evidence of Maung Shwe Gè having taken away the documents which were left at U Saing's death and the respondent has definitely stated that the deed of gift was among the title-deeds which had been taken away by Maung Shwe Gè. So the learned District Judge is right in holding that the deed of gift had been lost and in admitting secondary evidence of its contents.

U Mya, Honorary Magistrate (P.W.1), has given evidence of his having drawn up the deed of gift for U Saing, of the late U Myint and the late U Saw having signed it as attesting witnesses, of its having been registered at the Registration Office to which he accompanied U Saing and of U Saing and the respondent having "enjoyed the fruits of the lands" thereafter.

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U Tha Din, Headman (P.W.4), son of the late U Myint, has given evidence of his having been present with his father when U Saing gave the pieces of land to the respondent.

Maung Tha Dwe (P.W.6) has given evidence of the deed having been executed and attested in his presence. The evidence of the above witnesses is corroborated by the entries in the land records (Exhibits ခ ဃ ဝ ဇ in Suit No. 8 and Exhibit . . . in Suit No. 9) which show that the pieces of land were transmuted to the name of the respondent on account of an outright gift to her by registered deed No. 136 of 1939. [*See* also the evidence of U Thon, Revenue Surveyor (P.W.2). Incidentally no certified copy of the deed is available as the records of the Registration Office have been lost or destroyed during the war.]

The respondent admittedly lived with U Saing and the appellant Maung Tun Nyein has deposed " U Saing used to come down to collect rents and I saw Ma Pwa Tin also come along with U Saing ".

Under these circumstances there can be no doubt of the pieces of land having been given by U Saing to the respondent by a registered deed and of her having been enjoying the rents and profits thereof with U Saing.

The learned Advocate for the appellants has submitted that the gift is invalid for want of acceptance inasmuch as the respondent has not endorsed her acceptance on the deed. However, this is a new plea ; and acceptance can be inferred from the facts that there has been transmutation to her name since June, 1939, that the land revenue receipts have been issued in her name since then and that she has also enjoyed the rents and profits since then. In this connection U Mya's evidence is corroborated by the appellant Maung Tun Nyein and also by Maung Myat Kyaw whose evidence

has been admitted in the Court of first instance without any objection whatsoever.

The learned Advocate for the appellants has further submitted that the gift is valid only in respect of U Saing's share in the said pieces of land as his wife Daw Tha Nu also had a share in them at the time of the gift. Apart from the fact that this is a new plea, we are of the opinion that it is not sustainable at all. As Broom has observed in his Legal Maxims, 10th Edition, page 192, "it is a well-known rule that a lessor or grantor cannot dispute, with his lessee or grantee, his own title to the land which he has assumed to demise or convey (1). Nor can a grantor derogate from his own grant (2)".

Section 43 of the Transfer of Property Act does not apply to a gift ; but the Act is not exhaustive and in any case not covered by the Act the Court is entitled to apply the rule of justice, equity and good conscience. (*See* Mulla's Transfer of Property Act, 2nd Edition, page 2.)

So U Saing himself would not have been allowed to derogate from his own grant ; and his subsequent acquisition of title to his wife Daw Tha Nu's share by survivorship must ensure for the benefit of the respondent and perfect her title to Daw Tha Nu's share in the said pieces of land also.

In this respect neither Maung Shwe Gè, who is an heir of U Saing, nor Ma Htwe, who claims to have inherited U Saing's estate through Maung Shwe Gè, can be in a better position than U Saing himself.

Incidentally we find that U Saing made a gift of only a moiety of the landed property which belonged to him and Daw Tha Nu, that at the time of making the gift

(1) Judgment in *Leod Levy* v. *Horne*, 3 (Q.B.) 757 at p. 766, cited per Alderson, B. in *Poole Corporation* v. *Whitt*, 15 M. and W. 571 at p. 576.

(2) 2 Shepp. Touchst. by Preston at p. 286.

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he had " about 20 acres of other lands ". [*See* the evidence of U Tha Dwe (P.W. 6)] and there accordingly is a fair share left for his heirs.

The appeals are dismissed with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CRIMINAL.

Before U Thein Maung, Chief Justice, on difference between U Tun Byu and U Aung Tha Gyaw, JJ.

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Feb. 15.

AUNG NYUNT AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Indian Penal Code, s. 396—True meaning of the word murder "in the course of dacoity."

Held by Chief Justice (agreeing with U Aung Tha Gyaw, J.) : Where the dacoits take one or more hostages to ensure their safe retreat and the hostage is murdered before the dispersal of the gang, murder is committed in the course of the dacoity.

In order to comit dacoity it is necessary not only that the dacoit should get booty away but that he should get away with the booty and if in getting away with the booty he commits a murder he is guilty of offence under s. 396.

In view of s. 3 of the Penal Code and Criminal Procedure (Temporary Amendment) Act, 1947, and General Letter No. 20 of 1947, dated 31st October 1947 of the High Court of Judicature at Rangoon, no direction that an accused should be shot is necessary.

Queen-Empress v. *Sakharam Khander*, (1900) 2 Bom. L.R. 325 ; *Vitti Thevan* v. *Vitti Thevan*, (1906) 17 M.L.J. 118=5 Cr.L.J. 201, followed.

Lashkar and others v. *The Crown*, (1921) I.L.R. 2 Lah. 275 ; *Karam Baksh* v. *Emperor*, (1924) 25 Cr.L.J. 319 ; *Sundar* v. *Emperor*, (1924) 25 Cr.L.J. 700 ; *Monoranjan Bhattacharya and others* v. *Emperor*, (1932) 33 Cr.L.J. 722 ; *Tha Nge Gyi and one* v. *The King*, (1946) R.L.R. 229, referred to.

I. S. Chahl for the appellants.

Choon Foung for the respondent.

U TUN BYU, J.—The appellants Aung Nyunt and Nga Chit were convicted under section 396 of the Penal Code, and they have each been sentenced to death. The direction that they are to be shot dead is unnecessary, and it is well that a Judge passing a sentence of death should follow strictly the provisions

* Criminal Appeal No. 20 of 1949 being appeal from the order of Special Judge, Henzada, dated the 18th December 1948, in Special Judge Trial No. 44/48.

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U TUN BYU, J.

of the law under which the sentence is passed. The facts, briefly, are that certain *lusoes* attacked the house of Po Yin (P.W. 1) on the 13th *Waning* of *Kason* last (5th May, 1948) at about midnight, and that they demanded a sum of Rs. 300 and 10 ticals of gold from Ma Mai Sint (P.W. 3), wife of Po Yin, his wife Ma Mai Sint, his son Maung Khwe, Po Shein, Po Sint and Tun Khin, the last three persons were said to be guests, were all in the house at the time. The *lusoes* were in the house for about two betel-chews time, and they took away properties worth about Rs. 500 from the house of Po Yin ; and there can be no doubt in this case that a dacoity was in fact committed by five *lusoes* at Po Yin's house.

It does not appear that any of the *lusoes* was recognized by any person on the night of the dacoity, which was a dark night. The appellants have been convicted on the retracted confessions. They however allege that the confessions were obtained by ill-treatment, and it will accordingly be necessary to discuss whether there is any evidence to reasonably suggest that the confessions must have been obtained by ill-treatment. The appellants Aung Nyunt and Maung Chit gave evidence in Court, but their evidence shows clearly that they were persons who were ready to make reckless and unfounded statements against the Magistrate who recorded their confessions. U Ba Aye (P.W. 9), who recorded the confessions of the appellants (Exhibits B and C), was not questioned in any way during his cross-examination about the irregularities or non-observance of the procedure which should be followed when recording confessions, and thus it is clear that it will be necessary to scrutinize the evidence of the witnesses for the defence carefully. Maung Kyat Khoe (D.W. 3) stated that he saw an injury on the thumb of Aung Nyunt bleeding and that he also

noticed blisters on the testicles of Aung Nyunt at Lemyethna Police Station. Kyat Khoe's evidence appears to be of a casual nature, and there does not appear to be any reliable evidence in this case to indicate that Aung Nyunt's wound on the thumb, which he received before his arrest at the hand of Than Shein (P.W. 4), was found at any time to be bleeding while he was in police custody ; nor is there any reliable evidence to indicate that Aung Nyunt had blisters on his testicles. The evidence of Dr. Sein Hline (P.W. 2) shows that Aung Nyunt had three incised wounds, one on his left thumb, the second was on the skull and the third wound on the ring finger, and Aung Nyunt does not anywhere say in his evidence before the Court that any of those wounds which the doctor saw, had been caused by ill-treatment. In fact, Dr. Sein Hline's evidence shows that Aung Nyunt never complained to him about the ill-treatment by the police, nor did he say to the doctor that the police had injured his thumb with a pointed compass for the purpose of extracting confession from him. The report of Aung Nyunt, which he made at the Police Station against Than Sein, also shows that the incised wounds which Dr. Sein Hline saw on him must have been the wounds caused by Than Sein. Dr. Tun Sein (P.W. 13) says that in accordance with the Admission Register kept at the Jail there was an entry to the effect that Aung Nyunt had an injury on his head, referring obviously to the wound on the skull of Aung Nyunt, which he received at the hand of Than Sein.

It might be mentioned that Sub-Inspector of Police Maung Pyant (P.W. 10) was not cross-examined about the alleged treatment on Aung Nyunt's testicles, and the absence of such cross-examination suggests that there could not have been any truth in respect of the

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alleged ill-treatment by the police to Aung Nyunt's testicles. If a pointed compass was thrust into the injured thumb of Aung Nyunt after he got into police custody it must have caused an injury which could have been seen by many persons who were in custody at the same time with Aung Nyunt, but no witness has come forward to describe the nature of the injury which was alleged to have been caused by a pointed compass on the injured thumb of Aung Nyunt. It must, in the circumstances, be held that there is no evidence in this case to raise even a reasonable conjecture or surmise that Aung Nyunt must have been ill-treated before he made his confession before the Magistrate in this case.

The appellant Maung Chit examined three witnesses to prove ill-treatment to him while in police custody. Aung Shein's (D.W. 4) evidence appears to be vague, and in fact he did not actually see, according to his own admission in cross-examination, the appellant Maung Chit being taken into the *kyaung* where Maung Chit was alleged to have been ill-treated. Tha Khin (D.W. 6) alleged that Maung Chit told him that he had been beaten by the police on the head and that he saw injuries on Maung Chit's head, but there is no evidence to show that Tha Khin told anybody about what he saw or heard. Aung Thein (D.W. 5) stated that he heard a beating sound one night coming from the direction where the appellant Maung Chit slept. He, however, admitted that he did not hear anyone shout out, whether in pain or terror, when he heard that sound. In the circumstances it will not be proper to assume that Maung Chit was being beaten at that time. Thus in respect of the appellant Maung Chit too there does not appear to be any reliable evidence on which it might properly be presumed or conjectured that he was ill-treated.

The evidence of U Ba Aye (P.W. 9) shows that the confessions (Exhibits B and C) have been properly recorded, and they are therefore admissible as evidence in this case. The learned Sessions Judge has set out the circumstances which he considered to afford general corroboration to the confessions of the two appellants in the judgment which he delivered on the 18th December, 1948. It also appears on reading the confessions that the confession which Maung Chit made on a date subsequent to the confession of Aung Nyunt contains more details in matters which only a person who participated or was involved in the dacoity could describe, and it is therefore difficult to believe Maung Chit that when he made his confession before the Magistrate he was merely trying to repeat from what he read in a copy of the confession of Aung Nyunt, which was alleged to have been given him by the police, and it might be mentioned at once that there is no evidence to show that anyone saw Maung Chit reading a copy of a confession made by Aung Nyunt. As each of these two appellants not only made a confession but each of them is incriminated in the retracted confession of the other, it can properly be held that the two appellants have been properly convicted, particularly when there is some general corroboration of the confessions in the present case. The appellant Aung Nyunt is related to the deceased Maung Khwe as he is a first cousin of the latter's mother Ma Mai Sint. It is difficult to conceive that Aung Nyunt would have made a confession involving his complicity in the dacoity in which Maung Khwe lost his life unless he was actually involved in the case

The next question is—Can these appellants be convicted under section 396 of the Penal Code ? In

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the case of *Tha Nge Gyi and Nga Mya* v. *The King* (1) it was held that—

> "where murder is committed in the course of effecting a safe retreat, it is committed 'in the course of' the dacoity, as the safe retreat was an essential part of the common criminal purpose of the dacoits."

With respect, this case lays down the correct law in respect of section 396 of the Penal Code, and to stretch the meaning of section 396 beyond what was held in the above case would, in my opinion, be to go beyond the plain words of section 396 of the Penal Code. In *Tha Nge Gyi*'s case (1) it appears that the dacoits had gone away about 100 yards only when they stopped and separated the deceased woman from other members of the hostage. It appears that the dacoits after having taken her for a short distance murdered her, and it seems that she still had a gold ring with her at the time she was killed. The other hostages had also not been released at that time. Thus in *Tha Nge Gyi*'s case there were facts on which Dunkley J. could properly observe that that was a case in which the offence was punishable under section 396 of the Penal Code because the place where the deceased woman was killed was not only quite close near to the village, but she was killed at a place where it was obvious that the dacoits could not have been said to have been out of danger of pursuit altogether; and moreover the deceased woman was deprived of her ring just before she was actually killed. In the present case however the evidence shows clearly that one of the two hostages was allowed to return to the village after the dacoits had gone a call's distance, and thus it could from that action of the dacoits be presumed that they no longer apprehended, especially when it was a dark night, that

(1) (1946) R.L.R. at p. 229.

they would be pursued at the time they released one of the hostages. The evidence of Po Yin also shows that the deceased boy's body in the present case was found about a mile away from the village near a "taman", and thus the dacoits must have gone a considerable distance from the village when the boy was killed, and in view of the fact that there is no evidence to show that anyone attempted to pursue the dacoits, it is only reasonable to conclude that in this case the boy was not killed in the course of or for the purpose of effecting a safe retreat. It will be dangerous to extend the meaning of section 396 of the Penal Code beyond what it ordinarily conveys, particularly when an offence under section 396 of the Penal Code is an offence which can be punished with death, even in normal times.

It must be borne in mind that if there is any benefit of doubt whether the particular facts and circumstances of a case fall within the provisions of section 396 or not, the accused will be entitled the benefit of that doubt. As it will depend on the facts and circumstances of each case as to whether an offence of dacoity falls within the provisions of section 396 or not, it will be dangerous to lay down any hard or fast rule beyond what has, in my opinion, been correctly expressed in the first paragraph of the head-note in *Tha Nge Gyi*'s case (1). It will be most dangerous to lay down as a proposition of law that a dacoity continues until the hostages are all released because it is possible that hostages or some of them might in many cases be released only after considerable interval of time, and when the circumstances of the case would also indicate that the dacoits were beyond all dangers of pursuit long before the hostages were released. It would be beyond the scope of section 396

(1) (1946) R.L.R. at p. 229.

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to treat a dacoity case as coming within section 396 where it is obvious that the hostage was killed at a time when the dacoits were not in danger of pursuit, or where he was probably killed from some other motive than for the purpose of effecting a safe retreat. In a penal provision very strict constructions are to be followed, and particular care ought to be exercised in this respect, especially in the case of provisions relating to an offence punishable with death. The convictions of the appellants will therefore be altered to section 395 of the Penal Code, and as Maung Khwe could not be said to have been killed during the commission of the dacoity, the sentences of death passed upon the appellants will be altered to transportation for life.

It might in this case be mentioned that, if the offence falls under section 396, it seems to me that Aung Nyunt ought to be punished with death as he appears to be the person who organized the dacoity in the present case; and it is also probable that Maung Khwe was murdered with his connivance, otherwise it is not likely that Aung Nyunt would have allowed the boy to be killed more or less in his presence, in view of the fact that Maung Khwe was related to him.

My learned brother U Aung Tha Gyaw J. is however of opinion that this case falls within the provisions of section 396 of the Penal Code. The records of this case will be fowarded to the learned Chief Justice so that it might be heard again by one or more Judges as the learned Chief Justice may be pleased to appoint on the question whether it can on the facts and circumstances of this case be said that this is a case which falls clearly within the purview of section 396 of the Penal Code, and, if so, whether the sentence of death passed upon the appellants is

proper—*vide* section 429 of the Code of Criminal Procedure.

U AUNG THA GYAW, J.—I am in respectful agreement with my learned brother in the conclusions at which he has arrived on the questions of fact involved in this appeal. On the question as to whether section 396 of the Penal Code should be applied to the facts of this case I find myself in some difficulty. In most of the dacoities committed in this country one or more hostages are generally taken out by the dacoits in order to ensure their safe retreat. Hostages are taken out from the village in order to deter the villagers from offering resistence to the dacoits and is thus part of the whole criminal proceeding. If before the dispersal of the gang, one of their number happens to make away with the life of a hostage, the murder so taking place should be deemed to have been committed while the whole dacoit gang was committing the offence of dacoity. The distance of the place of murder from the village whence the hostage was taken offers by itself no adequate ground for holding that the offence of dacoity had already been completely committed before the murder took place ; neither would the earlier release of the woman hostage in this case in the neighbourhood of the village afford a similar reason.

The important fact having a strong bearing on the point raised in this case is that at the time the murder was committed the dacoit gang had not dispersed or disbanded. They had no doubt covered a distance of about a mile from the village but this distance is not so considerable as to give rise to the inference that these dacoits had no longer any common criminal purpose of ensuring a safe retreat. Moreover, at the time of the commission of this murder, they were admittedly carrying away the booty they had collected from the place of

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dacoity and it has been held in *Vitti Thevan* v. *Vitty Thevan* (1), and *Lashkar and others* v. *The Crown* (2), "That murder committed by dacoits while carrying away the stolen property is 'murder committed in the commission of dacoity'." This view of the law is evidently based on the definition of the offence of robbery set out in section 390 of the Indian Penal Code. If the dacoits found it necessary for their own safe retreat to take the life of the hostage before they finally dispersed or disbanded with the booty in their possession, it is only reasonable to hold that the murder was committed while committing the offence of dacoity. To hold otherwise would lead to the undesirable result of setting the prosecution to the impossible task of attempting to fix the guilt on the member of the dacoit gang actually responsible for the murder.

If the offence is held to come under section 396 of the Penal Code, the appellant Aung Nyun who was admittedly known to the deceased, deserves the infliction of the extreme penalty.

For these reasons I respectfully agree with my learned brother that the record of this case might be submitted to the learned Chief Justice for a further consideration of the point of law on which we are at present divided in our opinion.

U THEIN MAUNG, C.J.—This is a reference made under section 429 of the Code of Criminal Procedure by a Bench of two Judges who are divided in opinion as to whether the offence committed by Aung Nyunt, Nga Chit and their companions falls within the purview of section 396 of the Penal Code.

It appears from the order of reference of one of them, *viz.* U Tun Byu J. that the question as to whether the sentences of death passed on Aung Nyunt

(1) 5 Cr L.J. at p. 201. (2) I.L.R. 2 Lah. at p. 275.

and Nga Chit are proper also has been referred. However, they agree that he should be punished with death, if the offence falls under section 396 of the Penal Code, and there is nothing to show that there is any difference of opinion between them as to the propriety or otherwise of the sentence on Maung Chit.

Aung Nyunt, Maung Chit and others attacked the house of Maung Po Yin and Ma Mai Sint in Wadawkwin Village. They beat both Maung Po Yin and Ma Mai Sint and demanded properties from them with the result that Ma Mai Sint had to give them two rings, one pair of *nagats*, Rs. 107 in cash and six cotton blankets. They also seized some clothings and a tin of oil. Then they left the house with the said booty taking Ma Mai Sint and Maung Khway (a twenty-year old son of Maung Po Yin by his former wife) as hostages. They released Ma Mai Sint when they got to a paddy field about a call away from her house. She got back to her house about a betel-chew after the dacoits had left it with her and she told the villagers to search for Maung Khway, who had been taken away by the dacoits. According to Maung Than Shein about 25 villagers searched for him then but he was not found ; and it was only on the following morning that his dead body was found near a " taman " about a mile away from the village. There were four stab wounds on the dead body and according to Dr. Sein Hline (P.W. 2) three of them " are separately necessarily fatal ". The search party also found the tin of oil and a *Shan* bag containing some clothings not very far from the place where the dead body was found.

According to Aung Nyunt's confession, Exhibit B, Maung Khway was killed by four or five of the dacoits who attacked him with *dahs* near the " taman " *at the top of the village.* They then proceeded along the path by which they had come to commit dacoity and when

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they got to Htonbaukwa across the stream Lephon *Chaung* they divided the booty among themselves.

Maung Chit also has stated in his confession, Exhibit C, that he went ahead with another dacoit carrying some stolen property and that he heard abusing and shouting when he got to a hillock *near the village* and that he made inquiry and got information about Maung Khway having been murdered only at the time of the booty being divided among them.

So the confessions show (1) that the dacoits were carrying off the booty both before and after the murder of Maung Khway, (2) that up to the time of his murder Maung Khway was with them as a hostage, (3) that the dacoits did not consider the place where Maung Khway was murdered and which has been described by Aung Nyunt as "at the top of the village" and by Maung Chit as "near the village" to have been at a safe distance therefrom and (4) that they accordingly divided the booty only after they had gone across a stream on their way back from that place. They cannot be presumed to have released one of the hostages as they no longer apprehended that they would be pursued. The very fact that they still considered it necessary to keep and did actually keep Maung Khway as a hostage is enough to rebut any such presumption. They appear to have released one of the two hostages as they felt that the retention of the other hostage would serve their purpose. In this connection it must be remembered that dacoits are usually satisfied with one hostage only as their object in taking a hostage is to prevent their being chased by others. Moreover, the dacoits had yet to get away with the booty from the hostage who, on his release, might at least raise a hue and cry.

Aung Nyunt, Maung Chit and their companions will be punishable under section 396 of the Penal Code if

the murder was committed in conjointly committing dacoity.

In *Queen-Empress* v. *Sakharam Khander* (1) it was held that where murder was committed in the course of effecting a safe retreat, which was an essential part of the common criminal purpose of the dacoits, it was committed in the course and was a continuation of the actual dacoity.

In *Vitti Thevan* v. *Vitti Thevan* (2) it was held "Murder, committed by dacoits while carrying off the stolen property, is murder committed 'in the commission' of dacoity or robbery, as the case may be, and is punishable under section 396 of the Penal Code."

These rulings have been followed in *Lashkar and others* v. *The Crown* (3) at p. 277 of which Sir Shadi Lal C.J. observed:

> "It is beyond doubt that the culprits were engaged in carrying off their booty, and in view of the definition of robbery contained in section 390, Indian Penal Code, it must be held that they were still engaged in committing dacoity. The murders of Jaimal and Jamala were, therefore, committed in the commission of the dacoity; and every offender is equally liable for the consequences of the acts of one or more of his comrades."

The ruling in *Lashkar and others* v. *The Crown* (3) has in its turn been followed in *Karam Beksh* v. *Emperor* (4) and *Sundar* v. *Emperor* (5).

Monoranjan Bhattachariya and others v. *Emperor* (6) is a case where certain persons, who had committed dacoity, were pursued in hot haste after the act of dacoity and being brought to bay, one of the dacoits stabbed and murdered a man who was pursuing him. It was held therein "that the act of murder was

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(1) (1900) 2 Bom. L.R. at p. 325.
(2) (1906) 17 M.L.J. at p. 118-5 Cr.L.J. at p. 201.
(3) (1921) I.L.R. 2 Lah. at p. 275.
(4) (1924) 25 Cr.L.J. at p. 319.
(5) (1924) 25 Cr.L.J. at p. 700.
(6) (1932) 33 Cr.L.J. at p. 722.

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not a separate transaction but an offence committed 'in committing the dacoity' within the meaning of section 396, Penal Code." Rankin C.J. observed in the course of his judgment therein (at p. 723):

"In order to commit dacoity it is necessary not only that the dacoit should get the booty away but that he should get away with the booty and as long as he is being pursued in hot haste after the act of the dacoity has just been committed and is in flight for the purpose of completing his offence it is idle to contend that the dacoity is complete and that another transaction and a separate transaction has begun."

The late High Court of Judicature at Rangoon has held in *Tha Nge Gyi and Nga Mya* v. *The King* (1), following the rulings in *Queen-Empress* v. *Sakharam Khander* (2), *Vitti Thevan* v. *Vitti Thevan* (3) and *Monoranjan Bhattachariya and others* v. *Emperor* (4), that where murder is committed in the course of effecting a safe retreat, it is committed "in the course of" the dacoity, as the safe retreat was an essential part of the common criminal purpose of the dacoits.

Tha Nge Gyi's case (1) is a case in which one of the hostages was killed probably before the other hostages were released; but there is nothing to show therein that the dacoits were being chased by others at all at the time of the murder.

So the crux of the question is not whether the dacoits are being chased at the time of the murder, not even whether they are really in danger of being chased then, but whether they are still engaged in carrying off the stolen property or in getting away with it. In the words of Rankin C.J. "in order to commit dacoity it is necessary not only that the dacoit should get the booty away but that he should get away with the booty" and in getting away with it he is merely completing his offence.

(1) (1946) R.L.R. 229.
(2) (1900) 2 Bom. L.R. at p. 325.
(3) (1906) 17 M.L.J. 118-5 Cr.L.J. at p. 201.
(4) (1932) 33 Cr.L.J. at p. 722.

In the present case the dacoits were still getting away with the booty taking a hostage with them for their safety in retreat. So the murder of the hostage must be deemed to have been committed in the course and in continuation of the actual dacoity. The offence accordingly falls under section 396 of the Penal Code.

I agree with U Aung Tha Gyaw J. that the conviction of both Aung Nyunt and Nga Chit under section 396 of the Penal Code is correct. Having come to the conclusion that the offence is under section 396 of the Penal Code I agree with U Tun Byu and U Aung Tha Gyaw JJ. that the sentence of death on Aung Nyunt is appropriate. I further agree with what is implied in their judgments, *viz.* that the sentence of death on Nga Chit should be reduced to one of transportation for life as his liability to be punished for murder is purely vicarious.

The appeal of Aung Nyunt is dismissed ; but the appeal of Nga Chit is allowed to the extent that although his conviction under section 396 of the Penal Code is confirmed his sentence is reduced to one of transportation for life.

The direction that Aung Nyunt should be shot is also set aside as unnecessary in view of section 3 of the Penal Code and Criminal Procedure (Temporary Amendment) Act, 1947, and General Letter No. 20 of 1947, dated the 31st October, 1947 of the High Court of Judicature at Rangoon.

FULL BENCH (APPELLATE CIVIL).

Before U Thein Maung, C.J., and U Tun Byu and U San Maung, JJ.

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MA KYIN MYAING AND OTHERS (APPELLANTS)

v.

HOE LAN AND OTHERS (RESPONDENTS).*

Court Fees Act, s 7 (iv) (c)—Whether in a suit for declaration with consequential relief—The Court if bound to accept the plaintiffs' valuation in the plaint of the relief sought.

Held by the Full Bench : That where the plaintiff sues for a Declaratory decree with consequential relief the Court is not bound to accept the plaintiffs' valuation in the plaint of the relief sought.

The Legislature never intended to leave it to the plaintiff to choose the Court in which he would bring his suit for possession or partition of property by assigning the arbitrary value of the subject-matter of the suit and that it is not only within the power of the Court but it is also its duty to take action under Order VII, Rule 11 of the Code of Civil Procedure, if it is established that the plaintiffs' valuation is unreasonable or bears no relation to the value of the right litigated, although the Court should be slow to question the propriety of the plaintiffs' valuation especially in cases where no reasonable standards for valuation have been laid down by appropriate rules under s. 9 of the Suits Valuation Act.

C. K. Ummar v. *C. K. Ali Ummar*, (1931) I.L.R. 9 Ran. 165 (F.B.) ; *Maung Nyi Maung and others* v. *The Mandalay Municipal Committee*, (1934) I.L.R. 12 Ran. 335, distinguished.

Rajindra Baksh Singh v. *Bahu Rani and another*, A.I.R. (1928) Oudh 260 ; *Pitam Singh and another* v. *Bishun Narain and others*, (1931) I.L.R. 6 Luck. 426 ; *Maung Noe and one* v. *Maung Kha Pu*, A.I.R. (1933) Ran. 40, followed.

Held : That a suit for declaration that plaintiffs are joint owners of the State Lottery Ticket and for possession thereof should be treated as a suit for possession pure and simple—ignoring the claim for declaration of title when it is not incumbent upon the plaintiffs to obtain declaration.

Maung Shein and one v. *Ma Lon Ton*, (1931) I.L.R. 9 Ran. 401 ; *Ramkhelawan Sahu* v. *Bir Surendra Sahi*, (1937) I.L.R. 16 Pat. 766 ; *Kalu Ram* v. *Babu Lal and one*, (1932) I.L.R. 54 All. 812 ; *M. P. Sayed Mohamed* v. *K. S. Ebrahim Das and one*, (1947) R.L.R. 98 ; *Salahuddinhyder* v. *Dhanoolal*, (1945) I.L.R. 24 Pat. 334 ; *Ran Shekhar Prasad Singh* v. *Shonandan Dubey*, (1923) I.L.R. 2 Pat. 195, followed.

Held further : That the State Lottery Ticket which has drawn a prize, is moveable property of the market value of the same amount as the prize which is drawn within the purview of s. 7 (iii) of the Court Fees Act.

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* Civil Reference No. 6 of 1949.

Mohamed Sadiq Ali Khan v. *Kazim Ali Khan and others*, A.I.R. (1934) Oudh 118 ; *Kommura Venkata Rao* v. *Korella Sesharattamma*, (1935) I.L.R. 58 Mad. 228, followed.

Per U TUN BYU, J.—Plaintiffs should not be allowed under s. 7 (iv) (c) of the Court Fees Act to place an arbitrary value of the relief which he claims and if his valuation is clearly arbitrary and unreasonable the Court has power to revise it.

Bodiya Nath and others v. *Makhan Lal Adya*, (1890) 17 Cal. Series 680 at p. 683, referred to and followed.

Umatul Batul v. *Nanji Koer*, (1907) 11 C.W.N. 705 ; *Ramcharitar Panday* v. *Basgit Rai*, A I.R. (1932) Pat. 9 ; *Maung Noe and another* v. *Maung Kha Pu*, A.I.R. (1933) Ran. 40 ; *Mt. Rup Rani and another* v. *Bithal Dass*, A.I.R. (1938) Oudh 6 ; *Mt. Rupia* v. *Bhatu Mahton*, (1943) 22 Pat. 783, followed.

The following order of reference was made by U Thein Maung C.J. and U San Maung J. on the 3rd May 1949 in Civil Miscellaneous Appeal No. 2 of 1948 :

This is an appeal under Order 43, Rule 1 (*a*) of the Code of Civil Procedure from the order of the Fourth Judge of the Rangoon City Civil Court returning the appellants' plaint for presentation to the proper Court ; but in view of the ruling in *M. P. Sayed Mohamed* v. *K. S. Ebrahim Das and one* (1) the learned Advocate for the appellants has submitted that it might be treated as an application for revision of the said order under section 25 of the Rangoon Small Cause Court Act.

The appellants' suit is one for (1) declaration that they are the joint owners in equal shares of the Burma State Lottery Ticket No. A-821196 of the 18th drawing, which has won a prize of Rs. 20,000, and that the respondents have no right title nor interest in or over the same and (2) for recovery of possession of the said ticket.

They have valued the relief sought at Rs. 500 only under section 7 (iv) (*c*) of the Court Fees Act. However, the Fourth Judge has held on the authority of *M. P. Sayed Mohamed* v. *K. S. Ebrahim Das and one* (1) and *Mt. Rup Rani and another* v. *Bithal Das* (2) that the real and substantial nature of the relief sought as a whole must be considered. He has also held after consideration thereof that " the real purpose of the suit is to have the sum of Rs. 20,000 which the suit ticket has drawn ", that

(1 (1947) R.L.R. 98. (2) A.I.R. (1938) Oudh 1 (F.B.).

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the ticket which has won the prize of Rs. 20,000 is worth Rs. 20,000 and that the plaint must therefore be returned for presentation to the proper court.

The principal questions for consideration in this case are—

(1) whether in a suit for a declaratory decree with consequential relief the Court is always bound to accept the plaintiffs' valuation in the plaint of the relief sought ; and

(2) If not, whether in the circumstances of the case, the Court is justified in refusing to accept the plaintiffs' valuation thereof.

Such a suit falls within the purview of section 7 (iv) of the Court Fees Act which reads :

" 7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :—

(iv) In suits—

(*a*) for moveable property where the subject-matter has no market value, as, for instance, in the case of documents relating to title,

(*b*) to enforce the right to share in any property on the ground that it is joint family property,

(*c*) to obtain a declaratory decree or order, where consequential relief is prayed,

(*d*) to obtain an injunction,

(*e*) for a right to some benefit (not herein otherwise provided for) to arise out of land, and

(*f*) for accounts—

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

In all such suits the plaintiff shall state the amount at which he values the relief sought."

The words " according to the amount at which the relief sought is valued in the plaint " relate to all classess of cases in the said clause ; and the late High Court of Judicature at Rangoon has held :

" In a suit for accounts under clause (iv) (*f*) of section 7 of the Court Fees Act, the plaintiff in the trial Court, and the appellant in the Court of Appeal, is the person to make an estimate of the value of the relief that is claimed."

See *C. K. Ummar* v. *C. K. Ali Ummar* (1). This ruling has been followed in *Ma Thein On and others* v. *Ma Ngwe Hmon and others* (2), where it was held that the plaintiff is entitled to make such estimate as he pleases of the relief that he claims in an administration suit for accounts. Besides in *Maung Nyi Maung* v. *The Mandalay Municipal Committee* (3), Leach J. has held—

> " The valuation of the relief sought in a suit for an injunction is left entirely to the discretion of the plaintiff or the appellant as the case may be and the Court is not entitled to question the correctness of the amount so declared ; *Sunderabai* v. *The Collector of Belgaum* (4), *Faizullah Khan* v. *Mauladad Khan* (5) and *C. K. Ummar* v. *C. K. Ali Ummar* (1)."

The High Courts of Bombay and Madras and the Chief Court of Punjab have also taken the view that the valuation under the said clause rests with the plaintiff and not with the Court. [See *Govinda* v. *Hanmaya* (6) ; *Arunachalam Chetty and another* v. *Rangasawmy Pillai* (7) ; and *Barru and others* v. *Lachhman and others* (8).]

However, the High Courts of Calcutta, Allahabad, Patna and Nagpur have held the contrary view. In *Boidya Nath Adya and others* v. *Makhan Lal Adya* (9), Petheram C.J. and Banerjee J. observed :

> " The Court Fees Act (section 7, clause 4) provides that for the purpose of determining the amount of ' Court fee payable, the value of certain classes of suits should be taken to be the amount at which the plaintiff values the relief sought.' But we do not think the Legislature ever intended to leave it to the plaintiff *to choose the Court* in which he should bring his suit for possession or partition of property by assigning an arbitrary value to the subject-matter of the suit. The provisions of the Suits Valuation Act (Act VII of 1887, sections 7, 8 and 11) clearly indicate that that is not the intention of the Legislature."

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(1) (1931) I.L.R. 9 Ran. 165 (F.B.).
(2) (1934) I.L.R. 12 Ran. 512.
(3) (1934) I.L.R. 12 Ran. 335 at p. 338-339.
(4) (1919) I.L.R. 43 Bom. 376.
(5) 31 Bom. L.R. 841.
(6) (1921) I.L.R. 45 Bom. 567.
(7) (1915) I.L.R. 38 Mad. 922 (F.B.).
(8) (1913) 48 P.R. No. 111, p. 412.
(9) (1890) I.L.R. 17 Cal. 680

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In *Musst. Bibi Umatul Batul* v. *Musst. Nanji Koer and others* (1) Mookerjee and Holmwood JJ. observed :

" It may very well be that in some instances the Court will be slow to question the propriety of the valuation put by the plaintiff on the relief sought ; but we do not think it can be affirmed as an inflexible rule of law that it is not open to the Court to revise the valuation put by the plaintiff, when it is conclusively established that it is arbitrary and improper. To adopt such an interpretation is to enable an unscrupulous litigant *to defraud the Government and to oust the jurisdiction of the Court* which is competent to adjudicate the matters in controversy. The history of the section proves conclusively that such was not the intention of the legislature and we are satisfied that the language of the Court Fees Act as it stands, at present, does not necessitate the conclusion that the plaintiff is at liberty to put any arbitrary valuation upon the relief sought. We must consequently hold that in cases covered by section 7, sub-section (iv), clauses (*c*) and (*d*) of the Court Fees Act, although it is for the plaintiff to state the amount at which he values the relief sought and although the amount of Court Fees payable varies with the amount at which the relief sought is valued in the plaint, it is open to the Court, if a question is raised, as to the true valuation of the suit, to determine such question and that *it is not only within the power of the Court but it is also its duty to take action* under section 54 of the Civil Procedure Code,* if it is established that the valuation is improper."

In *Narayanganj Central Co-operative Sale Supply Society, Limited* v. *Mafizuddhin Ahmad* (2), a Full Bench of the Calcutta High Court held :

" Section 7, sub-section (iv) of the Court Fees Act should be read as controlled by Order VII, rule 11 (*b*) of the Code of Civil Procedure. The two enactments have to be read together and simultaneously given effect to. The Court has power, in a case of under-valuation of the relief in a suit to obtain a declaratory decree or

(1) (1906-07) 11 C.W.N. 705. (2) (1934) I.L.R. 61 Cal. 796.

* Now Order VII, Rule 11 of the Code.

order where consequential relief is prayed for and in a suit to obtain an injunction, to require the plaintiff to correct the valuation and to reject the plaint in case the plaintiff fails to do so."

Costello J. also observed in the course of his judgment therein :

" It seems to me perfectly clear that the legislature never could have intended that a plaintiff should be at liberty to assign any arbitrary value he chooses to his suit and thus be free to select the Court in which that suit should be brought. Unless it is held that the Court has jurisdiction to revise the valuation, it is obvious that an unscrupulous litigant would be in a position to defraud the Government and moreover to oust the jurisdiction of a Court competent to adjudicate the matters at issue between the parties. If it were not open to the Court to revise the valuation put by the plaintiff on his suit, then obviously he would be in a position to under-value the relief which he seeks and, if he chooses, to institute his suit in the lowest Court, that is to say, the Court having the lowest pecuniary jurisdiction. He could, in fact, either go to the lower Court in the ordinary way or to any higher Court at his own option. It is, therefore, in my opinion, abundantly clear that it was intended that the Court should be in a position to exercise a certain amount of control over the valuation made by the plaintiff."

In *Aijaz Ahmad* v. *Nazirul Hasan and another* (1) a Bench of the Allahabad High Court held :

" In a suit for declaration with consequential relief, it is not open to the plaintiff to give any arbitrary valuation in the plaint and the Court is not bound to accept such valuation."

In *Ram Shekhar Prasad Singh* v. *Sheonandan Dubey* (2), Dawson Miller C.J. and Mullick J. held :

" In a suit for a declaration of title and recovery of possession if the plaintiff does not place a reasonable value on the conseqnential relief which he prays for it is the duty of the Taxing Officer to value such relief."

(1) A.I.R. (1935) All. 849. (2) (1923) I.L.R. 2 Pat. 198.

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In *Motiram and others* v. *Daulat and another* (1) a Full Bench of the Nagpur High Court held :

" When the valuation put for court fee purposes by the plaintiff on a relief sought by him in a suit falling under section 7 (iv) (*c*) of the Court Fees Act appears to be arbitrary and unreasonable the Court may reject the plaint and leave the plaintiff to correct the valuation or have the suit rejected."

In the course of his judgment therein Stone C.J. observed :

" It can hardly be doubted, however, that it is not desirable to permit a litigant to place fanciful values on his suit and thereby not merely deprive Government of revenue but also ' get an important action in a Court of limited jurisdiction with the consequential result that the powers of appeal, however important the matter may be, will be strictly limited '."

* * * * *

" It is not, in our opinion, the value of the thing affected that settles the value of the relief sought. It is the value of the relief sought which has to be determined. Clearly if it is impossible to state what that value is the value must be a notional one settled by somebody's caprice, and the Act, in our opinion enables the plaintiff to fix it but it does not, in our opinion, follow that in a case *where, though the value is uncertain, it is manifestly great*, the plaintiff is at liberty, not merely to fix what value he likes but to maintain that value when a Court says it is unreasonable. We wish it to be clearly understood that a Court should not endeavour to correct the plaintiff's valuation except in a clear case where the disparity is so great as to show that the plaintiff has not endeavoured to fix a fair value at all but has simply set down a figure which is unreasonable and bears no relation to the value of the right litigated."

* * * * *

" In other words, unless the relief sought can be given some sort of a value and unless that value which any reasonable man would give is altogether disparate

(1) I.L.R. (1938) Nag. 558.

from the value that the plaintiff has given, the plaintiff's valuation stands. In other words, we do not understand section 7 (iv) (*c*) to demand a construction which would be appropriate if the relevent part of the Act above quoted ended with the words 'and such value shall be binding on the Court.' There is nothing in the Court Fees Act which shows that in this type of case the power which the Court is given by the Civil Procedure Code to challenge an undervaluation is taken away."

The conflict of authority is due to the facts (1) that section 7 (iv) of the Court Fees Act provides for six different classes of cases, (2) that even in each class, cases differ from one another as to the decree of difficulty to estimate the values of the respective reliefs and (3) that in some cases there can be no doubt of the reliefs having been under-valued ; and the reasons given in the rulings which are contrary to the ruling of a Full Bench of the late High Court of Judicature at Rangoon in *C. K. Ummar* v. *C. K. Ali Ummar* (1) are worthy of very careful consideration.

There is one other aspect of the case. A Full Bench of the Patna High Court has observed in *Ramkhelawan Sahu* v. *Bir Surendra Sahi* (2) (at pages 784-785) :

" Section 7, paragraph (iv) (*c*), has application to declarations properly so called, such, for instance, as declarations of public status, or a declaration that the plaintiff holds a public office, or a declaration as to the meaing of a will or a trust deed or other public document. *It has no reference to the kind of declaration in the sense of a fiding of fact as to the plantiff's title necessary for granting a decree for possession.* It is not in the least necessary for a plaintiff in a suit for possession to claim a declaration. Indeed declarations in the true sense are rarely required. The plaintiff should only allege the facts necessary to establish his title and that the defendant is wrongfully in possession. If he goes on to claim, in the manner so beloved of pleaders, a declaration of title in addition to an order for possession, the Court may *and should* treat the case as a claim for possession pure and simple, and ignore entirely the claim for a ' declaration of title '."

(1) (1931) I.L.R. 9 Ran. 165 (F.B.). (2) (1937) I.L.R. 16 Pat. 766.

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A Full Bench of the Allahabad High Court also has observed in *Kalu Ram* v. *Babu Lal and another* (1) (at page 822) :

> " The Court has to see what is the nature of the suit and of the reliefs claimed, having regard to the provisions of section 7 of the Court Fees Act. If a substantive relief is claimed, though clothed in the garb of a declaratory decree with a consequential relief, the Court is entitled to see what is the real nature of the relief, and if satisfied that it is not a mere consequential relief but a substantive relief it can demand the proper court fee on that relief, irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief.
>
> Suppose a plaintiff asks for a declaration that the defendant is liable to pay him money due under a certain bond and also asks for recovery of that amount; *or suppose that he asks for a declaration that he is the owner of certain property and is entitled to its possession and asks for recovery of its possession* ; surely the reliefs for the recovery of money or for the recovery of possession cannot be treated as mere consequential reliefs which can be arbitrarily valued at any low figure and court fees paid on that arbitrary valuation only."

In *M. P. Sayed Mohamed* v. *K. S. Ebrahim Das and one* (2) where the suit was one for declaration that the plaintiff was the absolute owner of a certain shop and for possession thereof, Sharpe J. observed :

> " I see no reason why it was necessary for the plaintiff to claim a declaration. He will, from a practical point of view, as against the defendants, be in the same position if he obtains a decree for possession of the shop without any declaration that he is the absolute owner of it, as if he also obtains such a declaration. What we have to consider is, ' what is the real and substantial nature of the relief sought, as a whole ? ' The real and substantial relief sought here is possession of this shop."

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(1) (1932) I.L.R. 54 All. 812. (2) (1947) R.L.R. 98.

So a question arises as to whether the plaintiffs-appellants' suit should not be treated as one for possession of the ticket, pure and simple, ignoring the claim for a declaration of title. In this connection it must be noted that one of the conditions printed on State Lottery Ticket reads :

" (2) Government will recognize only the person presenting a winning ticket as entitled to receive the prize money and is not concerned with any previous changes in ownership of the ticket."

This leads to another question as to whether the ticket, which has admittedly drawn a prize of Rs. 20,000 is moveable property which has a market value whithin the purview of section 7 (iii) of the Court Fees Act or whether it is moveable property which has no market value and which accordingly falls within the purview of section 7 (iv) (*a*) of the Act.

Since we are referring the question as to whether the Court is always bound to accept the plaintiff's valuation of the relief under section 7 (iv) of the Court Fees Act to a Full Bench, we will avail ourselves of the opportunity to refer the other questions also.

We accordingly refer the following questions to a Full Bench :—

(1) whether in a suit for a declaratory decree with consequential relief the Court is always bound to accept the plaintiffs' valuation in the plaint of the relief sought ;

(2) whether a suit for declaration that the plaintiffs are joint owners of a State Lottery Ticket and for possession thereof should be treated as one for possession, pure and simple, ignoring the claim for declaration of title ;

(3) where a State Lottery Ticket, which has drawn a prize say of Rs. 20,000, is moveable property with a market value within the purview of section 7 (iii) of the Court Fees Act or moveable property which has no market value and which accordingly falls within the purview of section 7 (iv) (*a*) of the Act.

P. N. Ghosh for the appellant.

R. K. Roy for the respondent.

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U THEIN MAUNG, C.J.—The first question that has been referred to us is :

(1) Whether in a suit for a declaratory decree with consequential relief the Court is always bound to accept the plaintiffs' valuation in the plaint of the relief sought.

With reference to this question we agree with the High Courts of Calcutta, Allahabad, Patna and Oudh (1) that the Legislature never intended to leave it to the plaintiff to choose the Court in which he should bring his suit for possession or partition of property by assigning an arbitrary value to the subject-matter of the suit and (2) that it is not only within the power of the Court but it is also its duty to take action under Order VII, Rule 11 of the Code of Civil Procedure, if it is established that the plaintiffs' valuation is unreasonable and bears no relation to the value of the right litigated, although the Court should be slow to question the propriety of the plaintiffs' valuation especially in cases where no reasonable standards for valuation have been laid down by appropriate rules under section 9 of the Suits Valuation Act.

C. K. Ummar v. *C. K. Ali Ummar* (1) is distinguishable as it relates to a suit for accounts under section 7 (iv) (*f*) of the Court Fees Act. In such a suit the plaintiff's valuation, which has to be made mainly by conjecture, is a tentative one and "if in the event it turned out that the court fees paid upon the estimate of the plaintiff were less than ought to have been paid having regard to the decree that was passed, under section 11 provision was made for payment of the additional court fees that were due".

Maung Nyi Maung and others v. *The Mandalay Municipal Committee* (2) also is distinguishable as it

(1) (1931) I.L.R. 9 Ran. 165 (F.B.). (2) (1934) I.L.R. 12 Ran. 335.

relates to a suit for injunction. In such a suit the value of the relief must be a notional one and the Court has no data by which it can test the reasonableness thereof.

In fact the learned Advocate for the appellants has conceded that the Court can interfere where the plaintiff's valuation is maifestly absurd ; and he has actually cited *Rajindra Baksh Singh* v. *Bahu Rani and another* (1) and *Pitam Singh and another* v. *Bishun Narain and others* (2), as his case is that the appellants' valuation of the relief is a reasonable one. In the first case Pullan J. observed :

"If a person attempted to sue in a Munsif's Court for property worth a lac of rupees by declaring it to be worth one hundred, the Court would refuse to entertain his plaint and similary this Couut would refuse to entertain a plaint if the valuation was demonstrably far below the minimum of five lacs, which is prescribed for the original jurisdiction of this Court."

In the second case, Srivastava and Pullan JJ. observed :

"The position is also the same in a case where the plaintiff has acted recklessly in fixing the valuation of the suit. The reason for these exceptions to the general rule stated above lies on the surface and is not far to seek. A plaintiff who does not act *bona fide* and with due care and attention cannot be allowed to take advantage of his wrongful act so as to enable him to have the case tried in a court different from that intended by the Legistature."

Besides, a single Judge of the late High Court of Judicature at Rangoon itself has held in *Maung Noe and another* v. *Maung Kha Pu* (3) that the plaintiff in a suit under section 7 (iv)(*c*) of the Court Fees Act is not at liberty to place an arbitrary value on the relief sought.

(1) A.I.R. (1928) Oudh 260. (2) (1931) I.L.R. 6 Luck. 426.
(3) A.I.R. (1933) Ran. 40.

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The second question that has been referred to us is :

(2) Whether a suit for declaration that the plaintiffs are joint owners of a State Lottery Ticket and for possession thereof should be treated as one for possession, pure and simple, ignoring the claim for declaration of the title.

A Bench of the late High Court of Judicature at Rangoon has held in *Maung Shein and another* v. *Ma Lon Ton* (1) :

"Section 7 (iv) (*c*) of the Court Fees Act is applicable to a suit in which, having regard to the substance of the plaint, it is incumbent upon the plaintiff to obtain a declaratory decree or order to perfect his right to the consequential relief that he claims ; for instance where the plaintiff seeks relief to which he is not entitled unless and until some decree or document, or alienation of property is avoided, a suit in which a declaration in that behalf is claimed is within section 7 (iv) (*c*).

If a plaintiff claims a declaratory decree where such declaration is not a necessary preliminary to obtain the real relief that is sought he is liable to pay an *ad valorem* Court fee."

[Cp. *Ramkhelawan Sahu* v. *Bir Surendra Sahi* (2), *Kalu Ram* v. *Babu Lal and another* (3) and *M. P. Sayed Mohamed* v. *K. S. Ebrahim Das and one* (4), extracts from which are quoted in the Order of Reference.]

In the present case it is not incumbent upon the plaintiffs to obtain a declaratory decree to perfect their right to the consequential relief that they claim ; as has been held in *Ramkhelawan Sahu* v. *Bir Surendra Sahi* (2) section 7 (iv) (*c*) of the Court Fees Act has no reference to the kind of declaration in the sense of a finding of fact as to the plaintiff's title necessary for ganting a decree for possession ; and as has been held in *M. P. Sayed Mohamed* v. *K. S. Ebrahim Das and one* (4) a suit which is in substance for possession cannot

(1) (1931) I.L.R. 9 Ran. 401.
(2) (1937) I.L.R. 16 Pat. 766.
(3) (1932) I.L.R. 54 All. 812.
(4) (1947) R.L.R. 98.

be converted into a suit for declaration with consequential relief by adding a prayer for declaration, Das J. has observed in a similar case, *viz. Salahuddinhyder* v. *Dhanoolal* (1). "If the plaintiff is out of possession as in the present case, the proper value should be the value of the property" after quoting with approval the following extract from the judgment in *Ram Shekhar Prasad Singh* v. *Sheonandan Dubey* (2) :

> "No case has been shown to us where there was a claim for possession and where the plaintiff was allowed to put a valuation upon it which the Court knew to be false."

The third question which has been referred to us is:

> (3) Whether a State Lottery Ticket, which has drawn a prize say of Rs. 20,000, is moveable property with a market value within the purview of section 7 (iii) of the Court Fees Act or moveable property which has no market value and which accordingly falls within the purview of section 7 (iv) (*c*) of the Act.

It has been contended by the learned Advocate for the appellants that lottery tickets which have drawn prizes are not moveable property with a market value as they are not usually sold in open market and that the lottery ticket in the present case cannot be such property as the appellants are not willing to sell it at all. However, the question as to whether a certain property has a market value does not necessarily depend on whether such property is usually sold in open market or whether its owner is willing to sell it at all ; and there is no suggestion in the present case that the lottery ticket has any intrinsic or sentimental value apart from its value as a ticket which has drawn a prize of Rs. 20,000.

Lottery tickets are sold on the basis of Government's undertaking to have prizes drawn at the State Lottery

(1) (1945) I.L.R. 24 Pat. 334. (2) (1923) A.I.R. Pat. 137.

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and to pay the respective prizes to those who present the winning tickets. So before the prizes are drawn each lottery ticket has a market value of two rupees or more ; and after the prizes are drawn the market value of ticket which has drawn a prize, instead of being reduced to zero, must be enhanced by its having drawn the prize. The previous undertaking of the Government to pay the prize, the ticket having subsequently drawn a prize and the condition printed on the ticket itself to the effect that Government will recognize only the person presenting the winning ticket as entitled to receive the prize money and is not concerned with any previous changes in ownership of the ticket have the combined effect of giving the ticket the same market value as a Government promissory note for the amount of the prize that the ticket has drawn. According to the said condition there can be changes in the ownership of lottery tickets both before and after the prizes are drawn and whoever presents a winning ticket is entitled to receive the prize money.

In *Mohamed Sadiq Ali Khan* v. *Kazim Ali Khan and others* (1) where the subject-matter of the suit is a fund consisting of Government promissory notes it was held that the face value thereof determines the jurisdiction.

The learned Advocate for the appellants relies upon *Kommura Venkata Rao* v. *Korella Sesharattamma* (2), the headnote whereof reads :

"A suit for a declaration that the person really interested in certain promissory notes is the plaintiff and not the defendant in whose name they stood and for recovery of the notes but not for the recovery of the money due thereunder falls under section 7 (iv) (*a*) and not under section 7 (iii) of the Court Fees Act (VII of 1870), and court fee is payable on the amount at which the plaintiff values the relief sought."

(1) A.I.R. (1934) Oudh 118. (2) (1935) I.L.R. 58 Mad. 228.

However, that case is distinguishable. In the first place a declaratory decree is really necessary in that case as the promissory notes stand in the defendant's name ; and in the second place there might not have been the same prospect of recovering the full amount as in the case of a Government promissory note or a State Lottery Ticket. [Cp. the remarks of Mukerji J. in *The Narayanganj Central Co-operative Sale and Supply Society, Limited* v. *Mafizuddhin Ahmad* (1).]

So our answer to the first question is that in a suit for a declaratory decree with consequential relief the Court is ***not*** always bound to accept the plaintiff's valuation in the plaint of the relief sought and that the Court can and should interfere with the plaintiff's valuation where it is manifestly unjust or improper.

Our answer to the second question is that a suit for declaration that the plaintiffs are joint owners of a State Lottery Ticket and for possession thereof should ordinarily be treated for the purpose of jurisdiction and court fees as one for possession, pure and simple, ignoring the claim for declaration of title.

Our answer to the third question is that a State Lottery Ticket, which has drawn a prize, is moveable property with a market value of the same amount as the prize it has drawn within the purview of section 7 (iii) of the Court Fees Act.

Advocates fee for the reference is fixed at five gold mohurs.

U TUN BYU, J.—I entirely agree with the answers given in the judgment of the learned Chief Justice, which has just been delivered, but I desire to add one or two observations. It appears to me that the first question propounded for this reference does not

(1) (1931) I.L.R. 61 Cal. 796 at pp. 810-811.

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strictly call for an answer so far as the case which gave rise to this reference is concerned, in view of our answers to the second and third questions that have been propounded—the effect of which is that the case which gave rise to this reference is not a case which falls within the purview of clause (iv) (*c*) of section 7 of the Court Fees Act. The first question propounded is,—

> "(1) Whether in a suit for a declaratory decree with consequential relief the Court is always bound to accept the plaintiff's valuation in the plaint of the relief sought."

However, as the first question would clearly require an answer if our answer to the second question had been expressed differently and as it also raises a question of general importance, it appears to me to be only proper that the first question should also be answered in this reference, especially when this matter has been argued fully before us.

There are a number of decisions to indicate that the plaintiff should not be allowed under section 7 (iv) (*c*) of the Court Fees Act to place an arbitrary value on the relief which he claims, and if his valuation is clearly arbitrary and unreasonable the Court has power to revise it—*vide* the cases of *Boidya Nath and others* v. *Makhan Lal Adya* (1), *Umatul Batul* v. *Nanji Koei* (2), *Ram Shekhar Prasad Singh* v. *Sheonandan Dubey* (3), *Maung Shein and another* v. *Ma Lon Ton* (4), *Kalu Ram* v. *Babu Lal and another* (5), *Ramcharitar Panday* v. *Basgit Rai* (6), *Maung Noe and another* v. *Maung Kha Pu* (7), *Mt. Rup Rani and another* v. *Bithal Dass* (8),

(1) (1890) 17 Cal. Series 680 at p. 683.
(2) (1907) 11 Cal. Weekly Notes 705.
(3) (1923) A.I.R. Pat. 137.
(4) (1931) 9 Ran. Series 401.
(5) (1932) 54 All. Series 812 at p. 822.
(6) (1932) A.I.R. Pat. p. 9.
(7) (1933) A.I.R. Ran. p. 40.
(8) (1938) A.I.R. Oudh. p. 1 at p. 6.

Mt. Rupia Bhatu Mahton (1), and *Salahuddin Hyder* v. *Dhanoolal* (2). I do not think that it was ever intended to allow the plaintiff to place an arbitrary value to his claim in a case which falls within clause (iv) (*c*) of section 7 of the Court Fees Act, because to do so would be to allow him to deprive a Court of its jurisdiction in a matter which it would ordinarily possess. It would also enable him to defraud the Government by having to pay less court fees than he would have to pay, if he had not sought to include in his plaint a relief which was not necessary for the purpose of obtaining the real relief or reliefs which he desired the Court to grant.

U SAN MAUNG, J.—While I am in general agreement with the views expressed by my Lord the Chief Justice in the judgment just delivered by him, I would like to add a few observations of my own, owing to the importance of the matter under reference. No doubt, the Court Fees Act, being a fiscal enactment, must be strictly construed and if there be any doubt the same must be resolved in favour of the subject, it is necessary for the Courts of law to guard against any possible evasion of its provisions so as to discourage speculative suits. Since the event of the Burma State Lottery, which has now become an institution in this country, a great temptation has been offered to unscrupulous persons to file speculative suits on very flimsy grounds. In regard to suits like the present (which is really one for the possession of a State Lottery Ticket alleged to have been lost by the plaintiffs and subsequently found in the possession of the defendants), they are really suits for the possession of specific moveable property and any attempt to frame such a suit in the form of a suit for a declaratory decree with consequential relief by

(1) (1943) 22 Pat. Series p. 783. (2) (1945) 24 Pat. Series 344 at p. 32.

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way of possession of the State Lottery Ticket seem an evasion of the law. In this connection the observations of a Bench of the late High Court of Judicature at Rangoon in *Maung Shein and another* v. *Ma Lon Ton* (1) quoted in the judgment of my Lord are not inapposite. In the present case also, it is not incumbent upon the plaintiffs to obtain a declaratory decree in order to perfect their right to the consequential relief which they claim.

In the case of *Maung Aung Hla* v. *U Ke Tu and Mauug Ba Thein* (2) where I held that the plaintiff must sue not only for a declaration that he was the owner of the lost lottery ticket but also for its possession as a consequential relief, the question as to whether the suit, if properly framed, should be one for possession of the lottery ticket only was not raised and it was therefore not considered. However, I came very near to the right answer to question No. 3 when I observed in that case :

> "The lottery ticket in question is a piece of moveable property. When purchased, it entitles the holder to a chance to obtain a prize at the ensuing draw of the Burma State Lottery. Therefore, if during the interval the plaintiff is wrongfully deprived of the possession of the ticket, he would have been entitled to file a suit for declaration of his ownership and for possession of the ticket as a consequential relief. The fact that a draw having taken place, the ticket has won a prize has not diminished the value of the ticket to nothing, but in fact has considerably enhanced its value."

I did not, however, pursue the question any further as to the amount of the value to be placed upon a lottery ticket which has thus won a prize. While the present reference was being argued I was somewhat

(1) (1931) I.L.R. 9 Ran. 401.

(2) Civil Revision No. 19 of 1949 of the High Court, Rangoon.

inclined to think that the lottery ticket which has won a prize and has thus acquired an enhanced value is a piece of moveable property which has no market value, as for instance, a document relating to title. However, I have since come to the conclusion that such a ticket has a market value more or less equal to the value of the prize it has drawn and that therefore it is a piece of moveable property which has a market value within the meaning of section 7 (iii) of the Court Fees Act. To have a market value it is not necessary that a piece of moveable property should be usually sold in the open market. Suppose an inventor has invented a motor rickshaw which has never been sold in the open market before, such a motor rickshaw would surely have a market value even though the inventor might never have intended to put it up for sale. The only criterion is whether such a motor rickshaw if put up for sale in the open market would attract buyers who would be willing to pay a price for it. That such a motor rickshaw would have a value if sold in the open market cannot be gainsaid ; so also in the case of a lottery ticket which has won a prize, although, in the generality of cases, the would-be purchaser would only take it if sold at a small discount. *Mohamed Sadiq Ali Khan* v. *Kazim Ali Khan and others* (1) where the subject-matter of the suit was a fund consisting of Government promissory notes it was held that the face value thereof determines the jurisdiction, and in my opinion the lottery ticket which has won a prize at the Burma State Lottery is very analogous to a Government promissory note in view of conditions (2) and (3) printed at the reverse of the tickets. These are as follows :—

"(2) Government will recognize only the person presenting a winning ticket as entitled to receive the prize money and is not

(1) A.I.R. (1934) Oudh 118.

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concerned with any previous changes in ownership of the ticket.

(3) Prizes to the value of Rs. 20,000 and upwards will be payable at Rangoon and may be drawn through any recognized Bank. Other prizes will be payable at Rangoon or at any Treasury or Sub-Treasury in Burma."

These conditions are sufficient guarantee that Government would pay to the person presenting the winnig ticket the value of the prize which it has drawn.

I agree to the answers proposed by my Lord.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

NAZIR AHMED CHOWDHURY (APPELLANT)

v.

DUDHU MEAH CHOWDHURY (RESPONDENT).*

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Feb. 9.

Code of Civil Procedure—Order for the return of the plaint under Order 7, Rule 10, instead of rejecting the plaint under Order 7, Rule 11 (d)*—Appeal to District Court—District Judge remanded the case—Appeal filed against the order of remand under Order 43, Rule 1* (d)*—S. 16, Urban Rent Control Act, 1948—General Clauses Act, s. 5* (c)*—Whether Certificate of Controller necessary.*

In a suit for rent, the Trial Court held that the suit was not maintainable without a certificate from the Controller of Rent certifying the standard rent of the premises and the learned Judge directed the return of the plaint under Order 7, Rule 10 of the Code to be presented to the Court after obtaining the necessary certificate. The plaintiff appealed to the District Court, and the learned District Judge set aside the order and directed that the plaint should be represented and that the suit should be decided according to law. An appeal was filed in the High Court against the order of remand.

Held : That an appeal lies under Order 43, Rule 1 (*u*) of the Code. The Trial Court was wrong in returning the plaint under Order 7, Rule 10, as he had jurisdiction to entertain the suit. The proper order he should have passed was to reject the plaint under Order 7, Rule 11 (*d*). Such order of rejection of plaint would be a decree within the meaning of s. 2 (2) of the Code of Civil Procedure. In substance therefore, the appeal to the District Judge was an appeal from the decree and his order of remand is under Order 41, Rule 23 and as such appealable under Order 43, Rule 1 (*u*) of the Code. The application to convert the appeal to Revision was filed *ex-abundanti cautela* under the authority of *Sakcena Bibi and others* v. *C. Stephens*, (1926) I.L.R. 4 Ran. 221, referred to.

S. 16 of the Urban Rent Control Act of 1946 provided that no plaint for the recovery of rent which had become due after the enactment of the Act of 1946 could be accepted by a Civil Court without certificate of standard rent. That Act was repealed by the Urban Rent Control Act of 1948 and s. 16 was re-enacted with slight modification. But the new section applies only to suits "for recovery of rent which become due after the enactment of this Act" *i.e.*, after the 17th January 1948 and has no application to the present suit which is for rent prior to 1948.

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*Civil Misc. Appeal No. 33 of 1948 against the order of the District Court of Akyab in Civil Misc. Appeal No. 14 of 1948, dated 21st July 1948.

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S. 16 of 1948 simply regulated procedure, for it provided "No Court shall accept a plaint, etc.," s. 5 (*c*) of the General Clauses Act which provides that repeal of an enactment will not affect any right, privilege, obligation, or liability which has already accrued, has no application to change of mere procedure.

R.M.K.A.R. Arunachallam Chettyar v *R.M.K.A.R.V. Valliappa Chettyar*, (1938) Ran. L.R. 176 (F.B.), followed.

The law does not compel a man to do that which he cannot perform. *Lex non cogit ad impossibilia.* S. 2 (*b*) of Act of 1946 defines Controller as Controller appointed *under the Act.* So the present Controller could not be said to be the one appointed under the Act of 1946 which has ceased to exist, and the present Controller acting under the Act of 1948 cannot grant a certificate for the rent due under the Act of 1946. But though Act of 1946 has been repealed, substantive rights and obligations created by s. 5 (*1*) of that Act continues, and the Landlord cannot get a decree for anything more than the standard rent.

P. K. Basu for the appellant.

Tun Sein for the respondent.

U THEIN MAUNG, C.J.—The present respondent sued the present appellant for recovery of Rs. 4,800 as rent for a piece of land at the rate of Rs. 600 per mensem; but the learned 2nd Assistant Judge, Akyab, held that the suit was "not maintainable without the plaint being accompanied by a certificate from the Controller of Rent certifying the standard rent of the premises" and directed that "under Order 7, Rule 10 of the Code of Civil Procedure the plaint shall be returned to the plaintiff to be presented to this Court after getting the necessary certificate." On appeal the learned District Judge set the order aside and directed that "the plaint shall be represented to the 2nd Assistant Judge's Court" and that the suit shall be decided according to law.

As the learned Advocate for the respondent has contended in the course of his argument that an appeal does not lie, the learned Advocate for the appellant has filed *ex abundanti cautela* an application to treat the memorandum of appeal as an application

for revision under the authority of *Sakeena Bibi and others* v. *C. Stephens* (1).

However, the learned 2nd Assistant Judge erred in directing the plaint to be returned under Order 7, Rule 10 of the Code of Civil Procedure, which provides only for return of the plaint "to be presented to the Court in which the suit should have been instituted," *i.e.* to the proper Court, as for instance, the Court, which returns the plaint thereunder, has no jurisdiction. He should have rejected the plaint under Order 7, Rule 11 (*d*) of the Code as, according to him, the suit, which had been instituted without the Controller's Certificate, was barred by section 16 of the Urban Rent Control Act, 1946.

In the case of the plaint having been rejected as it should have been under Order 7, Rule 11 (*d*), the order rejecting it would have been a decree as defined in section 2 (2) of the Code and it would have been appealable under Order 41, Rule 23.

The appeal having really been under Order 41, Rule 23, the learned District Judge's order should have been and, having regard to its own wording, must be deemed to have been an order of remand which is appealable under Order 43, Rule 1 (*u*).

So we need not consider the application which has been filed *ex abundanti cautela* at all.

Section 16 of the Urban Rent Control Act, 1946, as amended by the Urban Rent Control (Amendment) Act, 1947, reads:

"No Civil Court shall accept a plaint in any suit for the recovery of rent which became due after the enactment of this Act in respect of any premises to which this Act may apply, unless a certificate issued by the Controller certifying the standard rent of the premises has been attached to the plaint."

(1) (1926) I.L.R. 4 Ran. 221.

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However, the Urban Rent Control Act, 1946, has been repealed by the Urban Rent Control Act, 1948, which came into force on the 17th January 1948.

The new Act contains a similar section, *viz.* section 16 which reads :

"No Civil Court shall accept a plaint in any suit or allow to be filed any application for distress warrant under section 22 of the Rangoon City Civil Court Act, for the recovery of rent which became due after the enactment of this Act in respect of any premises to which this Act may apply, unless a certificate by the Controller certifying the standard rent of the premises has been attached to the plaint or the application for distress warrant."

However, the new section applies only to suits "for the recovery of rent which became due after the enactment of this Act", *i.e.* after the 17th January 1948, and the respondent's suit is for recovery of rents which, according to the plaint, became due before that date. So section 16 of the new Act does not apply. The only question for consideration is whether a certificate is still necessary under section 16 of the old Act in spite of its having been repealed ; and the answer to this question will depend on whether the enactment that no Court shall accept a plaint unless a certificate issued by the Controller certifying the standard rent of the premises has been attached to the plaint is an enactment relating to procedure only or whether it is an enactment under which any right, privilege, obligation, or liability has been acquired, has accrued or has been incurred within the meaning of section 5 (*c*) of the General Clauses Act.

A Full Bench of the late High Court of Judicature at Rangoon has held in *R.M.K.A.R. Arunachallam Chettyar* v. *R.M.K.A.R.V. Valliappa Chettyar* (1), that,

"No suitor has any vested interest in the course of procedure, nor any right to complain if during the litigation the procedure is changed."

(1) (1938) Ran. L.R. 176.

The learned Advocate for the appellant has contended that section 16 of the Urban Rent Control Act, 1946, is an enactment under which the appellant has acquired a right or privilege not to be sued without a certificate and the respondent has incurred an obligation to get a certificate before instituting a suit.

The Full Bench case is one in which a similar question arose in connection with section 10 of the Code of Civil Procedure (as amended by the Adaptation of Laws Order, 1937) which runs as follows :

" No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British Burma having jurisdiction to grant the relief claimed, or before His Majesty in Council.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in British Burma from trying a suit founded on the same cause of action."

The learned Advocate for the appellant appeared and he seems to have advanced the same arguments therein (*see* page 178 of the Report).

The Full Bench held in spite of his arguments to the contrary that section 10 of the Code of Civil Procedure (which began with the words " No Court shall proceed with the trial of any suit ") did not take away rights but related to a matter of procedure only and that the Adaptation of Laws Order merely " lifted the suspension of a remedy by making the direction to stay an action apply only to cases where there is an earlier suit in British Burma or before His Majesty in Council."

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Roberts C.J. observed in the course of his judgment therein :

"Now, where the word 'privilege' is coupled with 'right' in a statute it must be held to have a well defined meaning. It does not mean some advantage or boon which by reason of existing procedure a party may deem himself in fact to possess, but may be defined as a right, advantage or immunity in law enjoyed by a person or class of persons beyond the common advantages of others. The word must be construed in a strict sense as having legal meaning when it is employed in a statute, and not as having a loose or figurative meaning. * * * * Therefore the words, 'right, privilege, obligation or liability already acquired, accrued or incurred', in the Government of Burma Adaptation of Laws Order, 1937, must have reference not to the mere enjoyment of what is in fact a boon, or to the existence of being in fact under a disadvantage, but the rights, privileges, obligations or liabilities *which are enforceable at law.*"

Dunkley J. also observed therein :

"In law, a 'right' is an advantage *which can be enforced by appropriate action before a Court*, and a 'privilege' is nothing more than a special right enjoyed by certain persons, beyond the rights which the public in general enjoy. A '*privilege*' *also must be enforceable by action before a Court*, or, as an immunity, by a complete answer in law to an action brought to enforce a general right. In accordance with this view, the right (again using the word in a loose sense) to have a suit stayed is in law neither a right nor a privilege."

Section 16 of the Urban Rent Control Act, 1946, merely provides, "No Court shall accept a plaint, etc." It merely regulates procedure like section 10 of the Code of Civil Procedure. It cannot be said to confer any right or privilege on the appellant or to place the respondent under any obligation which was enforceable at law.

Besides, the law does not compel a man to do that which he cannot possibly perform. *Lex non cogit ad impossibilia.* (Broom's Legal Maxims, 10th Edition,

p. 162.) The Controller whose certificate had to be attached in accordance with section 16 of the Urban Rent Control Act, 1946, was the Controller of Rents appointed under that Act. [*See* section 2 (*b*) of the Act.] So the present Controller, *i.e.*, the Controller appointed under the Urban Rent Control Act, 1948, is not competent to grant a certificate for the purpose of the suit; and it could not have been the intention of the Legislature to take away—and that by mere implication—the right of landlords to sue for rents which became due while the 1946 Act was in force but as regards which they had not obtained certificates.

On the other hand the object of the Urban Rent Control Act, 1946, to restrict rents of premises in urban areas will not be defeated by the respondent being allowed to sue for rents without a certificate. Section 5 (1) thereof reads:

> "Subject to the provisions of this Act, where the rent of any premises has been or is hereafter during the continuance of this Act increased above the standard rent, the amount by which such increased rent exceeds the standard rent shall, notwithstanding any agreement to the contrary, be irrecoverable."

It relates to substantive rights as distinct from mere matters of procedure. The amount, if any, by which the agreed rent exceeded the standard rent was not recoverable while the said sub-section was in force and in view of section 5 (*c*) of the General Clauses Act, this amount, if any, remains irrecoverable in spite of its having been repealed.

For the above reasons we agree with the learned District Judge that the provisions of section 16 of the Urban Rent Control Act, 1946, by which the Courts were debarred from accepting plaints without the Controller's certificate, related to mere procedure and that the learned 2nd Assistant Judge can accept the

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plaint even though such a certificate is not attached thereto since the said section has been repealed.

The appeal is dismissed with costs, and the application to treat the memorandum of appeal as an application for revision is not considered as it is not, under the circumstances of the case, necesssary to consider it at all.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, C.J. and U San Maung, J.

M. E. O. KHAN (APPELLANT)

v.

M. H. ISMAIL (RESPONDENT).*

H.C. 1949

Feb. 26.

Urban Rent Control Act, 1946, as amended by Act 26 of 1947—S. 14 (1)—Order staying execution of decree for ejectment subject to regular payment of rent—Appeal by decree-holder dismissed—Judgment-debtor's failure to comply with terms—Whether rights of parties suspended by appeal—Code of Civil Procedure, Order 41, Rule 5 (1).

Held : That where under s. 14 (*1*) of the Urban Rent Control Act, 1946, as amended by Act XXVI of 1947, Court ordered stay of execution of a decree for ejectment of a tenant subject to his regular payment of rent by particular dates, and the decree-holder appealed against the order, such appeal does not exonerate the judgment-debtor from complying with the terms imposed by the Court. On judgment-debtor's failure to comply with the terms of the Stay Order, the decree-holder is entitled to execute the decree by ejecting the tenant. If the decree-holder had not executed the decree even on the failure of the judgment-debtor to comply with the terms imposed in the Order of Stay but awaited the result the matter might have stood on a different footing.

So long as the appeal is not disposed of the decree-holder has every right to execute the decree, and wording of Order 41, Rule 5 (1) of the Code of Civil Procedure is general in its terms and applies equally whether the plaintiff or the defendant appeals.

Abdul Rashid Mandal v. *Shaharali Molla*, (1919) I.L.R. 46 Cal. 1032, followed.

Noor Ali Chowdhuri v. *Koni Meah and others*, (1886) I.L.R. 13 Cal. 13 ; *Ram Narain Singh* v. *Lala Roghunath*, (1895) I.L.R. 22 Cal. 467 ; *Thamal Marap* v. *Rani Abhoyessuri Debi*, (1908-09) 13 C.W.N. 1060 ; *Rup Chand and others* v. *Shamsh-ul-Jehan*, (1889) I.L.R. 11 All. 346, distinguished.

P. B. Sen for the appellant.

A. I. Modan for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from the order by which the learned Chief Judge of the

* Civil 1st Appeal No. 60 of 1948 against the Order of the Chief Judge of Rangoon City Civil Court in Civil Execution No. 107 of 1948 dated the 9th August 1948.

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M. E. O KHAN v. M. H. ISMAIL.

U THEIN MAUNG, C.J.

Rangoon City Civil Court refused to discharge or rescind an order for ejectment under section 14 (*1*) of the Urban Rent Control Act, 1948.

The order for ejectment of the appellant has been obtained by the respondent as long ago as 20th December 1946. This order was altered on the 8th August 1947 under section 14 (*3*) of the Urban Rent Control Act, 1946, as amended by the Urban Rent Control (Second Amendment) Act, 1947, to the effect (*inter alia*) that it "shall stand unexecutable for so long as the judgment-debtor continues to pay regularly in advance by the 5th of each month the rent due for the use of suit rooms, the rent to commence from the date on which occupation is restored to him by virtue of this order." The appellant got possession of the rooms under the said order and paid rents in advance up to December 1947.

In the meanwhile, *i.e.* on the 3rd November 1947, the respondent appealed from the said order and his appeal was not dismissed till the 26th April 1948.

During the pendency of the said appeal the appellant failed to pay rent for December 1947 in advance by the 5th of that month ; and the respondent applied on the 13th of that month for execution of the order of ejectment on the ground that it had become executable as a result of the appellant's failure to pay the said rent as required by the order of the 8th August 1947. In his written objection dated the 2nd January 1948, the appellant stated *inter alia* that his mother could not collect sufficient money for the house rent for December 1947 and "craved the mercy of the Court" to allow him to deposit rent for December 1947 and January 1948, by the 20th January 1948. The Court however decided that the order could be executed. After the said decision and before the warrant of ejectment could be executed, *i.e.* on the

22nd January 1948, he applied for permission to deposit the rents in Court and for withdrawal of the warrant for ejectment. He was permitted to do so without prejudice to the respondent's rights. However, his application was dismissed with costs on the 19th February 1948. (*See* the diary order dated the 2nd January 1948.)

The present appellant then appealed from the order dated the 19th February 1948, on the ground that the Court should have granted him an extension of time for payment of the rents but his appeal was dismissed on the 1st July 1948.

The said appeal was filed on the 3rd March 1948. On the same date the appellant also filed an application in the Rangoon City Civil Court for rescission of the order of ejectment under section 14 (*1*) of the Urban Rent Control Act, 1948 ; and the present appeal is from the dismissal of the said application on the 9th August 1948.

The relevant part of section 14 (*1*) of the Act reads :

" . . . the Court shall, except in a case in which either clause (*c*) of section 11 (*1*) or clause (*b*) of section 13 (*1*) applies, stay or suspend execution of such order or decree or postpone the date of delivery of possession for such period or periods and subject to such conditions, as it thinks fit, in regard to payment, by the tenant or by the person against whom the order or decree has been made or given, of arrears of rent or mesne profits, and if such conditions are complied with, the Court shall discharge or rescind the order or decree. "

The learned Advocate for the appellant admits that the appellant would be entitled to have the order of ejectment discharged or rescinded only if he had complied with the prescribed conditions ; but he claims that the appellant has complied with them by depositing the rents in Court. His contention is that as a result of the present respondent's appeal from the

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order of 8th August, 1947 the condition for payment of rent in advance by the 5th of each month, which was prescribed by that order, remained in abeyance during the pendency of the appeal, *i.e.* up to the 26th April 1948, that rents for December 1947 and January 1948 accordingly fell due only after the 26th April 1948 when the appeal was dismissed, and that the appellant cannot therefore be held to have failed to comply with any condition at all.

He relies on *Noor Ali Chowdhuri* v. *Koni Meah and others* (1). The headnote thereof reads :

" A decree under section 52, Bengal Act VIII of 1869 (*a*) provided that unless the amount due was paid within fifteen days from the date thereof, the tenant (judgment-debtor) would be liable to ejectment. That decree was confirmed in appeal, *no steps to execute it having been taken in the meantime.* The tenant paid the decretal amount into Court within fifteen days of the appellate decree.

Held: That inasmuch as the appellate decree must be presumed to incorporate the terms of the original decree, and was the only decree of which execution could be taken, the tenant (judgment-debtor) having paid the decretal amount within fifteen days of that decree was protected from ejectment. "

However, the learned Judges observed in the course of their judgment therein :

" It was of course open to the decree-holder to take out execution of the original decree at any time before it was superseded by the decree in appeal. Not having done so, we are unable to see that he has any real grievance because the terms of the appellate decree have been complied with by the appellant. "

So the ruling merely decides that although the decree under appeal remains executable during the pendency of the appeal, it is merged in or superseded by the decree of the appellate Court after the appeal

(1) (1886) I.L.R. 13 Cal. 13.

has been decided. Several cases like *Ram Narain Singh* v. *Lala Roghunath* (1), *Thamal Marap* v. *Rani Abhoyessuri Debi* (2), *Rup Chand and others* v. *Shamsh-ul-Jehan* (3), in which *Noor Ali Chowdhuri* v. *Koni Meah and others* (4) is followed, have been cited by the learned Advocate for the appellant ; but they do not carry the matter further.

In *Abdul Rashid Mandal* v. *Shaharali Molla* (5), which is a case under the Bengal Tenancy Act, 1885, it was held " so long as an appeal is not disposed of 'date of the decree' in sub-section (2) of section 66 of the Act means the decree of the Court of first instance inasmuch as the decree of the Court of first instance is then the only decree capable of execution. "

In fact Order 41, Rule 5 (1) of the Code of Civil Procedure itself provides :

" An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree ; but the appellate Court may for sufficient cause order stay of execution of such decree. "

The learned Advocate for the appellant contends that Order 41, Rule 5 (1) will apply only where the appeal is by the judgment-debtor. However, the wording of the sub-rule is general ; and his contention is not consistent with the view on which there is a consensus of opinion that the decree of the Court of first instance remains executable during the pendency of an appeal therefrom, although it may merge in or be superseded by the appellate decree after the disposal of the appeal ; and there is no

(1) (1895) I.L.R. 22 Cal. 467.
(2) (1908-09) 13 C.W.N. 1060.
(3) (1889) I.L.R. 11 All. 346.
(4) (1886) I.L.R. 13 Cal. 13.
(5) (1919) I.L.R. 46 Cal. 1032.

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reason why a decree should not be executable as against a judgment-debtor who has not appealed therefrom.

The learned Advocate for the appellant contends that the present respondent, who appealed from the order of the 8th August 1947 should not be allowed to take advantage of the present appellant's failure to comply with a condition thereof as he cannot approbate and reprobate the same order. However, the respondent appealed from the order before there was any breach of condition on the part of the appellant as he wanted the order of ejectment to be absolute as it originally was ; and he subsequently applied for execution of the order of ejectment as the appellant failed to observe the condition and rendered the order executable in spite of the order then under appeal by his own default.

Noor Ali Chowdhuri v. *Koni Meah and others* (1) and similar cases are distinguishable inasmuch as those are cases in which the decree-holders, unlike the decree-holder in the present case, failed to execute the decrees of the Courts of first instance during the pendency of the appeals therefrom. Besides, the dates for payments in those cases were fixed with reference to the dates of the decrees, whereas the date for payment of rents are fixed in the present case as the 5th of each month after the appellant obtained possession of the premises.

The appellant, having got the absolute order for his ejectment altered under the Urban Rent Control Act, 1946, should have scrupulously complied with the condition prescribed by the order altering it—even though the respondent had appealed from it—as the alteration was for his benefit and he would in any case have to pay rents so long as he continued to occupy the premises.

(1) (1886) I.L.R. 13 Cal. 13.

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Under these circumstances we agree with the learned Chief Judge of the Rangoon City Civil Court that the appellant is not entitled to have the order of ejectment discharged or rescinded.

The learned Advocate for the appellant has also submitted that the order for ejectment may be discharged or rescinded, even though the appellant cannot claim its discharge or rescission as a matter of right, since the rents have been deposited in Court and the respondent has nothing to lose by keeping him as a tenant of the premises. However, the respondent has not been able to get possession of the premises up to date although the order for the appellant's ejectment was passed as long ago as the 20th December 1946, and we do not think that it will be fair to the respondent to discharge or rescind the said order and to let the appellant remain his tenant after all this litigation.

The appeal is dismissed with costs. Advocate's fee five gold mohurs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

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Mar. 22.

HOE SHWE FONG (APPELLANT)

v.

E. I. ATTIA (RESPONDENT).*

Limitation Act—Ss. 5 and 4 (2)—Article 181—Application for final decree—Courts (Emergency Provisions) Act, 1943, s. 7—Loss or destruction of record if grounds for not making application for the final decree.

Article 181 of the Limitation Act governs the application for a final decree in mortgage suit for sale and period of limitation is three years from the time when the right to make the application accrued.

M.A.L.M. Chettiar Firm v. *Maung Po Hmyin and others*, I.L.R. 13 Ran. 325 and *Maqbul Ahmed and others* v. *Pratap Narayan Singh and others*, I.L.R. 57 All. 242 (P.C.) followed.

S. 5 of the Limitation Act does not apply to an application for a final decree inasmuch as no enactment has been made making that section applicable to an application for final decree. S. 14 (2) also does not apply as the application for reconstruction of the records was not filed in a Court which had no jurisdiction, and it was not in fact rejected.

Though provisions of Limitation Act imposes certain arbitrary time limits, yet the Act must be construed strictly.

Udaypal Singh v. *Lakshmi Chand*, I.L.R. 58 All. 261 at p. 268, followed.

There is no judicial discretion which would enable the Court to relieve from the operation of Limitation Act in case of hardship, except in case where s. 5 of the Act applies.

Maqbul Ahmed and others v. *Pratap Narain Singh and others*, I.L.R. 57 All. 242 (P.C.), followed.

Loss or destruction of record is no ground for not making an application for the final decree or for execution of a decree.

Rajgir Sahaya v. *Iswardhari Singh*, 11 C.L.J., at 243, followed.

J. K. Munshi with Mr. Wan Hock for the appellant.

K. R. Venkatram with B. C. Paul for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, J.—The plaintiff Hoe Shwe Fong, who is the appellant, obtained a preliminary mortgage

* Civil 1st Appeal No. 79 of 1947 against the order of the Original Side, High Court, in Civil Misc. No. 101 of 1947, dated the 17th November 1947.

decree against the defendant E. I. Attia, who is the respondent in the present appeal, in June 1941. On the 17th March 1947, Hoe Shwe Fong filed an application under section 151 of the Civil Procedure Code for reconstruction of the record of the proceedings in which the preliminary mortgage decree was passed, and which application was known as Civil Miscellaneous Case No. 101 of 1947. The records were allowed to be reconstructed, which appear to have consisted of the plaint and the preliminary mortgage decree. On the 5th August 1947, which was a day after the record had been reconstructed as agreed upon between the parties, Hoe Shwe Fong applied under the Liabilities (War-Time Adjustment) Act for permission to be allowed to apply for a final decree, and he also at the same time filed an application for a final decree for the sale of the mortgaged properties to be passed and for the sale of the mortgaged properties ; and both the applications had been dismissed.

It appears that the right of the appellant Hoe Shwe Fong to apply for a final decree accrued at the end of December 1941, and under Article 181 of the Limitation Act, he would ordinarily have had three years from the end of December 1941, within which he could have made the application—*vide M.A.L.M. Chettiar Firm* v. *Maung Po Hmyin and others* (1) and *Maqbul Ahmad and others* v. *Pratap Narain Singh and others* (2). However, in view of the provisions of section 7 of the Courts (Emergency Provisions) Act, 1943, Hoe Shwe Fong had time up to the 1st of April 1947, within which he could have made the application for a final decree. But, as I have already observed, the application was

(1) I.L.R. 13 Ran. 325. (2) I.L.R. 57 All. 242 (P.C.).

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not filed until the 5th August 1947, which was admittedly beyond the date on which the application could be made. It is contended on behalf of the appellant Hoe Shwe Fong that the time which was spent by him in pursuing the application for the reconstruction of the record of the proceedings in which the preliminary mortgage decree was passed ought to be deducted for the purpose of the Limitation Act, and that in particular the provisions of sections 5 and 14 of the Limitation Act have been relied upon. Section 5 of the Limitation Act reads as follows :

" 5. Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. "

It might be observed that section 5 of the Limitation Act has not been made applicable to applications of the nature, which had been filed by Hoe Shwe Fong on the 5th August 1947, and it follows that the provisions of section 5 cannot be resorted to to extend the period of the limitation for the purpose of the applications filed on the 5th August 1947.

It will also be advisable to reproduce the provisions of section 14 (2) of the Limitation Act, on which reliance has also been made, and which is as follows :

" 14. (2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it. "

It might be observed at once that the provisions of section 14 (2) of the Limitation Act also do not apply to the facts in the present case in that the application of Hoe Shwe Fong for the reconstruction of the record of the proceedings, in which the preliminary mortgage decree was passed, was not presented to a Court which had no jurisdiction to entertain that application, and, moreover, the application for the reconstruction of the record of the proceedings in which the preliminary mortgage decree was passed, was not, in fact, rejected. The provisions of the Limitation Act will have to be construed strictly, and in this connection the observation of Sulaiman C.J. in the case of *Udaypal Singh* v. *Lakhmi Chand* (1), may be quoted :

" Now the law of limitation imposes certain arbitrary time limits on suits. There may not be any clear principle of equity underlying such restrictions, which are entirely a matter of policy, aiming at expedition and intended to prevent stale claims from being litigated. The interpretation of sections in such an enactment has to be made strictly according to the language employed, and not on a consideration of what ought to be the law. Of course, where the language is ambiguous and capable of two interpretations, the section should preferably be interpreted so as to mitigate the rigour of the bar. "

The prayer in the application of Hoe Shwe Fong for the reconstruction of the proceedings was as follows :

" Wherefore the petitioner-plaintiff prays that this Hon'ble Court may be pleased to reconstruct the records in the above suit, and that for such purpose all orders and directions may be given as this Hon'ble Court may deem fit and proper. "

It will thus be observed that that application was not an application for a final decree, and that there was nothing in the prayer of that application to suggest

(1) I.L.R. 58 All. 261 at p. 268.

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that it might also be considered to include an application for a final decree.

It has been contended that it was not possible to apply for a final decree until the record of the proceedings in which the preliminary mortgage decree was passed had been reconstructed, and the time spent in pursuance of the application for the reconstruction of the record ought accordingly to be excluded for the purpose of the Limitation Act. It has not, however, been shown that there is any law which prevents or disallows an application for a final decree being made without a copy of the preliminary mortgage decree being attached to such application, and, in the absence of any such provision of law, that contention cannot properly be accepted. The observation of Mookerjee J. in the case of *Rajgir Sahaya* v. *Iswardahari Singh* (1) may be quoted here :

> " An application for execution of a mortgage decree need not be accompanied by a copy of the decree. When, therefore, the decree has been lost or destroyed it is competent to the decree-holder to apply for the execution and to obtain relief upon proof of the contents of the decree by secondary evidence
>
> * * * *
>
> Hence the destruction or mutilation of the record by no means divest the Court or the proper officers thereof of authority to issue execution. "

In the absence of any rule or law to show that an application for a final mortgage decree cannot be made without a copy of the preliminary decree being attached to the application for the final decree, it will not be proper to allow the time spent in application for the reconstruction of the original proceedings as being time properly spent for the purpose of enabling Hoe Shwe Fong to make an application for a final decree.

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(1) 11 C.L.J. 243.

It has been argued on behalf of the appellant Hoe Shwe Fong that great hardship would fall on the appellant, if his application for a final decree is held to be barred by limitation of time. We fully agree with the observation of U Thein Maung J. as he then was, that, having regard to all the circumstances of the case, the law appears to be rather hard so far as the appellant is concerned, but we do not feel that it will be proper for a Court to make the hardship a pretext for enlarging the scope of the provision of any law, or for making a decision which will not be in accordance with law. The observation of Their Lordships of the Privy Council in the case of *Maqbul Ahmad and others* v. *Pratap Narain Singh and others* (1) may be reproduced here :

" Secondly it was urged that there was some sort of judicial discretion which would enable the court to relieve the appellants from the operation of the Limitation Act in a case of hardship and that this was a case of hardship, and in particular because it was alleged that the decree-holder was, in regard to the proceedings which he took by way of execution, in some way misled by some mistake in the form of the preliminary decree. It is enough to say that there is no authority to support the proposition contended for. In Their Lordships' opinion it is impossible to hold that, in a matter which is governed by the Act, an Act which in some limited respects gives the court a statutory discretion, there can be implied in the court, outside the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that this view is supported by the fact that section 3 of the Act is peremptory and that the duty of the court is to notice the Act and give effect to it, even though it is not referred to in the pleadings. "

It will also be useful in this connection to reproduce the observation made in the case of

(1) I.L.R. 57 All. 242 (P.C.).

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Mohammed Yunis v. Tilok Chand and others (1), which is as follows:

"When the law is clear, it is the duty of the Court to give effect to it irrespective of the fact that the result leads to some injustice to one party or the other. When a rule has been laid down by the legislature, it has to be followed, and it is not open to the Court to enquire into the reasons for that rule, and to attempt to supplement those rules on equitable grounds. In particular there is no room for the introduction of equitable principles in the administration of the law of limitation. In every case in which a defendant successfully invokes a rule of limitation in bar of a plaintiff's claim, who has apart from the law of limitation, a right to get relief against the defendant with respect to the subject-matter of the suit, the decision must be unjust in the sense that the defendant has, because of the bar of limitation, succeeded in withholding from the plaintiff what in common honesty is due to him. In other words, the law of limitation does, in many cases, lead to injustice to the defeated party. But such injustice, or supposed injustice, cannot be made the ground for enlarging or restricting the scope of a Statute passed by a competent legislation."

In the circumstances, we feel that the appeal must be dismissed in the absence of any provision of law, either in the Limitation Act or in any other law, to indicate that the time spent by the appellant in having the proceedings, in which the preliminary mortgage decree was passed, reconstructed could be deducted for the purpose of extending the period of limitation in so far as the present case is concerned.

It might be added that the counsel for the appellant objected strongly to the following passage in the judgment of the original Court, namely,—"The learned Advocate then filed the present application for permission under the Liabilities (War-Time Adjustment) Act, 1945, for a final decree on the following day. He must under these

(1) (1935) 153 I.C. 1058 at p. 1061.

circumstances be deemed to have given up the contention that an application for a final decree had already been filed towards the end of 1941, or the beginning of 1942;" It does not appear to be really necessary to consider for the purpose of the present appeal whether an application for a final decree had already been filed towards the end of 1941 or the beginning of 1942 by the appellant Hoe Shwe Fong. No application for the revival of the application filed either at the end of 1941 or at the beginning of 1942, if any, had been made before the Court. We are now only concerned with the applications which had been filed by the appellant on the 5th August 1947, and it does not appear to be necessary to consider for the purpose of the decision in the present case whether any application for a final decree was made either at the end of 1941, or at the beginning of 1942. The counsel for the appellant has also submitted that the appellant ought to be given an opportunity of proving that an application for a final decree had been made either at the end of 1941, or the beginning of 1942, but we do not think we can accede to this request, as this appeal is concerned only with the applications made by the appellant on the 5th August 1947. In the circumstances, the appeal will be dismissed with costs.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

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Feb. 2.

U ZEYA (APPELLANT)

v.

THE SECRETARY OF STATE OF HIS BRITANNIC MAJESTY FOR WAR REPRESENTED BY HEADQUARTERS, BURMA COMMAND (RESPONDENT).*

Code of Civil Procedure, s. 86—Suit against Secretary of State for War of a Foreign Government—Whether maintenable.

Held : That the provisions of ss. 86 and 87 of the Code of Civil Procedure are imperative and no suit could be filed against any Foreign Government without a Certificate of Consent from the President.

Held further : That it is the recognized principle of International Law that a Foreign Sovereign and his property are not subject to the process of a Court of another country, and this exemption is also extended to the Ambassador who represents the Sovereign.

Ordinarily, except with the permission of the President, the Ambassador cannot be sued.

Held further : That the provisions of s. 86 of the Code of Civil Procedure is imperative and there cannot be any waiver of the right under that section. *Chandulal Khushalji* v. *Awad bin Umar Sultan*, 21 Bom. 35, not followed ; *Mighell* v. *Sultan of Johore*, (1894) 1 Q.B. 149, distinguished ; *K. Narayana Mothad* v. *The Cochin Sirkar*, I.L.R. (1939) Mad. 661, followed ; *Maharaja Bahadur of Rewa* v. *Babu Shivasarang Lal*, (1921) 61 Indian Cases 989, dissented from ; *Gaekwar Baroda State Railway* v. *Hafiz Habib-ul-Huq and others*, 65 Indian Appeals p. 182, followed ; *Madan Lal Jhun Jhun Wala* v. *Reza Ali Khan*, I.L.R. (1940) 1 Cal. 344, followed.

W. T. Shan for the appellant.

Ba Sein (Government Advocate) *amicus curæ.*

The judgment of the Bench was delivered by

U TUN BYU, J.—The plaintiff-appellant U Zeya instituted a suit in the City Civil Court, Rangoon,

* Civil 1st Appeal No. 73 of 1948, against the decree of City Civil Court Rangoon, in Civil Regular Suit No. 46 of 1947.

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against His Britannic Majesty's Secretary of State for War for the recovery of a sum of Rs. 2,443-8-0 as compensation for use and occupation of the house at No. 21, Afar Shah Road, Rangoon, after the British re-occupation of Burma for the period commencing from the 1st June 1945 up to the end of November 1946 ; and the said sum is said to be the amount which the plaintiff-appellant said that he ought to receive for the use and occupation of his house after deducting the amount which had been paid to him by the British Military authorities. The appellant received a further sum of Rs. 903 after the institution of the suit from the British Military authorities, and the balance sum which he now claims is Rs. 1,540, as representing the sum which is still due to him for the use and occupation of his house. It might be mentioned that the plaintiff's suit was instituted some time in January 1947 and that after considerable delay it was held on the 12th August 1948 that the suit was not maintainable against the defendant in view of the provisions of section 86 of the Code of Civil Procedure and in that Burma became an independent country from 4th January 1948.

It might be mentioned at once that when this appeal came before this Court for admission the plaintiff-appellant mentioned that there was some one in Rangoon who would be accepting a notice on behalf of His Britannic Majesty's Secretary of State for War, but this was apparently not correct. An attempt was then made to have the notice of this appeal served on His Britannic Majesty's Ambassador in Rangoon, but through an oversight in the office of this Court the notice was allowed to be issued to His Britannic Majesty's Ambassador at Rangoon without any reference to a Judge of this Court. The question which first falls for consideration in this appeal is whether the suit which was instituted in the City Civil

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Court is maintainable as against His Britannic Majesty's Secretary of State for War in view of the fact that Burma had become an independent state since 4th January 1948. It is a recognized principle of International Law that a foreign sovereign and his property are not subject to the process of a Court of another country, and this exemption is extended to the ambassador who represents that Sovereign. It will Accordingly be necessary to consider whether there is any provision in the law of Burma, which allows a foreign Sovereign or State or the Ambassador who represents such Sovereign or State to be sued in Burma. It is clear that His Britannic Majesty's Ambassador cannot ordinarily be served with a notice of a suit. The purport of section 86 of the Code of Civil Procedure is apparently to give effect to certain principles of International Law.

The contention of the plaintiff-appellant is that the City Civil Court has jurisdiction to try the suit which he instituted against His Britannic Majesty's Secretary of State for War on the ground that the defendant-respondent had submitted to the jurisdiction of the City Civil Court in which the suit was instituted. He contends that His Britannic Majesty's Secretary of State for War had properly been represented by Lt.-Col. E. G. Josling who was in charge of the Claims and Hirings, Burma. The plaintiff-appellant in support of his contention that waiver to irregularities in conforming to the provisions of section 86 of the Code of Civil Procedure gives jurisdiction to the City Civil Court to try the suit instituted by him relied on the case of *Chandulal Khushalji* v. *Awad bin Umar Sultan* (1), but it might be observed at once that the case of *Chandulal Khushalji* (1) had been dissented

(1) 21 Bom. 35.

from in the more recent case of *K. Narayana Mothad* v. *The Cochin Sirkar represented by J. W. Bhore, The Dewan of Cochin* (1), and we respectfully agree with the observation of Oldfield J. in the later Madras case, which is :

> " I do not consider whether the course of his pleading did in fact amount to a waiver or not, because in my opinion the recognition of cases of waiver, as excepted from the ordinary provision of International Law as understood in England, cannot be imported into the clear language of the Indian Code."

And, in view of what has been stated above, it will not be necessary to discuss the case of *Mighell* v. *Sultan of Johore* (2) which deals with English Law which is not the same as the law in this country.

The plaintiff-appellant also referred to the case of *Maharaja Bahadur of Rewa* v. *Babu Shivasarang Lal* (3) in support of his contention that where a Ruling Chief or a Sovereign Prince has acquiesced to the jurisdiction of a Court the latter cannot afterwards challenge the judgment of the Court on the ground that the requisite consent had not been obtained under section 86 of the Code of Civil Procedure, but it is clear now that the decision made in that case cannot be considered to be correct in view of the decision of the Privy Council made in the case of *Gaekwar Baroda State Railway* v. *Hafiz Habib-ul-Huq and others* (4) where it was observed that the provisions of sections 86 and 87 of the Code of Civil Procedure are imperative and that they cannot be waived. The case of *Gaekwar Baroda State Railway* v. *Hafiz Habib-ul-Huq and others* (4) was referred to in the recent case of *Madan Lal Jhun Jhun Wala* v. *Reza Ali Khan* (5) where it was also indicated that the provisions of

(1) (1939) Mad. 661.
(2) (1894) 1 (Q.B.) 149.
(3) (1921) 61 Indian Cases 989.
(4) 65 Indian Appeals p. 182.
(5) I.L.R. (1940) 1 Cal. 344.

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section 86 cannot be waived. The words "but not without such consent" in sub-section (1) of section 86 appear to us to indicate clearly that the provisions of section 86 (1) are intended to be imperative and cannot be waived. It follows therefore that the suit of the plaintiff-appellant was rightly dismissed by the third Judge of the City Civil Court, Rangoon, for want of the requisite consent prescribed under section 86 of the Code of Civil Procedure.

The suit in the present case was in reality a suit against a foreign State or Sovereign, and we do not find anything on the record to indicate that Lt.-Col. Josling was at any time capable of representing His Britannic Majesty in the suit in question. He did not produce any authority which would entitle him to represent His Britannic Majesty, and Lt.-Col. Josling is not a person who can be assumed to be a representative of His Britannic Majesty's Secretary of State for War. The record of the case also indicates that there was in reality no acquiescence to the jurisdiction of the Court by the defendant-respondent in the present case. Lt.-Col. E. G. Josling presented a petition dated the 27th January 1948, in paragraph 3 of which he clearly stated that he had no authority to accept service of summons or to defend the suit on behalf of the Secretary of State for War. It is, however, argued by the plaintiff-appellant that paragraph 7 of the petition suggests that Lt.-Col. Josling had acquiesced to the jurisdiction of the City Civil Court, but it seems to us that paragraph 7 must be read together with paragraph 3 of the petition, and when they are read together it appears to us that what Lt.-Col. Josling purported to do was that he was willing to have the case argued on behalf of the Secretary of State for War, if the plaintiff-appellant persisted in proceeding with the suit, to show that the Court had no jurisdiction to entertain the suit

against His Britannic Majesty's Secretary of State for War. It is said that Lt.-Col. Josling in fact filed a written statement on a subsequent date, which purported to be on behalf of the Secretary of State for War and that the action of Lt.-Col. Josling should be taken to indicate that the defendant-respondent had acquiesced to the jurisdiction of the City Civil Court, Rangoon. We cannot accede to this contention, even assuming that Lt.-Col. Josling had proper authority to represent the defendant in the suit, because it is clear from clause (*c*) of paragraph 9 of the amended written statement that it was still being contended by Lt.-Col. Josling that the City Civil Court had no jurisdiction to entertain the suit against the Secretary of State for War. Moreover, paragraph 5 of the amended written statement also shows clearly that Lt.-Col. Josling who was the Assistant Director of the Claims and Hirings Department, Burma, had no authority to represent the Secretary of State for War; and paragraph 5 of the amended written statement is as follows:

"The defendant is not aware of the allegation contained in paragraph 5 of the plaint and states that in any case neither the Defence Secretary to the Government of Burma nor the Headquarters Burma Command nor the Claims and Hirings Department, Burma, is his legal representative in Burma. The defendant submits that any notice served on them, even if duly served, is not legally valid as against him."

It must accordingly be held in the circumstances of this case that there had in fact been no acquiescence by the defendant-respondent to the jurisdiction of the City Civil Court in the present case.

The decision of the 3rd Judge of the City Civil Court in Civil Regular Suit No. 46 of 1947 must therefore be considered to be correct, and this appeal is dismissed.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

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Mar. 1.

SAW CHAIN POON (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Burma Naturalization Act—S. 7 (1)—Certificate granted under—Union of Burma (Adaptation of Laws) Order, 1948, effect of delction—Union Citizenship (Election) Act, 1948, whether a naturalized Chinese entitled to Certificate of Citizenship.

Held: That a Chinese who was naturalized under the Burma Naturalization Act and obtained a certificate under s. 7 (1) of that Act, was *deemed* to be a British subject and was entitled to all the rights, privileges and capacities of a British subject born within British Burma.

The Burma Naturalization Act was repealed by the Union of Burma (Adaptation of Laws) Order, 1948. A person naturalized under the Burma Naturalization Act did not come within clauses (i), (ii) and (iii) of s. 11, Constitution of Burma. Under s. 11 (iv) of the Constitution of Burma and s. 3 of Union Citizenship Election Act, a person in order to be entitled to apply for a Certificate of Citizenship must be a person "born in any of the territories which at the time of his birth was included within His Britannic Majesty's Dominion." As the applicant did not satisfy this test, he was not entitled to apply for the Citizenship of the Union of Burma, even though he was naturalized under the Burma Naturalization Act. The s. 11 (iv) of the Constitution of Burma and s. 3 of the Union Citizenship Election Act have abrogated the rights acquired by the applicant under the Burma Naturalization Act.

Kyaw Hloon for the applicant.

Tin Maung for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, J.—The appellant Saw Chain Poon, a Chinese gentleman, was born in China. He obtained a Certificate of Naturalization under the Burma Naturalization Act on or about the 9th March 1939. In 1948 he applied for a Certificate of Citizenship to

* Civil Misc. Application No. 1 of 1949.

the Union of Burma under section 3 of the Union Citizenship (Election) Act, 1948, but his application was dismissed on the ground that he was not a person who was entitled to apply for a Certificate of Citizenship under section 3 of that Act. Saw Chain Poon now appeals against the order dismissing his application on the ground that he was a person who could be considered to be a person born in Burma in that, it is argued on his behalf, he should be deemed by reason of the provisions of section 7 (*1*) of the Burma Naturalization Act to be a person who was born in Burma.

It is not disputed that Saw Chain Poon is not a person who could have come within either clause (i) or clause (ii) or clause (iii) of section 11 of the Constitution Act. His Certificate of Naturalization dated the 9th March 1939, shows that both his parents were Chinese, and presumably his parents were also descendants of Chinese ; and in any case it has not been alleged to be otherwise while the appeal was being heard in this Court. The relevant portion of section 7 (*1*) of the Burma Naturalization Act, which has been referred to above, is as follows :

"No certificate of naturalization shall have effect until the person to whom it is granted has taken and subscribed the oath prescribed by section 6, but upon the taking and subscribing of such oath such person . . . . shall, when in British Burma be deemed to be British subjects and be entitled to all the rights, privileges and capacities of a British subject born within British Burma."

It might be mentioned at once that the Burma Naturalization Act has been deleted by the Union of Burma (Adaptation of Laws) Order, 1948. It has however been contended on his behalf that Saw Chain Poon has acquired a right to be considered to be a person who was born in Burma under the Burma

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Naturalization Act and that the repeal of that Act could not alter his national status which he had acquired before the Union of Burma (Adaptation of Laws) Order, 1948, was enacted. Section 7 (1), it will be observed, merely stated that Saw Chain Poon was to be deemed to be a British subject, and it does not state that he is to be deemed to be a British subject who was born in Burma. Although section 7 (1) mentions that Saw Chain Poon was to be considered to be a person who was entitled to all the rights, privileges and capacities of a British subject born within British Burma, it is obvious that it cannot be construed to mean that he was deemed either under section 7 or any other section of the Burma Naturalization Act to be a British subject who was born within British Burma. Moreover, as the Burma Naturalization Act had been repealed since 4th January 1948, whatever right which Saw Chain Poon might have acquired under the old Burma Naturalization Act, it would have to be considered to have been abrogated by the provisions of section 11 of the Constitution Act or section 3 of the Union Citizenship (Election) Act, 1948, where the exercise of any such right would be inconsistent with the express provisions of section 11 of the Constitution Act or section 3 of the Union Citizenship (Election) Act, 1948.

The order passed in this case by the Officer nominated for the purpose of the Union Citizenship (Election) Act, 1948, is, therefore, correct, and the appeal is dismissed. No costs will in the circumstances of this case, be awarded against the appellant.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

MA AHMAR HPYU (APPELLANT)

v.

MA E KHIN (RESPONDENT).*

H.C. 1949

Mar. 1.

Right of suit—Person in whose name a deed stands—Whether can sue when he has no beneficial interest—Money-Lenders Act, s. 12—Interest after preliminary decree if obtainable if he has received as interest a sum equal to the principal.

Held : That a benamidar, although not beneficial owner can institute a suit in his own name. He represents the real owner. Similarly a mortgagee whose name appears in the mortgage deed is competent to sue although he is a benamidar.

Gur Narayan v. *Sheolal Singh*, I.L.R. 44 Cal., 566 ; *Yad Ram* v. *Kmroa Singh and others*. I.L.R. 21 All. 380, followed.

Held further : Under Money-Lenders Act the total sum recoverable cannot be more than double the sum advanced. If the creditor has received by way of interest any sum which exceeds the principal, then the amount of interest in excess of the principal, should be deducted from the principal. Further creditor in such case cannot get interest for any period after the expiry of six months from the date of the preliminary decree.

M. M. Nair for the appellant.

Sen and Roy for the Respondent.

The judgment of the Bench was delivered by

U TUN BYU, J.—The plaintiff-respondent Ma E Khin instituted a suit against the defendant-appellant Ma Ahmar Hpyu in Civil Regular No. 1 of 1941 of the Court of the Assistant District Judge, Bassein, for the recovery of a sum of Rs. 11,000, which was the principal amount, said to have been advanced under a mortgage deed executed on the 1st December 1930,

* Civil 1st Appeal No. 89 of 1948 of the High Court against the decision in Civil Regular No. 1 of 1941 of the Assistant Court, Bassein, dated the 1st September 1947.

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U TUN BYU, J.

with interest which fell due from the date of the institution of the suit.

Ma E Khin, the plaintiff-respondent, is a younger sister of one Ma Htwe, a lady in whose favour the mortgage deed of the 1st December 1930 was executed. It might be added that Ma E Khin obtained a succession certificate in respect of the debts due or payable to Ma Htwe, and it is not disputed that the debt alleged to be due under the mortgage deed of the 1st December 1930 was mentioned in the schedule of the succession certificate.

The case of the defendant-appellant Ma Ahma. Hpyu is, in effect, that no consideration was said to have passed in respect of the said mortgage deed dated the 1st December 1930. Her case is that there was a trading partnership between the deceased Ma Htwe and her, that the mortgage deed of the 1st December 1930 was executed to enable Ma Htwe to obtain money from her mother Daw Mi for the purpose of advancing money to Ma Ahmar Hpyu and that whatever monies were advanced to, or taken by, her from Ma Htwe were advanced and made under promissory notes which had all been discharged by Ma Ahmar Hpyu.

It will be well to mention at once that there is no evidence to support the defendant-appellant Ma Ahmar Hpyu that she received no consideration for the execution of the mortgage deed dated the 1st December 1930 or that the mortgage deed was executed in the circumstances alleged by her in her statement before the Court. The evidence of U Myit and his clerk Tin Nyun, who were present when accounts were being settled between Ma Htwe and Ma Ahmar Hpyu just before the mortgage deed of the 1st December 1930 was executed, shows clearly that there was consideration for the execution of the said mortgage deed; and U Myint explains fully in his

evidence how the amount of Rs. 11,000 mentioned as principal in the mortgage deed was arrived at. Tin Nyun was U Myit's clerk, and it was he who helped to calculate the amount which was due to Ma Htwe at the time the accounts were being settled between them. We do not see anything why the evidence of U Myit, who was a rice miller at the time, and that of his clerk Tin Nyun, ought not to be accepted. U Ba Than who drafted the mortgage deed dated the 1st December 1930, said that when he asked Ma Ahmar Hpyu if she had received the money mentioned in the deed the latter replied that she had received the same. Thus, there is clear evidence in this case to show that there was complete consideration for the execution of the mortgage deed dated the 1st December 1930.

It has been strongly contended on behalf of the defendant-appellant that the suit instituted by the plaintiff-respondent was not maintainable in that it is clear from the written reply filed by the latter in the trial Court that the money due under the mortgage referred to above was money which belonged to Daw Mi and not to her daughter Ma Htwe. There is no substance in this contention ; and it has been held by the Privy Council in the case of *Gur Narayan* v. ***Sheolal Singh*** (1) that a benamidar, although not a beneficial owner, can institute a suit in that the benamidar represents the real owner. In the earlier Allahabad's case of *Yad Ram* v. *Umrao Singh and others* (2), it was also held that a mortgagee whose name appears in the mortgage deed is competent to institute a suit on the mortgage although he is only a benamidar. The succession certificate, on the other hand, gives Ma E Khin the right to collect and recover the debts which are due or payable to the deceased Ma Htwe,

(1) I.L.R. 44 Cal. 566. (2) I.L.R. 21 All. 380.

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and the succession certificate is conclusive as to the right of Ma E Khin to sue and recover the debts which are recoverable by the deceased Ma Htwe. The present suit by Ma E Khin has, therefore, been properly instituted.

An interesting point which has been raised during the hearing of this appeal is as to the effect and meaning of the provisions of section 12 of The Money : Lenders Act, 1945, which is as follows :

" 12. Notwithstanding anything to the contrary contained in any other law for the time being in force, or in any contract, no Court shall, in respect of a loan advanced before or after the commencement of this Act, pass a decree for a sum greater than the principal of the original loan and arrears of interest which, together with any interest already paid, exceeds the amount of such principal."

It is contended on behalf of the plaintiff-respondent that section 12 of The Money-Lenders Act, 1945, does not prevent the Court from passing a decree for the principal amount of the loan however much the interest might have been paid, and even if it exceeded many times the principal amount due on the original loan. We are unable to accede to this contention because it appears to us that section 12 of the Money-Lenders Act, 1945, fixes the sum which is payable in all, in respect of a loan, to a creditor, that section 12 in effect means that no Court shall grant a decree in respect of any loan advanced, for a total sum which will exceed twice the amount of the loan advanced, and that any interest already paid should be taken into consideration for the purpose of such calculation because those words which follow the expression " for a sum greater than " in section 12 appear to be words which indicate how the total sum which is recoverable under a loan is to be calculated. It has also been contended on behalf of the plaintiff-respondent that she is, in any case, to be

allowed interest for the period which falls after the expiry of six months from the date of the preliminary decree, even if such interest was to exceed the total amount recoverable as indicated in the provisions of section 12 of the Money-Lenders Act, 1945. The contention also appears to us to be against the plain wording of section 12, because, if this contention were to be accepted, it would in effect mean that the Court would be granting a decree in respect of a loan for a sum which would in all be greater than twice the amount of the loan, so far as this case is concerned. Ma E Khin's evidence shows that Ma Htwe died about three years after the execution of the mortgage deed Exhibit " A ", while, according to U Myit, Ma Htwe died about four or five years after the execution of the Exhibit " A " mortgage deed. U Myit also stated that one or two years after the death of Ma Htwe the defendant-appellant Ma Ahmar Hpyu went and requested Daw Mi, the mother of Ma Htwe, to reduce the rate of interest and that Daw Mi agreed to accept half the rate of interest mentioned in the mortgage deed. Thus, if we are to take the view most favourable to the creditor, the evidence can be said to indicate that the defendant-appellant had paid the interest in full for a period of four years which would amount to Rs. 10,560 and that the defendant-appellant had also paid interest at half the rate of interest mentioned in the mortgage deed for the subsequent period of four years which would amount to Rs. 5,280, and the total amount of interest paid for the whole period of eight years would be Rs. 15,840. If the sum of Rs. 15,840 is deducted from the total sum of Rs. 22,000, it would leave a balance of Rs. 6,160, and which latter sum appears to be all that the plaintiff-respondent is entitled to recover in view of the provisions of section 12 of the Money-Lenders Act, 1945. The judgment and the decree of the Assistant District

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Court of Bassein will accordingly be modified in the sense indicated above, and there will be no further interest payable in respect of the said mortgage debt. The plaintiff-respondent will be entitled to proportionate costs in both the Courts, and there will be no costs in favour of the defendant-appellant in that the point of law under section 12 of the Money-Lenders Act, 1945, was raised for the first time when this appeal came for hearing. We have no doubt that this point of law can be raised for the first time in appeal in that there are materials on the record on which this legal point can be decided, and it is also clear that under the provisions of section 12 of the Money-Lenders Act, 1945, the Court cannot pass a decree in respect of the loan for more than, in all, twice the amount of the principal loan. The appeal is allowed in the sense and to the extent indicated above.

APPELLATE CIVIL.

Before U Aung Tha Gyaw, J.

J. K. BEHARA (APPELLANT)

v.

MRINAL KANTI DUTTA (RESPONDENT).*

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Feb. 17.

Code of Civil Procedure—Order 32, Rules 1, 4 (1) and 6—Minor Plaintiff—Duty of Court—Qualification of a next friend.

Held : It is not necessary for a person to act as the next friend of a minor plaintiff, to obtain any written power or authority from anybody so as to qualify him to act in that capacity. Rule 6 of Order 32 of the Code of Civil Procedure protects the interest of a minor in whose favour a decree has been passed. There is a difference between a guardian-*ad-litem* and a next friend. The guardian-*ad-litem* is appointed by an order of the Court and a next friend automatically constitutes himself by taking step in the suit.

The Court has special inherent power to protect the interest of minors. It will exercise that jurisdiction whenever necessary.

Amar Chand v. *Nem Chand*, I.L.R. (1942) All. 144.

G. Joseph for the appellant.

J. B. Sanyal for the respondent.

U AUNG THA GYAW, J.—The applicant in his application in revision has questioned the correctness of the order passed by the learned 3rd Judge of the City Civil Court rejecting his plea that the next friend of the minor plaintiff required some legal authority or power for bringing the present suit on the minor's behalf.

In Civil Regular Suit No. 464 of 1948 of the said Court the minor plaintiff now residing in India by his next friend Mr. N. C. Chowdhry, a trader residing at No. 446, Strand Road, Rangoon, sued the applicant-

* Civil Revision No. 2 of 1949 against the Order of the 3rd Judge of the Rangoon City Civil Court in Civil Regular Suit No. 464 of 1948, dated the 5th November 1948.

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U AUNG THA GYAW, J.

defendant J. K. Behara for recovery of possession of the house property known as No. 20, 138th Street, Rangoon, on the strength of his title derived from his deceased father, the late Mr. S. D. Dutta. A sum of Rs. 720 was also claimed as mesne profits.

One of the defences set up to the claim as set out in paragraph 6 of the applicant's written statement is that Mr. N. C. Chowdhry, the next friend of the minor plaintiff, cannot assume the said role of the plaintiff's next friend for the reason that he had not obtained any written power or authority as required by law to qualify him to bring the suit.

The point raised was simple and was correctly disposed of by the learned 3rd Judge of the City Civil Court. A reference to the provisions contained in Order 32, Rule 4 (1), Civil Procedure Code, shows that :

> " Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit : Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or in the case of a guardian for that suit, a plaintiff."

Order 32, Rule 1, provides that " Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor." There is nothing in these provisions to indicate in any manner that the person acting as the next friend of the minor plaintiff should also possess the further qualification of legal authority to act in the said capacity. Admittedly the minor plaintiff is at present residing in India and this fact would undoubtedly impose upon the Court the responsibility of seeing that the minor's interests are properly and diligently protected. This is enjoined in Order 32, Rule 6 referred to in the order of the City Civil Court.

The more important part of this rule is contained in sub-rule 2 where before any benefit arising under the decree passed in favour of the minor is allowed to be received by the next friend, the Court " shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application."

As was stated in *Amar Chand* v. *Nem Chand* (1) :

" The Court has a special inherent jurisdiction, derived from the Crown as *parens patriae*, to protect the interests of minors. And it will exercise that jurisdiction wherever it finds it necessary in the interests of a minor."

The following remarks occurring at page 149 of the report would appear to be pertinent :

" The expression ' a next friend ' originally denoted the person through whom an infant acts without any necessary reference to litigation ; but in modern times it has come to assume a technical meaning of the person by whom a minor or an infant, as the case may be, is represented as a plaintiff in litigation. The real object of having a next friend is that there may be somebody to whom the defendant or the opposite party may be able to look for costs. The next friend himself does not actually become a party to the litigation. It is the minor who is the party and the next friend is a person—so to speak in the background—who can act on the minor's behalf and to whom the opposite party can look for costs . . . There is this difference between a guardian-*ad-litem* and a next friend that, whereas a guardian-*ad-litem* is constituted by an order of the Court, a next friend automatically constitutes himself by taking steps in the suit."

Apart from those salutory provisions embodied in Order 32 of the Code, there is no legal bar to any person acting as next friend of the minor plaintiff.

This application will accordingly be dismissed with costs, three gold mohurs.

(1) I.L.R. (1942) All. 144.

APPELLATE CIVIL.

Before U San Maung, J

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Mar. 9.

MA NYUN AND OTHERS (APPELLANTS)

v.

MA CHAN MYA AND OTHERS (RESPONDENTS).*

Limitation Act, Articles 123 and 144—Suit by an heir of a Burmese Buddhist for a share of heritance against the co-heirs—Not governed by Article 123 but 144.

A suit for shares of inheritance by children and grand-children of a deceased Burmese Buddhist against their co-heirs is governed by Article 144 of the Limitation Act and not by Article 123.

Gulam Mohammed v. *Gulam Hussein*, 59 I.A. 74 and *Ma Pwa Thin* v. *U Nyo and others*, I.L.R. 12 Ran. 409, followed.

Maung Po Min v. *U Shwe Lu*, 2 L.B.R. 110; *Maung Po Kin and two others* v. *Maung Shwe Bya*, 1 Ran. 405; *Shirinbai* v. *Ratanbai*, I.L.R. 43 Bom. 845, *Ma Toke and nine others* v. *Ma Yin and seven*, I.L.R. 3 Ran. 77; *Maung Shwe An and one* v. *Maung Tok Pyu and one*, I.L.R. 5 Ran. 582, dissented from.

Tun Tha v. *Ma Thit and others*, 9 L.B.R. 56, distinguished.

Rustam Khan and another v. *Janki and others*, I.L.R. 51 All. 101; *Ma Bi and another* v. *Ma Khatoon and others*, I.L.R. 7 Ran. 744; *Maung Ba Tu* v *Ma Thet Su and three others*, 5 Ran. 785, referred to.

Tun Maung for the appellants.

Saw Hla Pru for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 102 of 1947 of the 2nd Subordinate Judge of Mandalay, the plaintiffs Ma Chan Mya and four others, as children and grand-children of the deceased U Shwe Lok, sued their co-heirs, Ma Nyun and nine others, for the administration of U Shwe Lok's estate. One of the defences raised was that U Shwe Lok having died more than twenty years before the date of the suit, the plaintiffs' suit for administration was barred by limitation. A preliminary issue as to whether the suit was barred by

* Civil 2nd Appeal No. 93 of 1948 against the decree of the District Court of Mandalay in Civil Appeal No. 7 of 1948.

limitation was framed, and on the evidence led by both parties the learned trial Judge came to the conclusion that U Shwe Lok died about twenty-one years ago. Then relying upon the ruling in the case of *Tun Tha* v. *Ma Thit and others* (1), the learned Judge held that Article 123 of the Limitation Act applied and that the suit was barred by limitation. On appeal by the plaintiffs, the District Judge of Mandalay held that the appropriate Article of the Limitation Act applicable to the suit was 144 and not 123 and accordingly remanded the suit under Order 41, Rule 23, to the trial Court for its disposal on the merits. For his decision the learned District Judge relied upon the ruling in the case of *Ma Pwa Thin* v. *U Nyo and others* (2) which followed the Privy Council case of *Gulam Mohammed* v. *Gulam Hussein* (3).

In my opinion, the learned District Judge was clearly right in holding that the appropriate Article of the Limitation Act applicable to the suit under appeal is Article 144. In *Tun Tha* v. *Ma Thit and others* (1) where it was held that an *auratha* son may claim his right to a one-fourth share of the joint property of his parents on the death of his father within any period prescribed by Article 123 of the Limitation Act, Their Lordships of the Privy Council had apparently assumed that the appropriate Article was 123 as held in *Maung Po Min* v. *U Shwe Lu* (4) which was referred to in the judgment then under appeal. *Tun Tha*'s case (1) was followed by a Bench of the Rangoon High Court in *Maung Po Kin and two others* v. *Maung Shwe Bya* (5) which was a suit between co-heirs for a share in the corpus of an inheritance. Lentaigne J. who wrote the leading judgment in that case relied upon the

(1) 9 L.B.R. 56.
(2) I.L.R. 12 Ran. 409.
(3) 59 I.A. 74.
(4) 2 L.B.R. 110.
(5) 1 Ran. 405.

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observations of MacLeod C.J. in the case of *Shirinbai* v. *Ratanbai and Navajbai* (1) for the view that *Tun Tha*'s case (2) had overruled the previous decisions of the Indian High Courts that Article 123 was only applicable to a suit against an executor or an administrator or some person legally charged with the duty of distributing the estate.

Maung Po Kin and two others v. *Maung Shwe Bya* (3) was followed by Pratt J. in *Ma Tok and nine* v. *Ma Yin and seven* (4) where the learned Judge observed at page 80:

"I entirely agree with the observation of Lentaigne J. in *Maung Po Kin* v. *Maung Shwe Bya* (3) (at page 415), that there is no reason why a differrent aspect should be given to a claim for a distributive share against an administrator, who should have distributed the estate and given a share but failed to do so, from the aspect of a similar claim against one or more heirs who should have amicably agreed to partition of the estate and given a share but failed to do so.

The appropriate Article for suits against co-heirs for a share in the corpus of an inheritance is 123."

In *Maung Shwe An and one* v. *Maung Tok Pyu and one* (5), after observing that it must be taken as settled law that the appropriate Article for suits instituted by co-heirs for a share in the corpus of an inheritance was Article 123 of the Limitation Act, Brown J. observed that if the heirs had either by express or implied agreement allowed one of them to hold the whole of the estate on behalf of them, Article 142 or 144 of the Limitation Act would apply to a subsequent suit for distribution of the estate.

After *Maung Shwe An*'s case (5) was decided, a Full Bench of the Allahabad High Court in *Rustam Khan and another* v. *Janki and others* (6) explained the

(1) (1918) 51 I.C. 209 = 43 Bom. 845.
(2) 9 L.B.R. 56.
(3) 1 Ran. 405.
(4) I.L.R. 3 Ran. 77.
(5) I.L.R. 5 Ran. 582.
(6) I.L.R. 51 All 101.

peculiar circumstance in which *Tun Tha*'s case (1) was decided and pointed out that that case did not have the effect of overruling the previous decisions of the Indian High Courts that Article 123 of the Limitation Act applies only to those suits in which the plaintiff seeks to obtain his legacy or share from a person who, as administrator, represents the estate of a deceased person and is under a legal duty to pay legacies and distribute shares to those entitled to them. The same view was taken by the Privy Council itself in *Gulam Mohammed* v. *Gulam Hussein* (2) wherein *Rustam Khan and another* v. *Janki and others* (3) was cited with approval.

In *Ma Bi and another* v. *Ma Khatoon and others* (4) also a Bench of the Rangoon High Court refused to follow *Maung Po Kin and two others* v. *Maung Shwe Bya* (5) on the ground that it was not applicable to a case of Mahomedan co-heirs, who became entitled to possession of the property as tenants-in-common on the death of their ancestor. However, the Bench seemed to have overlooked the fact that in *Maung Ba Tu* v. *Ma Thet Su and three others* (6) Chari J. has held that on the death of a Burman Buddhist also, his estate vests in his heirs as tenants-in-common, and that the position of Burmese Buddhist heirs resembles that of the heirs of the deceased Mahomedan under the Mahomedan Law. The authority in the case of *Maung Po Kin and two others* v. *Maung Shwe Bya* (5) must, in my opinion, be considered to have been shaken by the decision of a later Bench in *Ma Bi* v. *Ma Khatoon and others* (4) which followed *Rustam Khan and another* v. *Janki and others* (3) in preference to *Maung Po Kin and two others* v. *Maung Shwe Bya* (5).

(1) 9 L.B.R. 56.
(2) 59 I.A. 74.
(3) I.L.R. 51 All. 101
(4) I.L.R. 7 Ran. 744.
(5) 1 Ran. 405.
(6) 5 Ran. 785.

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However that may be, the matter must be regarded as settled by the decision of the Bench in *Ma Pwa Thin* v. *U Nyo and others* (1), which was a case between Burmese Buddhist heirs. There it was held, following *Gulam Mohammed* v. *Gulam Hussein* (2), that Article 123 of the Limitation Act did not apply, and that the Article only applies where the suit is brought against an executor or an administrator or some person legally charged with duty of distributing the estate. Although *Maung Po Kin*'s case (3) was not mentioned therein, it is not conceiveable that the decision in this case was not known to the Judges who composed that Bench and to the eminent Advocates (Mr. Doctor and U Thein Maung, now Chief Justice of the High Court), who appeared for the parties in that case. In this matter I am entirely in agreement with the observations of Rustomji in his Law of Limitation, 5th Edition, at p. 1057, where the learned Author said :

"In Rangoon it had been held in numerous cases that Article 123 was applicable also to suits between co-heirs for a share of the inheritance. These were, however, cases between Burmese Buddhists, and moreover, the decisions were mainly influenced by MacLeod C.J.'s erroneous interpretation (in 1918, 43 Bom. 845) of the judgment of the Privy Council in 1917, 44 Cal. 379, *Maung Tun Tha*'s case (4). These Rangoon cases must now be deemed to be overruled by the recent pronouncement of the Privy Council in *Gulam Mohammed*'s case (2), definitely laying down that Article 123 only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate, and that in a case between several co-heirs of an intestate the Article applicable would be Article 144 and not Article 123."

In the result, the appeal fails and must be dismissed with costs, advocate's fees two gold mohurs.

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(1) I.L.R. 12 Ran. 409.
(2) 59 I.A. 74.
(3) 1 Ran. 405.
(4) 9 L.B R. 56.

APPELLATE CIVIL.

Before U San Maung, J.

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Mar. 10.

LEONG MOH & CO. (APPELLANT)

v.

U AUNG MYAT AND TWO OTHERS (RESPONDENTS).*

Lootings of Rice and Paddy Enquiry Act, 1947 (Act XLIX of 1947)—Application for revision under s. 16 when lies—Order under ss. 4, 14 and 15 of the Act whether executable.

In the enquiry held by the Looting of Rice and Paddy Enquiry Committee in its Proceedings No. 72 of 1947 a finding was arrived to the effect that Leong Moh & Co. had defrauded the Agricultural Project Board of 2,800 bags of rice.

Held : That under s. 4 of the Act the Committee has power to decide such rights and liabilities as arise out of looting of paddy or rice and under s. 14 the Committee can assess and fix liabilities arising out of looting of rice or paddy. Under s. 15 only such findings are executable. But where the Committee found that a firm had defrauded the Agricultural Project Board and the Committee only brought that fact to the notice of the authorities concerned it was not a finding within the meaning of ss. 14 and 15 so as to be executable.

Further such findings are not revisable under s. 16 inasmuch as the High Court can revise a decision of the Committee only on the ground of gross and palpable failure of justice and no such circumstances exist in this case.

Dr. Ba Han for the appellant.

L. Choon Fong for the 2nd respondent.

Thein Maung for the 3rd respondent.

U SAN MAUNG, J.—This is an application by Leong Moh & Co. under section 16 of the Lootings of Rice and Paddy Enquiry Act, 1947 (Burma Act No. XLIX of 1947), to revise the finding of the Looting of Rice and Paddy Enquiry Committee in its Proceedings No. 72 of 1947 to the effect that Leong Moh & Co. had defrauded the Agricultural Project

* Civil Revision No. 18 of 1948 against the order of the Looting of Rice and Paddy Enquiry Committee in Proceedings No. 72 of 1947.

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Board of 2,800 bags of rice. One of the grounds for revision is that the Committee has caused a gross and palpable failure of justice in admittedly acting *ultra vires* and finding that the applicants had defrauded the Agricultural Project Board of the aforesaid quantity of rice.

The Lootings of Rice and Paddy Enquiry Committee which was appointed by the then Governor of Burma by a resolution in the Agriculture and Rural Economy Department, dated the 3rd July 1947 had, under section 2 of Burma Act No. XLIX of 1947, the power to enquire into any case where looting of paddy or rice is reported to have occurred in Burma. However, section 4 of the Act enacts :

"4. The Committee, or a person appointed by them for this purpose, shall cause public notice to be given at convenient places in the locality in which the Committee intends to hold an enquiry, stating that *the Committee has power to decide the rights and liabilities arising from a looting of paddy or rice at a specified place on a specified date and will hold enquiry into the facts* on a certain date at a specified place, *and calling upon all persons having any interest therein to state their claims and the facts within their knowledge.*" (The italicized are mine.)

Therefore, on the maxim *expressio unius est exclusio alterius* it would appear that in so far as the interests of third persons are concerned the Committee has power only to decide the rights and liabilities arising from a looting of rice or paddy. Now, in the case under revision, U Aung Myat's Rice Mill, locally known as Mill No. 4, at Dedaye was found by the Committee to have been looted on the night of the 15th of March 1947, so that very little rice and rice products remained in the mill on the 16th of March 1947, when U Sein Nyun, the then P.S.I. of Dedaye, Maung Hla Maung, the Inspector of the Agricultural Project Board, U Sonny, the Clerk in-charge

of the Delta Trading Company, Limited, and the Township Officer of Dedaye visited the mill. The value of the rice and rice products looted from the mill was estimated by the Committee at Rs. 3,16,384-8-0. In the course of the enquiry, the Committee went into the question of the ownership of 2,800 bags of *Ngasein* rice which were admittedly shipped from this mill after the lootings took place and on the evidence before it, the Committee came to the following finding :

" Considering all the evidence on record and having regard to the suspicious features in this case, we find that the 2,800 bags of *Ngasein* rice shipped from this mill against contract No. 2508 did not belong to Leong Moh & Co. but to the Agricultural Project Board. The rice may have been removed from this mill shortly before the lootings when rumours of intended lootings were heard and then stacked in godown No. 5 after the executive authorities had inspected the mills. Or it may be that the rice was stacked in godown No. 5 after Leong Moh & Co. had procured it either out of the stock looted from this mill or out of the stock looted from the other mills during the same night. In any case theft does not transfer ownership and those 2,800 bags of rice must be deemed to be property belonging to the Agricultural Project Board. It might perhaps be asked why those rice bags were kept in this mill rather than at some other places. It must however be remembered that the number of rice bags was considerable and their presence at any other place besides a rice-mill would naturally have aroused suspicion and no plausible explanation could have been given for their presence at any other place."

However, in the last paragraph of its report the Committee said :

" Now the Government of the Union of Burma have ruled that we are concerned only with assessing losses of rice and rice-products, etc., actually occasioned by lootings and not with losses due to fraud. Here in the present circumstances those 2,800 bags of rice in question cannot be considered to have been loss as the result of the lootings. On the other hand, the loss to the Agricultural Project Board was of the price paid for those rice

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bags in that the contractors have palmed off the rice bags really owned by the Agricultural Project Board as property belonging to themselves. The contractors must therefore be held to have defrauded the Agricultural Project Board. We accordingly, as directed by the Government of the Union of Burma, bring this case to the notice of the State Agricultural Marketing Board and the Deputy Commissioner, Pyapôn District, for such action as may be deemed fit."

From this paragraph it is clear that the Committee itself fully realised that if the 2,800 bags of rice in question were in fact lost to the Agricultural Project Board as a result of fraud committed by Leong Moh & Co. and not as a direct result of the lootings from Mill No. 4, the matter was beyond the scope of its enquiry. However, in pursuing this matter to a logical conclusion in the enquiry relating the lootings of rice from No. 4 Rice Mill, the Committee was apparently acting under an executive instruction issued by the Government of the Union of Burma. This procedure has not unreasonably led to the apprehension on the part of the applicants, Leong Moh & Co., that the finding of the Committee might be construed as one executable under the provisions of section 15 of Burma Act No. XLIX of 1947. This section reads :

"15. The findings of the Committee may be executed in the same manner as a decree of the Court on application by any person interested or by the Collector of the district in which the looting of rice or paddy which is the subject of enquiry under this Act has occurred."

In my opinion, the finding of the Committee to the effect that Leong Moh & Co. had defrauded the Agricultural Project Board by delivering to it 2,800 bags of rice as part of the rice to be supplied by the Company is not such a finding as is executable under section 15 of Burma Act No. XLIX of 1947. Of

course, in the course of the enquiry into the lootings of rice from No. 4 Rice Mill, the Committee would have to enquire, *inter alia*, the extent of loss to the Government due to the looting. Therefore, the question of the ownership of 2,800 bags of *Ngasein* rice which were admittedly shipped from this mill after the lootings would not be entirely irrelevant to the proceedings. Nevertheless, when the Committee comes to a finding that a third party had defrauded the Agricultural Project Board by selling to it the rice which really belonged to the Board, this matter would be beyond the scope of the enquiry unless there is evidence on record sufficient to warrant a finding that that third party had acted in concert or in collusion with the looters. Such is not the finding in this case.

The learned Government Advocate, who appeared for the Agricultural Project Board in this case was constrained to admit that if the Committee in coming to the finding that Leong Moh & Co. had defrauded the Agricultural Project Board of 2,800 bags of rice had meant to be one under section 14 of Burma Act No. XLIX of 1947, the Committee would be acting *ultra vires* and the finding should be set aside on revision. However, in my opinion, the Committee did not really mean the finding to be one under section 14 and therefore it is not open to revision under section 16 of the Act.

In the result, the application for revision is dismissed as not maintainable in law. There will be no order as to costs.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U Thaung Sein, J.

H.C. 1949

Aug. 23.

K.P.V.E.S. VAIRAVAN CHETTYAR (APPELLANT)

v.

P.L.V.R. VEERAPPA CHETTYAR (RESPONDENT).*

Rangoon City Civil Court (2nd Amendment) Act, 1947, ss. 12 (2) and 13—Article 10, Letters Patent—S. 7, General Clauses Act—Jurisdiction to pass judgment when no jurisdiction to try suit—Rule 236, Original Side Rules—Judgment to be delivered in open Court—Date of such judgment.

Held : As from 1st January 1948, according to s. 13, Rangoon City Civil Court (2nd Amendment) Act, 1947, the Rangoon City Civil Court had jurisdiction to try suits whose value did not exceed Rs. 10,000 and under s. 12 (2) such a suit cannot be tried by any other Court except as provided therein. Though under clause 10 of the Letters Patent the High Court had jurisdiction to try all cases except cases triable by the Rangoon Small Cause Court, the effect of s. 7, General Clauses Act, was to extend the jurisdiction of the said Court and re-name it the Rangoon City Civil Court. The reference to Rangoon Small Cause Court must be construed as referring to the Rangoon City Civil Court and cases falling within the City Civil Court are covered by the exception in clause 10, Letters Patent.

S. 12 (2) of the 1947 Act prohibits trial of a suit cognizable by the City Civil Court and a trial is not concluded till judgment. The delay of the Court between arguments on 24th December 1947 and delivery of judgment on 2nd January 1948 is not covered by the maxim that no party should suffer for delay in the act of Court. This does not apply to cases where Court at time of judgment has lost jurisdiction to deal with the case. If the Court had no jurisdiction, no jurisdiction can be conferred by antedating the order.

In re Keystone Knitting Mills Trade Mark, (1929) 1 Ch.D. 92, followed.

Under Rule 136 of the Original Side Rules, judgment must be pronounced in open Court and it shall bear the date on which it is pronounced. The High Court lost jurisdiction on this date, *viz.*, 2nd January 1948 and the judgment and decree are invalid. The plaint should be returned for being filed in proper Court.

E. C. V. Foucar for the appellant.

C. E. N. Surridge for the respondent.

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* Civil 1st Appeal No. 11 of 1948 against the decree of the Original Side of the High Court of Judicature at Rangoon in Civil Regular No. 16 of 1947, dated the 2nd January 1948.

H.C. 1949

K.P.V.E.S. VAIRAVAN CHETTYAR v. P.L.V.R. VEERAPPA CHETTYAR.

The judgment of the Bench was delivered by

U THEIN MAUNG, C.J.—This is an appeal from the judgment and decree passed in Civil Regular Suit No. 16 of 1947 on the Original Side of the then High Court of Judicature at Rangoon on the 2nd January 1948 in a suit on a promissory note which was valued for the purpose of court-fees and jurisdiction at Rs. 6,270 only.

In addition to the grounds of appeal on the merits, the appellant has filed additional grounds of appeal to the effect that in view of the Rangoon City Civil Court (2nd Amendment) Act, 1947, which came into force on the 1st January 1948 and clause 10 of the Letters Patent constituting the High Court of Judicature at Rangoon, the judgment and decree under appeal have been passed without jurisdiction and therefore are of no effect whatsoever ; and we have reserved judgment after hearing the learned Advocates on the additional grounds of appeal only.

According to section 13 of the Rangoon City Civil Court Act as amended by the Rangoon City Civil Court (2nd Amendment) Act, 1947, the Rangoon City Civil Court has jurisdiction as from the 1st of January 1948 to try all suits of a civil nature when the amount or value of the subject-matter does not exceed Rs. 10,000 ; and according to sub-section (2) of section 12 of the Act a suit cognizable by the Rangoon City Civil Court cannot be tried by any other Court having jurisdiction within the same local limits save as expressly provided by the Act or by any other enactment for the time being in force. There is no express provision in the Act or in any other enactment for trial by the High Court of Judicature at Rangoon of a suit on a promissory note although such a suit is cognizable by the Rangoon City Civil Court.

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U THEIN MAUNG, C.J.

The learned Advocate for the respondent has contended that the High Court of Judicature at Rangoon had original jurisdiction in cases falling within the jurisdiction of the Rangoon City Civil Court under Article 10 of the Letters Patent constituting it, inasmuch as the exception therein refers to cases falling within the jurisdiction of the Rangoon Small Cause Court and that exception has not been amended so as to cover cases falling within the jurisdiction of the Rangoon City Civil Court. However, section 7 of the General Clauses Act provides " Where any Act repeals or re-enacts with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted." There can be no doubt that the intention of the Legislature was to extend the jurisdiction of the Rangoon Small Cause Court and re-name it the Rangoon City Civil Court. The preamble to the Rangoon Small Cause Court (Amendment) Act, 1945, reads : " Whereas it is expedient to amend the Rangoon Small Cause Court Act, for the purpose of extending the jurisdiction of the said Court." So far from a different intention appearing within the meaning of section 7 of the General Clauses Act, there are clear indications of the intention of the Legislature having been that the references in any other enactment or in any instrument to the Rangoon Small Cause Court should thereafter be construed as references to the Rangoon City Civil Court. Cases falling within the jurisdiction of the Rangoon City Civil Court must therefore be held to be covered by the exception in Article 10 of the Letters Patent.

With reference to sub-section (*2*) of section 12 of the Act, the learned Advocate for the respondent has

contended that the sub-section prohibits only trial by any other Court of a suit cognizable by the Rangoon City Civil Court and that it does not prohibit a Judge of the High Court of Judicature at Rangoon, who has already tried a suit before the Rangoon City Civil Court (2nd Amendment) Act, 1947, came into force, from delivering judgment thereafter. However, he has not been able to cite any authority to show that a Court, which has been deprived of jurisdiction to try a suit, can still pass any order therein and we are of the opinion that a trial of a suit is not concluded till the Judge has signed the judgment therein and that a Judge, who no longer has jurisdiction to try a suit, cannot pass any judgment or order therein. (*Cp.* the judgment of a Bench of this Court in Civil Miscellaneous Appeal No. 5 of 1948 : *P. M. Hameed & Sons* v. *A. Kader Moideen.*)

The learned Advocate for the respondent has further contended that the judgment and decree under appeal might be deemed to have been passed *nunc pro tunc*, *i.e.* before the 1st January 1948, as arguments had been heard on the 24th December 1947 and the delay in passing the judgment and decree is an act of the Court, for which neither party should suffer. In this connection he has invited our attention to the well-known legal maxim " *actus curiæ neminem gravabit* " (An act of the Court shall prejudice no man) which is discussed on page 73 of Broom's Legal Maxims, 10th Edition and also to the ruling *In re Keystone Knitting Mills Trade Mark* (1). However, the delay in the act of the Court, for which neither party should suffer, *i.e.* the delay which falls within the maxim, is the delay which does not affect the jurisdiction of the Court. The maxim cannot and does not apply where

(1) (1929) 1 Ch.D. 92.

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U THEIN MAUNG, C.J.

the Court, which might otherwise allow judgment to be entered up *nunc pro tunc*, has actually lost jurisdiction to deal with the case altogether. In fact it has been pointed out *In re Keystone Knitting Mills Trade Mark* (1) "If he had jurisdiction when he made the order to remove the mark, no antedating was necessary. If he had not, he could not by antedating his order confer upon himself a jurisdiction which he did not otherwise possess." Besides, Rule 235 of the Original Side Rules provides, *inter alia*, that the judgment shall be pronounced in open Court either at the conclusion of the hearing of the case or on some future day of which due notice shall be given and that it shall bear the date of the day on which it is pronounced.

Under these circumstances we cannot but hold that the learned Judge on the Original Side of the High Court of Judicature at Rangoon lost jurisdiction over the case on the 1st January 1948, that the judgment and decree which were passed by him therein on the 2nd of January 1948 are invalid and that they must be set aside accordingly.

The suit was pending in the High Court of Judicature at Rangoon when the Rangoon City Civil Court (2nd Amendment) Act, 1947, came into force and the plaint therein should have been returned under Order 7, Rule 10 of the Code of Civil Procedure after that Act had come into force. [Cf. *Maung San Myint* v. U *Hla Maung* (2).]

For the above reasons, we set aside the judgment and decree under appeal and direct that the plaint in the suit be returned by the Original Side of this Court to the plaintiff under Order 7, Rule 10 of the Code of Civil Procedure.

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(1) (1929) 1 Ch.D. 92.

(2) Civil Regular Suit No. 30 of 1947 of the High Court of Judicature at Rangoon.

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The costs on the Original Side of the High Court of Judicature at Rangoon and the costs of this appeal shall follow the final result of the plaintiff-respondent's suit in the Rangoon City Civil Court. The advocate's fee for this appeal, eight gold mohurs.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Khine, JJ.

H.C. 1949

Mar. 21.

NAW HELEN (APPELLANT)

v.

NAW JESSIE (RESPONDENT).*

Succession certificate—Succession Act, s. 372—Contents—Duty of Court to see application is in accordance with law—Shan States Civil Justice (Subsidiary) Order, 1906—Appeal to Resident from order of Assistant Superintendent for Civil Justice—Delay—Limitation—Exclusion of time in prosecuting with due diligence before incompetent tribunal.

Respondent applied for a succession certificate before the Assistant Superintendent for Civil Justice, Taunggyi. It was granted *ex-parte*. An application to set aside the *ex-parte* order was dismissed on 20th January 1948 but an appeal to the Court of the Resident, Southern Shan States, was allowed on 25th February 1948. This order was set aside by the High Court on 26th August 1948 as being without jurisdiction. On 1st September 1948 the present appeal was filed direct to the High Court.

Held : That an infructuous appeal before a wrong Court by an Advocate does not disentitle a claim of good faith.

R.M.A.L. Firm v. *Ko Shan and another*, (1939) R.L.R. 639, referred to.

It was an error which could be made reasonably. It must have been known in the Shan States that under paragraph 18 of the Shan States Civil Justice (Subsidiary) Order, 1906, the Superintendent could call for the record of any case and modify or cancel the same. Court here includes an Assistant Superintendent, and there is nothing in Rule 18 that the same must be read as subject to other laws. The Court of the Superintendent is now known as the Resident's Court. If the Court of the Resident could make such a mistake, any reasonable or prudent man could make the same even acting with due diligence. The appeal was therefore in time.

Held further : The original application did not conform to the provisions of s. 372, Succession Act, as it mentioned neither the debts or securities or the nearest relatives, which are serious omissions. In the absence thereof the Court cannot fix the value of the security to be fixed, or the securities or debts to collect which certificate could issue. It is the duty of the Court to see that applications satisfy the requirements of the provisions of law under which they are made.

C. O. Lynsdale for the appellant.

Kyaw Khin for the respondent.

* Civil Misc. Appeal No. 28 of 1948 against the order of the Court of the Assistant Superintendent for Civil Justice, Taunggyi, in Civil Misc. No. 45 of 1946-47, dated the 17th December 1947.

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NAW HELEN v. NAW JESSIE.

The judgment of the Bench was delivered by

U TUN BYU, J.—Naw Jessie applied in Civil Miscellaneous Case No. 45 of 1946-47 of the Court of the Assistant Superintendent for Civil Justice, Taunggyi, for the grant of succession certificate in respect of the estate of the deceased Dr. Samuel, who apparently died in 1945 during the Japanese occupation of Burma. Naw Helen filed an objection against the grant of succession certificate to Naw Jessie. On 17th December 1947, as Naw Helen was late in arriving at the Court on that day, the case was heard *ex-parte*, and the Court of the Assistant Superintendent for Civil Justice ordered the succession certificate to be issued to Naw Jessie.

On 30th December 1947, Naw Helen applied to the Court of the Assistant Superintendent for Civil Justice, Taunggyi, to set aside the *ex-parte* order passed on the 17th December 1947, granting the succession certificate to Naw Jessie, but Naw Helen's application was dismissed on 20th January 1948. Naw Helen then instituted an appeal to the Court of the Resident to set aside the order of the Court of the Assistant Superintendent for Civil Justice granting succession certificate to Naw Jessie, which became known as Civil Miscellaneous Appeal No. 1 of 1947-48 of the Court of the Resident, Southern Shan States, Taunggyi, and her appeal was allowed on the 25th February 1948. Naw Jessie next applied in revision to the High Court to revise the order of the Court of the Resident which set aside the order of the Court of the Assistant Superintendent for Civil Justice ordering the grant of succession certificate to her, and the application of Naw Jessie was allowed on the 26th August 1948, in Civil Revision No. 41 of 1948, where it was held that the order of the Court of the Resident passed

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U TUN BYU, J.

on the 25th February 1948, was one which was made without jurisdiction. On 1st September 1948, Naw Helen filed her present appeal against the order of the Assistant Superintendent for Civil Justice passed on the 17th December 1947, granting succession certificate to Naw Jessie.

A preliminary objection has been raised on behalf of Naw Jessie that the appeal is barred by limitation of time on the ground that no sufficient cause has been made out in the present case for not preferring the appeal within the prescribed period of ninety days and the case of *R.M.A.L. Firm* v. *Ko Shan and another* (1) has been referred to in support of her contention. It is clear from the judgment at page 644 that the mistake of the Advocate in filing an infructuous appeal before a wrong Court in that case was considered to be "gross and inexcusable, and not such as to entitle the Advocate to claim that he acted in good faith." It appears to us that this is a matter which ought to be decided in accordance with the circumstances of each case. A good way of approaching this question is to consider whether the error which the appellant Naw Helen committed in preferring her appeal to the Court of the Resident, Taunggyi, was an error which could have been committed by a reasonable and prudent man, acting with due diligence. It has been urged on behalf of the respondent that Naw Helen could not be considered to have acted as a reasonable and prudent man when she took upon herself to file the appeal before the Court of the Resident without the aid of a lawyer. We cannot, however, accede to this contention as it must have been known generally in the Shan States that an order of the Court of the Assistant Superintendent can be revised by the Court

(1) (1939) R.L.R. 639.

of the Resident in view of the provisions of paragraph 18 of the Shan States Civil Justice (Subsidiary) Order, 1906, the relevant portion of which is :

"18. The Superintendent may, * * * * *, on the application of either party,—

* * * *

(*c*) call for the record of any case which has been disposed of or in which any order has been passed in any such Court and may—

* * * *

(i) confirm any such order ;

(ii) modify or cancel any order passed by any such Court which is not in accordance with justice, equity and good conscience, and, if necessary, re-hear such case himself ; * * * * ."

The word "Court" refers to the Court of an Assistant Superintendent or that of a Headman. It is thus clear that the Court of the Superintendent could ordinarily be considered to be a Court which could revise the orders of the Court of an Assistant Superintendent. It might be mentioned that the Court of the Superintendent is now known as the Court of the Resident. It will also be observed that there is nothing in paragraph 18 of the Shan States Civil Justice (Subsidiary) Order, 1906, to suggest that paragraph 18 is to be read as being subject to the provisions of any other law which might provide to the contrary. It must have been the absence of any such indication which misled Naw Helen in considering that the Court of the Resident had power to revise the order of the Court of the Assistant Superintendent for Civil Justice passed on the 17th December 1947. The absence of any such indication had obviously misled the Court of the Resident also in considering that it had power to deal with Naw Helen's appeal because Naw Helen's appeal before the Court of the

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U TUN BYU, J.

Resident was in fact allowed. If the Court of the Resident was capable of committing the same mistake which Naw Helen had made in assuming that the Court of the Resident had power to revise the order of the Court of the Assistant Superintendent for Civil Justice, can it be said that the error or mistake which Naw Helen made in preferring an appeal to the Court of the Resident was not an error which a reasonable and prudent man acting with due diligence could have committed. The answer, in our opinion, is in the negative.

The records of the connected proceedings in this case show that Naw Helen should be considered to have acted with due diligence in presenting her appeal both before the Court of the Resident as well as before this Court. It appears that she filed her appeal before the Court of the Resident soon after her application to set aside the *ex-parte* order was dismissed by the Court of the Assistant Superintendent for Civil Justice. Her present appeal before this Court was filed within six days of the order, which was passed in Civil Revision No. 41 of 1948, setting aside the order of the Court of the Resident passed on the 25th February 1948. The records in this case show that Naw Helen would at least have three weeks time, if not more, within which to file her appeal to the High Court, if her appeal before the Court of the Resident had been dismissed, instead of being allowed, on the ground that the Court of the Resident had on jurisdiction to entertain it. Subsequent events also show that Naw Helen was capable of filing her appeal in the High Court well before three weeks, and this is a circumstance which is in favour of Naw Helen. In the case of *R.M.A.L. Firm* v. *Ko Shan and another* (1)

(1) (1939) R.L.R. 639.

the appellant was still six days behind time even if the time spent in connection with the infructuous proceedings was excluded, whereas in the present case Naw Helen's appeal could clearly and indisputably be said to have been and was in fact filed well within the prescribed period of limitation if the time spent in the infructuous proceedings were excluded. The appellant Naw Helen can accordingly be considered to have sufficient cause for not preferring her present appeal in time, and the present appeal must therefore be held to have been filed in time.

The appeal will have, on the merits, to be allowed. The application of Naw Jessie for the succession certificate does not attempt to conform to the provisions of section 372 of the Succession Act. It does not mention the nearest relatives of the deceased, nor does it mention the debts or securities in respect of which the certificate is applied for. This omission appears to us to be serious. It is difficult to understand how the Court could have fixed the value of the security to be given in view of the absence of such details in the application of Naw Jessie, or how it could have specified the debts or securities in the succession certificate, which is to be issued. The order of the Assistant Superintendent for Civil Justice passed on the 17th December 1947, ordering the succession certificate to be issued to Naw Jessie will accordingly by set aside ; and the case will be sent back to the Court of the Assistant Superintendent for Civil Justice to be re-heard on its merits. It seems to us that Naw Jessie might be permitted to amend her application so as to make it more consistent with the requirements of section 372 of the Succession Act, and, if her application is amended, Naw Helen ought also to be allowed to file fresh objection, if she so desires; and the case ought to be re-heard anew. The appeal is allowed

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U TUN BYU, J.

with costs so far as the costs of this appeal is concerned, advocate's fee three gold mohurs.

We might add that it is the duty of a Court to see that when any application is made before it that the application is made in accordance with the requirements of law under which it is made. The application for the succession certificate in the present case is so irregular that we feel that we would have, on our own motion, set it aside on revision if we were of opinion that the present appeal had been filed beyond the prescribed period of limitation.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice and U San Maung, J.

U TUN YIN (APPELLANT)

v.

MAUNG BA HAN (RESPONDENT).*

H.C. 1949

Mar. 7.

Kittima *adoption—Subsequent gift by natural parent—Effect—Denial of adoption and reaffirmation—Relationship of marriage—Evidence of—Separate living—If effects severance or right of inheritance—Intention to be gathered from circumstances.*

Where evidence is sufficient and clear as to *kittima* adoption the mere fact that the natural parent made a gift of property subsequent to adoption does not prove severance of tie by itself or overthrow the conclusions derived from other evidence.

M.R.M.M. Meyappa Chettyar v. *Ma Nyun and others*, (1941) R.L.R. 742, followed.

Maung Seik v. *Ma Thet Pu*, (1916) 9 B.L.T. 154, referred to.

Reaffirmation by the adopting mother in a deposition and application before Court has the effect of nullifying denial of adoption.

Inference of relationship as a Burmese Buddhist couple must be from the conduct of parties themselves or conduct of neighbours and friends who treated them as such. A bare statement by a witness that a couple are man and wife is not evidence.

Maung Maung v. *Ma Sein Kyi*, (1940) R.L.R. 562, applied.

Whether living separately from parents causes severance of tie or forfeiture of right to inherit is a matter of intention depending on the circumstances of each case ; when the adoption had been reaffirmed by the adoptive mother after such separate living and the son attended the adoptive mother during her last illness, took her for treatment and performed her funeral rites, mere separate living cannot sever the tie created by adoption.

Maung Thwe v. *Maung Tun Pe*, 44 I.A. 251 at p. 255, applied.

Maung Shwe Thwe v. *Ma Saing and another*, (1901) 2 U.B.R. Buddhist Law Inheritance 135, distinguished.

Maung Po Sein v. *Maung In Dun*, (1872—1892) S.J.L.B. 191, considered.

Chan Htoon (Attorney-General) for the appellant.

Dr. Thein for the respondent.

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* Civil 1st Appeal No. 13 of 1948 against the decree of the District Court of Pyapôn in Civil Regular Suit No. 8 of 1946.

H.C. 1949

U TUN YIN v. MAUNG BA HAN.

U THEIN MAUNG, C.J.—This is an appeal from the judgment and decree for administration of the estate of the late Daw Toke which have been passed at the instance and in the suit of the respondent who claims to be her *kittima* adopted son against the appellant who has been granted letters of administration to administer the estate as her widower.

The respondent is a son of Daw Toke's sister Daw Me by her husband U Lun. He was born on the 22nd December 1910 ; his mother died on the 25th January 1911 ; and the District Court has found that he was adopted by Daw Toke and U Lun as their *kittima* son shortly after Daw Me's death.

The appellant is the third and last husband of Daw Toke. Her first husband was U Me who died on 28th June 1911. She married Ali in February 1915, but Ali died in 1927. The appellant claims to have married her on the 11th November 1927 (3rd *lazok* of *Tazaungmon* 1289 B.E.)—and not in September 1929 as found by the District Court. The dispute as to the date of the marriage between the appellant and Daw Toke is of some importance in connection with the confirmation of the respondent's adoption as a *kittima* son by Daw Toke alone by a deed dated the 24th January 1929 (Exhibit H), the appellant's contention being that Daw Toke who had already married him then could not confirm the adoption by herself without his knowledge and consent.

The principal questions for decision in this appeal are whether the respondent was adopted by Daw Toke and U Me as their *kittima* adopted son and whether he remained her *kittima* adopted son till the date of her death.

Exhibit G which is written on stamp paper purchased on the 12th May 1911, and which was intended to have been executed in May 1911, as a deed

of the respondent's adoption as *kittima* adopted son by Daw Toke and U Me, contains recitals to the effect (1) that the respondent is the youngest of the six children of Daw Me and U Lun, (2) that he had been brought up by Daw Toke and U Me since the burial of the remains of Daw Me, (3) that Daw Toke and U Me wished to adopt him as their *kittima* adopted son and heir as they had no child of their own, (4) that Daw Toke and U Me had accordingly asked for him in adoption from his father U Lun, (5) that U Lun had given him in adoption and handed him bodily over to Daw Toke and U Me, and (6) that he was only five months old at the time of adoption.

According to U Lun's deposition (Exhibit X) this document was written by one U Nyan Bwa whose whereabouts are now unknown. It was read out by U Lun to Daw Toke and U Me in the presence of Daw Pu (mother of Daw Toke and Daw Me), Daw Mya (their younger sister) and Ma The The (their cousin) all of whom are dead now. It could not be executed and registered as U Me died on the 28th June 1911. His evidence is not only consistent with but also supported by his previous conduct in (1) describing the respondent as " male Buddhist, born in 1272 and residing with his adoptive mother Ma Tok of Obo, Pazundaung " in his application dated the 16th December 1912, in Civil Miscellaneous No. 170 of 1912 in the District Court of Hanthawâddy (Exhibit V) and (2) describing the respondent as a *kittima* adopted son of Daw Tok in the printed document which was read and copies of which were distributed at the *shinbyu* ceremony of the respondent and other children on the 25th April 1926 (Exhibit F).

Daw Toke herself has stated in the course of her evidence in Civil Regular Suit No. 130 of 1916 in the Chief Court of Lower Burma on the

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U TUN YIN v. MAUNG BA HAN.

U THEIN MAUNG, C.J.

4th January 1918 "We (*i.e.* Maung Hla Maung, Ma Hla Nyun, Ma E Myint and herself) had several altercations on account of this little nephew of mine because I had adopted that boy and I was very dear to him. That boy's name is Ba Han and he used to sleep with me" (*see* Exhibit E). She not only preserved (Exhibit G) but also executed and registered another deed (Exhibit H) on the 24th January 1929, declaring that the respondent had been adopted by her and her deceased husband U Me as their *kittima* adopted son.

For the purpose of executing (Exhibit H), U Thaung (P.W. 4) who was then Daw Toke's agent had to write to U Lun, the natural father of the respondent, who had also been appointed to be the guardian of his properties in Civil Miscellaneous No. 170 of 1912 in the District Court of Hanthawaddy, to come to Pyapôn. U Lun came there with U Po Ya, Pleader, from Twantè, since deceased, whose evidence in Civil Regular Suit No. 17 of 1933 in the District Court of Pyapôn has been admitted as (Exhibit Z). On their arrival at her house in Pyapôn she showed (Exhibit G) to U Po Ya and told him that she wanted to execute another document as it had not been executed yet. U Po Ya then had a consultation with her agent U Thaung, who was also a Pleader, and U Mya Than, a local Higher Grade Pleader since deceased, who had appeared for her in some of her cases and who had been sent for by her then. Thereafter (Exhibit H) was prepared after due reference to (Exhibit G) and setting out practically the same recitals as therein. She and U Lun executed it after it had been duly read out to them. All the three lawyers—U Po Ya, U Thaung and U Mya Than—signed it as attesting witnesses. The respondent was present throughout the proceedings but he was not asked to sign it as he was still a minor. He was then a little over eighteen years of age but he

remained a minor under section 3 of the Majority Act till he was 21 years of age as a guardian of his property had been appointed under the Guardian and Wards Act by the District Court of Hanthawaddy in Civil Miscellaneous No. 170 of 1912 therein.

Not content with having executed and registered (Exhibit H), she submitted an application (of which Exhibit Q is a certified copy) dated the 26th May 1933, to the Deputy Commissioner, Pyapôn. In that application she stated that the respondent was her son who was entitled to inherit her estate including her paddy lands in Pyapôn and Bogalè Townships, a list of which was attached thereto and prayed that his name may be inserted (in the land records) in respect of all the said paddy lands and garden lands. The application was made after her marriage to and during her coverture with the appellant and the appellant actually attested it along with U Thaung, Pleader, and U Po Sin, who was her agent then. With reference to this application the appellant has stated under cross-examination :

" I know the original of (Exhibit Q) which I have just read. I was a witness in that application. Pleader U Thaung and Daw Toke's agent Po Sin were witnesses in that application. It is true that in that application Daw Toke described Ba Han as her son whom she adopted with a view to inherit. I did not object to her sending that application to the Deputy Commisioner. This application was made after Daw Toke and U Lun had executed the deed of adoption (Exhibit H)."

And he has not explained why he atteste d it at all if the respondent was not Daw Toke's son and heir.

The matter does not rest there. Daw Toke and the appellant executed a deed dated the 1st June 1933, by which they made a gift of 505·71 acres of paddy land in Bogalè Township and house No. 15 in Lloyd Road, Rangoon. They stated in the said deed

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of which (Exhibit P) is a certified copy, that the gift was made as the respondent was their adopted son whom they loved and regarded as their own natural son. Incidentally he appears to have been described as an adopted son of the appellant as well, not because he had really been adopted by the appellant, but because he had become his step-son on account of his marriage to the adoptive mother Daw Toke. The appellant not only executed the deed but also presented it for registration. With reference to this deed, which by the way was written by Kyaw Hla and attested by Ngwe Zin, Thein Maung and Ba Kyaw, the appellant has stated under cross-examination :

" It is true that a few days after this application was filed before the Deputy Commissioner, I and Daw Toke jointly executed the deed of settlement (Exhibit P). It is true that this document was read out to me and Daw Toke by Po Sein before we signed on it. It is true that I and Daw Toke executed this document of our own free will. Up to now I have not taken steps to cancel the said deed of settlement. Some of these lands have now been passed into the hands of third persons in execution of a decree obtained against Ba Han."

His explanation for having executed it appears in his examination-in-chief. There he stated :

" I executed it simply to please Daw Toke who was then bed-ridden. I came to know about this document only when it was brought to me for signature. I never agreed to give Ba Han the said property, but I signed that document as Daw Toke persuaded me to do so."

A part of the endorsement on Daw Toke's application (Exhibit Q), reads: " The petitioner may be instructed about the necessity of registering her gifts " and the deed of gift was executed and registered within a week after the date thereof.

On the 2nd June 1933, *i.e.* the date on which the deed of gift was registered, Daw Toke submitted

another application (of which Exhibit F) is a certified copy) to the Deputy Commissioner, Pyapôn, withdrawing her previous application, Exhibit Q. However, what is important for the purpose of the present appeal is that she referred to the respondent in the subsequent application also as her son and heir; and the previous application appears to have been withdrawn as she and the appellant had made a gift of the said properties by the said deed of gift after the presentation thereof.

Exhibits O, J, K, L, M, N and S are other documents in favour of the respondent. Exhibit O is a sample of printed labels on wrappers for yellow robes which were offered to seventy Buddhist monks at the ceremony relating to dedication of Daw Toke's monastery and consecration of her *thein* at Mayet in August-September 1927 (Tawthalin, 1289 B.E.). The label is to the effect that it is the charity of Daw Toke, land owner of 1st Street, Pyapôn, and her son Maung Ba Han (the respondent). U Pandita (P.W.1) who has succeeded U Zawta as presiding monk of the monastery, has given evidence of Daw Toke having introduced the respondent as her adopted son and heir from whom he (U Zawta) might ask for the four requisites as from her and of his having got the said labels printed at her instance. His evidence is corroborated by that of the late U Zawta which has been admitted as Exhibit Y. Exhibits J, K, L, M and N are Daw Toke's letters to the respondent in which she described herself as mother and the respondent as her son. The earliest and the latest of them are dated the 1st *lazan* Thadingyut, 1291 B.E. and the 7th *lazan* Tawthalin, 1292 B.E., respectively. With reference to these letters the appellant has stated under cross-examination " I have now seen the Exhibits J, K, L, M and N. They were written by me to Ba Han under

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the instructions of Daw Toke. I have now seen Daw Toke's signature on Exhibit M. The body of the letter was written by me." But he has not explained why Daw Toke and the respondent were mentioned as mother and son in them if she had not adopted him as alleged or at all.

Exhibit S is a photographic copy of an application dated the 19th June 1933, to the Registrar, Pyapôn. It purports to be a joint application by the appellant and Daw Toke but the alleged signature of Daw Toke thereon was written by him. He has stated under cross-examination :

> " I have now seen the Exhibit S. (Photograph copy of one of the applications). The signature ' U Tun Yin ' on it is my signature. I do not know if the signature ' Daw Toke ' was made by Daw Toke herself or made by me. If I had stated in Civil Regular Suit No. 17 of 1933 of this Court that the signature ' Daw Toke ' on this application was made by me, it may be correct."

And he did say in that suit " The signature purporting to be that of Daw Toke on that application was written by me at her request (*see* Exhibit G1). The prayer in that application is that no memorandum of the transfer by the deed of gift (Exhibit P) might be sent to the Land Records Department as the subject-matter of the gift could not be transmuted to name of the donee yet on account of the condition in the deed itself that the donee was to use them as he liked only after the death of *his mother* Daw Toke. For the purpose of the present case it need only be noted that even in this application there is no denial of the respondent being Daw Toke's son although there is an express reference to the condition in the said terms.

Apart from the documentary evidence there is also the oral evidence of U Saung Lin (P.W. 3), U Thaung (P.W. 4), U Wara (Exhibit A1) and U Pandawun

(Exhibit C1). U Saung Lin's house was only about twenty cubits away from the house of Daw Toke and U Me at the time of the respondent's adoption by them as their ***kittima*** son shortly after his mother's death. He has deposed under cross-examination "I know personally that Daw Toke adopted Ba Han as her *kittima* son because Daw Toke had been saying so to every one. To me also she said so."

His evidence is corroborated to a certain extent by that of U Pandawun, *Aggamahapandita*, who has stated that she told him also of her having adopted the respondent then although she did not mention the form of adoption.

U Wara (P.W.) who was a Buddhist monk ordinated at the expense of Daw Toke at Pyapôn on the 7th July 1929, deposed in his evidence (Exhibit A1) about her having told him two days after his ordination when he got to her house while going round for alms that she had only the respondent whom she had adopted with the right of inheritance.

U Thaung has given evidence of Daw Toke having told him about the respondent's ***kittima*** adoption, of Daw Toke having sent school fees, etc. for the respondent with him, of the respondent having returned to her house at Pyapôn whenever his school was closed, of her having introduced the respondent to U Zawta as stated above, of his having written to U Lun at her instance to come to Pyapôn for the purpose of executing Exhibit H and of his having advised U Lun and Daw Toke that it was not necessary for the respondent to execute Exhibit H.

With reference to the last illness of Daw Toke and her funeral, the respondent has deposed (1) that she was brought to Rangoon for treatment by her younger sister Daw Sein, her cousin Daw Thay Thay and himself on the 26th June 1933, after she had been ill

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for about a week at Pyapôn, (2) that he did not think that her condition was serious then, (3) that she however died on the 27th June 1933, (4) that she died of cancer in the chest and (5) that the appellant did not come to her funeral although the burial took place four days after her death (*see* Exhibit A); and U Pandawun has stated: " Before the funeral a number of monks were invited to the house where the dead body was. Gifts were made to the monks. A *ye-set-cha* was performed for those gifts, meant for the benefit of the dead person. At that *ye-set-cha*, Maung Ba Han held a cup of water and I recited a prayer for him. In the prayer I mentioned that the deed of charity was by the *kittima* son for the benefit of his adoptive mother."

Incidentally, the appellant also has stated : " During Daw Toke's last illness I never thought until she actually died that she was not likely to recover from her illness. Her last illness was not worse than previous attacks of illness."

To turn now to the grounds on which the learned Advocate for the appellant has contended that the respondent was not or could not have been adopted as alleged or at all and that he is not entitled to inherit her estate as such or at all.

The first ground is that the respondent has received a share of inheritance in the estate of Daw Me's father U Wizza after the alleged adoption.

The circumstances under which the respondent received what has been described as a share of inheritance are set out in paragraph 8 of U Lun's application (Exhibit V), dated the 16th December 1912, as follows :

" That U Wizza, maternal grandfather of the minors (and petitioner's father-in-law) died about two years ago, leaving considerable property; and the widow Daw Pu, above-mentioned,

has arranged to distribute the deceased's share of the said property among the children and grandchildren. Under the said agreement petitioner and the minors are respectively entitled to a moiety of a one-eighth share, the said Daw Pu is now ready to transfer the said share, but requires that a guardian should be appointed to protect the interests of the said minors, hence this application is made."

According to U Lun's deposition (Exhibit X), U Wizza died in December 1910, *i.e.* during the month in which the respondent was born. It is not clear whether the respondent was born before or after U Wizza's death. However, even if he was born before U Wizza's death he would not have been entitled to any share in his estate as his mother Daw Me survived U Wizza and died only on the 25th January 1911. As a matter of law, even Daw Me herself was not entitled to any share yet as her mother Daw Pu was still alive. So what has been described as a share of inheritance was only a gift made by the grandmother to all her grandchildren by Daw Me and U Lun including the respondent. In this connection it must be remembered that the respondent's adoption by Daw Toke and U Me did not make any difference to his relationship with his grandmother Daw Pu as Daw Pu was mother of Daw Me and Daw Toke. She remained his grandmother in spite of the adoption and she must have given him a share along with the other grandchildern for that reason.

U Lun's application (Exhibit V), is an application for his appointment as a guardian of the properties that Daw Pu has arranged to give to her grandchildren, and as we have stated above U Lun described the respondent in the said application as "male Buddhist, born in 1272 and residing with his adoptive mother Ma Tok of Obo, Pazundaung." He also mentioned the names of Daw Pu, Daw Toke and

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five others as those of the minors' near relations in the said application and notice thereof must have been given to them. This also supports the view that Daw Pu gave the respondent a share in spite of the adoption and with full knowledge thereof.

In *M.R.M.M. Meyappa Chettyar* v. *Ma Nyun and others* (1), it was held that "where the evidence is sufficient and clear that a person was the *kittima* adopted son of his adoptive parents, the mere fact that his natural father subsequently made a gift of some property to him and in the deed of gift described himself and his donee as father and son respectively, does not prove by itself that the adopted son had not severed his natural family tie. He still remains the adopted son of his adoptive parents."

Ba U J. (now the Chief Justice of the Union of Burma) observed in the course of his judgment therein :

"The making of a gift of certain immovable properties does not also, in my opinion, by itself, signify much. Because of his natural love and affection Po Saing thought that he should not also leave Hla Gyaw out, or else it might be due to such ideas as are decribed by Maung Kin J. in the case of *Maung Seik* v. *Ma Thet Pu* (2), wherein the learned Judge said :

'Regarding the contention that the fact of the plaintiff's having obtained inheritance in her natural parent's estate negatives the idea of there being an adoption, it is not, in my opinion, tenable at all. There must be many cases in which a child adopted into another family is allowed to inherit from its natural parents, owing to ignorance of the law on the part of the co-sharers. In any case, this fact alone cannot overthrow the conclusion to be arrived at from positive evidence.'

I respectfully agree with this view."

The second ground is that on the 27th April 1926, *i.e.*, on the second day after the respondent's *shinpyu*

(1) (1941) R.L.R. 742. (2) (1916) 9 B.L.T. 154.

ceremony, Daw Toke gave a notice, of which Exhibit 6 is a copy to U Lun through her lawyers Messrs. Cowasjee, Sen and Banerji. They stated therein : " When the libation ceremony was being performed our client was astounded to hear Maung Ba Han being designated as her *kittima* adopted son. We are to state that Maung Ba Han was never adopted by our client as her *kittima* son." This notice was followed up by a letter dated the 2nd May 1926, to the Editor of the *Sun* Newspaper (Exhibit 7) asking him to insert an announcement in the *Sun* for one month ; and the announcement (Exhibit 8) was published in the *Sun* for a month from the 14th May 1946. The announcement is to the effect that the respondent is not her *kittima* son as described in Exhibit F or at all.

There is a dispute as to (1) whether Daw Toke really instructed the lawyers to send the notice, (2) whether U Lun received the notice and (3) whether the letter to the Editor was written by her at all. However, we are not prepared to attach much importance to the notice, the letter and the announcement even if they are genuine. As we have stated above Daw Toke herself has given evidence in (Exhibit E) on the 3rd January 1918, *i.e.*, about eight and a half years earlier that she had adopted Maung Ba Han. Both U Lun and Maung Ba Han have deposed that she spent Rs. 600 over Maung Ba Han's *shinpyu* ceremony and U Thaung has given evidence of her having told him that she had spent about Rs. 800 on it. Besides U Pandawun, *Aggamahapandita*, who appears to be the family monk, has stated very significantly :

" After she had poured the water from the cup Daw Toke wept. I said to her, ' *Dayakamagyi*, why do you weep at a time when your son is having a *shinpyu*, you should be happy and

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not sorry.' She replied : ' He is U Me's adopted son. I weep because I miss U Me.' "

U Lun and Maung Ba Han also have given evidence about this incident.

Daw Toke was already "married" to Ali at the time of the *shinpyu* ceremony but he did not come to the ceremony at all.

So the circumstances rather indicate that she might have been influenced by Ali to give the said notice and to make the said announcement. In this connection it is interesting to note that she executed and registered Exhibit H on the 24th January 1929, re-affirming the adoption within eighteen months after the death of Ali which according to the appellant himself took place in *Wazo*, 1289 B.E. (July 1927). At any rate the re-affirmation must have the effect of nullifying whatever she might have said or done to the contrary before the date thereof.

The third ground is that Exhibit H is not valid as at the time of the execution thereof Daw Toke had already married the appellant and she could not re-affirm the adoption without his knowledge and consent. His case is that she married him on the 11th November 1927 (the 3rd *lazok* of *Tazaungmon*, 1289 B.E.). However, he has admitted under cross-examination. "From that date we cohabited secretly and the people of the quarter came to know about our cohabitation only about one and a half or two years after we first cohabited in *Tazaungmon*, 1289 B.E. Our house was stoned about one and a half or two years after *Tazaungmon*, 1289 B.E. * * * * * It is true that before our house was stoned Daw Toke did not mention my name jointly with hers in any of her business or transaction * * * * * It is true that before our house was stoned I had to live permanently in a sawmill in Apyaung Village and

visited Daw Toke only at night by coming in a small dugout * * * * * It is however true that I promised to give him (Po Kin) the said paddy land and money for his services in taking me to Daw Toke's house and back to my sawmill stealthily at night for over one year. I used to visit Daw Toke only once a month when I was living in the sawmill at Apyaung because Daw Toke told me to come to her only when she wanted and Po Kin had to come and fetch me in a boat." He explained in his re-examination : "During the period of our secret cohabitation I was living in Myingagon and put up in a saw-pit at Apyaung whenever I visited Pyapôn" (Pyapôn being the town in which Daw Toke lived).

He produced Exhibit 10 as the draft of a power of attorney, which was granted to him and U Po Sin by Daw Toke in November 1929, to show that there is a recital therein of her having married him on the 3rd *lazok* of *Tazaungmon*, 1289; saying that the power of attorney itself had been taken away by U Po Sin. The District Court refused to admit it in evidence in Civil Regular Suit No. 17 of 1933 giving very cogent reasons for doing so at pages 150-151 of the record thereof, *i.e.*, in the course of recording U Po Sin's deposition [now Exhibit D (1)] ; and it should have been rejected in this case also. However, it is not of any evidentiary value at all. The appellant himself has stated : "I know that one of the main disputes between me and the plaintiff in this suit is the date on which I and Daw Toke were married. I did not produce it in Court earlier because my advocate said that it had not been registered. Although it was not necessary to mention the fact of our marriage and its date in a power of attorney, I have done so because I knew that there would be litigation over Daw Toke's estate after her death.

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I wrote this draft under consultation with Mr. P. N. Banerjee, since deceased. I do not know who attested this registered document besides Mr. Banerjee. I copied the registered document from this draft. Except Mr. Banerjee, no one knows that the registered document was copied word by word from this draft."

Incidentally U Po Sin has stated in Exhibit D (1) that power had been finally returned to the appellant.

The appellant has called only one witness Maung Ba Tu to prove that he married Daw Toke in *Tazaungmon*, 1289. This witness does not give evidence about his stealthy nocturnal visits to her. He merely gives evidence of his having found them together in a room one day and of her having told him after the appellant had gone out and in the absence of anyone else that he was her husband. He began (1) by saying that Daw Toke asked him to build a house in 1289 and that she married the appellant before the completion of the house and (2) by actually denying that it was in 1288 B.E. that Daw Toke engaged him. However, he had stated in his former deposition [Exhibit J (1)]: "I contracted to build a new house for Daw Toke in 1st Street, Pyapòn, in 1288 B.E." Besides he has stated in the present case "I did not tell anyone that according to Daw Toke, U Tun Yin was her husband," whereas in Exhibit J (1) he has given evidence of his having informed U Thaung and having brought U Pandi and one other *phongyi* from Mayet Ywathit *Kyaung* to "persuade Daw Toke from continuing to live with Tun Yin."

Apart from the said self-contradictions, it is highly improbable that Daw Toke who, even according to the appellant, did not want others to know of her love intrigue with the appellant would have told the witness that he was her husband.

As has been held in *Maung Maung* v. *Ma Sein Kyi* (1):

"If the Court has to decide whether or not a Burmese Buddhist couple have by mutual consent entered into the married state it can only do so by inferring the relationship from the conduct of the parties themselves or from the conduct of neighbours and friends who treated them during the period under dispute as though they were man and wife. A bare statement by a witness that a certain couple are man and wife is not evidence.

Cohabitation means living in conjugal relationship and the term cannot properly be used in connection with clandestine intercourse. In a lawful union there must be an open avowal of the married state as distinct from the relationship between a man and his mistress, or proof of a mode of living by a couple such as to induce members of the public, not to gossip about the relationship, but to show by their conduct that they treat the pair as man and wife."

In the present case we are not satisfied that even clandestine inter-course started in *Tazaungmon*, 1289.

The District Court is right in holding that Exhibit H was executed and registered by Daw Toke before she married the appellant. In this connection it must be remembered that after their marriage he actually wrote the letters (Exhibits J, K, L, M and N) for Daw Toke to the respondent describing them as mother and son and attested the application (Exhibit Q) and executed the deed of gift (Exhibit P) in both of which the respondent was described as her son and heir.

The fourth ground is that the respondent has inherited the estate of his brother Maung Ba Nyun, his sister Ma Hla Tin and his grand-mother Daw Pu who died in 1913, 1914 and 1920 respectively. It is based on Exhibits 1 and 2. Exhibit 1 is a copy of the present respondent's plaint dated the 28th February

(1) (1940) R.L.R. 562.

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1932 in Civil Regular Suit No. 116 of 1932 in the High Court of Judicature at Rangoon against (1) U Lun, (2) U Ba Maung, (3) U Ba Han (2), (4) Ma Saw Hlaing, (5) Ma E Khin and (6) M.A.R.R.M.M.A. Chettyar Firm and Exhibit 2 is a copy of the compromise decree therein dated the 23rd January 1933.

The statements of facts which are material for the purpose of this appeal are contained in paragraphs 2, 3, 4 and 5 of the plaint (Exhibit 1) which read :

"2. The plaintiff is informed that in December 1912 he and his said brothers and sisters became absolutely entitled (*inter alia*) to a sum of Rs. 34,800 and so far as the plaintiff has been able to ascertain the properties decribed in the Schedule hereto annexed and marked 'A' as their share of inheritance the estate of their maternal grand-father U Weikza, deceased.

3. At that time, the plaintiff and his above-named brothers and sisters being minors, the 1st defendant as their father, applied for and obtained an order from the District Court of Hanthawaddy in Civil Miscellaneous No. 170 of 1912 whereby he (the 1st defendant) was appointed guardian of the said properties of the minors.

4. Out of the plaintiff's said brothers and sisters, Maung Bo Nyun and Ma Hta Tin died in 1913 and 1914 respectively during the minority. The plaintiff submits and contends that according to the Burmese Buddhist Law of inheritance the undivided shares of Maung Ba Nyun and Ma Hta Tin in the said inherited properties devolved upon their surviving younger brothers and sisters, namely, the plaintiff, the 2nd and 5th defendants and Mi Mi Gyi (since deceased).

5. The plaintiff submits and contends that on the 2nd August 1920 by virtue of a mutual partition effected between the heirs of their maternal grand-mother Daw Pu, the plaintiff collectively with the 2nd and 5th defendants and the late Mi Mi Gyi acquired (*inter alia*) the properties described in the Schedule hereto annexed and marked 'B' by way of their share of inheritance and possession thereof was taken by the 1st defendant as their guardian."

The amount mentioned in paragraph 2 appears to be the subject-matter of the gift referred to in the first ground ; but for the purposes of this appeal it must be noted (1) that the respondent claimed in paragraph 4 to have inherited the undivided shares of his brother Maung Ba Nyun and his sister Ma Hta Tin along with the other brother U Ba Maung and the other sister Ma E Kin in 1913 and 1914 and (2) that he claimed in paragraph 5 to have been treated by the heirs of Daw Pu at the time of the "mutual partition" in 1920 as one of them.

If he had inherited the said shares in 1913 and 1914 and if he had been treated, as alleged, in 1920, these facts must have been known to Daw Toke before she re-affirmed his adoption by Exhibit H on the 24th January 1929 ; and the re-affirmation must have the effect of condoning whatever he might have done or left undone before the date thereof.

Moreover, it is fairly obvious that the suit was really against the Chettyar Firm which had already obtained a preliminary mortgage decree against U Lun by all his children.

U Thaung (P.W. 4) has stated :

"In the year 1931-32 when I visited Rangoon I came to know that certain properties belonging to U Lun's parents-in-law were advertised to be sold by auction on a decree obtained by a Chettyar firm against U Lun and at the request of Daw Toke I consulted certain advocates in Pyapôn and on their advice Daw Toke financed Ba Han to file a suit for a declaration that as a grandson of the owner of those properties he had received a share in them and that his share was not liable to be attached. Ba Han accordingly filed a suit for declaration in Civil Regular No. 116 of 1932 of the High Court, Rangoon.

* * * * *

I know personally that Daw Toke advanced all the expenses incurred in the suit for declaration filed by Ba Han against the Chettyar. I was not working as an agent under Daw Toke when Ba Han filed that suit. I know Daw Toke had advanced over

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Rs. 1,000 to Ba Han in that case. I know it because Daw Toke gave him that money in my presence. It is true that in the year 1932 when this suit was filed by Ba Han, U Tun Yin and Daw Toke were living together as husband and wife. I now remember that U Tun Yin was also present when Daw Toke agreed to advance the said expenses to Ba Han and U Tun Yin also agreed to the same." .

In helping the respondent, Daw Toke would have been helping her nephews and her nieces by her deceased sister Daw Me as well ; and U Thaung's evidence is consistent with the conduct of Daw Toke and U Tun Yin subsequent to the institution of the said suit. Far from considering the adoptive tie as severed by the institution of that suit, Daw Toke applied to the Deputy Commissioner on the 26th May 1933, *i.e.*, about four months after the decree therein, to insert the name of the respondent in respect of her holdings in Bogalè and Pyapôn Townships on the ground that he was her son and heir ; and the appellant admittedly attested her application (Exhibit Q). Besides Daw Toke and the appellant executed the deed of gift in favour of the respondent (Exhibit P) on the 1st June 1933, stating therein that he was their adopted son whom they loved as their own son.

Moreover, even as regards taking a share of inheritance in the estate of the natural parents it has been held in *Maung Seik* v. *Ma Thet Pu* (1) :

"When there is positive evidence of adoption, the fact that the alleged adoptive child took a share by inheritance in the estate of his or her natural parents cannot overthrow the conclusions derived from such evidence."

The learned Advocate for the appellant also relies on the respondent's affidavits in the suit (Exhibits 3, 4 and 5), wherein he gave his father's name as U Lun.

(1) (1916) 9 B.L.T. 154.

However, in the body of Exhibit 4 he stated that the suit was filed against his *natural* father and this is significant inasmuch as it is not usual to refer to a father as natural father unless there is something more to be said about the relationship. It must also be remembered that the adoptive father U Me died when the respondent was only a few months old.

The fifth ground is that re-affirmation of the adoption by Exhibit H was a hole and corner affair. However, it is difficult to see how re-affirmation after consulting three lawyers and by a registered document can be said to be a hole and corner affair. Besides the re-affirmation must be taken with what had been said and done by Daw Toke and U Lun both before and after it. Before the re-affirmation Daw Toke had given evidence on oath about the adoption, informed U Pandawun, U Saung Lin, U Thaung and others of the adoption and U Lun had stated in his application (Exhibit V) that the respondent was living with his adoptive mother Daw Toke and had copies of Exhibit F, in which Daw Toke was stated to have adopted the respondent as her *kittima* son, read and distributed at the respondent's *shinpyu* ceremony. After the re-affirmation Daw Toke had filed the applications [Exhibits Q and F (1)] in which the respondent was described as her son and heir; and both Daw Toke and the appellant executed and registered the deed of gift (Exhibit P) in favour of the respondent described him therein as their adopted son. So we are satisfied that there has been enough publicity of the relationship by adoption.

The sixth ground is that the adoptive tie had been severed as the respondent lived separately from Daw Toke. This is not a ground which has been expressly pleaded in the written statement and there is no special issue about it. However, it has been

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suggested that this ground is covered by Issue No. 2. Be that as it may, we are satisfied on the evidence that there has been no severance of the adoptive tie.

He did live separately from her for some time before the re-affirmation of the adoption. However, as Their Lordships of the Privy Council have stated in *Maung Thwe* v. *Maung Tun Pe* (1), whether separation causes a forfeiture is a question of intention depending upon the circumstances of the case. In Their Lordships own words :

> "It is a matter of intention. If the *kittima* child goes to live separately from his adoptive parents, it may be that he has shaken off the tie, that he has provided for himself, has discontinued the further performance of duty towards his adoptive parents, and has given up with his duty his claims upon their estate ; and it is more easy to presume this when the parents have other children who can perform the duties and receive the estate.
>
> The fact that the child goes to live apart is some evidence of an intention to break the bond. The distance may be so great as to render it impracticable for the child to continue to discharge duties to his adoptive parents, and in that case it probably works a forfeiture. But if the distance be not great, if the separation of residence be *with the consent of the adoptive parents*, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken."

As regards the circumstances under which he lived separately from her then, Daw Toke herself has stated in her evidence dated the 3rd January 1918 (Exhibit E) "I have returned Maung Ba Han to his natural father. It was not on account of Nabi (*i.e.*, her second husband Ali). I returned him to his natural father because I had lots of places to go to and I had no one in the house to look after him. He was about 3 or 4 years of age at that time."

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(1) 44 I.A. 251 at p. 255.

Thereafter the respondent was attending school in Rangoon while she was living at Pyapôn. But there is the evidence of the respondent and Maung Thaung to show that Daw Toke used to send school fees, etc. for him and that he used to return to her house at Pyapôn whenever his school was closed. The respondent has stated in his evidence (Exhibit C) that he had been living permanently with Daw Toke at Pyapôn since 1927 although he had gone on occasional visits to Rangoon ; and Daw Toke herself has re-affirmed the adoption on the 24th January 1929, *i.e.* after the separate living.

As regards the period after the re-affirmation although the appellant denies that the respondent lived with her, he has stated in his examination-in-chief "he used to visit Daw Toke almost every month at Pyapôn and used to stay with her about three days at each visit. Daw Toke used to ask him to go back after three days' stay as he has been seen going about with boys of bad character." So it appears from the appellant's own evidence-in-chief that it was not a case of the respondent having lived separately from her with the intention "to shake off the tie" or "to break the bond" and that it was a case of separate residence with the consent of the adoptive mother. In this connection it must be remembered that Daw Toke had married Ali and the appellant in succession after the death of U Me and that she might not have wanted to keep her adopted son in the same house with his step-fathers.

Moreover, Daw Toke has acknowledged the respondent to be her adopted son in Exhibits Q, P and F (1) which are dated the 26th May 1933, 1st June 1933 and 2nd June 1933, respectively and the appellant himself has signed them either as a joint executant or a witness.

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He also attended on Daw Toke during her last illness, took her to Rangoon for treatment and performed her funeral there.

Under these circumstances his case is easily distinguishable from that of ***Maung Shwe Thwe*** v. ***Ma Saing and Another*** (1). **Maung Shwe Thwe** stayed away from his adoptive mother for about 14 years, arrived only the day before her death and neither paid for nor conducted the funeral ceremony.

The respondent's case is even stronger than that of Maung In Dun in ***Maung Po Sein*** v. ***Maung In Dun*** (2), where Maung In Dun who had lived apart from his adoptive father for many years was held to be entitled to inherit the adoptive father's estate as the latter, near his death, acknowledged him as his adopted son and he acted as such, without dispute, in performing the funeral.

The appeal fails on all the grounds and is dismissed with costs.

U SAN MAUNG, J. _ I agree.

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(1) (1901)2 U.B.R. BUDDHIST LAW Inheritance,135.

(2) (1872-1892) S.J.L.B. 191

APPELLATE CRIMINAL

Before U Thein Maung Chief Justice and U San Maung, J.

U SEIN MYINT AND ONE (APPLICANTS)

V.

U LU MEAH AND ONE (RESPONDENTS)

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Apl.20

Criminal Procedure Code, s. 491- Habeas corpus application for status of parties – If can be decided – considerations applicable

Held; Questions involving status validity of marriage or conversion and the like are not questions which can be determined properly in summary proceedings on an application for habeas corpus under s.491,Criminal Procedure Code. Emergency powers under that section should be exercised in matters of urgency and the application in this case which was made after ten months and without satisfactory proof of illegal or improper detention did not satisfy the test of urgency for the exercise of emergency power.

Jai Dayal Dhingra v. Mt.Solagan (1934). A.I.R. Lah. 647; Sultan Singh v. Maya Ram,(1930) I.L.R. 52 All. 491, followed

Cf. Swa Lay Teong v. Yeo Boon Lay.4 B.L.J.269; cf.P.A.Paul v. Hunt and one. 6 B.L.J. 111 referred to.

Hla Sein for the applicants.

Aung Min for the respondents.

U Thein Maung, C.J - This is an "application for custody of a minor girl under clause (a) of section 491, Criminal Procedure Code". The minor Te Te Ma is about six years of age; the respondents are her natural grand-parents; and the petitioners claim to be her adoptive parents.

The facts as stated in the application, the affidavits, counter-affidavits, reply affidavits and annexures thereto are as follows. The respondents' daughter Ma Mya Thein eloped with Maung Tin U in or about the year

*Criminal Mis Application No .2 of 1949- application for custody of a minor girl under clause (a) of s.491 of Criminal Procedure Code.

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1934. The respondents have always been Muslims and their daughter Ma Mya Thein also was a Muslim at the time of her elopement. However, the petitioners claim, on the one hand, that she "had forfeited her Muslim faith for having married Maung Tin U a Burman Buddhist" and the respondents claim, on the other hand, that Maung Tin U himself became a Muslim and married Ma Mya Thein "according to the tenets of Islam" in December 1942. The respondents' claim is supported by Ma Mya Thein and Ismail and the recital in the deed of divorce dated the 31st August 1946. The learned Advocate for the petitioners has contended that Maung Tin U had to marry her according to the tenets of Islam as he was defrauded or unduly influenced by the respondents to do so; but he cannot get any affidavit in support of this contention as Maung Tin U himself has been a *detenu* for some time.

The minor Te Te Ma is the issue of the said marriage; and the case for the petitioners is that she was given by both of her parents in *kittima* adoption in October 1945 and that on the 28th January 1948 her father (Maung Tin U) executed a deed of adoption, which was registered on the same day, and a deed of declaration stating therein—

> "3. that I as father of the said Te Te Ma do hereby confirm giving of my baby in adoption unto U Sein Myint and Daw Aye Than's custody and care—
>
> (*a*) in the circumstances of the mother eloping with another husband and abandoning the baby;
>
> (*b*) in the circumstances of U Lumeah's announcement the following day in the local papers disowning the said daughter (Ma Mya Thein—my divorced wife);
>
> (*c*) in view of the past care of the adoptive parents for the baby for about three years and the baby's attachment in return for the said adoptive parents."

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The petitioners have brought the minor up in their own house since October 1945 till the 29th April 1948 when she was forcibly taken away by the respondents.

The respondents' defence is that the minor has never been given to the petitioners by Ma Mya Thein as alleged or at all, that as a matter of fact the said deed of divorce (which is dated the 31st August 1946, *i.e.* after the alleged giving by her in adoption) gave the custody of the minor to her, that the minor was left with them when she (Ma Mya Thein) left their house on the 18th January 1948, that they have never disowned her, that the minor has never been in the custody of the petitioners and that they have neither taken nor detained the minor as alleged or at all and their defence is fully supported by Ma Mya Thein herself.

So difficult questions arise as to (1) the validity or otherwise of Maung Tin U's conversion and his marriage to Ma Mya Thein, (2) the alleged giving of the minor in adoption by Maung Tin U and Ma Mya Thein in October 1945, (3) the alleged disowning of Ma Mya Thein by the respondents and the effect thereof on their relationship with the minor and (4) Maung Tin U's power to give the minor in adoption by the registered deed dated the 28th January 1948, or to confirm the adoption by the deed of declaration of the same date ; and these are not questions which can be determined properly in summary proceedings on an application under section 491 of the Code of Criminal Procedure. As has been held in *Jai Dayal Dhingra* v. *Mt. Sohagan* (1), "it is not proper that questions involving status of parties, *i.e.* validity of marriage and conversion, should be decided in an application for writ of *habeas corpus* under section 491."

(1) (1934) A I.R. Lah. 647.

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Besides as Dalal J. has observed in *Sultan Singh* v. *Maya Ram* (1) :

"in the very nature of things the power would be exercised in matters of urgency, where, for instance the father is suddenly deprived of the custody of his sons and there is danger to the life of the sons in the transferred custody."

In the present case, although the minor is alleged to have been taken away forcibly on 29th April 1948, the application under section 491 of the Code was not filed till the 4th March 1949 ; there is no suggestion even in the belated application that the minor is not being properly looked after by the respondents and there are no special features of the case which would justify the exercise of the emergency power under section 491 at all.

[Cf. Swa Lay Teong v. Yeo Boon Lay (2)]. We are not satisfied on the material before us that the minor is illegally of improperly detained in custody; nor are we satisfied that this is a matter of urgency in which we should exercise the emergency power under section 491 of the Code. [Cf. P . A . Paul v. C. Hunt and another (3)].

The petition is dismissed accordingly. There will however, be no order as to costs having regard to all the circumstances of the case.

U SAN MAUNG, J. – I agree.

(1) (1930) I.L.R 2 All. 491 (2) 4 B.L.J. 269.
(3) 6 B.L.J. 111

APPELLATE CIVIL

Before U Thein Maung, Chief Justice, and U Aung Byu,

DAW THAI (APPELLANT)

v.

DAW NGOOT AND ONE (RESPONDENTS).*

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May 18.

Sino-Burmese Buddhist—Gift by—Entire estate given—Law governing—Death-bed gift—Validity of.

The donor, a Sino-Burmese Buddhist, nine days prior to her death, made a gift of her entire estate, when death was imminent, to strangers when there were natural heirs.

Held: Buddhist law of Burma governs inheritance to the estate of a Sino-Burman Buddhist in the absence of any special usage or custom.

Tan Ma Shwe Zin and others v. *Koo Soo Chong and others*, (1939) R.L.R 548, applied.

Sino-Burmese are not Chinese. They are half Chinese and half Burmese and Buddhist law applies where a gift involves questions of succession.

Yue Soon I v. *Saw Boon Kyaung*, (1941) R.L.R. 285, distinguished.

Observations in *Cyong Ah Lin* v. *Daw Thike* (a) *Wong Ma Thike*, Civil 1st Appeal No. 4. of 1948, followed.

Ma Pwa Nee v. *Ma Tin Nyo*, (1902-03) II U.B.R. Buddhist law—Gift p. 1; *Maung Pan U and others* v. *Ma Kyi Nyo and others*, 3 B.L.T. 107; *Maung Ba Maung* v. *Maung Pyu*, 40 I.C. 854, referred to.

A gift of entire estate is not valid according to Buddhist law.

U Naga and others v. *Maung Hla*, (1907—09) II U.B.R. Buddhist law—Gift p. 7 at p. 8, approved.

A death-bed gift to a stranger, even if accompanied by delivery of possession is invalid against natural heirs under Buddhist law as intended to defeat the personal law.

U Tezawuntha v. *Maung Zaw Pe and another*, (1932) I.L.R. 10 Ran. 224 cp. *Ma Yu* v. *Po Theing and others*, 11 B.L.T. 234: *U Kya Byu another and* v. *Maung Aung Thein*, (1946) R.L.R. 139, distinguished.

Thet Tun for the appellant.

S. T. Leong for the respondents.

U THEIN MAUNG, C.J.—The principal questions for consideration in this case are (1) whether the learned

* Civil 1st Appeal No. 103 of 1948 against the decree of District Court of Bassein in Civil Regular No. 16 of 1947, dated the 13th September 1948.

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District Judge is right in applying the Buddhist law of Burma to a gift by a Sino-Burman Buddhist and (2) whether he is right in holding that the gift is void thereunder for two reasons, *viz.* (*a*) that it is a death-bed gift and (*b*) that it is a gift of the entire estate of the donor to the exclusion of her heir (the 2nd respondent).

In *Tan Ma Shwe Zin and others* v. *Koo Soo Chong and others* (1) Their Lordships of the Privy Council have held :

"*Prima facie* inheritance to the estate of a Chinaman who was domiciled in Burma and was a Buddhist is governed by the Buddhist law of Burma and the burden of proving any special custom or usage varying the ordinary Buddhist rules of inheritance is on the person asserting the variance."

So there is all the more reason for the Buddhist law of Burma governing inheritance to the estate of a Sino-Burman Buddhist in the absence of any special usage or custom varying the ordinary Buddhist rules of inheritance.

In the present case such special usage or custom has neither been pleaded nor proved. The learned Advocate for the appellant merely relies on *Yup Soon E* v. *Saw Boon Kyaung* (2) where it has been held that the custom or usage varying the strict rule of the Buddhist law of Burma (which does not recognize wills) in the case of a Chinese Buddhist has received the recognition of the highest judicial authority for Burma and that a Chinese Buddhist can therefore make a will.

However, as a Bench of this Court has observed in *Cyong Ah Lin* v. *Daw Thike* (a) *Wong Ma Thike* (3) :

"The question as to whether there is a special custom which enables Chinese Buddhists to make wills has been settled. But

(1) (1939) R.L.R. 548. (2) (1941) R.L.R. 285.
(3) Civil 1st Appeal No. 42 of 1948.

Sino-Burmese are not Chinese. They are as the name indicates half Chinese and half Burmese. To treat them as Chinese would be like treating an alloy of gold and some other metal as pure gold. Their domicile of origin is not China and the learned Advocate for the respondent has admitted that many Sino-Burmans have adopted Burmese customs and manners have become Burmans for all purposes. In our opinion Sino-Burman Buddhists form a class or community by themselves. [*Cp.* the case of Kalais in *Ma Yait* v. *Maung Chit Maung* (1).] If they claim that there is special custom or usage prevalent among them varying the strict rule of intestacy under the Buddhist law, they must allege its existance and prove it by clear evidence.

In the present case the respondent has not even alleged the existence of such special custom and usage; and in the absence of such allegation and proof the ordinary rules of Buddhist law must apply."

Besides, the Buddhist law applies where a gift involves questions of marriage, succession, inheritance or religious usage. [See *Ma Pwa Swe* v. *Ma Tin Nyo* (2), *Maung Pan U and others* v. *Ma Kyi Nyo and others* (3) and *Maung Ba Maung* v. *Maung Pyu* (4)].

We accordingly hold that the Buddhist law of Burma governs inheritance to the estate of the donor and that the learned District Judge is right in testing the validity of the gift with reference to its rules relating to death-bed gifts and gifts of entire estates.

With reference to the question as to whether the gift was a death-bed gift, the deed of gift, (Exhibit 1) which was prepared by U Win (P.W. 1) on instructions given on behalf of the donor by U Kwain himself, contains recitals to the effect that the donees, *i.e.*, the appellant Daw Thai and her husband U Kwain, since deceased, had looked after the donor Daw Shwe Yi and her younger sister Daw Ngwe Yi during their illness which commenced over ten years before the

(1) (1921-22) 11 L.B.R. 155 (P.C.)
(2) (1902-03) II U.B.R. Buddhist law—Gift p. 1.
(3) 3 B.L.T. 107.
(4) 40 I C. 854.

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date of the gift, that they had satisfactorily performed the funeral ceremony of Daw Ngwe Yi who died in their house, that they had been attending on Daw Shwe Yi who had been continuously ill up to the date of the gift as if they had been her kith and kin, that they would continue to attend on her till her death and perform her funeral ceremony thereafter, and that the gift was being made to them out of gratitude for what they had done and would do for her.

The donor Daw Shwe Yi was 72 years of age when she made the gift. She had been suffering from leprosy for several years before the gift. She had propitiated "nats" at her house about a month or so before the gift on account of her ill-health. She could not go to Pleader U Win (P.W. 1) to give him instructions for drafting the deed of gift and she had to ask the Sub-Registrar U Sein Kyai to come to her house and register the deed on the ground that she could not go to his office as she was not well. The deed had to be registered in her bed-room while she was just sitting up in her bed, and the Sub-Registrar, who asked her to hold the pen while he himself made the cross-mark on the deed by way of execution, actually endorsed against the cross-mark "Cannot write, being unwell."

She had to be carried in a cradle when she was removed on the same day from her own house (which is included in the gift) to the house of the donees, and she died in their house on the 4th February 1947, *i.e.* on the ninth day after the gift.

With reference to the question as to whether the gift was of the entire estate, the appellant herself has deposed in her evidence-in-chief: "On the 3rd *lazan* of *Tabodwe* (24th January 1947) Daw Shwe Yi told me and my husband that she would make a gift of the house in dispute and all other movable properties

belonging to her." Her witness U Shein Kyan (D.W. 1) also has deposed : " One day about a year ago I think in the month of *Tazaungmon* or *Nadaw* (about December 1946 or January 1947) U Kwain the husband of Daw Thai came to my house and told me that Daw Shwe Yi was willing to make a gift of all her properties to them and asked me for my advice as to what steps should be taken." Besides, her case is that Daw Shwe Yi did not leave any property although Daw Shwe Yi died in her house only nine days after the gift.

Under these circumstances there can be no doubt of the gift having been of the entire estate of the donor ; and with reference to such a gift Twomey C.J. observed in *U Naga and others* v. *Maung Hla* (1) :

" But it appears from the texts cited in section 75 that according to Buddhist law a gift of the entire estate is not valid even though the parent may not be *in extremis*, and though the gift may be accompanied by delivery of possession. Such being the rule as regards gifts to children, it seems to follow *a fortiori* that gifts to strangers would be invalidated in like circumstances. At the present day a gift made when the donor is not *in extremis* would not be governed by Buddhist law, but the rule of Buddhist law on the subject is relevant as showing the general trend of that law in safeguarding the rights of the natural heirs."

The donor made a gift of her entire estate including the very house in which she was living, had to be carried therefrom to the house of the donees on the same day to be attended on by them in her illness, and died there nine days later.

The circumstances, under which the gift was made, and the subject-matter of the gift clearly indicate that she gave all her properties to the appellant and U Kwain and moved into their house as her death was imminent and she herself was under an apprehension that her dissolution was at hand. It is actually stated

(1) (1907-09) II U.B.R. Buddhist law—Gift p. 7 at p. 8.

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in the deed of gift that the donees were to continue to attend on her up to her death and to perform her funeral ceremony thereafter. She made herself over with all her properties to the donees not only for treatment but also for burial as she felt that her death was imminent. So the learned District Judge is right in holding that the gift is a death-bed gift.

With reference to such a gift, it has been held in *U Naga and others* v. *Maung Hla* (1) that under the Buddhist law a death-bed gift to a stranger, even if delivery of possession is made, is invalid as against the natural heirs. [*See* also *U Tezawunta* v. *Maung Zaw Pe and another* (2) in the course of his judgment in which Page C.J. observed:

> "When such a transfer is made by a Burman Buddhist whose death is imminent, and who is under an apprehension that his dissolution is at hand, it is commonly called a 'death-bed' gift, and a *presumptio juris et de jure* arises that the transferor intended the transfer to become operative after his death A transfer of this nature is invalid as being a device by which a Burman Buddhist has attempted 'to defeat his own personal law, and practically to dispose of his property by a method which would be in all essentials equivalent to a will'."

Cp. *Ma Yu* v. *Po Thoung and others* (3).]

U Kya Byu and another v. *Maung Aung Thein* (4) which is relied upon by the learned Advocate for the appellant is easily distinguishable, as it is a case between the parties to a deed which expressly stated that the gift was "by way of partition of inheritance," the donors were adoptive parents of the donee, both the donors were still alive when they themselves filed the suit seven years later although one of them was ill at the time of the gift, the circumstances shew that

(1) (1907-09) II U.B.R. Buddhist law—Gift p. 7 at p. 8.
(2) (1932) I.L.R. 10 Ran. 224.
(3) 11 B.L.T. 234.
(4) (1946) R.L.R. 139.

their death was not imminent when they made the gift and the gift was not of the entire estate but only by way of partition thereof.

So the learned District Judge is right in applying the Buddhist law of Burma and in holding that the said gift is void thereunder as a death-bed gift of the entire estate of the donor.

The appeal is dismissed with costs. However, the decree under appeal is amended by substitution of the words "is declared to be the owner of" for the words "do possess" in clause (1) thereof in order that it may be in accordance with the judgment of the learned District Judge.

U TUN BYU, J.—I respectfully agree.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Khine JJ.

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Mar. 29.

MAUNG AUNG KYI (APPELLANT)

v.

MA AYE YIN AND SIX OTHERS (RESPONDENTS).*

Burma Municipal Act, s 52—Bassein Municipal Provident Fund Rules—Clauses (4) (5) and (6) of Bye-law Family—Member of—Competition between wife and nephews—Whether rules ultra vires.

Bye-laws of Bassein Municipality relating to Provident Funds provide in clause (4) that a subscriber can only nominate a member of his family and in clause (5) that if he has no family he can nominate an outsider "provided that such nomination will be valid so long as he has no family."

Held: That the proviso to clause (5) of bye-laws of Bassein Municipal Provident Fund Rules was not *ultra vires*. S. 52 of the Municipal Act under which the bye-laws were made provided for fixing the circumstances and the conditions under which payment may be made out of the Fund.

The word "family" in Bye-laws 4 and 5 does not ordinarily include a nephew when a man has a wife.

Ma Kyway v. *Ma Mi Lay and another*, 6 Ran. 682; *Mt. Hurmat Bibi and another* v. *Mt. Kaz Banu and others*, A.I.R. (1932) Sind 115, referred to.

P. B. Sen for the appellant.

The judgment of the Court was delivered by

U TUN BYU, J.—One Maung Thet, who worked as a vernacular teacher under the Bassein Municipality, died in April, 1943. He was a subscriber to the provident fund of the Bassein Municipality before his death. On the 8th June, 1940, he nominated the appellant Maung Aung Kyi, a minor, as the person who was to receive the amount which was standing to his credit in the Bassein Municipal Provident Fund at the time of his death—*vide* Exhibit A, form of nomination. Clauses (4), (5) and (6) of Bye-law 4

* Civil Misc. Appeal No. 37 of 1948 against the order of the District Court of Bassein in Civil Misc. No. 2 of 1948, dated the 16th September 1948.

relating to the Bassein Municipal Provident Fund are as follows;

"(4) A subscriber who, at the time of joining the Fund, has a family shall send to the President a nomination in Form V appended hereto, in favour of one or more members of his family.

(5) A subscriber who has no family may similarly nominate a person or persons in Form VI appended hereto;

Provided that a nomination made under this clause shall be deemed to have been duly made in accordance with these bye-laws only for so long as the subscriber has no family.

(6) if a subscriber at any time acquires a family he shall send to the president a nomination is provided in clause (4) and if he has under clause (5) nominated any person other than a member of his family, he shall formally cancel the previous nomination."

It will be observed that clause (4) of Bye law 4 of the Bye laws for the Establishment and Maintenance of the Bassein Municipal Provident Fund makes it clear that in the case of a person who is already married the nomination made by him will not be valid unless the person so nominated is a member of his family. The appellant Maung Aung Kyi is a nephew of the deceased Maung Thet, and he cannot accordingly be considered to be a member of Maung Thet's family as the expression "family will, in the absence of any indication in the bye-laws to the contrary, have to be given it's ordinary meaning.

It becomes necessary to consider in this appeal whether the 1st respondent Ma Aye Yin, to whom a succession certificate has been issued, can properly be said to be a widow of the deceased Maung Thet, and, if so, whether she was a wife of the deceased on or before the 8th June, 1940, on which date the appellant Maung Aung Kyi was nominated to receive the money which would be standing to Maung Thet's

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credit at the time of the latter's death. It has been argued on behalf of the appellant that Ma Aye Yin could not have been a legal wife of the deceased in 1939 or before the 8th June, 1940, in view of the declaration made by the deceased Maung Thet in the form of nomination signed by him on the 8th June, 1940, wherein he stated that he had no family.

It appears that the deceased Maung Thet and Ma Aye Yin were both *eindaunggyis* before they lived together in Daw Kyaw's house ; and Daw Kyaw, in her evidence said :

> " About three months after the death of Maung Thet's first wife Ma Ohn Nyun he brought Ma Aye Yin to my house where he was living as my tenant. She was brought there as his wife. Maung Thet himself told me so. Maung Thet asked me to report about this to Ma Aye Yin's mother. When I did so Ma Aye Yin's mother told me that they were ' *eindaunggyis* ' and that no ceremony would be necessary. I gave the same reply to Saya Thet, and I told him that he would not be satisfied without being fed for the ceremony. He then said that he could not give us tea but would supply us plain tea and ' *laphet.*' He entertained me, Mai Ngo and few others with plain tea and " *laphet.*"

Thus, Daw Kyaw's evidence shows that no formal ceremony of marriage was performed, and that it was only at her suggestion that Maung Thet consented to give plain tea and *laphet* to Daw Kyaw and other persons who were probably Daw Kyaw's neighbours. It is possible that Maung Thet might have considered that Ma Aye Yin was not his legal wife in that the feeding, which he gave, of plain tea and *laphet* was confined to his landlady and a few other persons, without that publicity which would ordinarily be given to a ceremony of marriage. However, the question to be considered is not what Maung Thet thought of the legal status of Ma Aye Yin at the time he made his nomination in June, 1940, but whether on the evidence

it can properly be said that Ma Aye Yin was his wife at the time Maung Thet nominated Maung Aung Kyi as the person who was to receive the provident [illegible]d standing to Maung Thet's credit at the time [illegible]e latter's death. The evidence of Daw Kyaw, Maung Chan Tun and Ko Maung Kyin shows that Maung Thet and Ma Aye Yin became husband and wife about three years before the British evacuation of Burma, and, if their evidence is accepted, Ma Aye Yin must have already become the wife of Maung Thet at the time he submitted his nomination paper under the Provident Fund Rules, and a copy of the nomination paper has been filed as Exhibit A. The evidence of these three witnesses, as well as the evidence of Maung San Lwin, shows that Maung Thet and Ma Aye Yin were living together openly as husband and wife, that they were looked upon by the neighbours as husband and wife, that they were seen to go about together openly to pagodas, *ahlus*, and other ceremonies. Ko Maung Kyin is a ward headman, while Maung San Lwin was a headman before the British evacuation of Burma in 1943. There is nothing on the record to suggest or indicate that Ma Aye Yin and Maung Thet had not been living together openly as husband and wife soon after Ma Aye Yin was brought to Daw Kyaw's house. We are unable to see anything in the evidence which will indicate that the evidence of these witnesses ought not to be accepted. In the circumstances, the only reasonable conclusion to arrive at in this case is that Ma Aye Yin and Maung Thet lived openly as husband and wife after she was brought to Daw Kyaw's house and that Ma Aye Yin and Maung Thet continued to live openly as husband and wife until his death. Ma Aye Yin must therefore be considered under the Burmese Buddhist Law to have been a wife of Maung Thet, in the strict legal sense, before June, 1940. The

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only evidence which has been given on behalf of the minor Maung Aung Kyi to suggest that Ma Aye Yin was not Maung Thet's wife and that she was only his mistress, is that of Maung Tha Hline. He is, however, the father of Maung Aung Kyi, and his evidence cannot therefore be accepted unless it is corroborated ; and we do not find any corroboration of his evidence in this case. Maung Thet apparently left relations surviving him, and none of them have been examined on behalf of Maung Aung Kyi, who is a nephew of Maung Thet. The finding of the District Court that Ma Aye Yin is a widow of the deceased can accordingly be said to be correct, and the evidence on the whole can also be considered to indicate that she became Maung Thet's legal wife before 8th June, 1940. The nomination of Maung Aung Kyi made in June, 1940, must therefore be considered to be invalid in view of the proviso to clause (5) of Bye-law 4 of the Bye-laws for the Establishment and Maintenance of the Bassein Municipal Provident Fund.

We do not think that there is any substance in the argument advanced on behalf of the appellant Maung Aung Kyi that the proviso to clause (5) of Bye-law 4 is *ultra vires*. The Bye-laws for the Establishment and Maintenance of the Bassein Municipal Provident Fund was made under what is now known as section 52 of the Municipal Act, the relevant portion of which, for the purpose of this case, is :

" 52. (1) The committee of any municipality to which the Governor may by notification declare this section to apply may make bye-laws for the purpose of—

(*a*) establishing and maintaining a provident or annuity fund ;

* * * * *

(*d*) fixing the times, circumstances and conditions under which payments may be made out of any fund established under this section and the conditions

under which such payments shall discharge the fund from further liability ;

* * * * *

(*f*) regulating generally such other matters incidental to such fund and the investment thereof as the Governor may approve."

U TUN BYU, J.

Section 52 of the Municipal Act is therefore sufficiently wide to enable the Municipality to make bye-laws in the form of clause (5) of Bye-law 4 of the Bye-laws for the Establishment and Maintenance of the Bassein Municipal Provident Fund. Moreover, a nomination in order to be valid should, under section 5 of the Provident Fund Act, be a nomination which was made in accordance with the rules relating to the fund concerned. The nomination of Maung Aung Kyi at a time when Ma Aye Yin had become the wife of the deceased Maung Thet must therefore be considered to be invalid.

In view of the findings which we have arrived at above, it will not be necessary to discuss the case of *Ma Kyway* v. *Ma Mi Lay and another* (1) and the case of *Mt. Hurmat Bibi and another* v. *Mt. Kaz Banu and others* (2) which had been referred to during the arguments in this Court on behalf of the appellant Maung Aung Kyi, because the nomination of Maung Aung Kyi must, in the circumstances of this case, be considered to be a nomination which was from the outset invalid. The appeal of Maung Aung Kyi by his father and next friend Ko Tha Hline is accordingly dismissed with costs in the lower Court.

(1) 6 Ran. 682.

(2) A.I.R. (1932) Sind 115.

APPELLATE CIVIL.

Before U Tun Byu, J.

H.C. 1949

Mar. 17.

A. S. HUTTON (APPLICANT)

v.

I. M. MADHA (RESPONDENT).*

Code of Civil Procedure, Order 6, Rule 17—Principles applicable—When amendment should be granted.

Respondent filed a suit claiming Rs. 5,000 as part of profits he was entitled to receive in respect of certain purchases from the Military made by the parties jointly with the aid of a financier. On objection that the suit was not properly framed and not maintainable under the Partnership Act, leave to amend the plaint was granted. The allegations were substantially the same except an additional prayer for a declaration of dissolution of partnership and a statement that additional court fee was being paid. On revision.

Held : Unless the party was acting *mala fide*, it should be allowed.

Tildesley v. *Harper*, (1878) 10 C.D. 393 at 396, referred to.

There was no injury to the defendant which could not be compensated for in costs, nor a change of causes of action.

Clarapede & Co. v. *Commercial Union Association*, (1883) 32 W.R. 262 at 263 ; *Ma Shwe Mya* v. *Maung Mo Hnaung*, L.R. (1914) 41 I.A. 214=5 Ran. 817, followed. *P. M. Cheltyar Firm* v. *Ma Shwe Pon and two others*, 5 Ran. 115 ; *Krishna Prasad Singh and another* v. *Ma Aye and others*, 14 Ran. 383 ; *Kasinath Das* v. *Sadasiv Patnaik*, (1893) 20 Cal. 805 at 808 ; *Tajamunnul Hussain* v. *Ahmad Ali and another*, (1937) I.C. 389, referred to.

Pleadings in this country are not too artistically drafted, and failure to ask for a relief does not disentitle a party to make amendments claiming the relief he is entitled to, whether the omission is due to negligence or otherwse

Even if the effect of the amendment in this case was to take the plaint out of the mischief of s. 69, Partnership Act, the amendment should be allowed.

Dr. Thein for the applicant.

N. R. Burjorjee for the respondent.

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* Civil Revision No. 112 of 1948 against the order of 2nd Judge, City Civil Court of Rangoon, in Civil Regular No. 2434 of 1947, dated the 17th September 1948.

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U TUN BYU, J.

U TUN BYU, J.—The plaintiff-respondent I. M. Madha instituted a suit against the defendant-applicant A. S. Hutton in Civil Regular Suit No. 2434 of 1947 of the City Civil Court of Rangoon for the recovery of a sum of Rs. 5,000 which was said to be part of the profit which I. M. Madha was entitled to receive in respect of the purchase of margarine and yeast from the Officer Commanding, Supply Reserve Depôt, Rangoon. I. M. Madha alleges that his share of the profit in the transaction amounted to about Rs. 15,833, and he states in his plaint that he claimed only Rs. 5,000 and waived all his share of the profit in the transaction in excess of Rs. 5,000. A perusal of paragraphs 3, 4, 5, 6, 7, 8 and 11 of the plaint in effect shows that the case for the plaintiff-respondent is that he and the defendant-applicant A. S. Hutton and a third person, as a financier, agreed to become partners every time a purchase was made from the Military and Government. A financier had apparently to be found every time the purchase was to be made. Thus, the claim of the plaintiff-respondent I. M. Madha was a claim for his share of the profit in a partnership venture. The defendant-applicant *inter alia* contended in his written statement that the suit as framed was not maintainable. On 5th July 1948 the plaintiff-respondent applied for leave to amend his plaint, and the leave was granted.

The question which falls for consideration is therefore, can the amendment in the present case be said to have been properly granted in view of the provisions of Order VI, Rule 17 of the Civil Procedure Code, and for this purpose it is very important that a comparison should be made between the allegations contained in the original plaint and those contained in the amended plaint. A perusal of paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13 and 14 of both the plaints

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shows that they are identical, word for word, while paragraphs 1 and 10 of both the plaints, except for minor variations are the same, but paragraph 15 of the amended plaint is not quite the same with the corresponding paragraph in the original plaint in that it contains a statement that an extra Court fee of Rs. 10 had been paid for the purpose of clause (*a*) of the prayer wherein the plaintiff asked for a declaration that the partnership between him and the defendant-applicant had been dissolved, a relief which was not asked for in the original plaint. It might also be mentioned that in the prayer of the amended plaint the plaintiff-respondent also asked for accounts to be taken. It would thus be observed that but for the variations as indicated above the two plaints can be said to be the same. It is difficult to appreciate how it can properly be said that the character of the suit as contained in the amended plaint is different and inconsistent with the nature of the suit as contained in the original plaint. The claim of the plaintiff-respondent in both the plaints is clearly for payment of the plaintiff-respondent's share of the profit, which he was said to have been entitled to receive as part of his share of the profit in the partnership venture which was entered into between them in May, 1947. Bramwell L. J. as long ago as 1879 observed in the case of *Tildesley* v. *Harper* (1) :

> " I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to a man unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."

(1) (1878) 10 C.D. 393 at 396.

I am unable to see anything on the record to indicate that the application in the present case was made *mala fide* or that the plaintiff-respondent can be said, by his amended plaint, to have caused some injury to the defendant-applicant which could not be compensated by an award of costs. In the case of *Clarapede & Co.* v. *Commercial Union Association* (1) it was observed as follows :

"However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

I fully agree with the above observation, and especially when the pleadings in this country are not as a rule too artistically drafted. Lord Buckmaster also observed in the case of *Ma Shwe Mya* v. *Maung Mo Hnaung* (2) :

"All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."

The above observation made by Lord Buckmaster indicates clearly, and with which I respectfully agree, that the amendment ought to be granted unless it can be shown clearly that by means of the amendment it was either intended to substitute one subject-matter of the suit for another subject-matter of the suit or that it was intended to replace one cause of action by another distinct cause of action which was not

(1) (1883) 32 W.R. 262 at 263. (2) L.R. (1914) 41 I.A. 214 = 5 Ran. 817.

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connected with the cause of action as pleaded in the original plaint. In the case of *P. M. Chettyar Firm* v. *Ma Shwe Pon and two others* (1) it appears that the case was first instituted on the basis of an ordinary registered mortgage but, on discovery that the mortgage was not registered, the plaint was sought to be amended, and the amendment was granted to make the suit as one instituted on an equitable mortgage, and at page 117 it was observed :

> " What the appellant primarily wants is the repayment of his money with interest. His first allegation, no doubt, was that he lent the money on the security of an ordinary mortgage and in his amended plaint he alleged that he lent the money on the security of an equitable mortgage and also asks for a personal decree. A personal decree is an ordinary and certainly not an inconsistent prayer in mortgage suits, and, although the cause of action on an equitable mortgage is different from the one on an ordinary registered mortgage, bearing clearly in mind the nature of both and the primary relief sought, namely, the repayment of the money lent with interest, we do not consider that the claim, as set up in the amended plaint, was so distinctly inconsistent with the original plaint that the amendment should have been refused."

The above observation applies, in my opinion, appropriately to the case at present under consideration in that the primary relief which is sought for is a claim for a share of profit in a partnership of a single venture and it is obvious, if what was stated in the original plaint is correct, that the claim for a share of profit was in a venture which had long ended. In the case of *Krishna Prasad Singh and another* v. *Ma Aye and others* (2) the plaintiffs filed a suit on a promissory-note and when it was discovered that the stamp on the promissory-note had not been duly cancelled the plaintiffs sought to amend the plaint to base the claim on the original consideration and the amendment was

(1) 5 Ran. 115. (2) 14 Ran. 383.

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allowed. The defendants in that case subsequently contended that the amendment should not have been allowed in that it deprived them of pleading limitation which had by then accrued to them. It was observed in that case that the plaintiff ought not to lose his money because of a technical error in the execution of a promissory-note. It is thus clear that a Court ought to allow a pleading to be amended, where it is reasonable, to do so, under the provisions of Order VI, Rule 17 of the Code of Civil Procedure. It is difficult to appreciate how the alteration in the nature of the relief which was sought can properly be considered to be an alteration in the nature of a suit as set out in the original plaint. It seems to me, in order to find out what is the nature or character of a suit, we ought to look at the allegations that had been set out in the plaint in respect of which certain relief was sought. If, on the allegations which the plaintiff had set out in his plaint as constituting the basis of his claim, the plaintiff is entitled to claim certain reliefs, and if he omitted, whether accidently or otherwise, to ask for some of the reliefs which he was so entitled, he ought, in my opinion, to be allowed to amend his plaint to allow him to claim other reliefs which he could have asked for in his first plaint but which he had at first omitted, whether through carelessness or otherwise, to claim in his original plaint. In the case at present under consideration the plaintiff could clearly, in view of paragraph 4 of his original plaint, have asked for a declaration that the partnership, which was constituted for the purchase of margarine and yeast had been dissolved. It is urged on behalf of the defendant-applicant that the amendment had in the present case been made to overcome the effect of the provisions of section 69 of the Partnership Act. Even assuming that the amendment of the plaint

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was sought to be made in the present case in order to take the case out of the mischief of section 69 of the Partnership Act, it is difficult to understand how an amendment to a plaint could be refused where it can be properly brought within the provisions of Order VI, Rule 17 of the Code of Civil Procedure. The observation in the case of *Kasinath Das* v. *Sadasiv Patnaik* (1) at page 808 appears to be appropriate, and which is :

> " Section 53, clause (*c*) (of the old Civil Procedure Code) distinctly provides that an amendment, so long as it does not alter the character of the suit, may be allowed at any time before judgment. The restriction is only as to the nature of the suit ; the law prohibits any such amendment as would change the fundamental character of the suit ; for example, a plaint cannot be so amended as to convert a claim based on contract, into an action on tort. But an alteration in the relief does not alter the character of a suit."

And, with respect, I entirely agree with the observation made in the last sentence of it set out above.

The case of *Tajamunnul Hussain* v. *Ahmad Ali and another* (2) was cited on behalf of the defendant-applicant. There the plaint shows that the suit was a suit for partition. The attempt which was made subsequently to have the plaint treated as a plaint for dissolution of partnership was clearly an attempt to introduce a totally new and inconsistent cause of action, because the enquiries in a suit for dissolution would be on matters different from enquiries in a suit for dissolution. If the amendment had been granted in that case the plaintiff could have been said to have been allowed to make an altogether new and distinct case which was entirely different from the pleadings which he had set out originally. Both the plaints in this case show clearly that the real

(1) (1893) 20 Cal. 805 at 808. (2) (1937) I.C. 389.

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relief which is sought is a claim for a share of profit in a certain partnership venture which occurred in May and June of 1947, and which had also ended. For the reasons set out above it is clear that the amendment to the plaint in the case at present under consideration must be considered to have been properly allowed.

The application is dismissed with costs, advocate's fee three gold mohurs.

APPELLATE CIVIL.

Before U Tun Byu, J.

H.C. 1949

Apl. 6.

U MYAT PYU AND ONE (APPELLANTS)

v.

MA SAW SHIN AND TWO OTHERS (RESPONDENTS).*

Family dispute—Settlement—Validity of—Strength of claim in and found subsequently—If affects validity.

On the death of Daw Gauk, her younger brother and three nephews entered into a family arrangement for division of inheritance orally and a garden land was allotted to the nephews. There was some dispute between the parties and the brother had called village elders to make a settlement. In a suit by the brothers to recover a land so allotted on the ground that the nephews were not entitled to inherit and the settlement was not legal.

Held : A family settlement is valid, even though the claims of some of the parties may not be strictly legal and even if there has been misconception of legal rights. In the absence of fraud or misrepresentation it is not open to Court to try to ascertain if all claims were well founded. There was a *bona fide* settlement of conflicting claims and the adequacy or otherwise of the consideration leading to the compromise will not be considered by the Court. It is the design of such arrangements to preserve quiet in the family.

Ma Kyaw and another v. *Daw Kye U*, A.I.R. (1935) Ran. 355, explained.

Jhamatmal Hassanand and another v. *Chetanram Diwan Hashmatrai and others*, I.L.R. (1940) Karachi 241 = A.I.R. (1940) Sind 81 ; *Uma Datt and others* v. *Ram Jiwan and others*, A.I.R. (1941) Oudh 185 at 188-9, referred to.

Ze Ya for the appellants.

Mya Tin for the respondents.

U TUN BYU, J.—The plaintiff-appellants U Myat Pyu and his wife Daw Sin filed a suit for possession of a garden land measuring 3·059 acres against the defendant-respondents Ma Saw Shin, Ma Aye Thant and Ma Ohn Yin in Civil Regular Suit No. 84 of 1946 of the Court of the Subordinate Judge, Myanaung. The garden land originally belonged to one Daw Gauk

* Civil 2nd Appeal No. 125 of 1948 against the decree of the District Court of Henzada in Civil Appeal No. 19 of 1948, dated the 2nd November 1948.

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who was said to have died about nine years before the present litigation arose. U Myat Pyu is the youngest brother of Daw Gauk, while Ma Saw Shin, Ma Aye Thant and Ma Ohn Yin are the wives of the three nephews of Daw Gauk, called Than Daing, Tun Myaing and Maung Thwin. Than Daing and Tun Myaing are the children of Ma Galay, a younger sister of Daw Gauk, while Maung Thwin is the son of Ko Ngai Galay, a younger brother of Daw Gauk. Ma Galay and Ko Ngai Galay predeceased Daw Gauk. Than Daing, Tun Myaing and Maung Thwin are also dead. The case for the defendant-respondents is that after the death of Daw Gauk a family arrangement was concluded between U Myat Pyu, Than Daing, Tun Myaing and Maung Thwin, that Than Daing, Tun Myaing and Maung Thwin obtained under that family arrangement a piece of paddy land each, which belonged to the estate of Daw Gauk, and that the garden land in question was said to have been made over to Than Daing, Tun Myaing and Maung Thwin jointly under that family arrangement. The family arrangement is said to have been made orally ; and there is nothing in the Transfer of Property Act which prevents a family settlement being made orally.

There is evidence in this case to show that there was some dispute over the estate of Daw Gauk between U Myat Pyu and his three nephews Than Daing, Tun Myaing and Maung Thwin. It is also clear from the evidence of U Myat Pyu that it was he who went and invited the village elders U Po Hla, U Htin Kyaw and U Po Hlaing to make a family settlement. U Htin Kyaw and U Po Hlaing are however dead. U Myat Pyu alleged that the garden land in question was made over to Than Daing, Tun Myaing and Maung Thwin only for their temporary use and occupation, but there does not appear to

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be any evidence to support U Myat Pyu's statement in this respect. U Po Hla who has been examined as a witness does not support him, and the evidence of U Po Hla indicates that the garden land in question was given outright to Than Daing, Tun Myaing and Maung Thwin at the time the family settlement was made ; and I am unable to see anything in this case which would suggest why U Po Hla's evidence ought not to be accepted. U Myat Pyu admitted in his cross-examination that he is on good terms with U Po Hla. The evidence of Daw Chit Su, who was a neighbour of Daw Gauk, also suggests that the properties which were made over to Than Daing, Tun Myaing and Maung Thwin at the time the settlement was arrived at were given outright to Than Daing, Tun Myaing and Maung Thwin, and not for their temporary use and occupation. Ma Aye Thant, the wife of the deceased Tun Myaing, stated that the paddy land which she and her husband obtained as the result of the family settlement which was arrived at after the death of Daw Gauk was later sold to U Myat Pyu for Rs. 500. There is no reason why U Myat Pyu should have paid Rs. 500 to Tun Myaing and his wife when U Myat Pyu took over the paddy land from them unless that paddy land had been given to Tun Myaing outright at the time the family settlement was made ; and U Myat Pyu does not deny that he had to pay Rs. 500 when he took over that paddy land from Ma Aye Thant and her husband. Exhibit 2 is an important document in that U Myat Pyu signed in that document as a witness, where it was mentioned that Tun Myaing and Maung Thwin each received Rs. 75 from Than Daing for relinquishing their right and interest in the garden land in dispute. It is not possible to believe that U Myat Pyu would have signed as a witness in

Exhibit 2 unless the garden land in dispute had been given outright to his three nephews at the time the family settlement was concluded. In any case the evidence on the whole shows that the properties which Than Daing, Tun Myaing and Maung Thwin received at the time the family settlement was concluded were given to them outright, and not for their temporary use and occupation.

It has been contended on behalf of the plaintiff-appellants that the family settlement which was concluded in this case between U Myat Pyu and his three nephews Than Daing, Tun Myaing and Maung Thwin had no binding force in law on the ground that Than Daing, Tun Myaing and Maung Thwin were not persons who were strictly within the reach of inheritance to the estate of Daw Gauk, and the observation of Dunkley J. in the case of *Ma Kyaw and another* v. *Daw Kye U* (1) was referred to in support of this contention. There, one Daw Kye U after the death of her husband made a partition of their joint property between herself and her children, under which her children received one piece of paddy land each. Subsequently, Daw Kye U brought a suit for declaration of her title to the land which she had made over to her son Maung San Hla, and it was held that the family compact or arrangement so concluded was valid. I do not think that the case of *Ma Kyaw and another* v. *Daw Kye U* (1) can be said to lay down a wider proposition of law than the facts in that case warranted. If it was intended to argue, as it appears to be during the hearing of this appeal, that a family settlement could not be validly made unless the claims of all the persons who were parties to the family settlement were in

(1) A.I.R. (1935) Ran. 355.

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fact found to be good, I regret that I am unable to accept such a contention.

In the case of *Jhamatmal Hassanand and another* v. *Chetanram Diwan Hashmatrai and others* (1) Davis J.C. observed :

" There may have been some misconception at the time of the family arrangement on the part of all concerned as to their legal rights. That there may have been a misconception or a misunderstanding among the parties to a family arrangement as to their legal rights, is no sufficient ground for disturbing the quiet which such family arrangement was designed to preserve. There was here no case of a fraud, no misrepresentation and no suppression of truth but merely a mistake in good faith as to the law."

No fraud or misrepresentation or suppression of truth has been alleged against Than Daing, Tun Myaing or Maung Thwin in respect of the settlement which was arrived at between them and U Myat Pyu, so far as this case is concerned. It will also be appropriate to reproduce the observation made towards the end of the judgment in the case of *Uma Datt and others* v. *Ram Jiwan and others* (2), which is as follows :

" As has been rightly observed in a number of cases, it is not open to the Court to try to ascertain as to whether the claims of the parties to the family settlement were good and well founded and to test the validity of the family arrangement after having arrived at a finding upon the strength or otherwise of such claims."

I respectfully agree that the validity of a family settlement ought not to be determined by the strength or validity of the claim of the parties as might be arrived at afterwards. There is evidence in this case to show that Than Daing and his brother Tun Myaing could genuinely put forward a claim to be

(1) I.L.R. (1940) Karachi 241 = A.I.R. (1940) Sind 81.
(2) A.I.R. (1941) Oudh 185 at 188-9.

the *apathita* adopted sons of Daw Gauk at the time the family settlement was made. There is also evidence to show that Maung Thwin was also *shinbyued* by Daw Gauk, and thus the family settlement which was concluded could therefore be considered to be a *bona fide* adjustment of conflicting claims by Than Daing, Tun Myaing and Maung Thwin in respect of the estate of Daw Gauk. The family settlement or arrangement which had been so arrived at must therefore be considered to be valid. I do not think it will be correct to consider the adequacy or inadequacy of the consideration which led to the compromise or settlement of a *bona fide* dispute.

The decision of the lower appellate Court is therefore correct, and the appeal is dismissed with costs.

CIVIL REVISION.

Before U Tun Byu, J.

H.C. 1949

May 6,

MESSRS. AHMED COMPANY (APPLICANT)

v.

ABDUL GAFFAR (RESPONDENT).*

Civil Procedure Code, s. 115—Revision—Competency of when no appeal to High Court—Land Disputes (Summary Jurisdiction) Act, 1945—S. 22.

Under s. 115, Civil Procedure Code, the High Court can revise a decision of a subordinate Court when no direct appeal lies to the High Court, as it can send for the record of any case decided by a subordinate Court. The appeal referred to in s. 115, Civil Procedure Code, means an appeal to the High Court. No wider interpretation should be given than what the section actually states, and the High Court's power of dealing with cases on revision should not be restricted.

Daw Min Baw v. *A.V.P.L.N. Chettyar Firm and another*, I.L.R. 11 Ran. p. 134, followed.

Beni Madho Ram v. *Mahadeo Pandey*, 28 A.L.J. p. 924, not approved.

Tirtan Prasad Singh and others v. *Secretary of State*, A.I.R. (1935) Pat. 86; *Mahadeo Prasad* v. *Khubi Ram*, I.L.R. 51 All. p. 1023 at 1024; *Radha Mohan Datt* v. *Abbas Ali Biswas and others*, A.I.R. (1931) All. 294 at 296, referred to.

Saw Hla Pru for the applicant.

Guha for the respondent.

U TUN BYU, J.—The plaintiff-applicant filed a suit against the defendant-respondent for declaration of title and for the recovery of a piece of land in Tavoy Town. After the written statement had been filed the learned Subordinate Judge held on the 18th September 1948, apparently on a preliminary issue, that he had no jurisdiction to entertain the suit, and the suit was dismissed with costs. A decree had also been drawn up in accordance with the judgment of the learned Subordinate Judge, dated the 18th September 1948. It is clear from the provisions of section 2 (2) of the

* Civil Revision No. 104 of 1948 of the order of the Court of the Subordinate Judge of Tavoy in Civil Regular Suit No. 29 of 1948, dated the 18th September 1948.

Code of Civil Procedure that a decree could also be properly drawn up in pursuance of the judgment passed on the 18th September 1948.

A preliminary objection has been taken on behalf of the defendant-respondent that the application in revision in the present case does not lie in view of the provisions of section 115 of the Code of Civil Procedure. It is contended that no application for revision can be entertained in a case where the decree is appealable to a lower appellate Court and no appeal had been filed in that appellate Court. This contention is contrary to the decision made in the case of *Daw Min Baw* v. *A.V.P.L.N. Chettyar Firm and another* (1), where it was held that the High Court could under section 115 of the Code of Civil Procedure entertain an application for revision from the decision of a Court subordinate to the High Court where no direct appeal lies to the High Court, even in a case where an appeal lies from such a decision to a lower appellate Court. A decision to the contrary made in the case of *Beni Madho Ram* v. *Mahadeo Pandey* (2) was expressly dissented from, and, with respect, rightly. It appears to me that the provisions of section 115 of the Code of Civil Procedure should be construed strictly, and if section 115 is construed in that light, it is clear that the High Court has power under section 115 to call for the record of any case which has been decided by a subordinate Court, from which no appeal lies to the High Court. The observation made in the case of *Tipan Prasad Singh and others* v. *Secretary of State* (3), which is as follows, appears to be appropriate :

" A further point is raised on behalf of the opposite party that an application in revision should not be entertained inasmuch

(1) 11 Ran. p. 134. (2) 28 A.L.J. p. 924.
(3) A.I.R. (1935) Pat. 86.

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MESSRS. AHMED COMPANY v. ABDUL GAFFAR.

U TUN BYU. J.

as the petitioner had a right of appeal to the District Judge from an order rejecting the plaint. It is true that ordinarily this Court will be reluctant to entertain an application in revision where the party has not resorted to a remedy available to him by way of appeal, but it does not follow that merely because the petitioners did not prefer an appeal to the District Judge in this case, the Hight Court has no power to interfere in revision. Section 115 provides that the High Court may act under that section in a case which has been decided by a Court subordinate to it and in which no appeal lies to the High Court."

In the case of *Mahadeo Prasad* v. *Khubi Ram* (1) it was observed as follows :

" Section 115 of the Civil Procedure Code empowers this High Court to call for the record of any case which has been decided by any subordinate Court if no appeal lies thereto. This obviously includes a trial Court and the appeal referred to therein means an appeal to the High Court. The present case therefore fulfils the conditions required by that section. If therefore a trial Court has acted with material irregularity in the exercise of its jurisdiction, or acted illegally, the High Court has power to interfere in revision, provided that no appeal lies to the High Court."

This observation applies appositely and fully to the circumstances which gave rise to the present application for revision, and with respect it appears to me to lay down a correct interpretation of the provisions of section 115 of the Code of Civil Procedure. The case of *Radha Mohan Datt* v. *Abbas Ali Biswas and others* (2) has also been cited on behalf of the defendant-respondent, where it was observed :

" The section itself, provides that revision is not entertainable where an appeal lies to the High Court. This clearly contemplates a case where no appeal lies either in the form of a first appeal or a second appeal from a decree or from an interlocutory order under section 104 and Order 43, Civil Procedure Code."

(1) 51 All. p. 1023 at 1024. (2) A.I.R. (1931) All. 294 at 296.

With respect, I regret that I am unable to agree with that interpretation of section 115 as I do not think that one ought to give it a wider interpretation than what that section actually states. In any case, owing to conflicting decisions in India on this point, I prefer to follow the decision made in the case of *Daw Min Baw* (1), especially when a similar view was expressed in the case of *Mahadeo Prasad* v. *Khubi Ram* (2). It seems to me that the High Court's power of dealing with cases in revision ought not to be more restricted than what the ordinary meaning of the words in section 115 of the Code of Civil Procedure conveys. The application for revision therefore lies in the present case.

This application must be allowed. The learned Subordinate Judge apparently overlooked the provisions of section 22 of the Lands Disputes (Summary Jurisdiction) Act, 1945, because no reference was made to it in his judgment delivered on 18th September 1948. The relevant portion of section 22 is as follows :

> " 22. Nothing contained in this Act and nothing done under or in accordance with this Act shall be deemed—
>
> (*a*) save as provided by section 13 and sub-section (*4*) of section 14 to preclude any person from instituting a suit or other proceeding in any competent Court under any law for the time being in force for possession of or for a declaration of a right to any land to which such person may deem himself to be presently entitled ; or."

Sections 13 and 14 of the Lands Disputes (Summary Jurisdiction) Act, 1945, do not apply to the present case, and thus it is clear that the plaintiff-applicant has a right in the present case to institute the suit in view of the provisions of section 22 of the Lands

(1) 11 Ran. p. 134. (2) 51 All. p. 1023 at 1024.

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MESSRS. AHMED COMPANY v. ABDUL GAFFAR.

U TUN BYU, J

Disputes (Summary Jurisdiction) Act, 1945. Much stress was laid on the provisions of section 16 on behalf of the plaintiff-applicant, but as section 22 is a subsequent section, it must be deemed to override the provisions of section 16 if there is any inconsistency between the provisions of those two sections because section 22 which is a saving clause, will have to be considered as expressing the last or final intention of the legislature.

The judgment and decree of the Court of the Subordinate Judge are accordingly set aside, and the Court of the Subordinate Judge, Tavoy, is directed to restore the case to its file and to hear and try the case on issues which had not been decided in the judgment of the 18th September 1948. The application for revision is allowed with costs, advocate's fee three gold mohurs.

APPELLATE CRIMINAL.

Before U San Maung, J.

U MAUNG MAUNG (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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June 3.

Criminal Procedure Code, ss. 497, 498—Bail—Principles in granting—Cancellation of bail granted by a higher Court.

Held: A Magistrate or Special Judge before whom a case is tried has no power to cancel the bail granted by a higher authority; s. 497 sub-s. (5) of Criminal Procedure Code is clear on this point.

Emperor v. *Raulmal Kanram Marwadi*, 1940 Bom. 38; *Imperatrix* v. *Sadashiv Narayan Joshi*, 22 Bom. 549; *Maung Ba Chit and one* v. *King-Emperor*, 4 B.L.T. 70; *Bashir Ud-din and another* v. *Emperor*, 33 Cr.L.J. 752, considered.

The type of disease the accused is suffering from, availability of treatment in Jail Hospital, his status in life, likelihood of his not absconding and not tampering with witnesses and that he is in a position to give sufficient security for attendance during trial are all relevant factors in granting bail.

Dr. Ba Han for the applicant.

Mya Thein (Government Advocate) for the respondent.

U SAN MAUNG, J.—At about 4-30 p.m. of the 16th of April 1949, the house of the applicant, U Maung Maung, a rice miller of Myenigon, was searched by S.I.P. Mr. H. Wilson of Cantoment Police Station and a party of men in the absence of the applicant who was then watching a show at the Carlton Cinema. At the search 3 sten-gun magazines loaded with 9 M.M. cartridges 78 in number were found on the top of a safe inside the west room of the house. The applicant was then arrested by the police and on an

* Criminal Misc. Application No. 3 of 1949 of High Court, Rangoon.

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application being made the next day by his advocate to the 2nd Additional Magistrate, Rangoon, to release him on bail on the ground that he has been ailing from gastric ulcer since 1948. The application was rejected by the Magistrate on the ground that the offence with which the applicant was charged was one punishable with death or transportation for life. The applicant then made an application before the Sessions Judge, Hanthawaddy, who then ordered that he should be released on bail during the pendency of the case against him on his furnishing security for a sum of Rs. 3,000 with two sureties in the like amount. In granting bail to the applicant, the learned Sessions Judge apparently acted under the provisions of section 498 of the Criminal Procedure Code read with the proviso to sub-section (1) of section 497 of the Code, and for this purpose reliance was placed on the report of the Medical Officer of the Central Jail, Rangoon, who had stated that the applicant was then suffering from gastro duodenal ulcer. Subsequently, when the case went up for trial before the 4th Special Judge, Rangoon, the applicant appeared in person on the 28th of April 1949. Thereupon, on the motion of the Court Prosecuting Inspector that the bail granted to the applicant be cancelled on the ground that the applicant was well enough to be able to attend the Court in person, the learned Special Judge cancelled the bail and remanded the applicant to jail custody. A fresh application for bail was made to the 4th Special Judge who then examined Dr. S. K. Dutta, the Medical Officer of the Central Jail, Rangoon, and U Ba Yin, Jailor of the Central Jail, Rangoon. According to Dr. Dutta, the applicant who was re-admitted into the jail on the 28th of April 1949, was again found to be suffering from gastro duodenal ulcer and treatment in the Jail Hospital led

to no improvement. The applicant's ailment was really serious and in the interest of his health the applicant should receive a better treatment than that which could be provided in the Jail Hospital. According to U Ba Yin, the applicant was mostly found lying in bed and was unable to take any food except milk diet. After the examination of these two witnesses, the learned Special Judge dismissed the application for bail on the ground that the applicant was not so ill as not to be able to walk about and that even if his condition became so serious as to necessitate his treatment at the General Hospital, Rangoon, action could be taken by the Jail authorities under paragraph 948 of the Jail Manual. The applicant then applied to the Sessions Judge to exercise his powers under section 498 of the Criminal Procedure Code but the Sessions Judge dismissed his application on the ground that the applicant was not so ill as to make his release on bail, imperative.

The applicant has now applied to this Court either to revise the order of the Sessions Judge rejecting his application for bail or to grant him bail as provided for in section 498 of the Criminal Procedure Code read with the proviso to sub-section (1) of section 497 of the Code.

Although the question is now only academic inasmuch as the learned Sessions Judge subsequently agreed with the learned 4th Special Judge that the bail granted to the applicant U Maung Maung should be cancelled, I would like to observe that when either the High Court or the Court of Session has granted bail under section 498 of the Criminal Procedure Code, the Subordinate Magistrate or the Special Judge, before whom the case against an accused person is being tried, has no power to cancel the bail granted by his higher authority. In this connection, I would invite

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the attention of the learned Special Judge to sub-section (5) of section 497 of the Criminal Procedure Code which reads :

" The High Court or Court of Session and, in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody."

It is clear from this sub-section that the Magistrate or the Special Judge can only cause the re-arrest of a person who has been released on bail by him (or by his predecessor) under the provisions of section 497 and not a person who has been released by the High Court or the Court of Session, as the case may be, under section 498 of the Criminal Procedure Code. The case of *Emperor* v. *Raulmal Kaniram Marwadi* (1) which has been cited to me by the learned Government Advocate is distinguishable from the present and moreover it is of doubtful authority. Cp. *Imperatrix* v. *Sadashiv Narayan Joshi* (2), *Maung Ba Chit and one* v. *King-Emperor* (3) and *Bashir Ud-din and another* v. *Emperor* (4). Furthermore, on the principal *expressio unius est exclusio alterius* where there is an expressed provision as that contained in sub-section (5) of section 497 of the Criminal Procedure Code, it must be inferred that no Court other than those mentioned therein has the power to re-arrest a person released under the provisions of section 497 of the Criminal Procedure Code.

In this case the proper course which the Court Prosecuting Inspector should have taken when, on the 28th of April 1949, he found the applicant fit enough to attend the Court in person, was to have

(1) (1940) Bom. p. 38.
(2) 22 Bom. p. 549.
(3) 4 B.L.T. p. 70.
(4) 33 Cr.L.J. p. 752.

moved the Sessions Judge, Hanthawaddy, who had granted him bail, to cancel it.

As regards the merits of the case, it is clear that although the applicant cannot be regarded to have been entirely bed-ridden, he was and is suffering from chronic gastro duodenal ulcer for which adequate treatment cannot be had at the Jail Hospital. No doubt under Burma Act No. LXIV of 1947, it is a serious offence to be in posession of sten-gun cartridges without a licence or permit therefor. However, in considering whether the applicant should be granted bail under the provisions of section 498 of the Criminal Procedure Code, this Court will have to take into consideration the fact that he is suffering from a type of disease for which adequate treatment is not obtainable at the Jail Hospital, that his status in life is such, that he is not likely to abscond during the pendency of the case against him, that there is no allegation whatsoever that he is likely to tamper witnesses for the prosecution and that he is in a position to give sufficient security to ensure his attendence in Court during the trial.

Besides, it is clear from the provisions of the Arms (Temporary Amendment) Act, 1949 (Burma Act No. XXII of 1949) which came into force on the 1st of May 1949, that it is the policy of the Government to deal severely only with those people who are in possession of illicit arms and ammunition with the intention of committing an offence punishable under the Treason Act or murder or dacoity. Therefore, although technically the applicant stands charged with an offence punishable with death or imprisonment under Burma Act No. LXIV of 1947, this consideration is relevant for the purpose of assessing the likelihood of his absconding even after he has been made to furnish security for a large sum.

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For these reasons, I would direct that the applicant be released on bail during the pendency of his trial on his furnishing security for Rs. 10,000 (Ten thousand) with two sureties in the like amount.

ORIGINAL CIVIL.

Before U On Pe, J.

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June 10.

AJODHYA SINGH (PLAINTIFF)

v.

SRIMATI GODAVARI BHAI AND THREE OTHERS (DEFENDANTS).*

Contract Act, ss. 69 and 70.

Held : That s. 69 of the Contract Act applies to the payment of money but s. 70 has no application in cases of payment of money. Where a person with intention of preserving the property of another enters into such property and preserves, manages and looks after the same it cannot be said he has acted unlawfully within the meaning of s. 70 ; as it is clear that he is entitled to compensation.

Chedi Lal and others v. *Bhagwandas and others*, (1889) I.L.R. 11 All. 234 at 243 ; *Punjabhai* v. *Bhagwandas Kisandas*, (1929) I.L.R. 53 Bom. 309 ; *Zulaing* v. *Yamèthin District Council*, (1932) I.L.R. 10 Ran. 522, followed.

Suchand Ghosal v. *Balaram Mardana*, (1910) 98 Cal. 1 ; *Raghunath Abaji Waghokai* v. *Labanu Vithoba Sutar*, (1931) A.I.R. Bom. 39 ; *Gordhanlal and another* v. *Darbar Shri Surajmalji*, I.L.R. 26 Bom. 1504 ; *Ram Das and others* v. *Ram Babu and others*, (1936) A.I.R. Pat. 194 ; *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar*, (1910) 33 Mad. 15 ; *Jyani Bagam and others* v. *Umrav Begam and another*, I.L.R. 32 Bom. 612 ; *Ghulam Ali* v. *Inayat Ali and another*, A.I.R. (1933) Lah. 95 ; *Dammdana Mudaliar* v. *Secretary of State for India*, I.L.R. 18 Mad. 88 ; *Maung Tun Myaing* v. *U Tar Poe and others*, R.L.R. (1947) 488, referred to.

P. B. Sen for the plaintiff.

B. K. Dadachanji for defendants Nos. 1 and 2.

S. B. Chakravarthy for defendant No. 3.

N. R. Burjorjee for defendant No. 4.

U ON PE, J.—This is a suit in which the plaintiff claims Rs. 50,000 from the defendants by way of remuneration for services rendered, the amount claimed being one per cent on the value of the properties

* Civil Regular No. 205 of 1947.

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alleged to have been saved by him as detailed in the Schedule attached to the plaint.

This action, one may say, is one of the consequences of the War. Evacuation of property owners from Rangoon due to enemy invasion of Burma in early 1942 has given birth to a class of persons who rightly or wrongly think that they have a claim against owners of house properties in Rangoon which, they say, they have saved at the risk of their lives. Where property owners failed to make their own arrangements by keeping men to watch their properties and if properties of such persons still remained unravaged or partly ravaged, these persons on their return to Burma were confronted with the claims of persons who took upon themselves the work of looking after such properties of absentee owners. The question of remunerating such persons is by no mean a simple one. It is full of difficulties due to circumstances arising out of the war and each problem requires to be considered in the light of the then prevailing circumstances. A property might have been razed to the ground on account of bombing, although there were people looking after them. A property might remain intact although there was no one looking after it. Looting was the general order of the day before the Japanese army arrived. It seemed impossible in most cases for anybody to do anything to save the property. Rangoon was subjected to almost constant bombing, and when one speaks of risking one's life one should not forget that it was the lot of everyone in Rangoon. This was the prevailing condition of the city after the entry of the Japanese and encouraged the growth of a class of persons who either out of good motive or as opportunists with a view to enrich themselves looked after the properties of absentee owners. This self-imposed task of looking after properties became the occupation of many in

Rangoon and only those buildings which were in occupation of the Japanese military and those which were managed by the absentee Indian Property Department of the Indian Independence League seemed to have escaped their attention. Both these classes seem to have lost no time in taking up the matter of their claims for services rendered. This was the general picture of Rangoon at the time of the Japanese invasion of which the Court should take judicial notice.

The plaintiff came into this picture in the following circumstances. According to him, he was an employee of the late Babu Nanigram Jaganath having joined his service as a bill-collector and, after the death of Nanigram Jaganath, continued in the service of the estate and was in the said service at the time of evacuation of the defendants to India which was on the 6th of February 1942. He says that he was a bill-collector on Rs. 40 per month, his starting pay being Rs. 25 per month. His case is that he was asked by the defendants particularly the 1st defendant to look after their properties and was promised remuneration on return. He has described the defendants as follows :

> "The defendants are the heirs and legatees of the said estate comprising properties belonging to the defendants individually and to the Dharmada Trust as well in which the defendants are also interested."

The 1st defendant is by name Godavari Bhai the widow and will also be called Maji in this case, the 2nd defendant is Mahadeo Prasad Tibrawalla the son, the 3rd defendant is Sagarmal Tibrawalla the son, and the 4th defendant is Bhagwandass Tibrawalla the son of the late Nanigram. The plaintiff remained in Rangoon till 20th February 1942 when he evacuated

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to Henzada where he remained up to 31st March 1942. He returned on the 1st April 1942 to Rangoon and made arrangements to look after the properties of all the defendants after obtaining Hiraoka permit to do so. He kept a clerk and durwans. He maintained books of account for his management which, he says, were accepted by the 2nd and 4th defendants when they returned from India. After British reoccupation he continued to manage the properties with the knowledge and under instructions from some of the defendants by correspondence until he left for India in June 1946 after his accounts, according to him, were settled with the 2nd defendant in May 1946 after the same had been looked into by the 4th defendant. He handed over jewellery found from a safe with a list and cash amounting to Rs. 2,000 and over to the 2nd defendant and Rs. 5,000 and other sums to the 4th defendant. Before he left for India he also handed over four account books maintained for the properties from the British re-entry from May 1945 to May 1946 and other papers and cash in hand. In August 1946 he came back to Burma to find that he was not going to be remunerated. Hence this suit.

All the defendants deny liability. The 1st defendant denies that there was any arrangement and agreement ever made with the plaintiff to look after her properties or the properties of her sons or of the Trust. The 2nd, 3rd and 4th defendants deny that they ever asked the plaintiff to look after their properties or that they knew anything of the arrangement and agreement made by their mother or that such arrangement, if ever made, binds them. All deny that for his officious intermeddling with their properties, he is entitled to any remuneration. On the other hand, they accuse him of intermeddling with their properties to enrich himself by appropriating to

himself the income from the properties, the proceeds from sale of goods, and realization from disposal of their belongings and by falsifying accounts. They say as a matter of fact he has paid himself more than what is due.

The claim for remuneration is set out in paragraph 2 and paragraph 9 of the plaint which may be reproduced :

" 2. That on or about 6th February 1942 the defendants on account of the War evacuated to India. Prior to evacuation the 1st defendant who is the mother of 2nd, 3rd and 4th defendants acting on behalf of herself and other defendants who are also heirs of the estate and also on behalf of 'Jaganath Dharmoda Trust' and with knowledge and consent of those heirs requested the plaintiff to stay in Burma and charged him with special care and protection of her own properties, properties of the Trust and the properties of her children belonging to the said estate and situate in Burma, during their absence in India. She further agreed to pay the plaintiff, on her behalf, on behalf of the Trust and on behalf the other defendants reasonable remuneration on their return after the cessation of War based on the value of the properties that might be saved by plaintiff's care and management from ravages of the War.

* * * * *

9. Alternatively and without prejudice to the agreement pleaded above, the plaintiff submits that he having taken charge of the properties mentioned above on behalf of the defendants and having saved them at his risk and expenses and the defendants having had the benefit of such acts and services rendered by the plaintiff, the defendants are liable to pay the plaintiff reasonable remuneration for the services so rendered."

Comments have been made by the counsel for the defendants on the bad draftmenship of the plaint for using expressions without having regard to their strict applicability. For instance, the term " heir and legatee of the estate " is a wrong description of the defendants and, again, the expression " The estate of Nangram Jaganath as comprising properties belonging

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to the defendants individually" is contradiction in terms. The plaintiff's lack of knowledge as to what properties were comprised in the estate of Nanigram Jaganath and what were owned individually by the defendants—he did not seem to know of the partition of the family in 1925—affords necessary explanation as to the unhappy way the plaint was drafted. This lack of information on the plaintiff's part is admitted by him and is mainly instrumental in my having had to hear evidence bearing on certain aspects of Hindu law, a good deal of which could have been avoided thus saving much of the time given to the hearing of the case. What should be the consequence of embarking on a litigation on indefinite information and scanty knowledge will receive attention in its proper place.

The following issues have been framed :

Issues.

(1) Is the suit bad for misjoinder of parties and causes of action ?

(2) Is the claim in suit or any part thereof barred by limitation ?

(3) Whether the properties shown in the Schedule to the plaint form the estate of Babu Nanigram Jaganath as stated in paragraph 1 of the plaint ? If not is the suit as framed maintainable in the Court ?

(4) Are the properties set out in the Schedule to the plaint separate and distinct properties of the defendants and is each of the defendant liable to pay remuneration for the alleged management of all the properties set out therein ?

(5) What is the value of the properties described in the Schedule in the plaint ?

(6) Is the remuneration at one per cent on the value of the properties referred to in the Schedule to the plaint reasonable ? If not, what would be the reasonable remuneration ? How much of such remuneration has he received ? Is he at all entitled to remuneration for alleged services rendered ?

(7) Did the 1st defendant for herself and on behalf of the other defendants with their knowledge and consent and also on behalf of Jaganath Dharmada Trust at the time of evacuation request the plaintiff to stay behind and charge him to look after the properties in the suit during her absence in India ?

(8) Did she also promise to remunerate him for doing so? If so, how far are the defendants bound by such request and promise ?

(9) Did the plaintiff render services in respect of properties mentioned in the suit voluntarily ? Did he intermeddle with the properties of the defendants and Trust ?

(10) Did the defendants ratify and approve of the services rendered by the plaintiff ?

(11) Has the plaintiff rendered accounts of his management ? Have the defendants accepted the same ?

(12) Did the plaintiff give to defendant No. 3 possession of any of the properties as alleged in paragraph 6 of the plaint ? Did he give possession of the properties in suit to any of the defendants ? Is the plaintiff liable to account to the 2nd defendant for the various items set out in paragraph 8 of the written statement ?

The plaintiff bases his claim firstly, on arrangement and agreement alleged to have been made and

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alternatively on circumstances in which his claim for services rendered by him falls within the principle of section 70 of the Contract Act. Consideration of the first point will be covered by determining Issue No. 7 which I propose to deal with before other issues. It reads :

"(7) Did the 1st defendant for herself and on behalf of the other defendants with their knowledge and consent and also on behalf of Jaganath Dharmada Trust at the time of evacuation request the plaintiff to stay behind and charge him to look after the properties in the suit during her absence in India ?"

The plaintiff's case may be summed up in his own words :

"*Q.* What about you ?

A. I was to go to India but Maji told me not to go to India. She told me ' you are an old man. You stay here and look after the houses.'

Q. Did Bhagwandass and Sagarmal say anything ?

A. They also told me to make arrangements and look after the affairs of all the brothers.

Q. What further conversation took place between you and they ?

A. Godavari Bhai said ' when we return and if by God's grace everything remain intact we will give good reward.' (Hum kushi karega).

Q. Then what did you say ?

A. Then Sagarmal told me ' my durwan has become aged, look after him and let him stay here.'

Q. What did you say ?

A. They were repeating the same thing everyday. So eventually I heard every day and I agreed to stay back and look after everything as they had asked me.

Q. Did you see them off at the jetty ?

A. Yes.

Q. Did any conservation take place at the jetty ?

A. They all said ' We are going. If everything stays well and goes well ' Hum tum ko acha say dekhega.' (We will look after you very well).

Q. At the time of this conversation at the jetty who were present ?

A. Bikha the driver, Jamadar Parasnath and Trilokinath Phatak, agent of Bansari Abagadh."

This is the arrangement and agreement, which the plaintiff has made, the basis of his claim. Let us now see what evidence is there in support of his story. He cites three witnesses, namely, Bikha, Parasnath Singh and Trilokinath to corroborate him. Their evidence does not agree in essential details. Bikha, in his examination-in-chief, says that the talk between the plaintiff and Maji and Bhagwandass took place in his presence at the Windermere Road house. In his cross-examination he admits he did not know the language in which these persons were talking, that he was not present in the room where the talk was taking place, he being a servant and was standing on the verandah and what he had said was from what he had heard from the plaintiff himself. As regards Parasnath Singh, he too has, so far as the talk in the Windermere Road house was concerned, contradicted himself in a number of ways. For instance, in one place he says he was present on every occasion, *i.e.* morning and evening when the talk used to take place. At the end of the cross-examination he simply says that what he had said about all the occasions, except the last one, was from what they had told him and that he was present on the last occasion only when the plaintiff took him to Maji's house and in his presence Maji asked the plaintiff to look after the properties. This is the evidence which is sought to prove that the request was made by Maji to the plaintiff to look after the properties. In my view this evidence is absolutely unreliable and untrustworthy. The next attempt made to prove that the plaintiff was requested to look after the properties was the conversation which was said

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to have taken place at the jetty when Maji and her two sons, Sagarmal and Bhagwandass, left for India on the 6th of February 1942. Here again we have the same three witnesses to support the plaintiff's story. According to the plaintiff he was requested in these following words :

"We are going, if everything stays well and goes well when we come back 'Hum tum ko acha say dekega.'" (We will look after you very well).

The evidence of the three witnesses as regards this conversation at the jetty is no better than the one they gave on the conversation at the Windermere Road house. According to Bikha, this conversation took place while they were going on board the launch. According to Trilokinath, the alleged conversation took place in the launch. According to Parasnath Singh, it took place when everybody was going away. Trilokinath's story as to how he had come to be at the jetty sounds absurd. According to him he came from his house in Thingangyun to send off one Bharat Singh. Bharat Singh was in one part of the launch away from the place where the three defendants were sitting and yet he brought himself near the defendants to hear that conversation which was alleged to have taken place. That part of the day in Rangoon, about 9 a.m., was the regular visiting hour of the Japanese bombers and one would have expected people to keep away from the town during that particular time to be safe from bombing, but Trilokinath followed a reverse process of coming into Rangoon from Thingangyun to face the bombing. It is in evidence that while the defendants were on the launch, which they embarked sometime after 9 o'clock there was an air raid siren given. Trilokinath's story that he was present at the alleged conversation at the jetty appears to me to be an

invention. It is significant that Maji was not at all cross-examined on the point that different witnesses were present at the time of her departure and that she requested the plaintiff to look after the properties in their presence. On the other hand, Maji in her evidence, has stated that she gave Rs. 100 to the plaintiff because he said that he wanted to go to India and that he had not the necessary expense for the journey. Receipt of this Rs. 100 was admitted by the plaintiff himself, but all that he says is that he does not know why this money was paid to him. The other three defendants deny definitely that they ever asked the plaintiff to look after the properties during their absence. There seemed to be no necessity to ask the plaintiff to look after their properties as they had their own respective men with whom they had left instructions to look after their properties.

However, one thing stands out clear from the evidence given regarding the alleged arrangement, that the plaintiff was present at the time of the defendants' departure for India along with other servants at the jetty and, as is quite usual at such farewell partings, that Maji might have made some kind of utterance befitting the occasion. What could she possibly have said? There was hustle and bustle of departure and there was imminent danger of bombing and an enemy air raid siren was in fact given. In those circumstances Maji's talk on that occasion could not have been in the nature of business talk or that of one person entrusting properties worth lakhs and lakhs of rupees to another person. Morever, it is rather unusual in a Hindu family that a female member should talk business for male members who are carrying on independent separate business of their own. If Maji had a talk with the plaintiff and other servants at the time of parting it would be, in the nature of things, just

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farewell wishes and greetings, addressed to all the empolyees. This is quite different from making a request to look after the properties or manage them. The answer to this issue must be in the negative.

Issue No. 8.

"Did she also promise to remunerate him for doing so? If so, how far are the defendants bound by such request and promise?"

After the answer to Issue No. 7 this question does not arise. However evidence on a point, where the plaintiff has given his admission, should not be passed over, as it may throw light on other substantial matters in the case. The evidence in question is in respect of payment of Rs. 100 by Maji to the plaintiff who has admitted receiving it. In this connection the statement made by her may be reproduced: "Plaintiff saw me on the day I left Rangoon in 1942. When I was going, plaintiff told me that he too was leaving this province and I told him. 'If you are afraid, do go to India.' He told me then, he had no money so I give him Rs. 100 note." The payment is not denied by the plaintiff. There is no convincing account given by the plaintiff as to why this payment was made. If the plaintiff had been asked to stay and to look after the properties, there would certainly have been made some arrangements by the sons themselve but, not on the eve of departure, and some reasonable sum say, a few hundreds at least, would have been left with him to carry on the management, of properties of the value of over 50 lakhs. This is a plain and straight story which will have to be accepted, in the absence of other equally reliable evidence. As regards the issue how far are the defendants bound by such request and promise, we have the evidence of the 1st defendant depicting the independent way, her sons have been living in

these words: "They were all majors and attended to their own business. After they became majors and started their own business none of my sons told me what business they were doing and what profit or loss they made." It is inconceivable that her action should have bound her sons, even if there had not been a partition in the family. In point of fact, the family was partitioned in 1925 for which there was a partition deed executed (*see* Exhibit 43). It is also in evidence that the controlling voice in the family is not the mother but the sons (*vide* Sooniram Rameshur's deposition) of whom the 2nd defendant was admittedly looking after the interest of Maji, the mother. In the nature of things, it is least expected of a woman member especially of a Hindu family, to make any business arrangement and much less to bind other male members by her action. The answers to both parts of this issue must be in the negative.

Issue No. 9.

"Did the plaintiff render services in respect of properties mentioned in the suit voluntarily? Did he intermeddle with the properties of the defendants and Trust?"

The effect of the answer to Issue No. 7 being to deny the relief asked for on the basis of the contract, namely, arrangement and agreement alleged, the plaintiff is now left to his own alternative relief set up in paragraph 9 of his plaint. This really raises the question as to whether the claim can be supported on the principles laid down in section 70 of the Contract Act. Determination of this question will furnish the answer to this issue. Section 70 of the Contract Act lays down three circumstances as necessary for a claim to be made, namely, firstly, the act should be lawfully done for another, secondly that it should not be the doer's intention to do it gratuitously, and thirdly, that the other

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party should enjoy the benefit of it. It may be said at the outset that the plaintiff did some kind of work in connection with at least some of the properties in suit belonging to the defendants and the Trust and for the purpose of considering the point under discussion it is sufficient to proceed on this footing without attempting to check the work for the purpose of assessing compensation under this section. Having conceded that he did some kind of work let us see whether he did it lawfully. The word " lawfully " has been explained in the case of *Chedi Lal and others* v. *Bhagwandas and others* (1) as follows:

> "Section 70 of the Contract Act contemplates cases in which a person held such a relation to another as either directly to create or reasonably to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation to the person for whom it was done. "

This has been followed in *Punjabhai* v. *Bhagwandas Kisandas* (2). The same principle is followed in *Zulaing* v. *Yamèthin District Council* (3).

In this case the plaintiff was an employee of at least one of the defendants, being in the service from the time of the late Narigram Jaganath and was not a stranger in a way to the defendants. He rightly or wrongly took upon himself the work of looking after some of the properties of some of the defendants though perhaps in a manner which may not speak well of him. It is only natural that one in a position of the plaintiff should look after the properties which came from his own master and which now belong to the defendants with whom he had been in close association for some years. He persisted in saying that he was the servant of the late

(1) (1889) I.L.R. 11 All. p. 234 at p. 243.

(2) (1929) I.L.R. 53 Bom p. 309.

(3) (1932) I.L.R. 10 Ran. p. 522.

Nanigram Jaganath and in describing himself, for that reason, as the servant of the estate of Nanigram Jaganath, in spite of the change in ownership that the said estate had undergone, consequent on the partition of the family in 1925. Perhaps it was his belief which prompted him to take upon himself the self-imposed task of preserving the properties and diminishing the damages to them. I do not think it is necessary to stop here to study his motive for it cannot affect the result that will be arrived at from the findings on other points in this case. It is in evidence that he did quite a variety of things in the so-called management of the defendants' properties. He had met a lot of difficulties with the Military Administration and succeeded in getting various people to help him to get the Hiraoka permit. He leased out rice mills and worked one himself for a few months. He had an office and maintained books of account in his own way. One cannot shut one's eyes to some of these works done. I am of the opinion that in the light of the principles enunciated in the Allahabad case quoted above, the plaintiff's case is one in which it may very well be said that he was doing the work " lawfully as there was such relation between him and the defendants as either to create or reasonably justify the inference that by service rendered by him he was entitled to look for compensation for such service from some of the defendants for whom it was done. From this it follows that he could not be an officious intermeddler.

In holding this view the following observation of Jenkins C.J. in *Suchand Ghosal* v. *Balaram Maidana* (1) is being borne in mind:

" The terms of section 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial

(1) (1910) 98 Cal. p. 1.

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justice in cases where it would be difficult to impute to the persons concerned relations, actually created by contract. It is, however, especially incumbent on final Courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious."

Several Indian cases have been cited by the Counsel for the defendants in support of their contention that the act of the plaintiff was not such as would entitle him to compensation or remuneration. Their main attack was that the act of the plaintiff was not one that was " lawfully " done. The word " lawfully " has been the subject of judicial interpretation in most of the cases cited and diversity of view in most cases is noticeable and it seem to have been the result of applying section 70 to cases of payments of money which are governed by section 69 of the Contract Act. The diversity of views expressed in the following cases seems to be the result of applying section 70 wrongly instead of section 69. In *Raghunath Abaji Waghokai* v. *Labanu Vithoba Sutar* (1) it was held that payment for benefit of another is not sufficient and that to support the claim there must be an obligation, express or implied, to repay. In *Gordhanlal and another* v. *Darbar Shri Surajmalji* (2) it was held that where there was no authority and the person paying was under no obligation to pay, payment was not lawfully made. In the case of *Ram Das and others* v. *Ram Babu and others* (3) it has been held that nobody has a right to force a benefit upon another without his having the option of refusing it. In the case of *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (4), it has been held that :

" the person from whom the claim is made must have the opportunity to accept or reject such benefit."

(1) (1931) A.I.R. Bom. p. 39.
(2) I.L.R. 26 Bom. p. 504.
(3) (1936) A.I.R. Pat. p. 194.
(4) (1910) 33 Mad. p. 15.

Other cases relied on which are in the same category are *Jyani Bagam and others* v. *Umrav Begam and another* (1), *Ghulam Ali* v. *Inayat Ali and another* (2). Most of these cases beginning with *Dammdana Mudaliar* v. *Secretary of State for India* (3) relate to payments of money and should have been considered under section 69 of the Contract Act. Their applicability to the present case may on that ground be safely ruled out. Please see the case of *Maung Tun Myaing* v. *U Tar Poe and others* (4).

Next we come to the two requisites of section 70 of the Contract Act. It is abundantly clear that he was under no misapprehension as to the claim which he would make for his remuneration from persons whose properties he said he had saved. There is nothing to indicate that he intended to do the work gratuitously. On the contrary, he started paying himself certain sums under the name of "Manager's fee" according to his book quite regularly right from the beginning—a fact which shows that his act was not gratuitous.

As regards the defendants having enjoyed the benefits we have the evidence of Babu Sooniram Rameshwar, a highly respectable Marwari merchant of this city to the effect that the properties belonging to the defendants suffered less damage than many in Rangoon and that it was atributable to the fact that men were left behind to look after the properties. Two Rice Mills were received back in quite a good condition although many were destroyed in the neighbourhood. The answer to the first part of the issue is answered in the affirmative and as regards the second part to this issue, the answer is that he did not intermeddle with the properties of the defendants and the Trust.

(1) I.L.R. 32 Bom. p. 612.
(2) A I.R. (1933) Lah. p. 95.
(3) I.L.R. 18 Mad. p. 88.
(4) R.L.R. (1947) p. 488.

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Issue No. 11.

"Has the plaintiff rendered accounts of his management? Have the defendants accepted the same?"

That the plaintiff maintained accounts of his management is abundantly clear. This fact was intimated by him in his correspondence to the defendants who were then in India. In his letter to his brother Mahdeo [Exhibit E-52 (*a*)] there was mention made of the plaintiff's request to Mahadeo to come early to settle the accounts as the plaintiff wanted to leave for India, and in the letter (Exhibit E-55), Bhagwandass wrote saying that the plaintiff was pressing for settlement of accounts. In the letter of Mahadeo (Exhibit E-58), to the plaintiff, Mahadeo says "please do as brother likes." On the 18th or 19th of May 1946 Mahadeo arrived in Rangoon when the plaintiff admittedly handed over an account book ralating to Mahadeo's properties. Mahadeo also kept the account books of his mother and Sagarmal, which remained with him till the time they were produced in Court. It is urged by the plaintiff's Counsel that accounts had been rendered and accepted. Mahadeo who seemed to have the last say as between the defendants themselves admits that certain adjustment of accounts were made in his presence after the matter was discussed with the plaintiff. The adjustment related to wrong debits of two sums of Rs. 2,000 and Rs. 1,000 in his account (Exhibit 8). When the plaintiff left for India the services of Kaliappan and Trilokinath were retained and the management went on as before. It is significant that the pay of Kaliappan and Trilokinath was paid by the 1st defendant Maji, Mahadeo and Bhagwandass Babu till November 1946 in three shares. According to Bhagwandass, he carried forward the cash and began a new account in (Exhibit 6). (Page 40

reverse of his evidence) and after that date Kaliappan was writing in that book and he supervised it (page 30). Mahadeo remained in Rangoon for nine or ten days after the plaintiff's departure for India, after which he went away by plane to India on 11th June 1946. He came back to Rangoon on the 2nd February 1947 while Bhagwandass who came here in February 1945 was all along here. Bhagwandass made a frank statement that his complaint against the plaintiff was about his No. 9 Rice Mill, Kanaungto, and says that no enquiry was made into the question of accounts for the Japanese period in the plaintiff's absence in India and also after his return. It seems that Mahadeo and Bhagwandass did not care to enquire into the accounts for the Japanese period after they were told by the plaintiff that he had Rs. 1,000 in Japanese currency. This was an attitude which was quite consistent with their subsequent conduct in their dealings with the plaintiff whose service was continued till he left for India in June 1946 and whose office staff was even retained long after that. The inference one would naturally draw from their conduct towards the plaintiff as disclosed from the correspondence and the continuance of the plaintiff's services for some months is that Mahadeo and Bhagwandass accepted the accounts as rendered by the plaintiff.

Issue No. 6.

"Is the remuneration at one per cent on the value of the properties referred to in the Schedule to the plaint reasonable? If not, what would be the reasonable remuneration? How much of such remuneration has he received? Is he at all entitled to remuneration for alleged services rendered?"

The remuneration claimed at one per cent on the value of the properties is the rate fixed by this Court at which commission is payable to the Receivers appointed by

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it. The qualification of the appointee and the nature of work are factors which the Courts bear in mind in making appointment of Receivers. The plaintiff is only a bill-collector and illiterate and his pay was said to be Rs. 25 per month but Rs. 40 according to him. It is said he was doing his best but it will be idle to expect his work to be of that quality one would expect from the Court's Receiver. It may be that his management was something of the kind which he used to do as a bill-collector, whose function would be to collect rents and moneys from money-lending business, and also to do Court work.

It will be necessary to check his work as far as possible and this is by no means an easy task in this case for want of reliable evidence, adduced by the plaintiff on the nature and extent of the work done and the value of properties on which he claim his commission. Let us, therefore, examine the background with the object of finding out what could one do in the midst of conditions prevailing then. In fairness to the plaintiff, the words depicting the picture may be reproduced from his evidence at page 196 reverse and page 197 :

"*Q.* Is it not a fact that not a single property escaped damage ?

A. Because the circumstances were such that even if the owner was here he could not have been able to save them from damage.

Q. So that there is not one property which you can truthfully to-day say that you have saved from the ravages of war as you put it in your plaint ?

A. According to me I have saved all the properties because I kept men and I paid their salaries.

Q. After you came from Henzada you found all the properties damaged or some completely wiped out ?

A. Yes.

Q. It was not within your power nor within the power of anybody to have saved these properties from damages suffered by them?

A. No.

Q. From that day to the British occupation there were further bombings in Rangoon?

Yes."

This shows the hopelessness of human agency to save properties during the time material to this case. Moreover, it would be a problem for any single man to manage the properties in various places in and outside the city—properties of considerable value, some of which being rice mills across the river.

The plaintiff, however, was not to be daunted with the magnitude of the work, for he even found time to look after properties of other people besides the defendants in this case, and in one case he received as his remuneration Rs. 1,000 from an absentee owner (*see* Ranglal Jamnadas (P.W. 4's evidence). It does not require much reasoning to come to the view that the work he did was that of a nominal character in respect of certain properties of those, he claimed to have saved, except in the case of some properties such as rice mills. Houses under military occupation did not require anybody's attention and yet the plaintiff included those in his list of properties saved. In most cases the work he did consisted merely, of asking the people living on the premises to look after the properties, of asking the neighbours to look after the vacant houses, and of going to the places and seeing them. This does not mean that he did not do any work at all. The question is what should be his remuneration for the work done.

This question turns on the work done and the result achieved by him. I have already commented on the qualifications of the plaintiff to show the nature

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of work that could be expected from a person of his calibre. The next aspect of the case relates to the result that could be checked with a view to assess its value or benefit to the person from whom compensation is expected. As has been stated there is no reliable evidence as to what the plaintiff did exactly in the case of many properties. It is not sufficient to be told that he kept watchmen, that he asked the people found living in the premises to look after the properties and that he collected rents. In point of fact, he admitted he could not do much as no one could prevent the consequence of war and that as there were too many properties he could not see into everything and that at one stage he had to divide his stay between Rangoon and Kanaungto. More important than this is the question as to whether the alleged management was beneficial to the defendants. The defendants contend that far from there being any benefit there was loss to them on account of destruction of immovable properties and loss of movables, such as jewellery, stick lac, furniture, motor-cars, cattle, etc. and of moneys, collected as rents and storage charges of rice-mills, realised from proceedings instituted in Courts and, said to have been utilized in payment of bribes and charities and to the looters. From the admission made by the plaintiff that it was not possible for anybody to do much in saving properties during those times, it may safely be inferred that the properties saved have been saved not because of the plaintiff's efforts but because they escaped bombing and looting, and also some properties were in the occupation of the military or trespassers or old lessees. At the same time it cannot be gainsaid that the defendants did accept some benefit from the plaintiff which might not be as much as was expected by the defendants.

The defendants have strenuously urged that before the plaintiff can claim any remuneration he should account for the moneys or properties that came into his hands and that he must answer the charge as alleged in the written statement or as appearing from the evidence that several sums have been misappropriated or misused or wrongly used. These are serious charges which should have been specifically pleaded for which particulars should have been furnished. Apart from this aspect of the case there is not sufficient evidence which amounts to legal proof in respect of certain allegations made, whereas in respect of some other allegations, the proof seems to be mere guess work. Certain items which have been alleged to have been misappropriated are found to have been the result of mis-accounting. It will not be fair and just to call upon the plaintiff to meet the case in this manner. It may well be that the plaintiff will have to account for them strictly in a case in which the defendants come to the Court and ask for accounts, when perhaps the Court will have to act according to well defined principles.

Now, viewing the case as a whole and taking all its various aspects into consideration I am driven to the conclusion that the plaintiff did some work for Bhagwandass and Mahadeo and that these two gentlemen accepted some benefit out of it, for which the plaintiff should receive reasonable remuneration as laid down in the case of *Zulaing* v. *Yamèthin District Council* (1). Now comes the most difficult task for the Court, that is to fix that remuneration. It is urged by the defendants' Counsel that he had fixed his own remuneration and had been paid. That refers to Rs. 250 which the plaintiff drew as Manager's fee right from the beginning up till the time he left for India.

(1) (1932) I L R. 10 Ran. p. 522.

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This sum, the plaintiff called, pocket expense but he paid income-tax on it and he has not shown how this sum was spent as pocket expense. It is not necessary to say more about this payment than to point out that it will be taken into account when fixing remuneration in question now. Another factor that weighs very heavily with me in fixing the amount is the plaintiff's failure to account satisfactorily in respect of certain items which appear in the books and certain commissions which should have been there and the unsatisfactory way the books were kept. That is what I meant by saying at the earlier part of my judgment that he managed in a manner that did not speak well of him. But he is only a bill-collector and illiterate also. In this case remuneration should be measured in the light of these various factors. In plain words, what is the highest a bill-collector can expect to be paid and what is it when his work was not quite satisfactory. Applying this test, I think justice will be done if I pass a decree that he should now be paid the sum equal to twice as much as the amount of his salary which he maintains he has not drawn, since Rs. 250 which he was drawing monthly was not drawn as his salary but as special fee or allowance as Manager. His salary according to him was Rs. 40 per month and the defendants have not produced any of their books to prove that it was Rs. 25 per month, as alleged by them. For one whose salary was Rs. 40, Rs. 80 would be a fair wage during the period of war, as has been deposed to by Sooniram Rameshwar a highly respectable Marwari merchant giving evidence in this case. The amount on this basis will be paid in equal shares by Mahadeo defendant No. 2 and Bhagwandass defendant No. 4. His claim against Sagarmal defendant No. 3 is rejected on the ground given hereunder :

The 3rd defendant Sagarmal's case is not on the same footing as that of other defendants. Besides denying that his mother instructed the plaintiff as alleged, or that he himself did so at any time he resists the claim on many grounds. He urges that the plaintiff has never alleged in his plaint that there was an agreement made with him that there was any reference in his lawyer's letters (Exhibits G-1 and G-3) that the request was made by any of the defendants other than the 1st defendant, and that there was no necessity for him to ask the plaintiff to do anything for him as he had his own durwan, Nagesar Dube, who had been left behind to look after his properties. The fact that Nagesar Dube remained in Rangoon is borne out by the plaintiff himself. As against Sagarmal, the plaintiff's case seems to rest on these words alleged to have been spoken to him by Sagarmal :

"My durwan has become aged. Look after him and let him stay here."

He further contends that the plaintiff did not do any work for him and he has not derived any benefit from the work alleged to have been done. For instance, on his return he found 59, Innes Road, properties non-existent and the 41st street property standing with bare walls only, besides many other things lost. As regards collection of rent made by him from Sandwith Road property in September and October 1945, for which entries were found in his book, it is urged that it was done with a view to build up this case when admittedly he was in constant contact with lawyers. When faced with the question of what work he did for Sagarmal and what expenses he incurred for doing it, he himself could not give a satisfactory account and always took cover behind his clerk, Kaliappan, by saying "My

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clerk knows. Ask him." When we come to his clerk Kaliappan, he adopts similar tactics and takes cover by saying to this effect "I have to obey my employer and act under his instructions." He readily attributes omissions and improper entries in the account book to his employer. Kaliappan, when cross-examined, says he does not remember whether any repair was done to Sagarmal's property or whether any expenditure for payment to durwans was incurred for Sagarmal, but explains that the plaintiff was managing all the properties as a whole and that the account book does not show any expenditure for any individual property nor the names of durwans kept. An account book kept in this manner is not of much use to the plaintiff to prove his case against Sagarmal. We are left with the plaintiff's statement for what it is worth. He says he used to go to the districts to pay salary to the employees or Sagarmal and that he used to go and inspect the properties in the City and ask the people living there to look after them. He however, cannot remember whether he supervised any building work for Sagarmal. He admits that he could not realize rent from the British military who were in occupation of some of the buildings. He also was persistent in saying that he had saved Sagarmal's properties, by shutting his eyes to the instances of losses such as 59 Innes Road, 41st street house, etc. To the question of Sagarmal's Counsel "You saved none?" his reply was "I saved all" (page 197).

It cannot be disputed that the defendant left his durwan, Nagesar Dube, to look after his properties although the plaintiff said that Nagesar was employed by him in proof of which he produced certain papers to prove payment of salaries to Nagesar Dube as his employee. Those papers have been challenged as being fabricated documents. Nagesar denies that he

worked under the plaintiff but says that he worked on his own, collected rents himself and that, if at times he kept certain moneys with the plaintiff, it was because the plaintiff's iron safe was a good depository. However, even that alleged employment came to an end when Nagesar and the plaintiff fell out, after which Nagesar Dube seemed to be working independently.

It is difficult to attach any value to the evidence of either the plaintiff or his clerk as each does not hesitate to shift his ground to find some suitable answer when faced with some glaring fact. The following statement of the plaintiff is illuminating, showing that Kaliappan has given evidence in this case more to gain his own end :

"*Q.* Is Kaliappan to share any money out of a decree that you may have in this case?

A. Yes, he will get his share." (Page 221).

All these facts coupled with what came out in the correspondence between Sagarmal and the plaintiff (Exhibits E-22, E-27, E-36, 41, E-45 and E-55), in some of which the plaintiff complained to Sagarmal of Nagesar's interference, resulting in rents not being collected and also Nagesar's refusal to hand over the keys to enable the plaintiff to enter No. 52/56, 30th street house (Exhibit E-36) would go to negative the plaintiff's case that he looked after Sagarmal's properties. This view is strengthened by the attitude taken by Sagarmal in his letter dated the 4th December 1945 (Exhibit 41) in which he repudiated any arrangement under which the plaintiff was said to be looking after his properties. The plaintiff being confronted with that position, accepts the inevitable, namely Sagarmal's properties were excluded from his management (Exhibit E-55). In spite of this the

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accounts relating to Sagarmal (Exhibit 9), were written and, when put to task, Kaliappan has the following explanation for it:

"*Q.* Why did you at all write accounts for Sagarmal when he has repudiated everytaing?

A. My Master I mean the plaintiff, instructed me to write the accounts and so I wrote.

Q. Is it your evidence on the whole that you carried out purely and simply the instructions of Adjodya?

A. Yes, I was obeying him." (Kaliappan's evidence at page 113).

The conclusion is inevitable. It was Sagarmal's man, Nagesar Dube, who did the work, and not the plaintiff. In any case, the plaintiff had not done such work for Sagarmal's properties as would entitle him to any compensation from Sagarmal as contemplated in section 70 of the Contract Act. The plaintiff has also failed to prove what work he did for Godavari Bhai and the Trust.

Issue No. 1.

"Is the suit bad for misjoinder of parties and causes of action?"

The contention of the plaintiff against the plea of misjoinder is that there are questions of law and facts common to all the defendants and that the cause of action is based on the same act of transaction, namely, the arrangement alleged to have been made by Maji for herself and on behalf of her sons. The following facts have emerged from the evidence in the case, namely, that the plaintiff managed all the properties as a whole, kept joint account and joint establishment to manage the properties belonging to the defendants as well as to the Trust of which the three sons are the trustees. This perhaps was one reason why he has made a claim making all the defendants jointly liable.

Again, according to the allegations in the plaint, the plaintiff did not admit that the members of the family of the late Nanigram Jaganath had become separate, and it is argued that he was therefore justified in suing them together. Next he was lacking in information as to the ownership of the properties in suit perhaps not knowing which remained as the property of the father and which went to the sons. It is contended in those circumstances the plaintiff was justified in joining the defendants in suit in order that the question as to which of the defendants is liable may be determined as between all parties, *vide* Order 1, Rule 7. The answer to this issue will therefore be in the negative.

Issue No. 2.

"Is the claim in suit or any part thereof barred by limitation?"

It is urged by the Counsel for the plaintiff that limitation runs only from the date when the work was completed, that is in May 1946 and his alternative contention is that it runs from the date of the return of the defendants in 1946. In view of my answer to issue No. 7 that there was no agreement as alleged by the plaintiff the contention raised by the Counsel for the defendants that limitation ran from 6th February 1942 which is the date of alleged agreement is not sustainable. I hold that the suit is well within time.

Issue No. 3.

"Whether the properties shown in the Schedule to the plaint form the estate of Babu Nanigram Jaganath as stated in paragraph 1 of the plaint? If not, is the suit as framed maintainable in the Court?"

The plaintiff himself has shown properties in the Schedule to the plaint under different owners' names, which read with the partition deed (Exhibit 43), go to

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show that the properties in question are separate properties of the defendants. The partition deed has not been seriously challenged and it must be held as proved although in the partition one or two properties had not been included for which the defendants have given sufficient explanation. The properties in question, therefore, do not form the estate of Babu Nanigram Jaganath. The answer as to whether on that ground the suit as framed is not maintainable is to be found in my answer to Issue No. 1 where I have held that the suit is not bad for misjoinder of parties.

Issue No. 4.

"Are the properties set out in the Schedule to the plaint separate and distinct properties of the defendants and is each of the defendants liable to pay remuneration for the alleged management of all the properties set out therein ?"

The answer to the first part of this issue had already been given in my answer to Issue No. 3 from which it follows that the properties set out in the Schedule to the plaint are separate and distinct properties of the defendants. As regards the point raised on the second part of the issue, the plaintiff himself has given the following answer (at page 222 of his evidence) thus :

"I have received all the properties ; so I will claim the compensation from the parties whose estate I have received."

This plea is also consistent with the view held by me in Issue No. 6. The answer is that the defendant for whom the work is proved to have been done will pay for such work done.

Issue No. 5.

"What is the value of the properties described in the Schedule to the plaint ?"

The plaintiff says he is not a valuer (at page 85 reverse of his evidence) and has not made any attempt to prove the valuation given by him. The defendants have made a valuation at between Rs. 18 and 20 lakhs which will have to be accepted in the absence of any other evidence.

Issue No. 10.

"Did the defendants ratify and approve of the service rendered by the plaintiff?"

The answer to this issue one way or the other will not affect the claim made on the basis of *quantum meeruit*. This needs no answer.

Issue No. 12.

"Did the plaintiff give to defendant No. 2 possession of any of the properties as alleged in paragraph 6 of the plaint?

Did he give possession of the properties in suit to any of the defendants? Is the plaintiff liable to account to the 2nd defendant for the various items set out in paragraph 8 of the written statement?"

The answer to the first and second part of this issue is in the negative, both Mahadeo and Bhagwandass saying that they took charge of their properties themselves on their arrival from India (Mahadeo's evidence at page 110 reverse, and Bhagwandass' evidence at page 38). As regards the last part of the issue the second defendant will have to prove these allegations and in the absence of legal proof, the question of liability cannot arise at least in this case.

In the result there will be a decree for Rs. 4,000 to be paid in equal shares by Mahadeo and Bhagwandass without costs.

The suit as against defendants No. 1 and 3 is dismissed without costs.

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No costs have been awarded to any of the parties as both the plaintiff and the defendants have succeeded equally on substantial issues. If it is necessary to add more, in the case of the plaintiff, I must say that the unhappy way his plaint was drafted is mainly responsible for the loss of his costs.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

THE UNION GOVERNMENT OF BURMA (APPLICANT)

v.

U AH TUN (RESPONDENT).*

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June 8.

Certificate of Citizenship—S. 8 (2), Union Citizenship (Election) Act, 1948—Union of Burma Act 11 (iv)—Qualifications necessary.

Only those qualified under s. 3, Union Citizenship Act, 1948, can apply for a certificate of citizenship. The applicant was not born in any of the Territories included in His Britannic Majesty's Dominions and so he had failed to establish his right to elect citizenship of the Union.

Tin Maung (Government Advocate) for the applicant.

U THEIN MAUNG, C.J.—This is a reference under section 8 (2) of the Union Citizenship (Election) Act, 1948. It has been heard by a Bench as if it were a Civil 1st Appeal in accordance with Rule 22 (A) of the Rules and Orders relating to the Appellate Jurisdiction as the provisions of Order 41 of the Civil Procedure Code apply to it.

Only those who are qualified under section 3 of the Act can apply for a certificate of citizenship ; and the section reads :

"3. Any person who was born in any of the territories which, at the time of his birth, was included in His Britannic Majesty's dominions and who had resided in any of the territories included in the Union for a period of not less than eight years in the ten years immediately preceding either the first day of January 1942 or the fourth day of January 1948, may apply to the officer in the district in which he resides for a certificate of citizenship."

* Civil Reference No. 3 of 1949.

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THE UNION GOVERNMENT OF BURMA v. U AN TUN.

U THEIN MAUNG, C.J.

It may be compared with section 11 (iv) of the Constitution of the Union of Burma which reads :

"(iv) every person who was born in any of the territories which at the time of his birth was included within His Britannic Majesty's dominions and who has resided in any of the territories included within the Union for a period of not less than eight years in the ten years immediately preceding the date of the commencement of this Constitution or immediately preceding the 1st January 1942 and who intends to reside permanently therein and who signifies his election of citizenship of the Union in the manner and within the time prescribed by law, shall be a citizen of the Union."

The respondent has not alleged in his application, in his affidavit, in his deposition or even in his written statement in this reference that he was born in any of the territories which, at the time of his birth, was included in His Britannic Majesty's dominions. On the other hand his case throughout has been that he was born at Hong Ngo Village in Hoiksan Township, Hoiksan District, Canton, China ; and there is nothing to show that the said village was, at the time of his birth, included in his Britannic Majesty's dominions. So the respondent has failed to establish his right to elect for citizenship of the Union.

The decision of the Subordinate Judge, Katha, under section 7 (*1*) of the Act is set aside and the application of the respondent is dismissed.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

ALI HOOSEIN (APPELLANT)

v.

W. COOPER AND ONE (RESPONDENTS).*

H.C. 1949

June 28.

Code of Civil Procedure, ss. 11 and 47—Res judicata—*Decree for an entire launch—Inquiry by executing court—General principles of* res judicata.

Held: Where in a suit for the redemption of a launch the defendant who was the legal representative of the original pledgee, pleaded a sale (which was negatived) and did not plead that he got the launch without the engine, he was barred by the principle of *res judicata* to plead in execution proceedings that he did not get the engine at all. The executing Court must take the decree as it stands.

S A. Nathan v. *S. R. Samson*, (1931) I.L.R 9 Ran. 480 (F.B.); *Khorshed, Ali Bepari and another* v. *Probhat Chandra Das*, A.I.R (1933) Cal. 496, followed.

When the executing court once held an inquiry and held that the judgment-debtor got the suit launch with the engine and he wilfully failed to deliver the engine and issued a warrant of arrest and there was no appeal against the order, the finding is *res judicata* between the parties in the subsequent stage of the same proceedings.

Ram Kirpal Shukul v. *Mussumat Rup Kuari*, (1883-84) L.R. 11 I.A. 37; *Daw Ohn Bwin* v. *U Ba and one*, (1930) I.L.R. 8 Ran. 302, followed.

Bhoobun Mohinee Debia v. *Gobind Chunder Mojoomdar*, (1873) 19 W.R. 82, distinguished.

P. B. Sen for the appellant.

K. R. Venkatram for the respondents.

U THEIN MAUNG, C.J.—This is an appeal under section 47 of the Code of Civil Procedure read with section 13 (*1*) (*c*) of the Courts Act, 1945; and the relevant facts are as follows:

In Civil 1st Appeal No. 17 of 1947 in the High Court of Judicature at Rangoon, the present appellant Ali Hoosein got a decree, dated the 14th July, 1947,

* Civil 1st Appeal No. 3 of 1949 against the order of the First Assistant Judge of Bassein in Civil Execution Case No. 48 of 1947, dated the 12th October 1948/14th December 1948.

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"for delivery and possession of the launch (Sham) to the appellant upon his paying to the (present) respondent No. 1, Mr. Cooper, Rs. 1,000 with interest at 1 per cent calculated from August 1st, 1941, to December, 1941." The present respondent No. 2, Dr. Nair, was the other respondent in that appeal, but the decree was passed in that form as the present respondent No. 1 was in possession of the launch.

Ali Hoosein applied for execution of the said decree on the 29th October, 1947 ; and Cooper, in his application dated the 13th November, 1947, in the execution proceedings stated that he had no objection to the execution of the decree. At the same time he asked for stay of execution till his application for Letters of Administration to the estate of P. Cooper, deceased, was disposed of as he wanted to claim Rs. 3,353-6-0 from the appellant as a charge on the said launch after getting the Letters of Administration to the estate. His advocate then asked for and actually took time for settlement. However, no settlement was arrived at ; and Cooper filed an objection dated the 20th November, 1947, stating contrary to his admission in the application dated the 13th November, 1947, that execution against him was not maintainable as he had no right nor authority to deal with the launch. By an order dated the 22nd December, 1947, the learned Assistant Judge rightly rejected the application for stay and overruled the objection holding, as he did, that Cooper could not file any objection which went against the decree of the High Court.

Thereafter the learned Assistant Judge issued two delivery orders but both of them were returned unexecuted as Cooper failed to accompany the process-server. On the second delivery order Cooper actually endorsed, "As I am very busy ? ? ? please wait a week or more."

So Ali Hoosein applied for execution of the decree by detention of Cooper in civil prison under Order 21, Rule 31 (1) of the Code of Civil Procedure. Cooper then filed an objection dated the 19th February, 1948, wherein he alleged for the first time (1) that only the hull and boiler were sold to him by the Custodian of Property, (2) that he had never been given actual possession of these even and (3) that he was " willing to help the delivery of whatever is left of the suit launch." He obviously refers to a sale in his favour as he had to pay over Rs. 3,000 to the Custodian of property to get the launch back after reoccupation of Burma by the British. He did plead the payment in the original suit but he did not plead that he was to get only the hull and the boiler from the Custodian and that he had not been given actual possession even of them ; and the suit and the appeal have been decided and the decree in the appeal has been passed on the basis of the entire launch having been in his actual possession. Furthermore he made the said allegations only at a late stage of the execution proceedings after (1) he had actually admitted that he had no objection to execution and (2) Hoosein had applied for his detention in civil prison.

However, the learned Assistant Judge decided by his order dated the 28th February, 1948, that an inquiry was " necessary before deciding the mode of execution to be enforced." He then held the inquiry and passed an order dated the 29th April, 1948, the latter part of which reads :

" But it is clear from the proceedings of the Custodian that the suit launch including the engine and boiler had been returned to W. Cooper when he paid one-third of the price of the steam launch. W. Cooper has not accounted for the loss of the engine but he simply says that he did not receive the engine. Therefore it should be held that *the judgment-debtor has wilfully failed to*

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make over the engine of the suit launch and that he is responsible for the loss of the engine. Therefore the judgment-debtor should be penalised by commitment to civil prison *if he fails to make over the engine of the suit launch to the decree-holder*. Therefore a delivery order will be issued for delivery of the hull and the engine and if the engine is not delivered the judgment-debtor will be arrested and committed to the civil prison.

ORDER.

A delivery order will be issued for the hull and engine and if the engine is not recovered the judgment-debtor will be arrested and committed to the civil prison. The judgment-debtor will also pay costs of this enquiry, together with lawyer's fee, Rs. 17."

In spite of the said order Cooper failed to deliver possession of the engine. So a warrant for his arrest was directed to be issued on the 10th May, 1948. Cooper then filed an application dated the 17th May, 1948, in which he prayed that he might be discharged on personal security and stated:

"5. That the J.D. further brings it to the notice of the Court that there are certain items of heavy machinery and parts of engine lying about at some distance from the place wherein is lying the hull and the J.D. does not know whom do all these things belongs to.

6. That it is quite open for the Court to make enquiry about the ownership of those articles and order delivery by seizure thereof."

The learned Assistant Judge issued another delivery order in respect of the parts of the engine which are alleged to have been lying about but only the frame of the engine was found. So, Hoosein repeated his application for detention of Cooper in civil prison and Cooper asked for another inquiry.

The learned Assistant Judge reserved orders thereon till the 22nd June, 1948; and just one day before that date Cooper filed another application

stating therein "that this J.D. received *the engine* in its present condition from the Custodian of Enemy Properties"; "that under the circumstances this J.D. begs to request this honourable Court to hold an inquiry before passing orders;" and "that this J.D. is ready and willing to abide by the decision of this Court *and pay the value of the engine.*"

So, instead of passing orders on the 22nd June, 1948, as originally fixed, the learned Assistant Judge called upon Hoosein to show cause why another inquiry should not be held. Hoosein then applied to the District Court for transfer of the case under section 24 of the Code of Civil Procedure.

The learned District Judge dismissed the application for transfer but in the course of his order thereon he rightly observed:

> "No doubt the proceedings had been unduly delayed and *the judgment-debtor had taken all sorts of delaying tactics permissible in law.*"

He also appended a note thereto which reads:

> "NOTE.—The learned 1st Assistant Judge is warned to expedite the disposal of this matter. No further delaying tactics should be countenanced by him."

Hoosein then filed an objection, dated the 13th September, 1948, pointing out, *inter alia*, that "it had already been found and held that the judgment-debtor did get and was in possession of the engine"; and Cooper filed a reply, dated the 30th September, 1948, submitting "that both law and equity demand that enquiry into *the nature, amount and value* should be made of the property in dispute." This reply read with his previous offer to abide by the decision of the Court and pay the value of the engine would give one the impression that the object of the inquiry was just

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to fix the amount of damages for failure to deliver possession of the remaining parts of the engine.

The learned Assistant Judge then held the inquiry and dismissed Hoosein's application for Cooper's detention in civil prison by an order, dated the 14th December, 1948, wherein he stated :

> " There is no evidence whatsoever from the side of the decree-holder that W. Cooper had received the whole engine and that he had concealed or disposed of any of the parts. In these circumstances I am inclined to hold that the judgment-debtor has not done anything to render himself liable for the loss of parts of the engine and that he should not be penalised by his detention in a civil prison."

" There was no evidence whatsoever from the side of the decree-holder " in the said inquiry as the decree-holder, who had objected to the inquiry mainly on the ground of *res judicata*, did not produce any evidence at all. (*See* their objection dated the 13th September, 1948, and their application dated the 13th November, 1948). The principal questions for consideration in this case are (1) whether in view of the decree in the Civil 1st Appeal it was open to Cooper to plead in the execution proceedings that he did not receive the engine at all and (2) even if it was open to him to do so, whether the question was not *res judicata* under the order dated the 29th April, 1948.

The decree was passed in a suit for redemption of the launch and Cooper merely pleaded therein that the launch had really been sold by Hoosein and that Hoosein was estopped from denying his ownership thereof. He never pleaded therein that he was not in actual possession of the launch or that he was to get only the hull and the boiler of the launch ; and the High Court of Judicature at Rangoon has actually decreed that "an order for delivery and possession of the suit launch to the plaintiff-appellant be made upon

his paying to the 2nd defendant—2nd respondent (*i.e.* Cooper) a sum of Rs. 1,000 with interest, etc." Under these circumstances the question as to whether the entire launch was in his possession is *res judicata* ; it is not open to him to plead in the execution proceedings that he did not get the engine at all ; and the executing Court must take the decree at it stands. [Cp. *S. A. Nathan* v. *S. R. Samson* (1) and see also *Khorshed Ali Bepari and another* v. *Probhat Chandra Das* (2)]. However the matter does not rest there even. The learned Assistant Judge has held an inquiry and decided by his order dated the 29th April, 1948, that Cooper did get the suit launch including the engine, that he had wilfully failed to make over the engine and that he must be arrested and committed to the civil prison if the engine was not delivered.

Now, Their Lordships of the Privy Council have held in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (3) :

"A Judge having decided in the course of execution proceedings that the decree according to its true construction awarded future mesne profits, such decision having been or become final was binding between the parties, and could not in a later stage of the execution proceedings be set aside and future mesne profits be disallowed."

This ruling has been followed in *Daw Ohn Bwin* v. *U Ba and one* (4) where a Bench of the late High Court of Judicature at Rangoon held that the principles of *res judicata* as laid down in section 11 of the Civil Procedure Code, together with the explanations thereto apply to execution proceedings.

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(1) (1931) I.L.R 9 Ran. 480 (F.B.)
(2) A I.R. (1933) Cal. 496.
(3) (1883-84) L.R. 11 I.A. 37.
(4) (1930) I.L.R. 8 Ran. 302.

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The learned Advocate for the respondent has invited our attention to *Bhoobun Mohinee Debia* v. *Gobind Chunder Mojoomdar* (1). In that case the learned Judge observed:

"When the extent and value of a moveable property are not precisely ascertained before decree, it is obviously necessary, in order to guide the Court in exercise of the discretion it has under section 200, to ascertain what the value of the moveable property not delivered to the plaintiff is, *in order that* the Court may make, if necessary, sufficient and not excessive order by way of imprisonment of the party, or by attachment of his property in case of non-delivery."

However, in that case there was no question of *res judicata* and in the present case even if there was any justification for the first inquiry, there cannot be another inquiry into the same matter as it has become *res judicata*.

We have also looked into the evidence as the learned Advocate for Cooper has submitted that it would be improper to detain him in civil prison relying on a mere rule of procedure like *res judicata* ; and we are satisfied that no injustice will be done by his detention at all. The probabilities, having regard to the circumstances of the case including his own conduct, are that he received the launch with the engine ; and the evidence which he has produced to prove the contrary even at a very late stage is highly unsatisfactory. The learned Assistant Judge has held, on the evidence of U Ba Tun and Ko Tun Win, that Cooper did not receive the whole engine. U Ba Tun did say that he did not see the engine ; but he is a witness whose evidence in the first inquiry had been rightly rejected by the learned Assistant Judge himself as he had to admit, "I saw the launch from

(1) (1873) 19 W.R 82.

outside and had never been inside it" and "I do not know whether the boiler was in the launch at the time," although the boiler was admittedly there at the time of the "sale" to Cooper. Ko Tun Win is a new witness. Cooper did not refer to him in his evidence in the first inquiry. He mentioned Ko Tun Win's name for the first time in the second inquiry making the following inconsistent statements :

"Maung Tun Win, Clerk of the Custodian, gave over the hull and engine to me. I did not receive parts of the engine. I saw the engine a fortnight before the delivery. I mean I saw the framework of the engine. I have never seen the engine."

The statement that Tun Win "gave over the hull and the engine to me" is also inconsistent with his previous statements in his objection dated the 19th February, 1948, that only the hull and the boiler were sold to him and that he had not been given effective and physical possession thereof. It is also inconsistent with his previous statement in the first inquiry "I took (*sic* ? gave) a receipt acknowledging receipt of the properties but I did not take possession of them."

Be that as it may, Ko Tun Win has stated "U Nyi Nyi who was Deputy Custodian delivered the launch *S.L. Sham* to W. Cooper." It is true that Ko Tun Win has also stated :

"About four or five years ago W. Cooper came and told us at the office that parts of engine of the launch were said to be in the store room of the Ellerman Arracan Rice Mill. I went along with Cooper and found a box in the store room which contained a few short pipes and few brass scraps. I gave them to W. Cooper as it was said to have belonged to the launch *Sham*."

But this is an incident which Cooper himself has not mentioned in the two inquiries. If Cooper's contention that only the hull and the boiler were sold to him be correct he could not and would not have complained

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about parts of the engine having been missing ; and if he had purchased the entire launch he would have made the complaint to the Custodian or the Deputy Custodian and not to a mere Clerk in their office and he would not have kept quiet unless and until he got all the missing parts.

As for Cooper's own evidence, it is quite clear that he had no objection to the execution of the decree at the outset and that he has raised one objection after another only when he realized that he could not recover Rs. 3,353-6-0 from Hoosein as a charge on the the launch or at all. It is also interesting to note (1) that when a warrant for his arrest had been issued, he made an application stating that "certain items of heavy machinery and parts of engine" were lying about at some distance from the hull and (2) that he has again stated in the course of his evidence-in-chief in the second inquiry "I have still got the things which I have received from the Custodian. These things which I have may be worth will be (*sic* ? about) Rs. 150 or Rs. 200."

Under these circumstances the learned Advocate for Hoosein is justified in saying that Cooper has not played the game and that he will play the game and produce the engine or the parts thereof which are now missing, only if an order for his detention in the civil prison be passed.

We accordingly set the order under appeal aside and direct the lower Court to execute the decree by detention of Cooper in the civil prison under Order 21, Rule 31 (1) of the Code of Civil Procedure.

The 2nd respondent Dr. Nair has not contested the appellant's application for execution at all. So the 1st respondent Cooper must bear the appellant's costs in both Courts. Advocate's fee for this appeal, five gold mohurs.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

V.R.A. VEERAPPA CHETTYAR (APPELLANT)

v.

U PO NGE (RESPONDENT).*

H.C. 1949

July 18.

Mortgage by deposit of title deeds—S. 58 (f) of the Transfer of Property Act—Counterfoil for absence from the Register of Reports of Alienation of Land and Land Revenue Receipts—Whether documents of title.

Held : That a counterfoil for alienee from the Register of Reports of Alienation of Lands and Land Revenue Receipts for nine years are not documents of title within the meaning of s. 58 (*f*) of the Transfer of Property Act. Deposit of such document does not create a mortgage by the deposit of title deeds.

Maung Shwe Lon v. *Maung Shwe An*, (1893—1900) P.J.L.B. 68 ; *Maung Lu Gale* v. *Maung Kyaw Yan*, (1893—1900) P.J.L.B 158 ; Cf. *Maung Kin Lay and one* v. *Maung Tun Thaing and one*, (1927) I.L.R. 5 Ran. 679 ; *V.E.R.M.A.R. Chettyar Firm* v. *Ma Joo Teen*, (1933) I L.R. 11 Ran. 239 ; *Ma Joo Tean and another* v. *Ma Thein Nyun and others*, (1932) I.L.R. 10 Ran. 403, followed.

Punjab and Sind Bank, Ltd., Lyallpur v. *Ganesh Das-Nathu Ram and others*, (1935) I.L.R. 16 Lah. 1113 ; *K.L.C.T. Chidambaram Chettyar* v. *Aziz Meah and others*, (1938) R.L.R. 316 ; *Surendramohan Ray Chaudhuri* v. *Mahendranath Banerjee*, (1933) I.L.R. 59 Cal. 781 ; *Peoples Bank of Northern India, Ltd., Lahore* v. *The Forbes, Forbes, Campbell & Co., Ltd., Karachi*, A.I.R. (1939) Lah. 398, distinguished.

Cf. *Babu Brij Mohan Kemka* v. *Abdul Majid and others*, A.I.R. (1939) Ran. 185 ; *Bhupendra Nath Basu* v. *Mussamat Wajihunnissa Begum*, 2 P.L.J. 293, referred to.

It is necessary to distinguish between documents creating a title and documents evidencing title ; it seems desirable to restrict as far as possible to the former category, deeds the deposit of which can validly create a mortgage by deposit of title deeds.

Jowala Das Govind Ram v. *Thakar Das*, A.I.R. (1936) Lah. 251 at 255, followed.

Hla Pe for the appellant.

Thein Moung for the respondent.

U THEIN MAUNG, C.J.—This is an appeal under the latter part of section 20 of the Union Judiciary Act,

* Special Civil Appeal No. 2 of 1949 against the Decree of High Court of Rangoon in Civil 2nd Appeal No. 114 of 1948.

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1948 ; and the only question for decision is whether an equitable mortgage can be effected by deposit of the following documents :

1. A counterfoil for alienee from the Register of Reports of Alienations of Land, Lower Burma (Exhibit B28), and

2. Land Revenue Receipts for nine consecutive years (Exhibits B1 to B27).

The counterfoil which is dated the 26th May 1916, is that of an acknowledgment by the Circle *Thugyi* of his having received a report of alienation from Maung Myat Phu of the one part and Maung Po Thin and Ma Thin Mya of the other part and the alienation is described therein as a gift by a deed which had been registered as document No. 9 of 1913 in Book III, Volume 4, in the Sub-registration Office, Rangoon.

The Land Revenue Receipts are for payments of land revenue for the said holdings from 1925-26 to 1933-34 both inclusive ; and they are in the names of Maung Po Thin and Ma Thin Mya.

There are concurrent findings of fact that the said documents were deposited by Ma Thin Mya with U Ba Tin on the 4th June 1935, with intent to create a security on the said holdings. So the only question that arises under section 58 (*f*) of the Transfer of Property Act is whether they are " documents of title to immovable property." It has been held in *Maung Shwe Lon* v. *Maung Shwe An* (1) that a report entered in the *Thugyi's* Register No. IX of the transfer of land by sale cannot be regarded as an instrument by which the land is transferred. Hosking J.C., observing in the course of his judgment therein :

" This register is kept for revenue purposes only. An entry in this register, though signed by the transferor cannot be

(1) (1893 - 1900) P.J.L.B 68.

regarded as the instrument by which the land is transferred on sale, mortgage, or lease, as the case may be. The entry, moreover, only purports to be a report of a transaction which has taken place. If parties rely upon such entries without having stamped and registered instruments of transfer they do so at their own peril."

Besides as has been held in *Maung Lu Gale* v. *Maung Kyaw Yan* (1) :

"It would be illogical to hold that entries in the Government revenue records are made for purposes of revenue administration and are not documents of title. (*See* the case of *Maung Shwe Lon* v. *Maung Shwe An* (1) and at the same time to rule that the counterfoil Form IX in which a mutation of names after an alleged sale is entered by the Revenue Officer constitutes in the hands of the transferee in the revenue accounts a document of title the possession of which by the transferee enables a third person purchasing from the transferee to say that the original and real owner had allowed the transferee to hold himself out as the real owner with the legal consequences set forth in the ruling of the Privy Council in *Ramcoomar Koondoo*'s case (11 B.L.R. 46)."

[Cf. *Maung Kin Lay and one* v. *Maung Tun Thaing and one* (2) where it was held that a *pyat-paing* is not even a document recording the terms of any contract].

In the present case the counterfoil is only an acknowledgment by the *Thugyi* of a report of alienation having been received by him. It is not even a report of the transfer signed by the transferor ; and it cannot by any means be regarded as a document of title to the said holdings.

The learned Advocate for the respondent relies on the fact that there is a reference therein to a registered deed of gift but this reference cannot convert the *Thugyi's* acknowledgment of receipt into a document of title in favour of Maung Po Thin and Ma Thin Mya like the deed of gift or at all.

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(1) (1893–1900) P.J.L.B. 158. (2) (1927) I.L.R. 5 Ran. 679.

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The counterfoil with the said reference cannot be compared with a certified copy of a deed of transfer; and it has been held in *Punjab and Sind Bank, Ltd. Lyallpur* v. *Ganesh Das-Nathu Ram and others* (1) that "in the absence of proof of the fact that the original sale deed was lost or was not available to the depositor at the time, a copy of the sale deed deposited with the creditor does not create an equitable mortgage." And in the present case there is no proof whatsoever of the deed of gift having been lost or unavailable at the time of the alleged mortgage.

As regards the land revenue receipts, under section 37 of the Lower Burma Land Revenue Act, "the amount payable on account of revenue on any land for any year of assessment shall be due jointly and severally from all persons who have been in possession of such land at any time during the year and all persons who have held under them as tenants, mortgagees or conditional vendees;" and the notice which is printed on each land revenue receipt begins with the warning "This form is a receipt for revenue only and is not a certificate of title."

It has been held in *V.E.R.M.A.R. Chettyar Firm* v. *Ma Joo Teen* (2) confirming the ruling in *Ma Joo Tean and another* v. *Ma Thein Nyun and others* (3), that a tax receipt is not a document of title. Page C.J. rightly observed in the course of argument therein:

"Tax receipts are issued periodically; if these are held to be documents of title the result would be to open the door to fraud."

His Lordship also observed in the course of his judgment therein:

"The tax receipt which was deposited with the appellants was *prima facie* evidence that U Po Loke's name was entered on the roll of town lands as being in possession of the land in suit, and

(1) (1935) I.L.R. 16 Lah. 1113. (2) (1933) I.L.R. 11 Ran. 239.
(3) (1932) I.L.R. 10 Ran. 403.

assuming (without deciding) that it was evidence that U Po Loke was in possession of the land, it certainly was not, and did not purport to be, evidence that he was entitled to be in possession of the said land. In my opinion the learned trial Judge came to the correct, and the only reasonable, conclusion when he decided that the tax receipt under consideration was not a ' document of title ' upon which a mortgage by deposit of title deeds could be founded."

V.E.R.M.A.R. Chettyar Firm v. *Ma Joo Teen* (1) has been overruled by a Full Bench in *K.L.C.T. Chidambaram Chettyar* v. *Aziz Meah and others* (2) only in so far as it decided that the document of title must show a *prima facie* or apparent title *in the depositor himself.*

The Full Bench held that :

" A deposit with the intention to create a security of a deed of grant of land by Government to the mortgagor's transferor is sufficient to create a mortgage, and this document coupled with a certificate by the revenue surveyor recording an oral transfer of the land from the original grantee to the mortgagor and a number of tax tickets showing revenue being paid by the mortgagor, all go to disclose an apparent title in the mortgagor to the land. "

[Cf. *Babu Brij Mohan Kemka* v. *Abdul Majid and others* (3) where Mya Bu J. who had been a member of the Full Bench, held that deposit of a deed of conveyance in favour of a person other than the mortgagor was sufficient. See also *Bhupendra Nath Basu* v. *Mussamat Wajihunnissa Begum* (4) at page 302 of which deposit of conveyances under which the mortgagor's father had purchased the property was held to have been sufficient.]

However, *V.E.R.M.A.R. Chettyar Firm* v. *Ma Joo Teen* (1) remains an authority for the proposition that a tax receipt by itself is not a document

(1) (1933) I.L.R. 11 Ran. 239.
(2) (1938) R.L.R. 316.
(3) A.I.R. (1939) Ran. 185.
(4) 2 P.L.J. 293.

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of title. In fact Dunkley J. who wrote the leading judgment in the Full Bench case actually observed in the course of his judgment therein :

" Both Courts relied upon the judgment of Page C.J. in *V.E.R.M.A.R. Chettyar Firm* v. *Ma Joo Teen and others* (1). The question for decision in that case was whether a receipt for payment of revenue, commonly called a ' tax receipt, ' is a document of title, within section 58 (*f*) of the Transfer of Property Act, and that case is authority only for the proposition that a ' tax receipt ' by itself is not such a document of title. "

The Full Bench case is distinguishable from the present case as in that case *a deed of grant* to the mortgagor's transferor was among the documents which were deposited and in the words of Dunkley J. "a deposit of this document alone with the requisite intention to create a security would be sufficient to create a mortgage by deposit of of title-deeds." In the present case no document of title whatsoever has been deposited to satisfy the requirements of section 58 (*f*) of the Transfer of Property Act.

The learned Advocate for the respondent has invited our attention (1) to *Surendramohan Ray Chaudhuri* v. *Mahendranath Banerjee* (2), where deposit of the probate of the will under which the mortgagor became entitled to the property and a certified copy of the redemption certificate relating to the property was held to have been sufficient and (2) to *Peoples Bank of Northern India, Ltd., Lahore* v. *The Forbes, Forbes, Campbell & Co., Ltd., Karachi* (3), where the " sold notes " by firms from whom the machinery was purchased, the drafts for the purchase price, etc. and the receipts by the firms for the amounts paid, the insurance certificates and papers relating

(1) (1933) I.L.R. 11 Ran. 239. (2) (1933) I.L.R. 59 Cal. 781.
(3) A.I.R. (1939) Lah. 398.

to the clearance of the goods at the port were held to be documents of title of the factory as distinct from the building and the site. However, it is fairly obvious that the counterfoil and the land revenue receipts are not comparable with the said documents at all. The probate of the will under which the mortgagor became entitled to the property is a substantial document of title ; and sold notes also are such documents so far as goods are concerned. Besides these cases are comparable with the Full Bench case of *K.L.C.T. Chidambaram Chettyar* v. *Aziz Meah and others* (1) as documents of title were among the documents which had been deposited.

The learned Judge who decided the second appeal has observed in the course of his judgment therein :

> " It is clear that even assuming that the documents deposited by Daw Thin Mya did not show ownership in her nevertheless they clearly showed that she had been in lawful possession of the lands for several years at the date of the mortgage. This possession was a valuable interest and she could mortgage that interest by deposit of the documents. "

The land revenue receipts may be evidence of Ma Thin Mya and her deceased husband Maung Po Thin having been in possession ; but they are not evidence of their being entitled to possession. The counterfoil may be evidence of their possession being lawful ; but it certainly is not a document which confers or purports to confer title to the said holdings.

The land revenue tickets and the counterfoil may be valuable pieces of evidence to support Ma Thin Mya and Maung Po Thin's title to the said holdings ; but they are not documents of title as they do not purport to confer or create any right, title or interest in any property.

(1) (1938) R.L.R. 316.

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U THEIN MAUNG, C.J.

Sale J. has observed in *Jowala Das Govind Ram* v. *Thakar Das* (1) " it is necessary to distinguish between documents creating title and documents evidencing title and it seems desirable to restrict as far as possible to the former category of the deeds, the deposit of which can validly create an equitable mortgage " and we respectfully agree with him.

Besides the real question for decision is not whether Ma Thin Mya had any right, title or interest in the holdings but whether any document of title has been deposited by her as required by section 58 (*f*) of the Transfer of Property Act ; and we find that no such document has been deposited.

The appeal is allowed and the respondent's suit is dismissed with costs throughout.

U SAN MAUNG, J.—I agree.

(1) A.I.R. (1936) Lah. 251 at 255.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

AH KYIN (APPELLANT)

v.

THOMAS COOK & SON (BANKERS), LTD. (RESPONDENTS).*

H.C. 1949

July 21.

Code of Civil Procedure—Order VII, Rule 10—Order 49, Rule 3—Order for the return of plaint—Rule 21 of Original Side Rules of Procedure—Whether appeal lies against order returning the plaint either under Order 43, Rule 1 (a) or under s. 20 of Union Judiciary Act—Whether such order is judgment.

Held: In view of Rule 3 (1) of Order 49 of the Code of Civil Procedure, Rule 10 of Order VII does not apply to the Original Side of the High Court. An order for the return of a plaint is made in the original side of the High Court under Rule 21 of Original Side Rules of Procedure and not under Order VII, Rule 10 of the Code. The order not being under Order VII, Rule 10 is not appealable under Order 43, Rule 1 (*a*) of the Code.

An order returning a plaint is not a judgment within the meaning of s. 20 of Union Judiciary Act.

In re Dayabhai Jivandas and others v. *A.M.M. Murugappa Chettiar*, (1935) I.L.R. 13 Ran. 457; *Ex-parte Chinery*, L.R. 12 Q.B.D. 342 at 345; *U Ohn Khin* v. *Daw Sein Yin*, (1948) B.L.R. 105 followed.

A.R.A. Arunugan Chettyar and one v. *V.K.S.K.N.M Kanappa Chettyar*, (1927) I.L.R. 5 Ran. 99, referred to.

S. *T. Leong* for the appellant.

T. K. Boon for the respondent.

The judgment of the Bench was delivered by

U THEIN MAUNG, C.J.—This is an appeal from an order, by which a plaint was returned under Rule 21 of the Original Side Rules of Procedure (Civil); and it must be dismissed on the short ground that no appeal lies from such an order.

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* Civil Misc. Appeal No. 17 of 1948 against the order of the Original Side, High Court, Rangoon in Civil Regular No. 155 of 1947, dated the 3rd May 1948.

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AH KYIN v. THOMAS COOK & SON (BANKERS), LTD.

U THEIN MAUNG, C.J.

The 2nd Deputy Registrar ordered the return of the plaint under Order VII, Rule 10 of the Code of Civil Procedure on the 4th March, 1948. However, on the present appellant pointing out in his application dated the 26th March, 1948, that Order VII, Rule 10 of the Code does not apply to this Court, he altered the said order to one under Rule 21 of the Original Side Rules, the wording of which is practically the same as that of Order VII, Rule 10 ; and the learned Judge to whom the present appellant appealed from the said order under Rule 7 of the Original Side Rules dismissed the appeal observing in the course of his principal order dated the 21st April, 1948, in Civil Regular Suit No. 284 of 1947 and other suits " I do not think I should interfere with the orders of the 2nd Deputy Registrar in so far as he has ordered the return of the plaints under Order (sic ? Rule) 21 of the Original Side Rules of Procedure (Civil)."

If the order to return the plaint had been one under Order VII, Rule 10 of the Code, an appeal would have lain under Order 43, Rule 1 (*a*) thereof. However Order VII, Rule 10 does not, in view of Order 49, Rule 3 (1), apply to the High Court as the appellant himself has rightly pointed out ; and there is no express provision for an appeal from an order under Rule 21 of the Original Side Rules.

The learned Advocate for the appellant has contended that the appeal lies under section 20 of the Union Judiciary Act, 1948, inasmuch as the order under appeal must be deemed to be a judgment within the purview of the said section. He has invited our attention to Page C.J.'s observation in *in re Dayabhai Jiwandas and others* v. *A.M.M. Murugappa Chettiar* (1). His Lordship observed at page 472 thereof :

(1) (1935) I.L.R. 13 Ran. 457.

" Now, the word ' judgment ' is not always used in the same sense. It depends on the collocation in which it is found."

However, His Lordship has added on the same page :

" *In Ex parte Chinery* (1) Cotton L.J. observed that—

> 'in legal language and in Acts of Parli ment, as well as with regard to the rights of the parties, there is a well-known distinction between a ' judgment ' and an ' order ' " '

Cotton L.J's observation applies with equal force to the Union Judiciary Act, 1948, which expressly recognises the distinction between judgment, decree and final order. (*See* sections 5 and 6 thereof).

He has also invited our attention to *A.R.A. Arumugan Chettyar and one* v. *V.K.S.K.N.M. Kanappa Chettyar* (2). There it was held " where an appeal from an order is allowed by the Code of Civil Procedure, such an order is to be construed as a judgment within the meaning of section 13 of the Letters Patent. An appeal therefore lies from an order of the Original Side appointing a receiver."

However, the Supreme Court of the Union of Burma has observed in *U Ohn Khin* v. *Daw Sein Yin* (3).

" The word ' judgment ' as used in the Letters Patent of the several High Courts in India and in clause 13 of the Letters Patent of the late High Court of Judicature at Rangoon gave rise to different interpretations and a conflict of decisions both in India and Burma. But so far as this country was concerned it was finally settled by a Full Bench of seven Judges *in re Dayabhai Jiwandas* v. *A.M.M. Murugappa Chettiar* (4). According to that decision the word ' judgment ' in clause 13 of the Letters Patent means and is a decree in a suit by which the rights of the parties in issue in the suit are determined. "

We accordingly hold that the order returning the plaint under Rule 21 of the Original Side Rules (Civil)

(1) 12 Q.B.D. 342 at p. 345.
(2) (1927) I.L.R. 5 Ran. 99.
(3) (1949) B.L.R. (S.C.) 105
(4) (1935) I.L.R. 13 Ran 457.

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AH KYIN v. THOMAS COOK & SON (BANKERS), LTD.

U THEIN MAUNG, C.J.

is not a judgment within the purview of section 20 of the Union Judiciary Act, 1948, and that there is no appeal from such an order.

The appeal is dismissed with costs; advocate's fees three gold mohurs.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

BHOGEE RAM (APPELLANT)

v.

U BA SO AND ONE (RESPONDENTS).*

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July 25.

Urban Rent Control Act, 1946, 1947, 1948—S. 14 (1)—Distinction—Meaning of "tenant"—The arrears in s. 14 whether applicable both to rent and mesne profits— Mesne profits by whom payable.

Held : A comparison of the wordings of sub-s. 1 of s. 14 of the Urban Rent Control Act before and after amendment show that (1) before the amendment the Court could impose any condition it thought reasonable as a condition precedent to the discharge or rescission of an order of ejectment whereas after the amendment the order must be in regard to payment of *arrears* of rent or mesne profits but not future rent or mesne profits (2), before amendment it was discretionary on the part of the Court whether to rescind or not to rescind an order for ejectment even if conditions imposed by the Court have been complied with ; but after the amendment if the condition as to the payment of arrears of rents or mesne profits has been complied with, the Court has no discretion in the matter. The Court shall rescind the order.

Under the new sub-s. it would be illegal for the Court to impose any condition other than payment of arrears of rent or mesne profits. The word "arrears" refers both to rent and mesne profits.

Under the Urban Rent Control Act, 1948, even if tenancy has been determined the tenant continues to be tenant and therefore *rent* is payable by a person whose tenancy has been terminated but who is still in occupation of his premises. Mesne profits is payable by person who has been permitted to occupy under s. 12 (*1*) of the Act.

When respondent does not appeal against the part of the decree which is against him, the Court will not help him.

V. S. Venkatram for the appellant.

R. K. Roy for the respondents.

U SAN MAUNG, J.—This is an appeal by Bhogee Ram, decree-holder in Civil Regular Suit No. 103 of 1947 of the City Civil Court of Rangoon against the order of the Court of the 4th Judge of the City Civil

* Civil Misc. Appeal No. 108 of 1949 against the order of the 4th Judge, City Civil Court of Rangoon, in Civil Execution No. 76 of 1948.

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U SAN MAUNG, J.

Court, dated the 18th of April 1949, staying execution of the decree for the ejectment of the judgment-debtors, U Ba So and U Thein Maung upon conditions prescribed in that order.

The facts leading to this appeal are briefly these. On the 12th of May 1947, the appellant Bhogee Ram, obtained an order for the ejectment of the respondents U Ba So and U Thein Maung for non-payment of arrears of rent after due notices have been served under the Transfer of Property Act and under section 11 (*a*) of the Urban Rent Control Act, 1946. On the 17th of May 1947, the respondents filed an application under section 14 (*1*) of the Urban Rent Control Act, 1946, for the rescission of the order for their ejectment from the premises in suit. In the affidavit in support of the application they stated that they had already deposited the rents due up to date and as well as the costs of the suit. The counter-affidavit filed by Bhogee Ram in support of his objection against the application for rescission of the ejectment order stated, *inter alia*, that the judgment-debtors were never in the habit of paying their rent regularly and that they also owed him rent for several other rooms for which separate suits had to be filed against them. On the 19th June 1946, the learned 3rd Judge of the City Civil Court passed the following order :

"This is an application under section 14 (*1*) of the Urban Rent Control Act, for rescission of the order for ejectment passed against the petitioners. It is borne out by the affidavits that the petitioners are residing in the suit premises and using the same as a lawyer's offices. It is urged that the petitioners are in arrears of rent for other rooms which they had been occupying previous to their shifting to this room. However, as far as the costs of this suit and the arrears of rent up to April 1947 have been paid into Court. Under these circumstances I would direct that subject to the right of the respondent to establish his other claims for arrears of rent due previous to the occupancy of the

present room by the petitioners and the petitioners paying up all dues if any decree for rent is passed against them and on their also paying up the arrears of the current rents due for the suit premises regularly for a period of six months from to-day, I will again consider whether this decree should be rescinded or not."

After this order was passed no steps were taken either by the decree-holder to have the ejectment order executed or by the judgment-debtors to have it rescinded, until the 6th February 1948 when an application for execution of the ejectment order was filed on behalf of the appellant Bhogee Ram. On notices being issued to them the judgment-debtors filed a written objection to the effect that they had complied with the order of the learned 3rd Judge of the City Civil Court dated the 19th June 1947 and that instead of the ejectment order being executed, it should in fact have been rescinded. The learned 4th Judge of the City Civil Court who then had seizin of the case, passed the order dated the 24th March 1948 wherein he mentioned that although it was true that the judgment-debtors had paid the rent regularly for six months as directed in the order dated the 19th of June 1947, they had taken no steps to have the ejectment order rescinded after the expiry of the period mentioned in that order, that at the time the decree-holder filed the present application for execution of the ejectment order the judgment-debtors were in arrears for three months and that in these circumstances the ejectment order would be neither executed nor rescinded but that the judgment-debtors should continue to pay the rent due regularly before the 7th of each calendar month failing which the decree-holder could apply for execution of the ejectment order against them. He also mentioned that the judgment-debtors could apply for the rescission of the ejectment order after they

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had complied with his order regarding regular payment of the rent due for the ensuing six months.

On the 15th of January 1949, the decree-holder filed an application asking the Court to proceed with the execution in pursuance of the order dated the 24th March 1948. This order was objected to by the judgment-debtors on the ground that they had been paying rent regularly as directed in the several orders narrated above. An enquiry was then held by the learned 4th Judge of the City Civil Court before he passed the order now under appeal. In that order which is dated the 18th April 1949, he mentioned that although it was true that the judgment-debtors were not in arrears in respect of the said room they were still in arrears in respect of other rooms which they had occupied prior to the room in suit and that decrees had since been passed against them in respect of those arrears. He therefore directed that when these decrees have been satisfied the judgment-debtors could apply to have the ejectment order in respect of the said room rescinded and that in the meantime they must pay the rent due for each month regularly on the 15th of each calendar month. As stated above, the decree-holder being dis-satisfied with the learned Judge's order staying execution of the ejectment for a further period as stated in that order has filed this appeal.

Now, it is by no means clear from the order of the learned 3rd Judge of the City Civil Court dated the 19th June 1947, whether the learned Judge had meant to make the due payment by the judgment-debtors of the arrears of rent due for the rooms which they had occupied prior to the occupation of the suit room, a condition precedent to the filing of an application for the rescission of the ejectment order. However, it is clear therefrom that the due payment of the rent due for the suit premises regularly for a period of six months

was made a condition precedent to the filing of such an application. This order would have been a perfectly valid order under sub-section (*1*) of section 14 of the Urban Rent Control Act, 1947, as it stood prior to its amendment by the Urban Rent Control (Amendment) Act, 1947. It then ran as follows :

"14. (1) At the time of the application, or the making or giving of any order or any decree, for the recovery of possession of any premises or for the ejectment of a tenant therefrom or in the case of any such order or decree which has been made or given whether before or after the commencement of this Act, the Court may, except in a case in which either clause (*b*) of section 11 or clause (*b*) of section 13 (*1*) applies, adjourn the application or stay or suspend execution of any such order or postpone the date of delivery of possession for such period or periods and subject to any conditions in regard to payment by the person against whom the application or order or decree has been made or arrears of rent or mesne profits *or otherwise* as the Court thinks fit, and if such conditions are complied with, the Court may, if it thinks fit, discharge or rescind any such order or decree."

However, by the Urban Rent Control (Amendment) Act, 1947, which came into force on the 18th March 1947, this sub-section was amended so as to read as follows :

"At the time of making or giving of any order or decree for recovery of possession of any premises to which this Act applies or for the ejectment therefrom of a tenant or a person permitted to occupy under the provisions of section 12 (*1*) or in the case of any such order or decree which has been made or given whether before or after the commencement of this Act and which has not yet been executed, either at the time of the application made by the landlord for the execution of such order or decree or on application made by the tenant or the person permitted to occupy under section 12 (*1*) against execution of such order or decree, the Court may, except in a case in which either clause (*c*) of section 11 or clause (*b*) of section 13 (*1*) applies, stay or suspend execution of such order or decree or postpone the date of delivery of possession for such period or periods and

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subject to such conditions, as it thinks fit, in regard to payment, by the tenant or by the person against whom the order or decree has been made or given, of arrears of rent or mesne profits, and if such conditions are complied with, the Court shall discharge or rescind the order or decree."

A careful comparison of the wording of this sub-section before and after amendment would show that whereas prior to the amendment the Court could impose any condition it thought reasonable as a condition precedent to the discharge or rescission of an ejectment order or decree, the only condition which it could impose after the amendment was made must be "in regard to payment, by the tenant or by the person against whom the order or decree has been made or given, of arrears of rent or mesne profits." Furthermore, whereas under the old sub-section it was discretionary on the part of the Court to rescind or not to rescind the ejectment order or decree even after the conditions imposed by it had been fulfilled the words "and if such conditions are complied with, the Court shall discharge or rescind the order or decree" occurring in the amended sub-section makes this matter no longer discretionary. The Court must rescind the ejectment order or decree if and when the conditions imposed by it regarding the payment of arrears of rent or mesne profits had been complied with.

Therefore, under the new sub-section which came into force on the 18th March 1947, it would be illegal on the part of the Court to impose any condition other than that relating to the payment of arrears of rent or mesne profits; and, in our opinion, the condition relating to the due payment of future rent is not one envisaged in that sub-section. It has been argued by the learned Advocate for the appellant that the amount payable by the tenant for the period

occupied by him after his tenancy has been terminated according to law must be regarded as mesne profits and that therefore, the Court was competent to impose the condition that the decree would be rescinded only if the mesne profits accruing in future were paid regularly on or before a date fixed by the Court. As to that, it seems clear to us that the words "arrears of" occurring before the words "rent or mesne profits" in sub-section (*1*) of section 14 of the Urban Rent Control Act, 1946, qualify both the word "rent" and the words "mesne profits" and that the words "mesne profits" had to be added to the word "rent" in order to provide for the cases of those from whom arrears of mesne profits would be due because they were persons permitted to occupy the premises in question under the provisions of sub-section (*1*) of section 12 of the Urban Rent Control Act.

Under the Urban Rent Control Act, 1948, a tenant who remains in possession of the premises leased out to him after the termination of the lease still remains a tenant as defined in section 2 of the Act. Therefore, if the argument advanced by the learned Counsel for the appellant that the words "mesne profits" appear in sub-section (*1*) of section 14 of the Urban Rent Control Act, 1946, because the amount payable by the tenant after the termination of the lease can be nothing else but mesne profits only, be sound, one would not expect to find any reference to "mesne profits" in sub-section (*1*) of section 14 of the 1948 Act. The arrears payable by a tenant for occupying the premises in suit before and after the termination of the tenancy must be regarded as arrears of rent as he will remain a tenant as defined in the Act even after the termination of the lease. Therefore, the language of sub-section (*1*) of section 14 of the Urban Rent Control Act, 1948, makes it clearer still that the words

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"mesne profits" occurring therein as well as in sub-section (*1*) of section 14 of the Urban Rent Control Act, 1946, were used to provide for the cases of those persons who have been permitted to occupy the suit premises under section 12 (*1*) of the Act.

For these reasons, we consider that the learned 3rd Judge of the City Civil Court was wrong in passing such an order as that dated the 19th of June 1947 to the effect that the question regarding the rescission of the ejectment order would be considered if and when the judgment-debtors had paid the rent due for the suit premises regularly for a further period of six months from that date. So also was the 4th Judge of the City Civil Court wrong in passing orders to similar effect on the 24th of March 1948 and on the 18th of April 1949. Needless to say, the learned 4th Judge was entirely wrong in imposing such a condition as that contained in his order dated the 18th April 1949 that he would only consider the rescission of the ejectment order if and when the judgment-debtors had paid up the arrears due for rooms other than that for which the decree-holder had obtained an ejectment order against them.

However, the difficulty in this case is that the judgment-debtors have not appealed against the orders of the learned 3rd and 4th Judges of the City Civil Court by which the learned Judges not only refused to rescind the ejectment order even when there were no arrears of rent due from these judgment-debtors but also imposed further conditions upon them as stated above. The appeal is by the decree-holder against that part of the order of the learned 4th Judge of the City Civil Court rejecting his application for the execution of the ejectment order and if we are to allow his appeal and to direct the execution of the ejectment order obtained by him, we would in effect be

countenancing a series of orders which are *prima facie* illegal. We would observe that the proper course which the learned 3rd Judge of the City Civil Court should have taken on the 19th June 1947 was to have rescinded the ejectment order as soon as it was proved to his satisfaction that all the arrears of rent in respect of the suit premises had been paid by the judgment-debtors. His order dated the 19th June 1947 should have been one for the rescission of the ejectment order and not one staying execution upon the conditions set out therein.

For these reasons, we would, while deploring that we cannot interfere with that part of the order of the 4th Judge of the City Civil Court dated the 18th April 1949, imposing further conditions upon the judgment-debtors for the purpose of staying the execution of the ejectment order, direct that the present appeal against the order for the stay of execution be dismissed with costs. Advocate's fee two gold mohurs.

U THEIN MAUNG, C.J.—I agree.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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Aug. 12.

DAW THIKE (*a*) WONG MA THIKE (APPLICANT)

v.

CYOUNG AH LIN (RESPONDENT).*

Union Judiciary Act, s. 5—Ss. 109 and 110 of Code of Civil Procedure—Value for the purpose of appeal in an application for probate—Value of the estate is more than Rs. 10,000 but the share of the applicant is not.

Held : Where an application for probate of a will is made, the value for the purpose of the appeal to the Supreme Court under s. 5 of the Union Judiciary Act, is the value of the whole estate and not the value of the share of the applicant.

Vellasawmy Servai and two others v. *L. Sivaraman Servai*, (1927) I L.R. 5 Ran. 119, followed.

Vellasawmy Servai v. *L. Sivaraman Servai*, (1930) I.L.R. 8 Ran. 179 at 182 ; *U Ba Oh* v. *M. A. Razak and others*, (1935) I.L.R. 13 Ran. 123, distinguished.

T. K. Boon for the applicant.

Saw Hla Pru for the respondent.

U THEIN MAUNG, C.J.—This is an application for a certificate under section 5 of the Union Judiciary Act, 1948, to appeal to the Supreme Court from an appellate decree of this Court dismissing an application for probate of the will of the applicant's deceased husband Cyoung Lone Shwe, under which she is the sole executrix.

The learned Advocate for the applicant cannot at this stage satisfy us that her share under the will is worth not less than ten thousand rupees ; but the will relates to an estate which is worth over ten thousand rupees and we have refused probate on the ground that Cyoung Lone Shwe, who was a Sino-Burman

* Civil Misc. Application No. 16 of 1949 application for leave to appeal against the judgment and decree of the High Court in Civil 1st Appeal No 42 of 1948, dated the 24th January 1949.

Buddhist, had no right to make a will as there was no evidence of any special custom or usage varying the strict rule of intestacy under Buddhist Law.

The conditions prescribed by section 5 of the Union Judiciary Act, 1948, are substantially the same as those which were prescribed by sections 109 and 110 of the Code of Civil Procedure ; and it has been held in *Vellasawmy Servai and two others* v. *L. Sivaraman Servai* (1) which was decided under the said sections " that a judgment of the High Court on the Appellate Side, granting probate to a person, is a final decree and if the estate in respect of which probate is sought is of the value of Rs. 10,000 or upwards, an appeal lies to His Majesty-in-Council against such decree."

This ruling was not only followed in *Ma Hnin Hlaing* v. *U Po Lein*, Civil Miscellaneous Appeal No. 130 of 1926 in the High Court of Judicature at Rangoon but also approved by Their Lordships of the Privy Council in *Vellasawmy Servai* v. *L. Sivaraman Servai* (2).

The learned Advocate for the respondent relies on *U Ba Oh* v. *M. A. Razak and others* (3) and argues that the requirement of section 5 as to value is not fulfilled as it is not possible to estimate in money or by any pecuniary standard the loss or detriment to the applicant. However, the case relied on by him is one affecting religious sentiment, rights and privileges which cannot be so valued, whereas the present case relates to the claim of a sole executrix, who is also the widow of the testator, to administer his estate which has been valued throughout at over ten thousand rupees and the question as to the validity of the will itself is involved therein.

(1) (1927) I.L.R. 5 Ran. 119. (2) (1930) I.L.R. 8 Ran. 179 at 182.
(3) (1935) I L.R. 13 Ran. 123.

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DAW THIKE (a) WONG MA THIKE v. CYOUNG AH LIN.

U THEIN MAUNG, C.J.

Besides, *P.L M.C.T.M. Kasiviswanathan Chettyar* v. *P.L.M.C.T.K. Krishnappa Chettyar*, Civil Miscellaneous Application No. 10 of 1949 in this Court, is distinguishable as the subject-matter of dispute therein was a mere right of way which had been valued throughout at Rs. 1,100 only, although the dominant tenement was worth over Rs. 10,000.

For the above reasons we certify under section 5 (*c*) of the Union Judiciary Act, 1948, that the judgment and decree, from which the applicant wants to appeal, involve some claim or question respecting property of the value of not less than ten thousand rupees.

The costs of this application will follow the final result of the appeal to the Supreme Court ; advocate's fee three gold mohurs.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Khine, JJ.

K. E. M. ABDUL MAJID (APPELLANT)

v.

M. A. MADAR AND TWO OTHERS (RESPONDENTS).*

H.C. 1949

June 23.

Decree for possession—Judgment-debtors obtaining permit later—Under s. 12 (1) of the Urban Rent Control Act, 1948—Right to execute—Who can apply for permit—Tenant—Monthly Leases (Termination) Act, 1946—S. 4.

Held : A decree-holder who has got a decree for possession cannot execute his decree against the judgment-debtors after the latter obtained a permit from the Controller of Rent under s. 12 (*1*) of the Urban Rent Control Act, 1948. An order passed in execution proceedings will come within s. 13 (*1*) of the said Act.

As the judgment-debtors had gone to India in 1941 December, the previous lease must be deemed to have been determined under s. 4, Monthly Leases (Termination) Act, 1946, with effect from the end of the month in which the lessee ceased to occupy the property. Subsequent occupation after the war cannot be considered as a continuation of the previous tenancy and the judgment-debtors could not be considered to be tenants, who could not apply for a permit under s. 12 (*1*) of the Urban Rent Control Act, 1948.

Aung Min (1) for the appellant.

Dr. Thein for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, J.—M. A. Madar and K. O. Abdulla, on 23rd November 1948, obtained a decree for a declaration of their title to and for possession of a small piece of land, with the shed thereon, at No. 270, Thompson Street, Rangoon, against K. E. N. Abdulla and K. E. M. Abdul Majid in Civil Regular Suit No. 216 of 1947 of the Rangoon City Civil Court and they, on 26th November 1948, applied for the execution of the said decree in Civil Execution No. 725 of

* Civil 1st Appeal No. 6 of 1949 against the order of the City Civil Court of the 2nd Judge in Civil Execution No. 725 of 1948, dated the 24th January 1949.

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U TUN BYU, J.

1948 of the Rangoon City Civil Court. K. E. N. Abdulla and K. E. M. Abdul Majid, however, contended that the decree could not be executed against them in view of the fact that K. E. M. Abdul Majid had obtained a permit from the Controller of Rent under section 12 (*1*) of the Urban Rent Control Act, 1948. The question which arises appears to us to be simple, and it is—are the decree-holders M. A. Madar and K. O. Abdulla entitled to execute their decree which they obtained in Civil Regular Suit No. 216 of 1947 in view of the provisions of sections 12 and 13 of the Urban Rent Control Act, 1948. The relevant portions of sections 12 and 13 are as follows :

" 12. (*1*) In any area or in respect of any class of premises to which the President may, by notification, declare this section to apply, any person, not already being a tenant of any premises, but being in occupation of such premises *bona fide* for residential or business purposes, may make application to the Controller to be permitted to continue in occupation of such premises, and the Controller shall, on the applicant making a written declaration of his willingness to pay the standard rent of such premises, issue a written order to the said applicant permitting him to continue in occupation of the said premises and shall send a copy of his order to the landlord, or his authorized agent, if his whereabouts are known.

(*2*) Subject to any orders passed by a Court under section 13 every order passed under sub-section (*1*) granting permission to any person to continue in occupation of any premises shall remain in force for so long as the provisions of this section apply to the area in which the said premises are situated or the class of premises within which the said premises come and for three months afterwards :

Provided that if during this period a person in whose favour an order has been passed shall voluntarily vacate the premises the Controller may, on the written application of the landlord, cancel such order and shall not thereafter renew it.

13. (*1*) Notwithstanding anything contained in any other law, no order or decree for the recovery of possession of any premises which any person has been permitted to occupy under

the provisions of section 12, or for the ejectment of any such person therefrom shall be made or given unless—

(*a*) any rent lawfully due from such person in respect of any period subsequent to the grant to such person by the Controller of permission to occupy the said premises has not been paid to the landlord or deposited with the Controller under section 14B after written demand for payment of such rent has been sent to such person by registered post and has not been complied with for seven days from the date of such demand ; or

(*b*) such person or any person residing with him has been guilty of conduct which is a nuisance or annoyance to adjoining or neighbouring occupiers or has been convicted of using the premises or allowing the premises to be used for an immoral or illegal purpose or the condition of the premises has in the opinion of the Court deteriorated owing to acts of waste by or the neglect or default of any such person ; or

(*c*) the premises are reasonably and *bona fide* required by the landlord for occupation by himself or by any member of his family or for the occupation of any person for whose benefit the premises are held or for any other purpose deemed satisfactory by the Court and the landlord executes a bond in such amount as the Court may deem reasonable that the premises will be occupied by himself or by such member or person or that he will give effect to such purpose within such period as the Court may prescribe ; or

(*d*) the order granting such permission has been cancelled under the proviso to section 12 (*2*)."

It will be observed that sub-section (*2*) of section 12 cannot apply in the present case as the provisions of section 12 are still in force in Rangoon.

We are also unable to see anything on the record which will bring the present case under any of the four clauses in sub-section (*1*) of section 13 of the Urban Rent Control Act. It also appears to us to be clear

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that no order for possession of any premises can now be made in view of the provisions of section 13 (*1*) unless it is a case which can be brought within one of the four clauses in sub-section (*1*) of section 13, and an order passed in an execution proceedings will, in our opinion, come within the provisions of section 13 (*1*) of the Urban Rent Control Act.

It has been contended, however, on behalf of the decree-holders that the defendant-appellant K. E. M. Abdul Majid is still a tenant within the meaning of clause (*g*) of section 2 of the Urban Rent Control Act, 1948, and that he was accordingly not a person who was entitled to apply for a permit under section 12 of that Act. It is not disputed in this case that K. E. M. Abdul Majid and K. E. N. Abdulla were tenants of the premises in question in 1941. It appears that K. E. M. Abdul Majid was in India at the time the war was declared against Japan in December 1941 and that K. E. N. Abdulla also left for India some time after the war was declared against Japan. According to K. E. N. Abdulla, he left two assistants named S. M. Aliar and Kader Mohideen to take charge of the premises for him but his statement and the evidence produced by him for this purpose had been disbelieved by the learned 2nd Judge of the Rangoon City Civil Court who held, in the main case, that the tenancy of the premises in question had been terminated in December 1941, when K. E. N. Abdulla abandoned it and left for India. The subsequent occupation of the premises in Thompson Street by K. E. N. Abdulla and K. E. M. Abdul Majid after the British reoccupation of Burma could not therefore be considered to be an occupation which was in continuation of the tenancy created before the British evacuation of Burma in 1942. Thus, neither K. E. N. Abdulla nor K. E. M. Abdul Majid could be considered

to be a tenant within the meaning of clause (*g*) of section 2 of the Urban Rent Control Act after the decision in the main case had been passed. It will also be convenient to reproduce the provisions of section 4 of the Monthly Leases (Termination) Act, 1946, which is :

" 4. Notwithstanding anything contained in any law for the time being in force, if a lessee ceases to occupy or be in possession of an immovable property by reason of the occupation by the enemy of the place where the immovable property which is the subject of a lease is situate, the lease of such immovable property shall be deemed to have been determined with effect from the end of the month in which the lessee so ceased to occupy or be in possession of the property."

K. E. M. Abdul Majid could not accordingly be considered to be a tenant at the time he applied for or obtained the permit of the Controller of Rent under section 12 (*1*) of the Urban Rent Control Act, 1948. The order of the learned 2nd Judge of the Rangoon City Civil Court passed in Civil Execution No. 725 of 1948 will accordingly be set aside, and the appeal is allowed with costs, advocate's fee three gold mohurs.

APPELLATE CRIMINAL.

Before U Tun Byu and U Aung Khine, JJ.

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June 23.

KYAW HLA AUNG AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code—Ss. 302 (1) and 109—Accomplices—Who are—Corroboration of accomplice—Evidence Act, s. 159—Strict compliance necessary—Charge—Necessity of mentioning particular clause.

Held: The question whether a witness is or is not an accomplice is a question of fact, in each case.

Though a person according to his own evidence cannot be strictly called a guilty associate, his conduct immediately preceding a murder and afterwards can show him to be an accessory after the fact. The statements that the witnesses accompanied appellant Kyaw Hla Aung to the side of the creek or some distance from the village, that they went across the creek to the side further away with the murdered persons, and that they did not run away at the time of the murder or after the murder, but helped to dispose of the dead body make the witnesses as accessories after the fact. As such, their evidence requires independent corroboration, and it would be very unsafe to accept the evidence alone and convict on it.

Brijpal Singh v. *Emperor*, A.I.R. (1936) Oudh 413 at 415; *Ramaswami Gounden* v. *Emperor*, (1904) 27 Mad. 271; *Emperor* v. *Kallu*, A.I.R. (1937) Oudh 259 at 261, considered.

Nga Pauk v. *The King*, A.I.R. (1937) Ran. 513, distinguished.

Corroboration means independent evidence, not more tainted evidence but fresh untainted evidence.

Aung Pe v. *King-Emperor*, (1937) R.L.R. 110; *The King* v. *Nga Myo*, (1938) R.L.R. 190, followed.

Aung Hla and others v. *King-Emperor*, (1931) 9 Ran. 404, referred to.

Nawal Kishore Rai and others v. *Emperor*, A.I.R. (1943) Pat. 146, approved.

Before a witness make use of a document to refresh his memory the Court should be satisfied that the provisions of s. 159, Evidence Act, are strictly complied with.

When a charge is framed under s. 302 (1), Penal Code, the relevant clause of the sub-section should be mentioned in the charge. The accused must know which of the three sub-clauses he is charged with.

Tun Sein for the appellants.

Choon Foung for the Union of Burma (respondent).

* Criminal Appeal No. 178 of 1949 being appeal from order of the 1st Special Judge of Akyab, dated the 9th May 1949, in Special Trial No. 56 of 1948.

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The judgment of the Bench was delivered by

U TUN BYU, J.—The appellants Kyaw Hla Aung and Kra Noe have been sentenced to death in all the three charges which have been framed against them under section 302 (1) of the Penal Code and under section 302 (1) read with section 109 of the Penal Code, respectively, in connection with the deaths of three Indians, which occurred on the 21st August, 1948. The co-accused Kyaw Aye and Pyo Nyo, who were also sent up for trial at the same time were, however, discharged.

The brief facts of the case, as appears from the evidence adduced by the prosecution, are that certain *Yebaws* from Panmraung Village, about 15 in all, left Panmraung on the 20th August, 1948, to attend a *Yebaw* conference at Minbya, and they stopped for the night at Nawnaw Village where a batch of Special Police Reserve were stationed. The next day while the *Yebaws* from Panmraung were still at Nawnaw, three Indians were said to have been arrested by some of the *Yebaws*, and one of the Indians attemptd to escape by jumping into a creek, but he was recaptured. This incident took place at about 3 p.m., and it might be mentioned at once that the members of the Special Police Reserve are also called *Yebaws*. Aung Nu Shay (P.W. 2), Ni Tun Pru (P.W. 3), Shwe Tha U (P.W. 4) and Saw Tha Hla (P.W. 21), who were four of the *Yebaws* that had come over from Panmraung, stated that they left Nawnaw at about 4 p.m. and crossed over the creek to go to Ngapru Village and that, on the way, they met the appellant Kyaw Hla Aung, who was in charge of the members of the Special Police Reserve at Nawnaw, and that the latter asked them to accompany him. Kyaw Hla Aung is said to have been taken them to the side of a creek, east of Ngapru Village, where they saw

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three Indians under the charge of the appellant Kra Noe who was armed with a rifle. Aung Nu Shay and his three companions were also each armed with a rifle on that afternoon. They, including the three Indians, crossed over the creek, where the water was said to be chest deep. After they had crossed over the creek, the three Indians were told to sit down, and they were shortly afterwards shot down by the appellant Kyaw Hla Aung. The dead bodies of the Indians were then thrown into the creek. Their dead bodies were, however, recovered from the creek, and they had been identified as those of Dadu Meah, Zafer Alum and Abdul Suban. According to Aung Nu Shay and his companions, Kyaw Hla Aung at first asked them to shoot the Indians but they refused.

It will, we think, be convenient to reproduce the most material part of the evidence given by Aung Nu Shay, one of the four prosecution witnesses who were alleged to be present nearby when the three Indians were shot down by Kyaw Hla Aung and it is as follows :

" About 4 p.m. I, Soe Tha Hla, Shwe Tha U and Nee Tun Pru crossed over the Nawnaw Creek by the ferry boat just to take a stroll in the village taking our rifles with us. After reaching the other side and while walking along the main road northwards we met *Tat Bo* Kyaw Hla Aung alone. He had a revolver on his waist and a rifle on his shoulder.

He asked us where we were going and we told him we were taking a stroll. Then he invited us to go along with him. With him we entered the new village called Ngaprurwa.

Then at the bank of the *chaung* to the east of the village we came upon three Indians and one member of the SPRO force. He had a rifle with him. He had the three Indians seated on the ground and he was guarding them with his rifle. I knew one of the Indians who had a gold tooth and he was from Nagara Pauktaw. I do not know his name. I did not know the other two Indians.

I did not know the SPRO. I had never seen him. I would not be able to identify him if seen. Then we forded and crossed the stream to the sandbank on the Lemro River with the *Tat Bo* Kyaw Hla Aung. The three Indians and the SPRO who was guarding them also crossed the stream. It was neck deep almost the water in the creek.

Tat Bo Kyaw Hla Aung simply told us "*Raibaws* cross over to the other side." I did not hear Kyaw Hla Aung talking to the SPRO who was guarding the three Indians.

We were not told why we were asked to cross over. Then we walked to the bank near the water's edge of main Lemro River. There the three Indians were kept squatting on the ground. Then the *Tat Bo* Kyaw Hla Aung ordered us four to shoot at the three Indians. We said we dared not shoot at them. Then Bo Kyaw Hla Aung said "You are not a *Raibaw* yet not daring to kill people." Then he fired at the Indians with the gold tooth or teeth with his rifle from his side. As soon as he fired the first shot we ran up the bank into the jungle growth. I saw the shooting once at the Indian and saw him fall down on the ground. While I was on the run I heard three or four more shots rang out from there. When Kyaw Hla Aung shot his first shot the SPRO who was guarding the Indians was near at hand with his rifle.

After the firing had ceased Kyaw Hla Aung called us out "*Raibaws*. Come out. Why are you so afraid." We then came out and went forward to where he was. I saw the three Indians lying dead. Kyaw Hla Aung then ordered us to drag away the three dead bodies into the main Lemro River.

Soe Tha Hla said he dared not do the job. At that the *Tat Bo* Kyaw Hla Aung boxed him on the temple. Then we four including Soe Tha Hla dragged down the dead bodies into the main river where there was water. At first I and Shwe Tha U took hold of one dead body and dragged it while Soe Tha Hla and Nee Tun Pru dragged the second. The third dead body was also dragged down by me and Shwe Tha U.

After that we four, *Tat Bo* Kyaw Hla Aung and the SPRO who guarded the three Indians walked back to the *Tatyoon*. Kyaw Hla Aung and his SPRO remained inside Ngapru Village but we four came over by the ferry to the *Tatyoon* side of Nawnaw River."

The evidence of Aung Nu Shay's three companions, namely, Ni Tun Pru, Shwe Tha U and Shwe Tha Hla

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in respect of this part of the incident is in effect the same. According to Aung Nu Shay and his three companions, they all went along with the appellant Kyaw Hla Aung without any protest, and their evidence also shows that they accompanied Kyaw Hla Aung without even taking the trouble to find out why they were required to go with him. It is, however, difficult to believe them when they said that they did not know why they were required to accompany Kyaw Hla Aung, or they did not ask him why they were required to accompany him, particularly when he was taking them to the side of a creek which was at some distance away from the village, and especially when Kyaw Hla Aung had asked them to go across the creek with him in the company of the three Indians, who were to be shot dead soon afterwards. It is, however, clear from the evidence that Aung Nu Shay and his three companions did not attempt to run away from the scene of crime when the Indians were about to be shot, or even after the Indians had been shot dead, although they were each armed with a rifle, and although Kyaw Hla Aung was not their *Bo*. It is also clear that Aung Nu Shay and his three companions also helped to remove the dead bodies of the three Indians into the creek from where the dead bodies were recovered two days afterwards. It might be mentioned that Aung Nu Shay and his three companions were Panmraung *Yebaws*, and were accordingly not under the command of Kyaw Hla Aung who was in charge of the Special Police Reserve at Nawnaw. Moreover the *Yebaws* at Panmraung were unpaid. It is also clear that Aung Nu Shay and his companions omitted to inform any one of what they had witnessed on that afternoon until they were examined by the Investigating Officer. Aung Nu Shay and Saw Tha Hla, however, said that they reported this incident to their leader Po Nyo, who was also at

Nawnaw on that afternoon, but there is nothing in the evidence to support their statement. Thus, the conduct of Aung Nu Shay, Ni Tun Pru, Shwe Tha U and Saw Tha Hla at about the time when the murder was about to be committed and soon after the murder was committed, when it is considered their silence, indicates that they were witnesses who were little better than accomplices, even if they were not strictly accomplices. The conduct of Aung Nu Shay and his three companions, who were each armed with a rifle, in accompanying the two appellants and three Indians across the creek where they had to wade through the water, which was chest deep appears to be somewhat strange unless they were at least conniving, if not actually assisting, at what was to happen across the creek. They must have known at the time that the three Indians were being taken across the creek to a place further away from human habitation. It will be observed that it will not, in the circumstances of this case, be safe to act on the evidence of those four witnesses without some corroborative evidence from an independent source. Moreover the appellant Kyaw Hla Aung has accused Po Nyo and his *Yebaws* as the persons who were responsible for the murder of the three Indians, *vide* Exhibit. D.

The question whether a witness is or is not an accomplice will naturally depend on the facts of each case. Although Aung Nu Shay, Ni Tun Pru, Shwe Tha U and Saw Tha Hla could not in accordance with their own evidence strictly be called guilty associates of the person or persons involved in the murder of the three Indians, yet their conduct immediately preceding the murder, and their conduct after the murder had been committed, show them to be persons who are not altogether above suspicion in connection with the death of the three Indians. In the case of

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Brijpal Singh v. *Emperor* (1), the Madras case of *Ramaswami Gounden* v. *Emperor* (2) was dissented from with the following observation :

"On the other hand the learned Government Advocate has invited our attention to a case reported in 27 Madras 271. In this case it was held that the witness was not an accomplice in the crime for which the accused was charged inasmuch as he had not been concerned in the perpetration of the murder itself and that even if the witness had assisted in removing the body to the pit, he could have been charged with concealment of the body under section 201, Indian Penal Code ; but that was an offence perfectly independent of the matter and the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder or liable to be indicted with him jointly, and it was therefore held that the witness was not an accomplice and the rule of practice as to corroboration had no application to this case. On the other hand Boddam J. held that even if the witness be not deemed to be an accomplice, the fact that he was cognizant of the crime for 15 days without disclosing it and that he had a cause of quarrel with the accused at the time when he did disclose it, were circumstances which would make it very unsafe to act upon his evidence unless it was corroborated in some material particular connecting the accused with the crime. With all due respect to the learned Judges, who decided this case, it seems to us that the view taken by the dissentient Judge, Boddam J. is the sounder view. In a recent ruling of Their Lordships of the Privy Council reported in 1936 A.L.J. 869 it was held that the evidence of an accomplice or accessory must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it, and that the evidence of one accomplice was not available as corroboration of another."

In the case of *Emperor* v. *Kallu* (3) it also was observed:

"The rule requiring independent corroboration in material particulars of the evidence of an accomplice is only a rule of caution which for a long time has been adopted as a rule of practice by the Courts in England as well as in this country, and

(1) A.I.R. (1936) Oudh 413 at 415. (2) (1904) 27 Mad. 271.
(3) A.I.R. (1937) Oudh 259 at 261.

is now virtually a rule of law. The reason underlying the rule is that the testimony of an accomplice is regarded as tainted evidence and it is, therefore, considered unsafe to base a conviction on it unless there is independent corroboration forthcoming. On the same principle corroboration is insisted upon in the case of the evidence of informers. We think that the evidence of an accessory after the event suffers more or less from the same taint as the evidence given by an accomplice. It would be very unsafe to accept the solitary evidence of such a person as proving the guilt of the accused without independent corroboration in material particulars . . . . "

The learned Government Advocate however cited the case of *Nga Pauk* v. *The King* (1) to indicate that a person who assisted in the disposal of a dead body, although he was liable to be punished under section 201 of the Penal Code, is not an accomplice so far as the offence of murder is concerned, and that the evidence of such a person does not require corroboration. The facts in that case are entirely different from the facts in the case now under consideration. It might also be mentioned that the Madras case in 27 Madras Series 271, which was dissented in *Brijpal Singh*'s case (2), was cited with approval in *Nga Pauk*'s case (1). We have already indicated in this judgment that the evidence of Aung Nu Shay, Ni Tun Pru, Shwe Tha U and Saw Tha Hla does not provide a safe basis for the conviction of these appellants without some sort of corroboration ; and it appears that there is also some corroborative evidence in *Nga Pauk*'s case (1). Thus the case of *Nga Pauk* v. *The King* (1) cannot be considered to be a case where an accused person is convicted of murder solely on the evidence of an accessory after the fact.

In the case now under appeal the statements of Aung Nu Shay and his three companions show that they accompanied the appellant Kyaw Hla Aung to the

(1) A.I.R. (1937) Ran. 513. (2) A.I.R. (1936) Oudh 413 at 415.

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side of the creek, at some distance from the village, where the three Indians had been kept under guard by the appellant Kra Noe who was armed with a rifle, that they all went across the creek to the side which is further away from the village in the company of the three Indians and the two appellants Kyaw Hla Aung and Kra Noe, that Kyaw Hla Aung was also armed with a rifle and a revolver and that Aung Nu Shay and three companions not only did not attempt to leave or run away from the scene of crime when Kyaw Hla Aung was about to shoot the Indians, or even after he had shot the Indians, but they even helped to dispose of the dead bodies of the three Indians. They were obviously accessories after the fact.

The fact that the three Indians had been kept under an armed guard at a spot which was some distance from the village and that those Indians were being led across the creek to a spot which is further away from the village by the two appellants, who were both armed with a rifle each, should have aroused their suspicion that something sinister was about to take place on the other side of the creek, especially when the day was rapidly drawing to a close, in that it was about 5 or 6 p.m. when the Indians were shot dead. The evidence of Aung Nu Shay and his companions will have, in the circumstances of this case, to be considered to be more or less as coming from a tainted source, in that they could be considered to be persons who had connived at what had been done to the Indians, particularly when they had not attempted to inform any one of what they saw there until they were examined by the Investigating Officer. It would accordingly be unsafe to accept the sole testimony of Aung Nu Shay and his three companions unless it is corroborated in some material particulars from an independent source.

It was observed in the case of *Aung Pe* v. *King-Emperor* (1) that—

" Corroboration means independent testimony. Where it is required, it is necessary because the evidence sought to be corroborated is in some way unreliable. When in the case of an accomplice it is desirable because the accomplice's evidence comes from a tainted source ; the nature of the corroboration required is not more evidence of a tainted kind but fresh evidence of an untainted kind."

It is also clear, so far as this country is concerned, from the case of *The King* v. *Nga Myo* (2), where the decision in the case of *Aung Hla and others* v. *King-Emperor* (3) was modified, that the corroboration required must be corroboration from a source extraneous to the person whose testimony it is sought to corroborate, and not from a tainted source. It will also be convenient here to reproduce the observation made in the case of *Nawal Kishore Rai and others* v. *Emperor* (4), which is :

" The Judges in England frequently use the words ' confirmed ' or ' confirmation ' as interchangeable with ' corroborated ' or ' corroboration.' Apart, however, from the derivation of the word and the manner in which it is ordinarily used in such cases in the Courts, I find it difficult to understand how it can properly be said that the evidence of one accomplice, who is himself unworthy of credit, can be corroborated or confirmed or strengthened by the evidence of another accomplice who is equally unworthy of credit. To say this is to say, or to come dangerously near to saying that evidence given on a particular point by two or more persons is necessarily of greater strength and cogency than evidence given by one person. It is, I imagine, for this reason that, when the suggestion has been made to the Courts in England that the evidence of two or more accomplices is in some way superior to the evidence of one accomplice, the

(1) (1937) R.L.R. 110 at 120.
(2) (1938) R.L.R. 190.
(3) (1931) 9 Ran. 404.
(4) A.I.R. (1943) Pat. 146 at 149-50.

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suggestion has been vigorously repudiated. In (1832) 172 E.R. 996 Littledale J. said this :

> ' It is not usual to convict upon the evidence of one accomplice without confirmation ; and in my opinion it makes no difference that there are more than one.'

Again in (1909) 2 Criminal Appeal Rep. 327 the Lord Chief Justice said :

> ' This Court will certainly not hold that the evidence of a number of accomplices needs any less corroboration than that of one accomplice.' "

The only evidence which is said to have afforded some sort of corroboration to the evidence of Aung Nu Shay and his companions is said to be that of Vaccinator Tha Gyaw (P.W. 14). According to Vaccinator Tha Gyaw, he saw the appellant Kyaw Hla Aung run after a man who was running away into a grove, which was about an hour before the three Indians were shot dead. The witness further stated that he saw Kyaw Hla Aung and three or four other *Ygbaws* bring back the man who had run away and that he also saw that man being taken away westward towards the paddy field. The suggestion is that Kyaw Hla Aung was one of the persons, who was seen to have taken away one of the Indians into a paddy field, apparently to the place by the side of the creek where the three Indians were first kept before they were taken across the creek. Vaccinator Tha Gyaw, in his cross-examination, stated that he was not sure whether the appellant Kyaw Hla Aung was one of the four or five men whom he saw taking away the Indian who had attempted to run away. It must in the circumstance be held that Vaccinator Tha Gyaw's evidence does not in reality show that Kyaw Hla Aung was clearly one of the men who was seen to have taken away the Indian into the paddy field. There is thus no corroborative evidence in this case

to show that either Kyaw Hla Aung or Kra Noe was seen with the three Indians, or any one of them, on the fatal afternoon when they were callously shot dead. It must therefore be held that there is no material in this case from an independent source, which tends to indicate that either Kyaw Hla Aung or Kra Noe must have been one of the persons who were involved in the murder of the Indians, and their appeal must be allowed.

It might be mentioned that before a witness is allowed to make use of any document to refresh his memory under section 159 of the Evidence Act, it will be the duty of the Court concerned to see that the provisions of section 159 are strictly conformed to before a witness is allowed to refresh his memory by any document while he is being examined in Court. In the present case we do not see anything on the record to indicate that there were proper materials on which Vaccinator Tha Gyaw could be said to have been properly allowed to refresh his memory by means of Exhibit B, which was said to have been an extract which he made from the statements recorded by the Investigating Officer. We might also observe that when charges are framed under section 302 (1) of the Penal Code, the relevant clause under section 302 (1) ought also to be mentioned so that the accused might know at once under which of the three clauses in section 302 (1) of the Penal Code that he is charged with.

The convictions and sentences of death passed upon the appellants under section 302 (1) and section 302 (1) read with section 109 respectively of the Penal Code are therefore set aside, and the two appellants will be released so far as this case is concerned.

CIVIL REVISION.

Before U Tun Byu, J.

H.C. 1949

July 8.

S. M. BHOLAT (APPLICANT)

v.

H. FERNANDEZ (RESPONDENT).*

Notice under s. 106, Transfer of Property Act—Not satisfying s. 11 (1) (a), Urban Rent Control Act, 1948—Effect.

Held : The object of a landlord in issuing a notice under s. 11 (*1*) (*a*), Urban Rent Control Act, 1948, is to eject the tenant and recover the premises by instituting a suit for ejectment. The ejectment suit can be successful only if s. 11 (*1*) (*a*) of the Urban Rent Control Act, 1948, is complied with. If notice is defective under this section, landlord cannot succeed, and the notice cannot be considered as duly given under s. 111 (*h*) of the Transfer of Property Act. S. 11 (*1*) (*a*) of Urban Rent Control Act and s. 111 (*h*) and s. 106 of Transfer of Property Act should be read together, as if embodied in the same Act.

Aung Min (1) for the applicant.

N. Bose for the respondent.

U TUN BYU, J.—The applicant Bholat filed a suit for ejectment against the respondent H. Fernandez in Civil Regular No. 891 of 1948 of the Rangoon City Civil Court on 17th September, 1948, but his suit was dismissed with costs on 8th April, 1949, apparently on the ground that the Exhibit B lawyer's notice, dated the 8th May, 1948, was not a proper notice as required under clause (*a*) of section 11 (i) of the Urban Rent Control Act, 1948. On 14th January, 1949, Bholat, while the Civil Regular No. 891 of 1948 was still pending, also applied for the issue of a distress warrant under section 22 (*1*) of the Rangoon City Civil Court Act, and which application became

* Civil Revision No. 30 of 1949 against the order of the 4th Judge, City Civil Court, Rangoon, in Civil Distress No. 1 of 1949, dated the 8th April 1949.

known as Civil Distress No. 1 of 1949 of the same Court. The application of Bholat for the issue of a distress warrant was also dismissed on the same date as the main case, that is on 8th April, 1949. The learned 4th Judge held that the relationship of landlord and tenant, which existed between Bholat and Fernandez, had ceased to so exist after the 31st May, 1948, in view of the lawyer's notice of 8th May, 1948, which has been referred to above.

The question which arises for consideration in the present application for revision is, whether the relationship of landlord and tenant which existed between Bholat and Fernandez, had been terminated after 31st May, 1948, in view of the lawyer's notice of 8th May, 1948. It is true, as contended or behalf of the respondent, that the Urban Rent Control Act, does not provide for the determination of the relationship of landlord and tenant and that one would have to look to the provisions of section 106 of the Transfer of Property Act for that purpose. This does not mean, however, that a notice which was defective under the provisions of clause (*a*) of section 11 (*1*) of the Urban Rent Control Act, 1948, could still be considered to be a good notice for the purpose of clause (*h*) of section 111 of the Transfer of Property Act, which reads :

> " 111. A lease of immovable property determines—
>
> * * * *
>
> (*h*) on the expiration of a notice to determine the lease or to quit, or of intention to quit, the property leased, duly given by one party to the other."

The notice (Exhibit B) appears to me to be a notice which might be described as a composite notice given as required both under section 11 (*1*) (*a*) of the Urban Rent Control Act and section 106 of the Transfer of Property Act. The question is then reduced to,

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U TUN BYU, J.

can the Exhibit B notice be considered to be a good notice for the purpose of section 106 of the Transfer of Property Act in view of the fact that it was clearly a defective notice from the outset, at least for the purpose of section 11 (*1*) (*a*) of the Urban Rent Control Act, 1948 ? The object of a landlord in issuing a notice under section 11 (*1*) (*a*) of the Urban Rent Control Act is obviously to have the tenant ejected from, and to recover possession of, the premises in respect of which the notice is issued, that is for the purpose of successfully instituting an ejectment suit against the tenant who is in occupation of that premises ; and he will be able to obtain possession, where the tenant refuses to vacate, only by means of a successful ejectment suit. What then is the object of requesting a tenant to quit and vacate a premises of which he is in possession ? It is obvious that the object of such notice is also to enable the landlord, so far as he is concerned, to file an ejectment suit against the tenant successfully. A notice which is defective under section 11 (*1*) (*a*) of the Urban Rent Control Act will therefore have to be considered also defective for the purpose of clause (*g*) of section 111 of the Transfer of Property Act. It is difficult to conceive how a legally defective notice sent obviously for the purpose of filing a successful ejectment suit can be considered to be a notice which has been duly given as required under clause (*h*) of section 111 of the Transfer of Property Act. A landlord has to comply with certain requirements of law, if he desires to successfully eject a tenant from a premises, and such requirements are now embodied both in the Transfer of Property Act and in the Urban Rent Control Act, 1948, and a notice which is illegal from the outset, because it does not conform to some of the requirements of law, as contained in those two Acts,

cannot be considered to be a notice duly given, in that it does not conform to the provisions of law, and as such it should be considered to be ineffective, *i.e.* as if such a notice had not been issued at all. It is only reasonable that the provisions of sections 106 and 111 (*h*) of the Transfer of Property Act and of section 11 (*1*) (*a*) of the Urban Rent Control Act, 1948, which are enacted for the same object, should be read together as if they were embodied in one Act. For the reasons set out above the order of the 4th Judge passed on the 8th April, 1949, is set aside, with costs, and he is directed to re-admit the distress proceeding to his file and to proceed with the case in accordance with the law.

APPELLATE CRIMINAL.

Before U Aung Khine, J.

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June 10.

MOALIM MUSHTAQUE RANDERI (APPELLANT)

v.

THE UNION OF BURMA (AZIM SHAIKH) (RESPONDENT).*

Penal Code, s. 500—Non-compliance with ss. 234, 235 and 236 when curable—Criminal Procedure Code Joinder of charges—Summary trial by Magistrates—S. 264, Criminal Procedure Code—Contents of judgment—Sentence.

The Appellant was charged under s. 500, Penal Code, in that he had defamed complainant by an article in the Urdu Daily "Pukar" of 28th January 1946 and repeating it in a Book published in Burma on 7th August 1947 and was convicted. It was contended in appeal that there was a misjoinder of charges, which was not curable under s. 567, Criminal Procedure Code, that the summary trial was wrong and that the judgment was not one in accordance with s. 264, Criminal Procedure Code.

Held: That ss. 233, 234, 235 and 239, Criminal Procedure Code, are inter-related and separate charges could be framed for distinct offences in a single trial; and though the offences cover over one year as they were part of the same transaction, within the meaning of s. 235 (1) of the Code of Criminal Procedure, the trial is not illegal. What does or does not form part of the same transaction is a question of fact in each case.

Emperor v. *Sherufalli Allibhoy*, I.L.R. 27 Bom. 135; *Sardar Diwan Singh Maftoon* v. *Emperor*, A.I.R. (1935) Nag. 90, considered and applied.

Held also: Where a summary trial was permissible under law and there had been no objection in the Trial Court and the Magistrate had recorded all important statements carefully, the summary trial could not be questioned in appeal.

Sentence altered from imprisonment to fine as the trial lasted eight months and the ends of justice were met by a sentence of fine

B. C. Guha for the appellant.

Dr. Ba Han for the respondent.

* Criminal Appeal No. 150 of 1949, being appeal from the order of the 1st Additional Magistrate of Rangoon passed in Criminal Summary Trial No. 266 of 1948, dated the 5th April 1949.

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MOALIM MUSHTAQUE RANDERI v. THE UNION OF BURMA (AZIM SHAIKH).

U AUNG KHINE, J.—This appeal arises out of Criminal Regular Trial No. 266 of the Court of the 1st Additional Magistrate, Rangoon, in which the appellant Moalim Mushtaque Randeri was found guilty under section 500 of the Penal Code on two charges and was sentenced to suffer six months' simple imprisonment on each charge, the sentence to run concurrently. The appellant is alleged to have defamed the complainant Azim Shaikh, general and provision merchant, Rangoon, firstly by writing an article under the heading "Logician on Philosophy" on the 28th January, 1946, in an Urdu daily paper called "Pukar" and also by repeating these allegations and insinuations contained in the said article in a book printed in India but published in Burma under the title "Revolution in the East and the Muslims" on the 7th August, 1947. There are three main points raised in this appeal, namely (1) that there has been a misjoinder of charges and therefore the trial was illegal as contravening the provisions of section 234 of the Criminal Procedure Code and the effect is such that it is not curable under section 537 of the Criminal Procedure Code, (2) that the learned Magistrate erred in trying this case in a summary manner and (3) that the judgment of the lower Court does not conform to the provisions provided for in section 264 of the Criminal Procedure Code.

Regarding the first contention I must say that sections 233, 234 and 235 are inter-related and in order to consider this question raised it is necessary that not only the provisions of the section which is alleged to have been contravened but also the provisions of the other two sections should be looked into properly. Section 233 directs two things, namely (1) that for every distinct offence of which any person is accused, there shall be a separate charge and (2) that

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every such charge shall be tried separately unless the case falls within the class of cases mentioned in sections 234, 235, 236 and 239 of the Code. Where separate charges were framed for distinct offences but a single trial is held in respect of these charges and if the case is not covered by sections 234, 235, 236 and 239 of the Code, there is a non-compliance with the section as to the mode of the trial. Section 234 is an enabling section which permits three offences of the same kind committed within the space of twelve months to be tried in one trial. However, if the offences are extended over a period longer than a year, a single trial therefor must be deemed illegal unless the trial is covered by the provisions of section 235. Sub-section (*1*) of section 235 reads as follows :

"If, in one series of acts so connected together as to form the same transactions, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence."

As to what does or does not form part of the same transaction is a question of fact depending largely upon the circumstances of each case. In *Emperor* v. *Sherufalli Allibhoy* (1) it was observed that the real and substantial test in determining whether several offences are connected together so as to form one transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action. This decision has been adopted generally by the different High Courts. In deciding as to whether the acts complained of form parts of the same transaction, proximity of time in the light of the above decision could not be so essential and important as continuity of action and purpose.

(1) I.L.R. 27 Bom. 135.

Here in this case the facts show that the appellant was bent on defaming the complainant on more than one occasion. He harped on the theme about the complainant getting rich at the expense of other merchants by breaking open their godowns so that the Japanese might take away the foodstuffs therein firstly in the paper "Pukar," and secondly in his book "Revolution in the East and the Muslims." The continuity of action and the singleness of purpose on the part of the appellant is quite patent in the case. Therefore, although the two charges in this case relate to offences which extended over a period longer than a year, I am of the opinion that the trial was quite regular under section 235 of the Code. The case of *Sardar Diwan Singh Maftoon* v. *Emperor* (1) was one where a person was prosecuted for being the author, the editor, the printer and the publisher of an offending article under section 3 of the Indian States Protection Act. In that case the applicant was charged and put on his trial for no less than nine distinct offences and therefore it was held that the several acts of the accused in composing the offending articles, editing and printing it at a certain place and publishing the same at six different places on different occasions cannot be regarded as one series of acts so connected together as to form the same transaction within the meaning of section 235. Thus the decision in that case has no bearing whatsoever in this appeal.

As regards the second contention that the case should not have been tried summarily, I am of the opinion that it has no merit for the following reasons: (1) There was no objection raised by the appellant in the lower Court objecting to the trial proceeding in a summary way. (2) The learned 1st Additional Magistrate has been invested with summary powers

(1) A.I.R. (1935) Nag. 90.

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wide enough to try not only cases of this nature but also all cases which are considered even more important. (3) It will be seen in the proceedings that the learned Magistrate has taken great pains to get all important statements of the witnesses recorded.

Turning to the third objection that the lower Court has disregarded the provisions of section 264 of the Criminal Procedure Code, a perusal of the judgment will show the elaborate manner in which it is recorded and I fail to see where the learned Magistrate had gone wrong. I am of the opinion that this assertion made on behalf of the appellant is without substance.

Now, turning to the facts, the case has been much simplified by the admission of the appellant that he is the author of the articles complained of. The complainant was the Secretary of the Indian (Foodstuffs) Merchants Association during the period of Japanese occupation. It is insinuated in the "Pukar" as well as in the book "Revolution of the East and the Muslims" that he was instrumental in causing all the godowns of Edward Street open to the Japanese troops thus causing immense loss to the owners and by doing so had enriched himself. In the book in addition to the above articles there also appears under the heading "An Example of Selfishness and Cruelty" two obnoxious and pointed passages to show how selfish and cruel the complainant was during the Japanese occupation. The writer says that when he and his family were in urgent need of getting to town from a suburb he appealed to the complainant to lend him his car. In spite of his knowledge that the journey to town was highly perilous and risky the complainant in his selfishness flatly refused to lend the car thus causing a good deal of mental worry and inconvenience to the writer and his family. Regarding the complainant's cruelty it is insinuated that during the

bombing at Okkyin the complainant turned away many persons who came to take refuge in his shelter thus causing the death of many of those persons. The appellant in his statement said, "I wrote the articles in general. I did not attack any person in particular. I wrote it as a public man to public organization. I mentioned Azim Shaikh's name as he was Secretary at the time." Judging by the way in which the language in the passages complained of was couched, the articles complained of were in the nature of personal attacks and directed towards the complainant as he was the Secretary of the Indian (Foodstuffs) Merchants Association. The motive for wanting to harm the reputation of the complainant is not far to seek. The appellant not being able to get a loan of the car just about the time people were trying to evacuate from Rangoon appears to have been much hurt and therefore attacked the complainant by making him appear as a grossly selfish and cruel man. Regarding the insinuation about turning away those persons who came to take shelter during the bombardment at Okkyin, it can be clearly seen that the article was also directed against the complainant because the complainant did own a house at Okkyin at the time of the bombardment and that in the compound of the house he had a bomb-shelter built. The prosecution has, I consider, satisfactorily proved that the accounts given were distorted versions of what actually took place. Taking the case from all its bearings, I am of the opinion that the charges against the accused have been proved satisfactorily and that the learned Magistrate was justified in coming to the conclusions he arrived at.

Now regarding the question of sentences, I am of the opinion that the learned Magistrate has erred slightly on the side of severity. He has failed to take into consideration that in this case the appellant had

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had to stand his trial for nearly eight months before he was convicted and that he also had been made to incur expenses in the way of lawyer's fees, etc. The reason given for passing sentences of imprisonment to my mind is not quite sound. The learned Magistrate should not have assumed that the appellant would not be in a position to pay fines if imposed. Sentences of fine would, I consider, meet the ends of justice in this case.

I would therefore while maintaining the convictions set aside the sentences of imprisonment passed upon the appellant and direct that the appellant do pay a fine of Rs. 150 on each charge or in default to undergo one month simple imprisonment.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

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Aug. 25.

HAJEE L. A. M. NAGOOR MEERA & SONS (APPELLANTS)

v.

BEHARILAL CHOTMAL (RESPONDENT).*

Pledge of goods—Ss. 151, 152, 160, 161 and 173, Contract Act—Right and obligations of bailor and bailee— Burden of proof of want of due care on Pledgor.

Held : That s. 161 of the Contract Act which provides that if by default of the bailee the goods are not returned, delivered or tendered at the proper time he is responsible to the bailor from that time, must be read subject to the provisions of ss. 160 and 173 of the Contract Act. If the time for which the goods have been bailed has expired, or the purpose for which they were bailed had been accomplished then only the bailee is to return the goods according to the bailor's directions ; but if the bailee be a pledgee, he can detain the goods bailed till his debt and interest and all expenses incurred by him are paid.

Where the goods were by consent of the bailor and bailee kept in the warehouse of a respectable warehouse-man, and the goods were lost owing to circumstances arising out of the war, the bailee is not responsible.

Shrimati Pevibai and others v. *Molumal Kulachand*, (1947) A.I.R. Sind 84 ; *Joseph Travers & Sons, Ltd.* v. *Cooper*, L.R. (1915) 1 K.B. 73 ; *Brabant & Co.* v. *Thomas Mulhall King*, (1895) A.C. 632 ; *Shanti Lal and another* v. *Tara Chand Madan Gopal*, (1933) A.I.R. All. 158 ; *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.*, L.R. (1937) 1 K.B. 534 ; *East Indian Railway Company* v. *Piyare Lal Sohan Lal*, (1929) I.L.R. 10 Lah. 361, referred to.

Held : That in the case of loss being proved or admitted it is for the bailor to prove that the bailee has not shown due care, skill and nerve.

River Steam Navigation Company v. *Choutmull and others*, L.R. (1899) 26 I.A. 1 ; *Kush Kanta Barkakati* v. *Chandra Kanta Kakati and others*, (1923), 28 C.W.N. 1041, referred to.

Dwaraka Nutha Pai Mohan Chaudhuri and one v. *Rivers Steam Navigation Co., Ltd.*, (1918) 27 Cal. L.J. 615 = 20 A.I.R. Cal. 151, followed.

Dr. Ba Han for the appellants.

C. A. Soorma for the respondent.

* Civil 1st Appeal No. 15 of 1949 against the decree of the Original Side of this Court (U Bo Gyi) in Civil Regular Suit No. 52 of 1946, dated the 26th February 1949.

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U THEIN MAUNG, C.J.—This is an appeal from the judgment and decree by which the plaintiff-appellants' suit for recovery of Rs. 12,262-8-0 from the defendants-respondents as damages for the loss of their goods deposited with them as security by their default after deducting a sum of Rs. 17,500 due by them on promissory notes has been dismissed.

The facts which led to the institution of the suit are as follows : The appellants deposited 27 bales of cloth as collateral security for the loans which they took from the respondents on four promissory notes, *viz.* :

Exhibit U, dated the 6th October 1941, for Rs. 3,000 ;

Exhibit V, dated the 27th October 1941, for Rs. 3,000 ;

Exhibit X, dated the 13th October 1941, for Rs. 10,000 ; and

Exhibit Z, dated the 3rd December 1941, for Rs. 4,000.

They had to deposit the bales at the godown of Messrs. Balthazar & Sons as directed by the respondents and to pay godown rents on their behalf. Besides, they had to get the bales insured against damage by fire with Messrs. Balthazar & Sons for the total sum of Rs. 27,000 in the name of the respondents but at their own expense. Messrs. Balthazar & Sons then granted them receipts (Exhibits 2, 3, 4 and 5) wherein they stated " received (from Hajee L. A. M. Nagoor Meera & Sons for warehousing the following goods held to the order of Messrs. B. Chothumull, " that the goods were insured for certain specified amounts against fire risks only and that they would not be " responsible for loss or damages due to unavoidable causes." The appellants had to make over these receipts together with lists of

goods deposited to the respondents at the time of the execution of the respective promissory notes. According to the agreement between the appellants and the respondents, the latter would give orders to Messrs. Balthazar & Sons for delivery to the appellants of the bales when payments in redemption thereof are made by the appellants, and as a matter of fact the appellants have got back five out of six bales in the first lot on such payment on the 22nd November 1941 (*see* Exhibit F5) and the appellants have admitted that their claim for damages for the loss of the bales must be reduced by the full value of those five bales, *i.e.* Rs. 5,250 and not by Rs. 2,500 only as in paragraph 5 of their amended plaint.

The last war broke out on the 8th December 1941 ; the first two air raids on Rangoon took place on the 23rd and 25th of the same month ; and Rangoon had to be evacuated under the orders of the then Government on the 20th of February 1942.

C. Joakim, Director of Messrs. Balthazar & Sons (D.W. 5) left Rangoon on the 20th February 1942. The godown in which the bales were deposited was then intact and he left Po Lon, who according to him had worked under him for a considerable number of years and was very faithful, to look after it.

Hasan Kader Moideen (P.W. 3) who was then the plaintiff's agent, left Rangoon on the 18th February 1942, and the other employees of the plaintiffs, *viz.*, Abdul Rahaman, Ahmed and Sulaiman (P.W. 1, 2 and 4) left Rangoon two or three days later.

According to Chothumull Goenka, his father Bikraj (since deceased) who was a partner in the respondent firm, left Rangoon only on the 10th February 1942 ; but the appellants say that he left Rangoon early in January 1942, and that the respondents' office had been closed since the first week of January 1942.

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Ali Akbar, a partner in the appellant firm, came back to Rangoon in May 1946, and at his instance Abdul Rahaman went and asked Chothumull Goenka what had happened to the goods. According to Abdul Rahaman, Chothumull Goenka then told him " You will have to give accounts in this respect " but a few days later he and Ali Akbar received a letter (Exhibit A) from him.

Exhibit A, which is dated the 22nd August 1946, is a lawyer's notice of demand for payment of the amounts then due on the promissory notes without any reference whatsoever to the pledge of goods.

The learned Advocate for the appellants replied to it by Exhibit B, dated the 28th August 1946, stating therein :

" These bales were never released by your clients to my clients but on the other hand your clients have wrongfully released a portion of the same to a third party in breach of the agreement and the trust. As such and on an examination of the mutual accounts between the parties it will be found that your clients will have to pay my clients large sums over and above the alleged loan due by them to yours."

The respondents then denied in their reply Exhibit C, dated the 5th September 1946, that any of the bales had been released to a third party and repeated the demand for payment.

Thereupon the learned Advocate for the appellants stated in his reply Exhibit D, dated the 7th September 1946 :

" Your clients failed to release the said goods by issuing the necessary authority to my clients, though the latter were at all times ready and willing to redeem the goods pledged by tendering the amount. Your clients did on the other hand run away and kept themselves out of the reach of my clients and without informing their whereabouts.

My clients as such claim hereby the full value of the goods entrusted to your clients as aforesaid and request the payment of the amounts due thereunder within three days of the receipt hereof, failing compliance they will be compelled to take legal action against your clients *for wrongful conversion or in the alternative for the value of the goods.*"

In Exhibit E, dated the 12th September 1946, which is the reply to Exhibit D, the learned Advocate for the respondents denied wrongful conversion, repeated the demand for payment and stated :

" The other allegations that my clients ran away out of reach of your clients are ridiculous and are denied. My clients would have been only too glad to receive payment of the amounts due to them if tendered by your clients."

Thereafter on the 18th October 1946, the appellants instituted the suit out of which the present appeal has arisen. The suit is not one for redemption of the pledge but one for " damages for loss of the plaintiff's goods deposited with the defendants as security *by the default of the defendant's* ; " and the defaults are set out in paragraphs 6 and 9 of the amended plaint. One is that early in January 1942, the defendant's agent in breach of the obligation of the defendants to the plaintiffs under the contract left Rangoon without any intimation to the plaintiffs. The plaintiff's were consequently unable to obtain a return of the bales even though they were at all times ready and willing to pay for and obtain a return of the same. The other is that in December 1941, " the defendants in breach of the contract with the plaintiffs and their obligations under the same failed to return the goods deposited with them and on the 7th September 1946 when demand was made."

The appellants also added in paragraph 6 of the amended plaint " As far as their information goes

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the said defendants either appropriated the bales to themselves or converted the same to the use of third parties." These allegations may be compared with the allegation of the respondent's having released a portion of the goods to a third party.

In Civil Regular Suit No. 47 of 1947 on the Original Side of this Court, which is the respondents' suit on the said promissory notes and which has been heard together with the appellants' suit, the appellants have pleaded in (paragraph 4 of their written statement therein) " Defendants deny that the bales were lost owing to circumstances arising out of the war and state that the bales were lost by the negligence and default of the plaintiffs who denied the defendants any opportunity to redeem the bales though they were at all times willing to do so and/or converted them to their use or to the use of other persons with whom the defendants have no concern."

However, the allegation of actual conversion by the respondents had admittedly been made on a mere rumour. No attempt has been made to substantiate it at the hearing of the suit and it has not been pressed in the appeal at all.

So inspite of some manoeuvring for vantage ground as regards the onus of proof, it is clear from the nature of the suit and the way in which it has been conducted that the appellants' case really is that the goods have been lost on account of the respondents. As a matter of fact one of their principal contentions at the hearing of the suit and the appeal has been that the respondents should have removed the goods to Mandalay before the general evacuation of Rangoon, suggesting thereby that the goods would not have been lost if the respondents had done so. The same implication is there in the other alleged defaults on the part of the respondents.

The respondents admit that the goods were pledged with them as security but deny that they left Rangoon in January 1942 or that they have committed any breach of contract and say (1) that Bikraj was in Rangoon up to the middle of February 1942, (2) that repeated demands for payment of the amounts due on the promissory notes had been made without success before their evacuation and (3) that they had been informed and that they believed it to be true that the goods were lost or destroyed as a result or circumstances arising out of the war. So the learned Judge on the Original Side is right in observing "It is common ground that the goods were lost from the warehouse.

At this stage we must note two outstanding facts. One is that there is no allegation whatsoever of the goods having been lost for any fault on the part of Messrs. Balthazar & Sons ; and the other is that there is no suggestion that the respondents should have claimed damages from Messrs. Balthazar & Sons as insurers against fire risks.

The learned Judge on the Original Side framed the following issues :

(1) What was the value of the goods in suit about the end of December 1941, and beginning of January 1942 ? (By consent).

(2) Whether the plaintiffs were unable to obtain a return of the goods though they were ready and willing to pay for and obtain the same as alleged in paragraph 6 of the plaint ?

(3) Are the defendants liable to return the goods or their value ?

(4) To what relief, if any, are the plaintiffs entitled ?

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His Lordships has ultimately dismissed the suit deciding issues Nos. 2, 3 and 4 against the appellants. Hence this appeal.

Dr. Ba Han, the learned Advocate for the appellants, has clarified the position at the beginning of the hearing by submitting that his case is one on contract and that he is not relying on the alleged tort of wrongful conversion. His first contention is that the respondents, who are pawnees and therefore bailees, are responsible for the loss of the goods under section 161 of the Contract Act which reads :

" If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time."

His second contention is that the respondents having failed to remove the goods to Mandalay before evacuation, although they admittedly removed their own goods, they are liable in damages for their loss under sections 151 and 152 of the Contract Act which provide:

"151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed if he has taken the amount of care of it described in section 151."

There is no suggestion in the appellants' correspondence with the respondent or in their plaint and amended plaint that the respondents should have removed the goods to Mandalay ; but this contention is based on admissions about the removal of the respondents' goods made by Chothumull Goenka

under cross-examination and it has been dealt with by the learned Judge on the Original Side in the course of his judgment.

With reference to the first contention section 161 of the Contract Act must be read with sections 160 and 173 of the same; the default on the part of the respondents to return the goods must be after the time for which they were bailed has expired or the purpose for which they were bailed has been accomplished; and as there admittedly was no time limit to the bailment it must be after the payment of the debts by the appellants. However, there is no allegation whatsoever of the debts having been paid or of any tender having been made by the appellants at any time. Their case as stated in their first reply (Exhibit B) is merely that the goods were never released to them, without any mention of their having made any attempt to find the respondents and redeem the pledge. Even in their second reply (Exhibit D) they merely stated that the respondents failed to release the goods by issuing the necessary authority to them although they were at all times ready and willing to redeem the goods by tendering the amount and that the respondents ran away and kept themselves out of their reach and "without informing their whereabouts." They have not stated definitely in their correspondence, plaint and amended plaint that they had actually tried to find the respondents and redeem the pledge at all.

They have tried to prove (1) that one of them, *viz.*, Mohamed Omar Khatab, who was then in Madras, wrote Exhibit Q, dated the 26th December 1941, to Hashim Kader Moideen in Rangoon, (2) that on receipt of the said Exhibit, *i.e.*, in the first week of January 1942, Hasan Kader Moideen gave Rs. 5,000 each to his four assistants, *viz.*, Sanker Lingam (who is not a witness), Abdul Rahaman (P.W.1), Ahmed (P.W.2) and

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Sulaiman (P.W.4) to redeem the pledge, (3) that they went to the respondents' office but found it closed, (4) that two of them, *viz.*, Rahaman and Sulaiman also went to Bauktaw to find the respondents but they were not found there, (5) that Hasan Kader Moideen himself tried to find the respondents several times on and after the 15th January 1942, and (6) that Hasan Kader Moideen wrote Exhibit 2A dated the 20th January 1942, to the partners in Madras informing them that they had "with the money on hand" been searching for the respondents in Rangoon and other places.

However, we agree with the learned Judge on the Original Side that Exhibits Q and 2A are not reliable. They are not mentioned expressly in the appellants' affidavit of documents. Their learned Advocate has drawn our attention to item 31 therein ; but it merely reads "Letter file which was received from Rangoon." If the file had been received from Rangoon, there must be some evidence of the file having been sent from Rangoon to Madras and it cannot by any means contain Exhibit 2A which is a letter written from Rangoon to Madras. Exhibit Q was produced on the 11th August 1948 when Mohamed Omar Khatab was examined ; but Exhibit 2A, which is alleged to be the reply thereto, was not produced till the 17th February 1949. As a matter of fact Mohamed Omar Khatab had been asked on the previous date whether he got any letter intimating whether they had acted on his instructions in Exhibit Q and he had merely answered "Hashim Kader Moideen came to India and told me. He came to India in the month of April 1942." Besides Hasan Kader Moideen, who is alleged to have received Exhibit Q in Rangoon, does not know how it came to be produced in Court although he used to keep letters received by him in a file and some letters were burnt in a fire at Seikko.

As regards the oral evidence of the attempt to find the respondents and to redeem the pledge from them, all the witnesses agree that the attempt was made in January 1942. That is not quite consistent with the appellants' statement in paragraph 9 of their amended plaint that the cause of action arose in December 1941, when the respondents in breach of the contract with them and their obligations under the same failed to return the goods deposited with them. Besides, like the learned Judge on the Original Side, we find it difficult to believe that the appellants' agent Hasan Kader Moideen would have sent the four assistants with Rs. 5,000 each to redeem the pledge—instead of going himself—and without accompanying them, although the respondents' office was only ½ or ¾ furlong from his office and residence, or that he would have allowed them to keep Rs. 5,000 each on their persons from the first week of January 1942 to the 18th of February 1942, without keeping any money on himself and leaving only about Rs. 300 in the safe which was there in his office and residence. We also find it difficult to believe that he left Rs. 7,000 each with Abdul Rahaman, Sulaiman and Ahmed to redeem the pledge when he himself left Rangoon, on the 18th February 1942, taking only about Rs. 600 of the appellants' money with him for his expenses although he was going to leave Burma *via* Mônywa and although he was then quite satisfied that the respondents had gone, especially in view of the facts that he did not take any receipt from them, that there are no entries in the account books to show that the moneys were so left and that he was a mere agent who would have to account for the monys to the principals on his arrival in India.

Moreover even if the assistants did go to the respondents' office as alleged, they went between 7 a.m.

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and 10 a.m. and it might have been before the respondent's office was open.

Hasan Kader Mooideen has deposed that he also went to redeem the pledge on several occasions after the 15th January 1942. However under further cross-examination, he had to reduce the occasions to two or three and to admit that he went without the four assistants who had the money and that he went at about 10 a.m. which again might have been too early. Besides, there was no reference whatsoever in the correspondence, the plaint, the amended plaint and his evidence-in-chief to his having gone to redeem the pledge at all ; and he came out with the belated story only in his cross-examination. He has also admitted that he never went to Messrs. Balthazar & Sons to try and get the goods from them although it is the appellants' case that the latter are the respondents' agents.

With reference to the dispute as to when the late Bikraj left Rangoon, Chothumull Goenka's statements that Bikraj was in Rangoon throughout the month of January 1942 and the Bikraj even attended the funeral of Jamnadas, a well-known member of the Marwari community, towards the end of that month is supported by Mangal Chand, senior partner in Mangal Chand Firm (D.W.3) and Hari Prasad, a partner in H. H. Bajaj & Sons (D.W.4). Besides P. K. Mohamed Gani (D.W.7) who had pledged similar goods with the respondents on similar terms, has given evidence of his having redeemed seven bales from them on the 17th January 1942 and of his having got possession thereof from Messrs. Balthazar & Sons. Moreover, the evidence of these witnesses is supported to a certain extent by that of H. M. Tingemans, Manager of the Trading Company (D.W.2). So we agree with the learned Judge on the Original Side that U Maung Maung

(D.W.1) must have made a mistake on account of faulty memory when he said that he met Ram Narain Das (admittedly meaning Bikraj) at Amarapura in the first week of January 1942.

For all the above reasons, we agree with the learned Judge on the Original Side that Bikraj was in Rangoon throughout January 1942, and that the appellants' agent and his assistants did not make any attempt to find him and redeem the pledge as alleged or at all.

The learned Advocate for the respondents has drawn our attention to the fact that the appellants and their agent have not made any offer to redeem the pledge even after the termination of the war. However, that may have been because they were aware of the goods having not been there any longer. C. Joakim of Messrs. Balthazar & Sons has stated that even the godown was not there when he came back after the war ; and Abdul Rahaman asked Chothumull Goenka what had happened to the goods when he met him first after the war.

With reference to the allegation in paragraph 6 of the amended plaint that early in January 1942 the respondents in breach of their obligations to the plaintiffs under the contract, left Rangoon without any intimation to the appellants, we have found that Bikraj did not leave Rangoon before the end of January 1942. As regards the other part of the allegation the learned Advocate for the respondents had rightly pointed out that as a general rule the debtor has to find the creditor and there is nothing to show that it was a term of the contract between the appellants and the respondents that the latter should not leave Rangoon without intimation to the former. Besides failure to give such intimation is not " default of the bailee by which the goods are not returned, delivered or tendered at the

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proper time" within the purview of section 161 of the Contract Act read with sections 160 and 173 thereof.

Moreover we are not satisfied that the appellants were ready and willing to redeem the pledge. Chothumull Goenka has deposed that they failed to redeem it inspite of several demands made by the respondents; and the probabilities are in his favour. The circumstances then prevailing, *i.e.*, just after the outbreak of the war and just after the first two air raids on Rangoon, were such that creditors would be pressing debtors for payment and the latter would be thinking twice before they parted with their money. At that juncture the appellants still had two thousand *longyis* valued at Rs. 8,000 in stock. They were not at all short of stock for sale in the market, which must have been more or less affected by the outbreak of war; and according to Hasan Kader Moideen's own evidence he would have been left with about Rs. 300 only if he had redeemed the pledge then. The pledged goods were then in Messrs. Balthazar & Sons godown, which was as safe as any other godown in Rangoon. Besides, the goods had been insured against fire risks in the said godown and the insurance would have lapsed on redemption and removal therefrom.

For all the above reasons we hold that there is no default of the respondents by which the pledged goods were not returned, delivered or tendered at the proper time and that they are not responsible for any loss or destruction of the goods under section 161 of the Contract Act.

To turn now to the question as to whether the respondents are liable under sections 151 and 152 of the Contract Act as they did not remove the goods to Mandalay. As we have already pointed out, the appellants have not suggested in the correspondence, the plaint, the amended plaint and their evidence

that the goods should have been removed to Mandalay; nor have they pleaded that the goods were lost as the respondents failed to take as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value. The question has been raised simply because Chothumull Goenka has stated in the course of his evidence that the appellants' own goods were removed to Mandalay. So it is fairly obvious that removal of the pledged goods to Mandalay did not strike the appellants as a step which the respondents should, as men of ordinary prudence, have taken. Chothumull Goenka has explained: "The goods belonged to the pledgor ; it was not my own. Without his consent, I could not take it away." Besides, the agreement between the appellants and the respondents was that the goods should be deposited in Messrs. Balthazar and Sons godown in Rangoon to be held by them to the order of the respondents after insuring them against fire risks with the said firm. There would have been a breach of contract on the part of the respondents if they had removed the goods from the said godown without the consent of the appellants. The goods would also cease to be covered by the said insurance on such removal.

Moreover, the result of the removal of the appellants' own goods to Mandalay does not appear to have been very happy. Chothumull Goenka has stated under cross-examination : "The goods which were liked by the Chinese as white and grey shirtings were sold but at a very low discount, whereas goods of the Burmese people's liking were left unsold. * * * Very little quantity was sold." And U Maung Maung (D.W.1) stated that Narain Dass (Bikraj) then made a free gift of *longyis* worth about Rs. 20,000 to him at Amarapura (near Mandalay) and that he not only

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refused to accept the gift but also returned the other *longyis*, which were already with him for sale, as there was no demand for *longyis* then.

It is also a well known fact that Mandalay has suffered greather war damage than Rangoon. As Davis J.C. has pointed out in *Shrimati Pevibai and others* v. *Motumal Kulachand* (1) it is easy to be wise after the event and offer counsels of perfection ; but this is a case in which it cannot even be retrospective wisdom to say that the goods should have been removed to Mandalay.

The learned Advocate for the appellants has cited *Joseph Travers & Sons, Ltd.* v. *Cooper* (2). However, that was a case in which the goods were damaged as the barge owner's lighterman, who was in charge of the barge, negligently left her unattended at night. In the present case the goods were left in the godown of Messrs. Balthazar & Sons who were their warehouse keepers and insurers.

He has cited also *Brabant & Co.* v. *Thomas Mulhall King* (3). However, that was a case in which goods were damaged by flood and the question was whether the bailee *who selected the place for their storage*, had stored them at too low a level. In the present case the goods were stored in the godown of Messrs. Balthazar & Sons by mutual consent and the appellants never suggested to the warehouse keepers or the respondents that the goods should be removed elsewhere for greater safety. The present case is more like *Shanti Lal and another* v. *Tara Chand Madan Gopal* (4) in which it was held :

" Where there is an unprecedented flood in the town, as a result of which part of the goods bailed is deteriorated, other

(1) (1937) A.I.R. Sind 84.
(2) L.R. (1915) 1 K.B. 73.
(3) (1895) A.C. 632.
(4) A.I.R. (1933) All. 158.

things being equal, the bailee is not responsible for such loss, but the bailor has to suffer it."

A bailee is not

"Apart from special contract, an insurer, and therefore in the absence of negligence on his part he is not liable for the loss or damage to the chattel due to some accident, fire, acts of third parties, or the unauthorized acts of his servants acting outside the scope of their employment."

(Halsbury's Laws of England, 2nd Edn., Vol. 1, p. 749-750). *See* also *Brook's Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (1)

So we agree with the learned Judge on the Original Side that the respondents are not liable under sections 151 and 152 of the Contract Act although they did not remove the goods to Mandalay.

The next contention of the learned Advocate for the appellants is that it is for the respondents to prove how the goods were lost. He relies on *East Indian Railway Company* v. *Piyare Lal Sohan Lal* (2). However that was a case in which the loss was not admitted and Bhide J. himself observed therein: "The burden as regards the proof of the loss will, of course, usually be light and formal evidence on the point may be sufficient to shift the onus to the plaintiff;" and we have already held that it is common ground that the goods have been lost.

His ultimate contention is that it is for the respondents to prove that the goods have been lost without any fault on their part. He relies on *River Steam Navigation Company* v. *Choutmull and others* (3) and *Kush Kanta Barkakati* v. *Chandra Kanta Kakati and others* (4). However, the first case is one in which the bailee took the onus on himself and discharge it;

(1) (1937) L.R. 1 K.B. 534.
(2) (1929) I.L.R. 10 Lah. 361.
(3) (1899) L.R. 26 I.A. 1.
(4) (1923) 28 C.W.N. 1041.

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and the second case is one under section 161 of the Contract Act, *i.e.*, one in which the bailee was held liable for loss after his failure to return the elephant although the period for which it was hired had expired. Besides, the matter is concluded by authority inasmuch as Their Lordships of the Privy Council have held in *Dwaraka Natha Pai Mohan Chaudhuri and another* v. *Rivers Steam Navigation Co. Ltd.* (1) that it remains, in the case of loss being proved or admitted, for the bailor to prove that the bailee has "not shown due care, skill and nerve." *See* also *Secretary of State* v. *Ram Dhan Das Dwarka Das Firm* (2).

It only remains for us to add with reference to his comment on the respondent's failure to put their account books in evidence that according to the note of the learned Judge on the Original Side at page 89R of the record Chothumull Goenka did produce them in Court while he was being examined-in-chief and that he was not cross-examined with reference to any entry therein.

The appeal is dismissed with costs.

(1) (1918) 27 Cal. L.J 615: 20 Bom. L.R 725 P.C.

(2) 37 C.W.N 1109: A.I.R (1934) Cal. 151.

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

HAJEE L. A. M. NAGOOR MEERA & SONS (APPELLANTS)

v.

BEHARILAL CHOTMAL (RESPONDENT). *

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Aug. 25.

Promissory note executed—Goods bailed—Goods lost owing to circumstances arising out of the war through no fault of the pledgee—Pledgee entitled to a decree.

Held : That where a Pledgor borrowed money on promissory notes, and as security for repayment of the loan pledged goods, and the goods were lost owing to circumstances arising out of the war without any default on his part, the pledgee is entitled to a decree on his promissory notes.

Trustees of the Properties of Ellis & Co. v. *Dixon-Johnson*, (1925) A.C. 489, followed.

Dr. Ba Han for the appellants.

C. A. Soorma for the respondent.

U THEIN MAUNG, C.J.—This is an appeal from the judgment and decree on the four promissory notes for which the pledge of goods mentioned in Civil 1st Appeal No. 15 of 1949 in this Court formed collateral security.

The appellants' defence was that the suit should be dismissed on account of the respondent's failure to return the goods.

However, we have held in the said appeal confirming the decree of the learned Judge on the original side that the respondents are not responsible for the loss of the pledged goods.

* Civil 1st Appeal No. 16 of 1949 against the decree of the Original Side (U Bo Gyi) Hight Court of Rangoon in Civil Regular Suit No. 47 of 1947, dated the 26th February 1949.

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The learned Advocate for the appellants relies on *Trustees of the Properties of Ellis & Co.* v. *Dixon-Johnson* (1). However that was a case in which the bailee had *improperly made away with the security*; and the present is a case in which the goods have been lost for no fault of the bailees.

As has been stated in paragraph 31 of Halsbury's Laws of England, Volume 25, at pages 13-14 of the part on Pawns and Pledges :

> " The law requires nothing extraordinary of the pawnee, but only that he shall use ordinary care for restoring the thing pledged. Thus, if the pawnee loses the goods pawned without default on his part, he may still recover the debt, and the loss falls on the owner. "

The appeal is dismissed with costs.

U SAN MAUNG, J.—I agree.

(1) (1925) A.C. 489.

APPELLATE CIVIL.

Before U Tun Byu, and U Aung Khine, JJ.

H. C. DASS (APPELLANT)

v.

U NGWE GAING AND OTHERS (RESPONDENTS). *

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Aug. 12.

Lease by Rangoon Development Trust—Entry in 1943 by another and sale by her—Nature of title—Lease in favour of such purchaser in 1947—Whether valid—S. 43, Transfer of Property Act—"Erroneous representation"—What is.

The Rangoon Development Trust in 1941 issued a lease to Daw Aye for 90 years. Subsequently in 1943 one U Ba Aye entered on the land, built a house and sold it to appellant, who subsequently got a lease from the Development Trust. The legal representatives of Daw Aye filed a suit for recovery of possession and mesne profits.

Held : That as no notice was issued to Daw Aye before the fresh lease, the same must have been issued by mistake on the assumption that the land was at the disposal of the Rangoon Development Trust. The lease to Daw Aye had never in fact been cancelled and it could not be deemed to have been impliedly cancelled and therefore must be presumend to be still subsisting. The Rangoon Development Trust had no right or title to create a fresh lease in respect of the same land.

Held further : That the Purchaser was not induced by any officer of the Rangoon Development Trust to act to his detriment. The principle underlying s. 43 of the Transfer of Property Act is only an extension of the well known rule of estoppel and the person in whose favour equity is allowed to be operated must have acted on representation. As there was no represention s. 43 of the Transfer of Property Act does not apply.

Ladu Narain Singh v. *Gobardhan Das*, (1925) I.L.R. 4 Pat. 478 at 480 ; *Mulraj* v. *Inder Singh and others*, (1925) 48 All. 150 at 151, referred to.

Dip Narain Singh v. *Nageshar Persad and another*, (1930) 52 All. 338, distinguished.

P. K. Basu for the appellant.

U Thein Maung for the respondents.

The judgment of the Court was delivered by

U TUN BYU, J.—The plaintiff-respondert U Ngwe Gaing was the husband of Daw Aye who died in

* Civil 1st Appeal No. 21 of 1949 against the decree of the 3rd Judge, City Civil Court, Rangoon, in Civil Regular Suit No. 65 of 1948, dated the 11th March 1949.

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August 1943, at Shwebo where U Ngwe Gaing who was then the Headquarters Assistant, was working at that time. Marie Gaing, Molly Gaing and Maisie Gaing, the other three plaintiff-respondents, are the daughters of U Ngwe Gaing and Daw Aye. U Ngwe Gaing and his three daughters instituted Civil Regular Suit No. 65 of 1948 of the Court of the City Civil Court, Rangoon, for the possession of a piece of land known as lot No. 88, in Survey Block 27D-I in Sanction Plan of Settlement No. 65, Kemmendine Circle, Rangoon, and for the recovery of a sum of Rs. 1,200 as mesne profits arising therefrom for the period from January 1946 to the end of December 1947. The lease of the land in dispute was issued to Daw Aye by the Rangoon Development Trust in 1941. It is said that the lease issued to Daw Aye had been lost during the last Great War. The (Exhibit D) extract from the Lease Register maintained by the Rangoon Development Trust suggests that the lease which was issued to Daw Aye was probably in the nature of a 90 years' lease. In any case in view of the (Exhibit A) lease and the Exhibit III lease, it could be presumed that the lease issued to Daw Aye must have been, at least, in the nature of a 30 years' lease.

One U Ba Aye, who had been examined as a witness for the defendant-appellant, entered upon the land in dispute and built a house thereon in 1943, obviously without the consent of Daw Aye who was then in Shwebo. U Ba Aye subsequently sold the house he had constructed to the defendant-appellant H. C. Dass for Rs. 2,750 under a registered deed. It is clear in this case that no lease was issued to U Ba Aye by the Rangoon Development Trust in respect of the land in dispute. The taxes which U Ba Aye paid for the occupation of the land in dispute were encroachment taxes, and his occupation could

accordingly be considered to be in the nature of a licensee. In May 1945, about six months after he had purchased the house from U Ba Aye, the defendant-appellant H. C. Dass applied to the Rangoon Development Trust for the lease of the land in dispute, and subsequently he obtained the Exhibit III lease dated 27th February 1947, from the Rangoon Development Trust. The evidence shows that no notice was issued to Daw Aye or her legal representatives before the Exhibit III lease was issued to H. C. Dass. The evidence of U Sein also indicates that the lease to H. C. Dass was issued by mistake, on the mistaken assumption that the land in respect of which it was issued was at the disposal of the Trust.

It appears that U Ngwe Gaing was arrested after the British reoccupation of Burma in 1945 and that he was in custody for about four months. There were also departmental enquiries opened against him. According to U Ngwe Gaing, he went in 1947 to U Ba Nyun, the Land Officer, and protested against the transfer of the lease of the land in dispute to H. C. Dass, and he also asked U Ba Nyun to issue a substituted lease in his name in respect of the land in dispute. Exhibit F shows that proceedings were opened to cancel the lease issued to H. C. Dass, and that the Land Officer cancelled the lease issued to H. C. Dass, under the Exhibit III and that H. C. Dass was requested to surrender his lease. The order of the Land Officer was dated 28th July 1947. Exhibit C also shows that subsequently a fresh proceeding was opened, in which an order was passed for a substituted lease to be issued to U Ngwe Gaing in respect of the same land, probably as an heir of Daw Aye. The Exhibit C order, dated 18th September 1947, suggests that the lease issued to Daw Aye was still subsisting, at least up to the date of

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that order. Exhibits C and F also indicate that the lease which had been issued to H. C. Dass was considered to have been issued under a mistake of fact. It cannot be disputed that the land in dispute was in the possession of Daw Aye after the lease had been issued to her by the Rangoon Development Trust in 1941, and, in any case, it must be assumed to be so in view of the fact that the defendant-appellant has not disputed the plaintiff-respondents' allegation in paragraph one of their plaint that Daw Aye was in possession of the land in dispute after the lease had been issued to her in 1941. It might be observed here that there is nothing in the Exhibit C to suggest that the lease to Daw Aye had been cancelled at the time by U Ba Nyun, the Land Officer, when he passed his order of 18th September 1947, directing a substituted lease to be issued to U Ngwe Gaing. The endorsement on the right side of the Exhibit D extract from the Lease Register does not show under whose order or direction the lease to Daw Aye was purported to have been cancelled, and it also does not describe who U Ba Thaw was, or under whose authority he made the endorsement. It must accordingly be assumed that U Ba Thaw had no authority to cancel the lease issued to Daw Aye.

It is contended on behalf of the defendant-appellant that he ought to be considered to be the person in whom the legal right in the land in dispute vests after the lease to Daw Aye had been cancelled in view of the provisions of section 43 of the Transfer of Property Act. We have already stated that there is no evidence to show in this case by whom or under whose direction or under which rule the lease to Daw Aye was said to have been cancelled. It has been urged on behalf of the defendant-appellant that the lease issued to Daw Aye should be considered to have been impliedly cancelled

after the issue of the Exhibit A lease to U Ngwe Gaing, dated 25th September 1947. However, if the lease issued to Daw Aye is to be considered to have been impliedly cancelled by the issue of the lease to U Ngwe Gaing on 25th September 1947, as contended on behalf of the defendant-appellant, that would by implication mean that a valid lease had been issued by the Rangoon Development Trust in favour of U Ngwe Gaing, because an invalid lease issued in favour of U Ngwe Gaing would not have the effect of impliedly cancelling the lease issued to Daw Aye. Thus if the lease issued to U Ngwe Gaing was to be considered ineffective, it must be presumed that the lease issued to Daw Aye would still subsist ; and if the lease issued to Daw Aye still subsisted, it is obvious that the Rangoon Development Trust had no right or title to create any lease in favour of H. C. Dass under the Exhibit III lease. Exhibits B and III forms of lease issued by the Rangoon Development Trust read with the endorsement made on the right side of Exhibit D suggest that the nature of the lease issued to Daw Aye must have, at least, been a 30 years' lease.

It has also been contended on behalf of the defendant-appellant that the provision of section 43 of the Transfer of Property Act apply to the case now under appeal. There is nothing in the statement of H. C. Dass to show that he was induced to apply for the lease by any of the Officer of the Rangoon Development Trust. The evidence in this case on the other hand shows that the house on the land in dispute had already been built before he bought it, and he applied for the lease to be issued in his name only about six months after he purchased the house from U Ba Aye. There was therefore no evidence to indicate that H. C. Dass was induced by any Officer of the Rangoon Development Trust to act to his detriment in

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connection with the land in dispute. In the case of *Ladu Narain Singh* v. *Gobardhan Das* (1) it was observed :

" . . . . . if the principle underlying section 43 of the Transfer of Property Act be an extension of the well known rule of estoppel, it must be established that there was a representation made by Sukhnath which was believed by the plaintiff and that the plaintiff relying on the truth of that representation changed his possession to his detriment. "

It was also observed in the case of *Mulraj* v. *Indar Singh and others* (2) as follows :

" Section 43 of the Transfer of Property Act opens with these words ' Where a person erroneously represents. ' The word ' represents ' clearly shows that the person in whose favour the equity is allowed to operate must have acted on the representation. The point has really been settled by numerous authorities. . . . "

It must accordingly be held that the provisions of section 43 of the Transfer of Property Act do not apply in the circumstances of this case.

We have already observed earlier that the land in dispute was not at the disposal of the Rangoon Development Trust at the time it purported to have issued the Exhibit III lease to the defendant-appellant H. C. Dass in view of the fact that the lease which was granted to Daw Aye was still subsisting. The facts in the case of *Dip Narain Singh* v. *Nagesher Persad and another* (3) are entirely different from the facts obtaining in the case now under appeal. The observation of Sulaiman J. as he then was, shows clearly that it was made in respect to a completed transaction, whereas in the case now under appeal the lease which was issued to H. C. Dass could not be considered to be a completed transaction in that

(1) (1925) I.L.R. 4 Pat. p. 478 at 480. (2) (1925) I.L.R. 48 All. p. 150 at 151.
(3) (1930) 52 All. p. 338.

the land was not at the disposal of the Rangoon Development Trust. The transaction, so far as the lease to H. C. Dass is concerned, could therefore still be considered to be one of contract only, although it had been reduced into the form of a written lease. Rule 20 of the Rangoon Development Trust Land Rules, 1922, also suggests that the Rangoon Development Trust would not have issued a lease to H. C. Dass, if it had known that the land was not at the disposal of the Trust. It is therefore difficult to understand how the lease, which was purported to be granted to H. C. Dass under Exhibit III, could be considered to be a completed transaction. It must accordingly be held that the provisions of section 20 of the Contract Act apply in the circumstances of the present case. The Rangoon Development Trust could accordingly treat the lease which it purported to have issued under Exhibit III as void, and as if it did not exist. It is true that there is nothing on the record to show that the lease to H. C. Dass had been expressly cancelled by the Trust although the Land Officer had passed an order to that effect, but express cancellation by the Trust is not necessary in the circumstances of this case. The fact that the lease was subsequently issued to U Ngwe Gaing by the Trust implies that the Trust in issuing the lease to U Ngwe Gaing subsequently had also impliedly cancelled the lease granted to H. C. Dass, even if the lease could be considered to be a completed transaction for the purpose of section 43 of the Contract Act. Thus in whatever light the present case is considered it appears that the claim of the plaintiff-respondents must be decreed.

The appeal is therefore dismissed with costs.

APPELLATE CIVIL.

Before U Tun Byu and U Aung Khin, JJ.

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July 27.

U MAUNG GALE (APPELLANT)

v.

U KYAW (RESPONDENT).*

Memorandum of appeal—Appellant represented by next friend, application to amend memorandum of appeal—Bona fide *defect or irregularity—Powers of Appellate Court—S. 107, clause 2 of the Code of Civil Procedure.*

Where a memorandum of appeal was filed describing the appellant as represented by a next friend and the Appellant applied to cure the defect by deleting the surplus words "by next friend."

Held : That the defect or irregularity in the memorandum of appeal having been made *bona fide* the amendment should be allowed.

Taqui Jan, minor, by his mother Banu Begum v. *Obaidulla,* (1894) 21 Cal. 806 ; *Shanmuga Chetty* v. *O. K. Narayana Ayyar,* (1917) 40 Mad. 743 ; *Ali Muhammed Khan* v. *Ishaq Ali Khan and others,* (1932) 54 All 57 ; *Indarpal Singh* v. *Bhagwati Singh,* (1941) 14 Luck. 256, referred to and applied.

The Court has ample power to correct the error under Order 1, Rule 10 of the Code of Civil Procedure and in view of the provisions of s. 107, clause 2 of the Code of Civil Procedure the Appellate Court has the same powers and duties as the Court of Original Jurisdiction.

Thein Moung for the appellant.

Tun Maung for the respondent.

The judgment of the Court was delivered by

U TUN BYU, J.—It appears that one Daw Gyan died in 1945 leaving U Maung Gale, who was her second husband, surviving her. There were apparently children or issue born of that marriage. Daw Gyan also left a son by her former marriage named Maung Kyaw. In 1948 Maung Kyaw instituted a suit for the administration of the estate of Daw Gyan against U Maung Gale

* Civil Misc : Appeal No. 30 of 1948 against the $\frac{\text{decree}}{\text{order}}$ of the District Court of Mandalay in Misc. No. 32 of 1948.

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and he applied in Civil Miscellaneous No. 32 of 1948 for the appointment of a Receiver in respect of the properties belonging to the estate of Daw Gyan, and his application was granted. Ma Ma Gyi, the eldest daughter of U Maung Gale and Daw Gyan, applied to be allowed to act as a *guardian ad litem* for U Maung Gale in Civil Regular Suit No. 4 of 1948 on the ground that U Maung Gale was not able, owing to his bodily and mental infirmity, to look after his own interests in that suit. Her application was, however, dismissed; and it might be mentioned that the order appointing a Receiver was passed sometime before Ma Ma Gyi's application to be appointed a *guardian ad litem* was dismissed. An appeal was filed on 10th September 1948, against the order of the District Judge dated the 6th September 1948, appointing a Receiver to the estate of Daw Gyan, that is, the present Civil Miscellaneous Appeal No. 30 of 1948 ; and in the memorandum of appeal the appellant was described as follows :

"U Maung Gale, by his next friend, Ma Ma Gyi, West Moat Road, Pyigyi-kyetthaye Quarter, Mandalay."

There is obviously a defect in the memorandum of appeal so filed as Ma Ma Gyi's application to be appointed *guardian ad litem* of U Maung Gale had been dismissed. It is apparently for the purpose of curing this defect that U Maung Gale files the present application to be allowed to amend the memorandum of appeal filed on the 10th September 1948, by deleting the words "by his next friend, Ma Ma Gyi," in the heading of the memorandum of appeal.

It is clear from the memorandum of appeal that U Maung Gale was described as the appellant and paragraphs 2 and 3 of the same make this very clear. The headnote of the case of *Taqui Jan. minor, by his*

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mother Banu Begum v. *Obai dulla* (1) reads as follows :

"When a suit is instituted by a person alleging himself to be a minor, and the suit is brought through a next friend, and when it is found that the plaintiff was not at the date of the institution of the suit in fact a minor, the Court should not dismiss the suit, as the defendant can be fully indemnified by the appellant of his costs. In such a suit the proper remedy for the defendant is to apply to have the plaint taken off the file or amended, and if it be not amended, the next friend's name may be treated as a mere surplus age and the suit be allowed to proceed."

The case of *Taqui Jan* (1) was referred to with approval in the case of *Shanmuga Chetty* v. *O. K. Narayana Ayyar* (2), the headnote of which is as follows :

"Where the plaintiff was described in the plaint as a minor but had really attained majority some four days before the plaint was filed by his next friend who was under a *bona fide* belief that he was still a minor when she filed the suit on his behalf as his next friend.

Held : That the suit ought not to be dismissed but that the proper procedure to be adopted in the case was to return the plaint for presentation after making the necessary amendments by striking off description of the plaintiff as a minor suing through his next friend and making other consequential alterations in the plaint."

In the Full Bench case of *Ali Muhammed Khan* v. *Ishaq Ali Khan and others* (3) it was held :

"That the misdescription of the plaintiff as a minor in suing through his next friend and any consequent defects in the signature, verification and presentation of the plaint were technical defects or irregularities of procedure which did not affect the jurisdiction of the Court to entertain the suit ; and the suit should

(1) (1894) 21 Cal. 866. (2) (1917) I.L.R. 40 Mad. 743.
(3) (1932) I.L.R. 54 All. 57.

not be dismissed, but the plaintiff could and should be allowed to amend the misdescription, and then the appeal in the lower Appellate Court should be proceeded with."

The decision in the case of *Indarpal Singh* v. *Bhagwati Singh* (1) is to the same effect, and the headnote reads:

"Where the plaintiff was described in the plaint as a minor and the suit was filed by him through his next friend but after the filing of the suit it was discovered that he was entered a minor by mistake but was actually a major and so application was made for correction of the mistake and amendment of the plaint.

Held: That under Order 1, Rule 10 of the Code of Civil Procedure, the Court has ample power to correct the error if it is satisfied that the mistake is a *bona fide* one . . . . . Section 22 of the Limitation Act has no application to a case where no new plaintiff is added after the institution of the suit, but by amendment only. His age is corrected by the order of the Court and he is allowed to sue without the intervention of the next friend."

In this case ordinarily U Maung Gale would be the person who should have charge of the properties belonging to the estate of Daw Gyan after the latter's demise, and he could accordingly be said to be the person who would be most interested in objecting to the appointment of a Receiver. It appears to us that the defect in the memorandum of appeal can be properly deseribed to be a defect which was made *bona fide* as Ma Ma Gyi's application to be appointed a *guardian ad litem* of U Maung Gale had not then been decided, and moreover, Ma Ma Gyi is the eldest daughter of U Maung Gale and the deceased Daw Gyan. In paragraph 3 of his present application U Maung Gale states:

"3. That the petitioner, being dissatisfied with the said order of the appointment of Receiver, file a Civil Miscellaneous

(1) (1941) I.L.R. 14 Luck. 256.

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U TUN BYU, J.

Appeal No. 30 of 1948 of this Hon'ble Court on 10th September 1948 through his next friend Ma Ma Gyi, the eldest and the only daughter of the petitioner under the *bona fide* belief that Ma Ma Gyi can act on the petitioner's behalf."

The above statements of U Maung Gale were challenged during the argument, but we are unable to see anything on the record to indicate or suggest why his statements ought not to be accepted. The defect or irregularity in the memorandum of appeal filed in the present case can therefore be described to be a defect or irregularity made *bona fide*, and the principal under which the cases cited above were decided applies, in our opinion, to the present application which is now under consideration, in view of the provisions of sub-section (2) of section 107 of the Code of Civil Procedure which reads :

" (2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of Original Jurisdiction in respect of suits instituted therein."

Thus, it is clear in the light of the decisions which have been referred to above that U Maung Gale must be allowed to amend his memorandum of appeal by deleting the words "by his next friend Ma Ma Gyi" between the expression " U Maung Gale " and the expression " West Moat Road " in the memorandum of appeal filed on the 10th September 1948. The office will take the necessary steps to have these words deleted, and the case can thereafter again be placed in the list for hearing.

We are, however, of the opinion that the appellant ought to pay the costs of the respondent in respect of the present application, which we fix at five gold mohurs.

APPELLATE CIVIL.

Before U Tun Byu, J.

DALBIR CHETTRI (APPELLANT)

v.

DHARAM BAHADUR CHETTRI (RESPONDENT).*

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July 28.

Order 21, Rules 58 and 62 of the Code of Civil Procedure—Application for removal of attachment of moveable properties where dismissed.

Held: Where after an application for removal of attachment has been dismissed the attachment itself was removed within one year of the dismissal of the application for removal of attachment it was not incumbent on the unsuccessful applicant to file a suit under Order 21, Rule 63 of the Code of Civil Procedure.

Gopal Purshotam v. *Bai Divali*, (1894) I.L.R. 18 Bom. 241; *Manila Girdhar* v. *Mahasukhram Vyas*, (1921) I.L.R. 45 Bom. 561 at 564; *Onkar Prasad* v. *Dhani Ram and others*, (1930) A.I.R. All. 177; *Najimunnissa Bibi* v. *Nacharuddin Sardar*, (1924) 51 Cal. 548 at 561; *Krishna Prosad Roy* v. *Bepin Behari Roy*, (1903) 31 Cal. at 228; *Habibullah and another* v. *Mahmood*, (1934) 56 All. 537 at 545, followed.

Koyyana Chittemma and another v. *Doosy Gavaramma and others*, (1906) 29 Mad. 225; *R. Singariah Chetty* v. *Chinnabbi and five others*, (1921) 44 Mad. 268; *Maung Pya and one* v. *Ma Hla Kyu and others*, (1923) Vol. I Ran. 281, distinguished.

Sulaiman v. *Tan Hwi Ya*, (1929) 7 Ran. 800; *Shamu Patter* v. *Abdul Kadir Ravuthan and others*, (1912) 35 Mad. 607 at 612, referred to.

K. R. Venkatram for the appellant.

Aung Min (1) for the respondent.

U TUN BYU, J.—The facts in connection with this appeal are that Dharam Bahadur, the plaintiff-respondent, sued one Bal Bahadur for the recovery of a sum of Rs. 2,546 in Civil Regular Suit No. 3 of 1946 of the Court of the Assistant Judge, Myitkyina, and his

* Civil 2nd Appeal No. 137 of 1948 against the decree of the District Judge of Myitkyina in Civil Appeal No. 7M of 1948, dated the 4th October 1948.

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U TUN BYU, J.

suit was decreed with costs on 4th April 1946. Dharam Bahadur then applied for execution of the decree so obtained by him, which became known as Civil Execution Case No. 1 of 1946, in the course of which he obtained an attechment of 18 buffaloes and a garden land, which were alleged to belong to his judgment-debtor Bal Bahadur. On 14th January 1946, one Jangbir Chettri applied in Civil Miscellaneous No. 2 of 1946 for the removal of the attachment on the ground that the buffaloes which had been attached in Civil Execution No. 1 of 1946 belonged to him, but his application was dismissed on the 23rd September 1946. On 25th June 1946, Dalbir Chettri, who is the defendant-appellant in the present appeal, also applied in Civil Miscellaneous No. 4 of 1946 for the removal of the same attachment on the ground that the buffaloes belonged to Jangbir Chettri, who was the applicant in Civil Miscellaneous No. 2 of 1946, and that Jangbir Chettri had mortgaged them to him for Rs. 500. Dalbir Chettri's application was also dismissed on the same day on which Civil Miscellaneous No. 2 of 1946 was dismissed. The attachment, which Dharam Bahadur obtained in Civil Miscellaneous No. 1 of 1946 was, however, removed on 11th December 1946 and the diary order passed in this connection is as follows:

"Called. Both decree-holder and judgment-debtor present and file a joint application that the execution be closed with a note of full satisfaction as per their application.

Inform Bailiff that the warrant on the buffaloes are removed and the decree holder submits that buffaloes are in his possession.

As the case is amicably settled there is no necessity to hold an enquiry about the loss of buffaloes.

Decree-holder has the right to apply for mutation of names for lands if desired before a competent Court.

Case closed with a note of full satisfaction."

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On 17th December 1946, that is five days after the attachment was removed and Civil Execution No. 1 of 1946 was closed, Dalbir Chettri, who was the applicant in Civil Miscellaneous No. 4 of 1946, instituted a suit, which was known as Civil Regular Suit No. 85 of 1946, against the legal representatives of Jangbir Chettri, who had died in the meanwhile, for the recovery of a sum of Rs. 600, which was alleged to have been due on an unregistered mortgage dated 7th February 1946, under which Jangbir Chettri was said to have mortgaged 20 buffaloes, 2 bullocks, 1 cart and a garden land to Dalbir Chettri for a sum of Rs. 500. The buffaloes, which were attached by Dharam Bahadur in Civil Execution No. 1 of 1946, were apparently included in the 20 buffaloes which were alleged to have been mortgaged by Jangbir Chettri to Dalbir Chettri. A preliminary mortgage decree was passed in favour of Dalbir Chettri in Civil Regular Suit No. 85 of 1946, which he instituted against the legal representatives of Jangbir Chettri; and a final decree was passed on 9th May 1947. Dalbir Chettri, on or about 12th June 1946, obtained an attachment of 14 buffaloes in Civil Execution No. 13 of 1947 of the Court of the Subordinate Judge, Myitkyina, which he took out in execution of the decree obtained by him in Civil Regular Suit No. 85 of 1946. Dharam Bahadur, the present plaintiff-respondent, then applied in Civil Miscellaneous No. 4 of 1947 for the removal of the attachment of those 14 buffaloes on the ground that those buffaloes belonged to him, but his application was allowed to be closed on 22nd August 1947, apparently for the reason that it was no longer necessary to proceed with the application as the decree-holder Dalbir Chettri had allowed his execution case to be closed because of his failure to deposit the necessary watching fees. Dalbir Chettri deposited the necessary

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watching fees on or about the 1st October 1947, and he again asked for the attachment of the buffaloes with the result that Dharam Bahadur again applied on 6th October 1947, for the removal of this attachment, which became known as Civil Miscellaneous No. 6 of 1947 of the Court of the Subordinate Judge, and which case later became known as Civil Miscellaneous No. 4 of 1947 of the Court of the Assistant Judge. Dharam Bahadur's application for removal of attachment was, however, dismissed on 3rd December 1947. He next instituted a suit for declaration of his title to the buffaloes in Civil Regular Suit No. 3 of 1948, where Bal Bahadur and the legal representatives of Jangbir Chettri were also made defendants. The case for Dalbir Chettri is that the buffaloes belonged to his judgment-debtor Jangbir Chettri. The legal representatives of Jangbir Chettri did not, however, enter appearance, while Bal Bahadur supported Dalbir Chettri, in that he alleged that he had sold the buffaloes in question to Jangbir Chettri in February 1944, and that the latter mortgaged them to Dalbir Chettri for Rs. 500.

A preliminary issue, which had been framed at the hearing by the Court of the Assistant Judge, was in effect whether the claim of Dalbir Chettri to attach the buffaloes was not barred in view of the order dismissing his application for removal of the attachment passed in Civil Miscellaneous No. 4 of 1946 ; and both the trial Court and the District Court answered this question in the affirmative, that is, in favour of Dharam Bahadur, the plaintiff-respondent. It appears that there is sufficient evidence on record on which this new issue might properly be framed ; and the trial Court must therefore be considered to have acted rightly in framing this issue, *vide* the case of *Sulaiman* v. *Tan Hwi Ya* (1).

(1) (1929) 7 Ran. p. 800.

In the case of *Shamu Patter* v. *Abdul Kadir Ravuthan and others* (1), a Privy Council case, it was observed :

"Even had there been no such express provision in the Code, Their Lordships consider every Court trying civil causes had inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties."

The word "Code" referred to therein was the Civil Procedure Code of 1882.

It has been strenuously argued on behalf of the defendant-respondent Dharam Bahadur that the decisions of the lower Courts on the preliminary issue were correct; and it will accordingly be necessary to refer to the cases relating to this point. It will perhaps be convenient for purposes of this appeal to refer first to the case of *Gopal Purshotam* v. *Bai Divali* (2). There the assignee of the mortgage decree purchased the property, which he had attached in execution of the mortgage decree, by a private contract, and after his purchase the assignee withdrew his application for execution. The facts in that case could therefore be said to be somewhat analogous to the facts in the case now under appeal in that in both cases the property which had been attached was not brought to sale. Sargent C.J., in that case, observed :

"We agree with the lower appellate Court that, when the plaintiff withdrew his attachment, the parties were restored to the *status quo ante*. The object of the claim which was preferred by the defendant was, as contemplated by section 278, Civil Procedure Code, to obtain the removal of the attachment, and when that attachment was removed by the judgment-creditor's own act on 20th November 1888, there was no longer an attachment or any other proceedings in execution on which the order could operate to the prejudice of the claimant and, therefore, no necessity for bringing a suit to set aside the order."

(1) (1912) 35 Mad. 607 at 612. (2) (1894) I.L.R. 18 Bom. 241.

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The above observation appears to me to apply with equal force to the case now under appeal in that in the present case under appeal the attachment was also removed, although for a different reason, and it could therefore be said that there was also no necessity for bringing a suit as indicated in Order 21, Rule 63 of the Code of Civil Procedure. The observation of Sargent C.J., in the above case, was also cited with approval by Macleod C.J. in the case of *Manilal Girdhar* v. *Mahasukhram Vyas* (1). At page 565 it was observed :

"No doubt if the attachment had continued when the property was sold in execution before the claimant filed the suit, then different considerations would apply and certainly the order would be conclusive against him in favour of the purchaser if the suit was not filed within a year of the date of the order."

In the case of *Onkar Prasad* v. *Dhani Ram and others* (2) the above two Bombay cases were referred to with approval ; and at pages 178-9 it was observed :

"The suit contemplated by Rule 63 is one in which the right of the decree-holder to attach the property in question in execution of his decree is contested. As soon as has his decree is otherwise satisfied and he withdraws the attachment in consequence, the cause of action for his suit of the nature contemplated by Order 21, Rule 63, Civil Procedure Code, to which Article 11, Schedule I, Limitation Act applies, disappears."

Rankin J. in the case of *Najimunnissa Bibi* v. *Nacharuddin Sardar* (3), after stating that the case of *Gopal Purshotam* v. *Bai Divali* (4) had been followed in the case of *Krishna Prosad Roy* v. *Bepin Behari Roy* (5), observed :

"The principle is that the object of making a claim in execution is to remove the attachment, that when the attachment

(1) (1921) I.L.R. 45 Bom. 561 at 564.
(2) (1930) A.I.R. All. 177.
(3) (1924) 51 Cal. 548 at 561.
(4) (1894) I.L.R. 18 Bom. 241.
(5) (1903) 31 Cal. at 228.

is withdrawn that object is gained, and that, if there exists no attachment or proceeding in execution on which the order in the claim case can take effect, one is not bound to bring a suit complaining of such order,"

Page J., as he then was, in the same case, at pages 562-63, observed :

"The respondent contends on appeal that, if a person elects to take advantage of the procedure laid down in Order 21, Rules 58 to 63 of the Code of Civil Procedure, he must content to abide by the provisions of the rules which he has invoked, and that, if an order is made rejecting his claim or objection, he must institute a suit within a year from the date of such order, notwithstanding that the execution proceedings in respect of which his claim had been preferred have in the meantime come to an end. In my opinion that contention is unsound. Whether the decree is set aside, or reversed, or whether the decretal amount is paid into Court under Rule 55, or whether the attachment is voluntarily withdrawn by the decree-holder, or whether the order of attachment is discharged, in my opinion, the same result follows, namely, the parties are put back in the same position as they were in before the execution proceedings were launched. When a claim or objection is preferred under Rules 53 to 68, the applicant seeks to obtain the release of the property from attachment. It may or may not in that behalf be necessary for him to establish a possessory or proprietary title to the property. That depends upon the circumstances of each case."

In the Full Bench case of *Habibullah and another* v. *Mahood* (1) Sulaiman C.J. observed :

"According to this view these rules relate to summary investigation into a claim of objection to the attachment of property seized in execution of a decree and it is the duty of the defeated party to bring a suit in order to get rid of the order so long as that attachment is continuing ; but if the attachment ceases to exist the order itself is vacated and there is no longer any further bar against re-agitating the matter on a fresh occasion whether on account of a fresh attachment or if some separate proceeding arises. The reason to my mind is obvious.

(1) (1934) 56 All. 537 at 545.

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The claimant does not object to the execution of the decree at all. Indeed, he has no right whatsoever to object to the execution. His objection can only be that the property attached should not be attached as it is his own property. If the attachment is released his object is gained and so it becomes unnecessary for him to seek relief by a regular suit."

Mukherji J., who was one of the Judges who referred that case to the Full Bench, at page 546 observed :

"Indeed, I think, I could say much on the point in support of the view which I was inclined to take. Some of my grounds are given in the joint order of myself and my brother who agreed to refer the case to a Full Bench. But, as has been pointed out by the Chief Justice, the interpretation that has been given to the rule has been one way in all the Courts and for a long period of time. Many persons, on the faith of those rulings, may have been advised not to file a suit, and if we hold otherwise to-day they might suffer and their loss may be irreparable. It is therefore necessary to stick to the interpretation which has been almost uniformly given in the interest of the public at large because it is for the interest of the public that the law exists."

It will be observed that there have been long and consistent decisions to the effect that where a property which had been attached was released within a year, it was no longer necessary for the claimant to pursue his claim by a regular suit as indicated in Order 21, Rule 63 of the Code of Civil Procedure. It is clear from the order which the Assistant Judge passed in Civil Execution case No. 1 of 1946, dated the 11th December 1946, that the attachment of the buffaloes, which was the subject of the dispute there, had been removed within a year and that they were not brought to sale in that execution case.

The decision in the case of *Koyyana Chittemma and another* v. *Doosy Gavaramma and others* (1) must be read in the light of the facts and circumstances

(1) (1906) I.L.R. 29 Mad. 225.

existing in that case. There the attachment was not raised until more than a year after the claim of the claimant to remove the attachment had been rejected. The case of *R. Singariah Chetty* v. *Chinnabbi and five others* (10), was also referred to during the argument. The facts in that case are different from the facts in the case now under appeal. There the claimant, after his objection to the attachment had been dismissed, instituted a suit for a declaration; and the suit which he filed in pursuance of Order 21, Rule 63, was also dismissed. It appears also that the property in that case was brought to sale; and thus that case does not afford any help to the consideration of the case now under appeal. The decision in the case of *Maung Pya and one* v. *Ma Hla Kyu and others* (2) should also be read in the light of the facts existing in that case. There the property which had been attached in execution of a decree was also brought to sale, and it was bought over by the decree-holder, whereas as in the case now under appeal the buffaloes which had been attached in Civil Execution case No. 1 of 1946 were never brought to sale, but instead the attachment was allowed to be removed after the decree-holder had entered into a settlement with his judgment-debtor.

Thus it can be said that there have been a series of decisions for at least 55 years indicating how the provisions of Order 21, Rule 63 of the Code of Civil Procedure, so far as the present appeal is concerned, should be construed; and for the reasons set out above the answer to the preliminary issue must be given in the negative, and the judgment and decree of the Court of the District Judge, Myitkyina, and those of the Court of the Assistant Judge, Myitkyina, are set aside. The Court of the Assistant Judge,

(1) (1921) I.L.R. 44 Mad. 268. (2) (1923) I.L.R. 1 Ran. 281.

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U TUN BYU, J.

Myitkyina, is directed to restore Civil Regular Suit No. 3 of 1948 to its file to proceed with the case on the footing that the preliminary issue had been answered in favour of the defendant-appellant Dalbir Chettri. The parties to the suit ought to be allowed to adduce further evidence, if they so desire.

The appellant will be allowed his costs in this Court as well as in the District Court. The costs in the trial Court will be left to be decided by the trial Court, after the case has been re-heard there.

CRIMINAL REVISION.

Before U On Pe, J.

HOKE GWAN (APPLICANT)

v.

AUN WUN TAN (RESPONDENT).*

H.C. 1949

Sept. 13.

Return of Exhibit Properties—Rule Governing—S. 517, Criminal Procedure Code.

Held: In directing the return of properties under s. 517 of the Criminal Procedure Code the guiding principle is that the Magistrate has discretion to decide the question of possession but he cannot be allowed to try the civil cause; unless the Magistrate has exercised his discretion on wrong principle the High Court will not interfere.

V. K. Vaiyapuri Chetti v. *Sinniah Chetty*, A.I.R. (1931) Mad. 17; *S. R. Subrama Ayya, Proprietor, The Ganesh Bank, Chittoor, Cochin* v. *Kizakka Purakkal Pazani Velan's son, Damodaram*, 38 Cr.L.J. 690, referred to.

T. P. Wan for the applicant.

Sein Daing for the respondent.

ON PE, J.—This is an application in revision for setting aside the order of the 5th Additional Magistrate of Rangoon in Criminal Regular Trial No. 304 of 1948, directing the return to the respondent of the exhibit property, namely, 10 tins of cocoanut oil, seized from Sun Choung and Company. The respondent Aun Wun Tan was charged under section 411/414 of the Penal Code along with the accused Ah Pyan and Mutta, who were charged under section 461 of the Penal Code. He was acquitted on both the charges, while the other two were found guilty and convicted.

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* Criminal Revision No. 47B of 1949—Review of the Order of the 5th Additional Magistrate of Rangoon, dated the 18th June 1949, in Criminal Regular Trial No. 304 of 1948.

H.C. 1949

HOKE GWAN v. AUN WUN TAN.

U ON PE, J.

The facts of the case are all set out in the judgment of the Lower Court and for the purpose of this application the relevant order of the Lower Court is a diary entry of 18th June 1949 which reads :

"It is ordered that exhibit properties be returned to Sun Choung and Company."

It is against this order that the applicant has made this application in revision under section 520 of the Criminal Procedure Code.

The grounds urged, amongst others, for setting aside this order may be sumarized as follows :—

(i) That Sun Choung and Company has not itself come forward to claim the exhibit property and that the respondent was merely their clerk.

(ii) That the receipt produced by Aun Wun Tan should not be accepted as genuine.

(iii) That the exhibit property should have been held to be those stolen from the godown of Yone Tai and Company.

(iv) That the value of the evidence of Thi Ngar and Ah Lu has not been properly assessed.

The question whether Aun Wun Tan is a clerk or a manager of the firm is not material for the purpose of this application, as his representative character is quite justified by the fact, as the evidence shows, that he holds some shares in the firm. As regards whether or not the Lower Court has properly assessed the evidentiary value of the statements of the two witnesses mentioned above, I am quite satisfied that the Lower Court has applied its mind in a proper manner and come to a well reasoned finding on the point involved, namely, the guilt or otherwise of the third accused, the respondent in this case.

The remaining point which calls for consideration on the grounds urged is in respect of the ownership of

the exhibit property and it can best be disposed of by applying the well established principle followed in similar cases. The guiding principle is laid down in *V. K. Vaiyapuri Chetti* v. *Sinniah Chetty* (1) that though the Magistrate has a discretion to decide the question of possession, he cannot be allowed to try the civil cause, to weigh evidence and to estimate probabilities—the procedure followed in determining a civil case. Please *see* also *S. R. Subrama Avya, Proprietor, The Ganesh Bank, Chittoor, Cochin* v. *Kizakka Purakkal Pazani Velan's son, Damodaram* (2) from which the following may be quoted :

> " The general rule is that in making an order for the return of property under the Criminal Procedure Code the Magistrate has a wide discretion and unless it is clear that he has exercised it on some wrong principle and returned the property to somebody who is obviously not entitled to have it, the High Court will not set aside his order in revision."

In this case it is common ground that the exhibit properties were seized from the premises of Sun Choung and Company and it was in conformity with the well established rule when the Lower Court ordered the exhibit oil tins to be returned to where they came from.

The application in revision must fail and is accordingly dismissed.

(1) A.I.R. (1931) Mad. 17. (2) 38 Cr.L.J. 690.

APPELLATE CRIMINAL.

Before U On Pe, J.

H.C. 1949

Nov. 11.

A. KHUNJALAM AND TWO OTHERS (APPLICANTS)

v.

T. C. MOHAMED (RESPONDENT).*

Penal Code, s. 483—Meaning of the word Trade Mark.

Held: In order to be a Trade Mark within the meaning of s. 478 of the Penal Code the mark must be "distinctive" in the sense of being adapted to distinguish the goods of the proprietor of the Trade Mark from those of other persons. Where the mark merely describes the quality or origin of the article and is such as is commonly used in the trade, to define goods of particular kind, it is not distinctive.

Loke Nath Sen v. *Ashwini Kumar De*, I.L.R. (1937) 1 Cal. 665; *Gaw Kan Lye* v. *Saw Kyone Saing*, (1939) R.L.R. 488 at 492, followed.

The style of get-up of the boxes or packages in which the goods are retailed do not constitute Trade Mark within the meaning of the section.

J. R. Chowdhury for the applicants.

Tin Toon for the respondent.

U ON PE, J.—This is an application made to review the order of the Eastern Subdivisional Magistrate, Rangoon, convicting the applicants under section 483 of the Penal Code and sentencing to pay a fine of Rs. 100 or in default to suffer two months' rigorous imprisonment each and out of the fines, if realized, to pay Rs. 50 to the complainant as compensation.

The applicants were charged for having counterfeited a trade mark to wit "Moulana Beedy" used by T. C. Mohamed's Firm, Moulana Beedy Company.

* Criminal Revision No. 45B of 1949—Review of the order of the Eastern Subdivisional Magistrate of Rangoon, dated the 8th July 1949, passed in Criminal Regular Trial No. 243 of 1948.

The respondent firm carries on business at No. 228, Fraser Street, Rangoon, supplying their beedies with the trade mark in question. The so-called trade-mark is the label " MOULANA (M) BEEDY " in English character on violet background—about an inch long and quarter inch in breadth in rectangular shape with white and violet border lines. This is marked Exhibit C. These labels of paper bands are wrapped round their loose beedies. This mark along with other marks were registered by the respondent firm in 1944 during the Japanese occupation and again in 1946 after the British reoccupation.

The prosecution case is that the applicants, two of whom were lately employed by the respondent firm, commenced the business of manufacturing beedies after they left the employment six months ago and have been selling beedies with similar labels fixed on them so as to be benefited by the reputation acquired by Moulana Beedy, thereby counterfeiting Moulana Beedy label—an offence punishable under section 483 of the Penal Code. It is said that the applicants' label MOULAVI (M) BEEDY (Exhibit D) is similar to the respondent's label (Exhibit C) except for a variation of two alphabetic letters thereby causing the general public to be misled into thinking one for the other.

The applicants' case is that no offence has been committed as the label round the respondent's beedies in question does not constitute a trade-mark nor has it by user and reputation come to be identified with the respondent's beedies.

The Lower Court found the offence proved on the ground which reads as follaws :

" It must be borne in mind that many of the purchasers of Moulana beedies would be unable to read what is on the labels, but would be attracted by the general effect of the purple label which has a circle with ' M ' in the centre."

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This is the finding which seems to follow from only one aspect of the case, *viz.*, whether the so-called trade mark is distinctive in the sense of being distinguishable from those of other persons without considering the existence of its user as has rendered the mark in fact distinctive of goods in question. It is for consideration whether the finding of the Lower Court is warranted by the evidence on record which I will discuss later on.

There is another aspect of the case which apparently has been overlooked by the Lower Court, *viz.*, whether the label in question (Exhibit C) is a trade mark. Needless to say, if it is not a trade mark then there is no ground for criminal action.

The respondent's firm has produced two documents of declaration of ownership of trade mark in which several labels have been described with pictorial representation (Exhibits A and B). In the first document (Exhibit A), there are six different labels and in the second document (Exhibit B) there are nine labels. There is one label to be affixed on loose beedies, and the rest are labels to be affixed on bundles of 25 beedies, labels to be affixed on packets of 500 beedies and so on. We may stop here and see what a label on bundles of 25 beedies looks like. It is named " B " label in the document dated the 26th February 1946 (Exhibit B) and its description is as follows :—

" The beedies are bundled up having 25 beedies in each bundle and over each of these bundles shall be pasted a bigger trade mark label as shown here in about two inches in width and four and half inches in length. These labels are printed in violet coloured base having on the top corners figures ' 25 ' and in the centre of the top in arched form MOULANA BEEDY in English. Below the arch in the centre the bust photo of a Moulana within the oval, wearing a fezz cap with a crescent mark, on either side of which two parrots just about to fly being inscribed resting on twigs. And in the botton is printed ' Proprietors—C. M. Md.

Kutty and C. M. Kunjimon and on either side of the label below the number 25 in ribbon base MOULANA BEEDY is printed in six different languages."

This is only to illustrate the kind of design which is adopted for bundles of packets in contrast with the design of the label affixed on each beedy (Exhibit C), the one which is alleged to have been counterfeited. In passing it may be mentioned that these two documents (Exhibits A and B) do not help the prosecution as they represent nothing more than the opinion and claim of the declarant and have no effect as the registration of trade mark is under the English Trade Mark Act. It is clear to me that anyone looking at the designs on all the marks shown in the document (Exhibit B) except the label (Exhibit C) in question will not fail to notice the bold distinguishing marks some of which are pictorial. These designs are so made that it will hardly be possible for any confusion to arise. It is conceded by the applicants' Counsel that if the alleged counterfeiting was in respect of these labels then many of the arguments in support of his case would not avail him. The exhibit label in question (Exhibit C) however stands on a different footing when we consider its appearance or in the words of the learned Magistrate. " . . . the general effect of the purple label which has a circle with ' M ' in the centre." It is in evidence that there are beedies with labels of the same type of paper band of the same colour and size with similar circle in the centre and with (M) in the circle. A few, answering the description are Maulana, Madina, Mina, Minor, Mustone, Moulmein, Mulaca and Muslim beedies. It is said that there are about 20 beedy makers who use ' M ' for the first letter and that all these makers use the letter ' M ' in circle on their labels. In the midst of so many similar labels if we place a beedy smoker

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who is illiterate or if literate does not know English the result is self-evident. In fact, it is admitted by the prosecution [*vide* the evidence of Hamed Esoof Seedat (P.W. No. 5)] that the only way to get Moulana Beedy is to ask for Moulana Beedy by name and that is how it seems, one could get the particular brand one wants. It will in the nature of things be impossible for beedy smoking public who are generally illiterate people to inspect the labels to get the particular brand they want. It is reasonably clear that by calling for particular brand by name one could get the brand one wants. The prosecution has failed in my view to prove that customers chose the beedies by their marks and there is no evidence that their labels have become the guide to the customers.

It is therefore contended by the Applicants' Counsel that the labels in dispute (Exhibit C) is not a trade mark and that the applicants cannot be restrained from using it even if similarity of the mark to that of the respondent may occasionally lead to confusion or to the goods of one being mistaken for those of others. In support of this contention, the learned Counsel relies on *Loke Nath Sen* v. *Ashwini Kumar De* (1) which is on all fours with this case. There it is held that :

" . . . A mark in order to be a trade mark as defined in section 478 of the Indian Penal Code must be ' distinctive ' in the sense of being adapted to distinguish the goods of the proprietor of a trade mark from those of other persons.

A mark which merely describes the quality or origin of an article or is such as is commonly used in the trade to denote goods of a particular kind is not ' distinctive. ' To determine whether a mark has become a trade mark, the Court has to take into consideration the extent to which its user has rendered the mark in fact distinctive of the goods in question."

(1) I.L.R. (1937) 1 Cal. 665.

What is a " distinctive " mark has been defined by Lord Halsbury whose definition quoted in *Gaw Kan Lye* v. *Saw Kyone Saing* (1) is as follows :

" ' Distinctive ' means distinguishing a particular person's goods from somebody else's—not a quality attributed to the particular article, but distinctive in that respect that it is a manufacture of his, distinguished from somebody else's. If a mark merely describes the quality or origin of an article, such a descriptive mark is, obviously, not capable of distinguishing the goods of one maker from those of others, *e.g.*, ' Painkiller ' and ' Gripe Water,' for medicines, ' Malted Milk ' and ' Madras Curry Powder ' for articles of diet."

Judged by this test, I am of the opinion that the respondent's label in this case (Exhibit C) is not a distinctive mark and that being not a distinctive mark cannot be a trade mark.

It is in evidence adduced by both sides that it has become the custom, may be only within recent time, to have wrappers round beedies which are admittedly similar in lettering, size and colour and that these wrappers which are called labels, with similarity in design cannot be sufficient guide to denote a particular brand. A lot of them have been exhibited in this case and the impression left in one's mind is that these labels merely constitute " the get-up " of a beedy.

It has been held in *J. Petley & Son* v. *S. Ah Kyun* (2) that the style of the " get up " of the boxes or packages in which goods are retailed does not constitute a " trade mark " as defined in section 478 of the Indian Penal Code. I am of the opinion that the label (Exhibit C) is not a trade mark but a part of the " get-up " of the respondent's beedy. In this view of the case the question of " user " loses its importance for the disposal of this case and does not require consideration. I am not unmindful of the popularity

(1) (1939) R.L.R. 488 at 492. (2) (1903-04) 2 L.B.R. 159.

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of the respondent's beedy in the market but that popularity is no ground under our law for prosecuting others for using similar wrappers round their beedies as many have been doing quite recently and some, quite honestly, with the notion that a beedy is not complete without a wrapper or paper band which with certain lettering and colouring is called label. I quite appreciate the hardship that must have been caused by it but prosecution is certainly not, on the authority on the subject and in the light of the evidence on record, the right weapon to restrain those who have no dishonest intention in using these similar labels.

In the result the prosecution case fails and the applicants cannot be liable to prosecution under the Penal Code for using a somewhat similar label to which the respondent cannot be said to have exclusive title to its use. The appeal is, therefore, allowed and the order of the Lower Court is reversed. The fine, if paid, will be refunded.

APPELLATE CRIMINAL

Before U Aung Khine, J.

H.C. 1949

Nov. 10.

THE UNION OF BURMA (APPLICANT)

v.

U KHIN MAUNG (RESPONDENT).*

Code of Criminal Procedure, ss. 497, 498 and 561A—Charge under s. 409 of the Penal Code.

Held : That orders by the Sessions Court under s. 498 of the Code of Criminal Procedure should be in accordance with the principles laid down by s. 497 of the Code. S. 497 (5) of the Code of Criminal Procedure has no application to the case of an accused person who has been released on bail under s. 498 of the Code by the Court of Sessions. But the High Court may interfere under s. 561A of the Code against an order of the Sessions Judge granting bail to an accused person.

The Crown Prosecutor, Madras v. *N. S. Krishnan and one*, I.L.R. (1946) Mad. 62 ; *Rex* v. *Scoti*, I.L.R. (1948) All. 477, followed.

Local Government v. *Gulam Jilani*, A.I.R. 1925 Nag. 228, distinguished.

Though the High Court is not fettered by the provision of s. 497 of the Code and has unfettered discretion in granting bail yet when a person is accused of a serious offence punishable with death or transportation, the High Court will not except in very special circumstances, grant bail.

H. M. Boudville v. *King-Emperor*, I.L.R. 2 Ran. 546, referred to.

Ba On for the respondent.

U AUNG KHINE, J.—The respondent U Khin Maung, who was the Deputy Commissioner, Maubin, at the time of the alleged commission of the offence, was sent up by the Police under section 409/120B of the Penal Code before the 3rd Special Judge, Rangoon. His application for bail before the trial Court having failed he presented in the Court of Sessions, Hanthawaddy, another application under section 498 of the Criminal Procedure Code praying that he be enlarged on bail on such terms as the Sessions Court might

* Criminal Misc. Application No. 6 of 1949—Review of order of U Maung Maung (17), Sessions Judge of Hanthawaddy, dated the 1st October 1949, passed in Criminal Misc. Trial No. 29 of 1949.

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deem fit and necessary. After hearing the Counsel the learned Sessions Judge directed that the respondent be granted bail in the sum of Rs. 10,000 with two sureties. This is an application by the Union Government against the said order of the Sessions Judge praying that the same order be set aside and further to commit the respondent to custody again.

An objection has been raised on behalf of the respondent that the High Court has no jurisdiction to interfere with an order passed by a Sessions Judge granting bail under section 498 of the Criminal Procedure Code after a previous application before the trial Court had failed. Impressing this point reliance has been placed on the case of *Local Government* v. *Gulam Jilani* (1). I must say that the headnotes of this case are rather misleading as there occurs this passage in the body of the judgment on page 230 :

> "There is much force in this argument addressed in support of the preliminary objection, and I am inclined to the view that the applications for revision as laid down under section 497, sub-section (5) are not maintainable. I am further of opinion that they are not maintainable under section 498 as it stands but at the same time I am of opinion that this does not and cannot mean that the High Court has no power to interfere with orders made in proceedings for bail when such proceedings are proved to be illegal."

It may be quite true that section 497 (5) of the Code of Criminal Procedure has no application to the case of an accused person who has been released on bail under section 498 of that Code, but the High Court has adequate jurisdiction under section 561A of the Code to make such orders as may be necessary in the interest of justice. I am fortified in this view by the

(1) A.I.R. 1925 Nag. 228.

decisions in (i) *The Crown Prosecutor, Madras* v. *N. S. Krishnan and another* (1) and (ii) *Rex* v. *Seoti* (2).

Section 497 of the Criminal Procedure Code provides for the granting of bail to accused persons before trial and other sections in Chapter 39 deal with matters ancillary or subsidiary to that provision. An order purported to be made under section 498 of the Criminal Procedure Code should also be in consonance with the accepted principles following those provisions. Section 497 gives a wide discretion to the Courts to grant bail even where an accused person is alleged to have committed a non-bailable offence. This discretion, however, is controlled by a restriction and that is when the prosecution satisfies the Court that there are reasonable grounds for believing that the accused is guilty of a serious offence which is punishable with death or transportation for life it has no option but to refuse bail. Thus the discretion vested in the Courts must always be exercised judicially and not arbitrarily. Even the High Court, though not fettered by the provisions of section 497 of the Code and having absolute discretion in the matter of granting bail, is bound to follow the general law as a rule and not depart from it except under very special circumstances. *See H. M. Boudville* v. *King-Emperor* (3).

The accusation against the respondent is that he committed criminal breach of trust in his capacity as a public servant in respect of a sum amounting to about Rs. 30,000, an offence under section 409 of the Penal Code. The punishment provided for this offence is transportation for life or ten years' rigorous imprisonment. Thus if it appears to any Court dealing with

(1) I.L.R. (1946) Mad. 62. (2) I.L.R. (1948) All. 477.
(3) I.L.R. 2 Ran. 546.

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U AUNG KHINE, J.

the matter of granting bail in this case that there are reasonable grounds to believe that the accused is guilty of that offence, bail should be refused. In the order of the learned Sessions Judge there appears a passage to the effect that the respondent does not deny that there is a sufficiently strong case under section 409, which could be sent up for trial against him.

The points canvassed for the respondent in this application are that (1) the hearing of the witnesses by the nature of the case is likely to be protracted, (2) the respondent is not likely to abscond, (3) although he was lately the Deputy Commissioner of Maubin he wields no influence over the prosecution witnesses and (4) he would be greatly handicapped in giving instructions to his lawyers if he be kept in custody. I am of the opinion that these are minor considerations when viewed against the fact that (1) the respondent has been sent up for an offence punishable with transportation for life and (2) there certainly are reasonable grounds for believing that he is guilty of committing that offence. At the same time these considerations do not make special circumstances which should be taken notice of by this Court in favour of the respondent. The two important aspects of the case, that is, (1) the nature of the accusation and the severity of the punishment which conviction will entail and (2) the existence of reasonable grounds for believing the respondent to be guilty appear to have been either overlooked or not brought to the notice of the learned Sessions Judge while he was dealing with the application before him. I am clearly of the opinion that the learned Sessions Judge has failed to exercise his discretion judicially in granting bail to the respondent and as such I consider that his order should be vacated.

In the result I would allow this application; the order of the Sessions Judge, Hanthawaddy, granting bail to the respondent U Khin Maung is set aside and I direct that he be re-arrested and committed to custody pending his trial.

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U AUNG KHINE, J.

APPELLATE CRIMINAL.

Before U Aung Khine, J.

H.C. 1949

Nov. 25.

THE UNION OF BURMA (APPLICANT)

v.

GOVINDASWAMY (RESPONDENT).*

Conviction under s. 337 of the Penal Code before the enactment of Burma Act 52 of 1948—Failure to comply with s. 242, Code of Criminal Procedure—S. 537 of the Code—Whether cures the defect.

Held: Mere failure to comply with the mandatory provisions of the Code of Criminal Procedure, regarding trial of cases does not necessarily vitiate a trial. The test to be applied in each case is to see whether the accused had a fair trial or not. If there has not been a fair trial, it will be presumed that there was a failure of justice. Failure to comply with s. 242 of the Code of Criminal Procedure may, under certain circumstances, be cured by s. 537 of the Code.

Shwe Hla U v. *The King*, (1941) R.L.R. 58; *King-Emperor* v. *Nga Po Min and others*, I.L.R. Ran. Vol. 10, p. 511; *Nga U Khine and others* v. *King-Emperor*, I.L.R. Ran. Vol. 13, p. 1; *Abdul Rahman* v. *The King-Emperor*, I.L.R. 5 Ran. 53.

Choon Foung (Government Advocate) for the applicant.

U AUNG KHINE, J.—In Criminal Regular Trial No. 1 of 1949 in the Court of the 6th Additional Magistrate, Moulmein, the accused Govindaswami was sent up for trial under section 337 of the Penal Code. In trying the case the Magistrate followed the procedure laid down for the trial of a summons case. At the close of the trial the accused was found guilty and was fined Rs. 10 or in default to suffer two weeks rigorous imprisonment. The learned Sessions Judge, Amherst, has submitted his recommendation to this Court that the conviction and sentence passed by the

* Criminal Revision No. 51B of 1949—Review of the order of U Tun Lwin, 6th Additional Magistrate of Moulmein, dated the 10th May 1949, passed in Criminal Regular Trial No. 1 of 1949 in his Criminal Revision No. 34 of 1949 by his order dated the 12th August 1949.

said Magistrate upon the accused should be set aside on the ground that an offence under section 337 of the Penal Code cannot be tried as a summons case.

At the time when this case occurred, 27th July 1948, Burma Act 52 of 1948 had not yet been promulgated and therefore the provisions in that Act which amended section 337 of the Penal Code have no application to this offence which was committed before the date on which the Act came into force, 31st October 1948. Consequently, the provisions of section 337 of the Penal Code as they existed prior to the enactment of Burma Act 52 of 1948 are applicable to this case although the accused was convicted after the promulgation of that Act. *See Shwe Hla U* v. *The King* (1). This being so, the Magistrate concerned was quite competent to try the offence as a summons case ; but where he has gone wrong was in not strictly observing the procedure laid down in the Code of Criminal Procedure for the trial of summons cases. It is clear that he has not complied with the provisions of section 242 of the Code. The particulars of the offence were not stated to the accused and he was not also asked whether he had any cause to show why he should not be convicted. What then is the effect of such non-compliance ? Does it amount to an illegality which would vitiate the trial or to a mere irregularity which could be cured by section 537 of the Criminal Procedure Code ? In *King-Emperor* v. *Nga Po Min and others* (2) Page C.J. re-affirmed what he had stated in a previous case with these words :

"The effect of non-compliance with the statutory rules of procedure, in my opinion, must vary according to the gravity and the effect of the breach, and the test in each case is whether the proceedings have resulted in a miscarriage of justice."

(1) (1941) R.L.R. 58. (2) I.L.R. Ran. Vol. 10, p. 511.

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U AUNG KHINE, J.

The test to be applied in each case is to see whether the accused has had a fair trial or not. If it is held that a fair trial has not been accorded it must he presumed that there has been a failure of justice. In *Nga U Khine and others* v. *King-Emperor* (1) it was contended on behalf of the appellant that the provisions of section 162 of the Criminal Procedure Code are mandatory and that as the lower Court had failed to comply with them a failure of justice has occurred should be presumed. In dealing with this matter Dunkley J. remarked :

"This is a contention with which I cannot agree, and there is ample authority for the proposition that if a mandatory provision of the Code of Criminal Proced is infringed that does not of itself make it necessary to hold that the Court must have failed in administering justice to the accused."

In support of this the case of *Abdul Rahman* v. *The King-Emperor* (2) was quoted. It was further held in that case that where the error does not affect the jurisdiction of the Court or does not cause a failure of justice the provisions of section 537 of the Code come into play and such error does not vitiate the trial.

In the case under consideration the accused knew fully well what charge he had to meet and he was given every opportunity of meeting the same. As such I cannot but hold that he has had a fair trial in view of the decisions above quoted. I am of the opinion that the non-compliance with the provisions of section 242 of the Criminal Procedure Code in this case is just a mere irregularity and as it has not occasioned a miscarriage of justice interference is not called for either in the conviction or the sentence passed by the trial Court.

Let the proceedings be returned with these remarks.

(1) I.L.R. Ran. Vol. 13, p. 1 (2) I L.R. 5 Ran. 53.

U.B.C.P.O.—No. 36 C.R., 20-4-51—1,720—II.